Student Discipline and the Active Avoidance Doctrine

Danielle Weatherby[*]

TABLE OF CONTENTS

INTRODUCTION 493
I. A BRIEF HISTORY OF STUDENT DISCIPLINE 497
A. *Corporal Punishment* 498
B. *Exclusionary Discipline* 500
1. Out-of-School Suspensions and Expulsions 500
2. In-School Suspensions 502
3. Zero Tolerance Policies 503
C. *School Resource Officers, Armed Teachers, and the Police State in K-12 Schools* 506
II. WHY ZERO TOLERANCE DISCIPLINE IS FAILING AMERICA'S YOUTH 508
III. THE ACTIVE AVOIDANCE DOCTRINE AND THE DUTY TO REFORM STUDENT DISCIPLINE 511
A. *As-Applied Constitutional Challenges to Zero Tolerance Policies* 514
B. *The Active Avoidance Doctrine* 516
1. *In Loco Parentis* and the Legal Duty to Reform Broken Educational Practices 518
2. Crafting an Active Avoidance Framework 527
IV. BARRIERS TO SUCCESS ON AN ACTIVE AVOIDANCE CLAIM 530
A. *No Heightened Scrutiny for Educational Deprivation Claims* 531
1. Arguing for Heightened Scrutiny Against the Backdrop of a Disinclined Bench 531

[*] Copyright © 2020 Danielle Weatherby. Associate Professor of Law, University of Arkansas School of Law; J.D. 2005, University of Florida; B.A. 2002, Franklin and Marshall College. A special thank you to Professors Derek Black, Kevin Brady, Terri R. Day, Nancy Dowd, Brian Gallini, Clay Sapp, and Beth Zilberman for your comments and feedback on earlier drafts and to Tyler Mlakar, Gray Norton, and Bethany Onishenko for your invaluable research assistance at different stages of this project.

2. Analyzing an Active Avoidance Claim 535
B. The Attenuation Problem 540
CONCLUSION 544

INTRODUCTION

Since the passage of the federal Gun-Free Schools Act of 1994 and the heightened concern about school shootings, public schools across the nation have adopted harsh, exclusionary approaches to student discipline. Zero tolerance discipline policies[1] have generated headline-worthy results, often leaving school experts wondering whether the punishment fits the crime.

For example, in 2013, a five-year-old was suspended for picking up a "gun-shaped" stick on the playground and pretending to shoot intruders.[2] In 2016, a middle school student was suspended for six days for using a toddler-proof butter knife to cut a peach in half at lunchtime,[3] and a seven-year-old boy was suspended for two days after chewing a breakfast pastry into the shape of a gun and uttering, "bang, bang."[4] In 2017, a sixteen-year old girl was expelled from all schools in an Alabama county and banned from school property for a full year after she was caught with a black water gun at school.[5] Other examples of innocuous student behavior that resulted in harsh penalties under zero tolerance policies include "wearing too much perfume," "eating chicken nuggets from a classmate's tray," "throwing skittles at another student," and "doodling on a desk."[6]

---

[1] Rocío Rodríguez Ruiz, *School-to-Prison Pipeline: An Evaluation of Zero Tolerance Policies and Their Alternatives*, 54 HOUS. L. REV. 803, 806 n.5 (2017) (defining zero tolerance policies as rules that "require specific punishments for outlined student misbehaviors irrespective of the circumstances surrounding the incident").

[2] Samantha Schmidt, *5-Year-Old Girl Suspended from School for Playing with 'Stick Gun' at Recess*, WASH. POST (Mar. 30, 2017, 3:06 AM CDT), https://www.washingtonpost.com/news/morning-mix/wp/2017/03/30/5-year-old-girl-suspended-from-school-for-playing-with-stick-gun-at-recess/ [https://perma.cc/Q7K9-BJEX].

[3] *Florida School Suspends Girl for Bringing Butter Knife to Lunch*, FOX NEWS (Nov. 18, 2016), https://www.foxnews.com/us/florida-school-suspends-girl-for-bringing-butter-knife-to-lunch [https://perma.cc/T9TS-N9YG].

[4] Cavan Sieczkowski, *Josh Welch, Second-Grader, Suspended For Making Pastry 'Gun' In Class*, HUFFPOST (Mar. 4, 2013, 10:31 AM ET), https://www.huffpost.com/entry/suspended-for-pastry-gun-josh-welch-second-grader_n_2805139 [https://perma.cc/9CE4-SX2H].

[5] Associated Press, *Prattville Teen Expelled for Bringing Water Gun to School*, ADVANCE LOCAL (Apr. 19, 2017), https://www.al.com/news/montgomery/2017/04/prattville_teen_expelled_for_b.html [https://perma.cc/5GWZ-PYFD].

[6] Leah Aileen Hill, *Disrupting the Trajectory: Representing Disabled African American Boys in a System Designed to Send Them to Prison*, 45 FORDHAM URB. L.J. 201, 208 n.31, 32 (2017) (citing Amanda Merkwae, Note, *Schooling the Police: Race, Disability, and the Conduct of School Resource Officers*, 21 MICH. J. RACE & L. 147, 153-54 (2015)) (explaining that schools apply "predetermined consequences" regardless of any "mitigating circumstances").

The most recent data from the United States Department of Education Office of Civil Rights indicates that roughly 2.7 million of all K-12 students received one or more out-of-school suspensions and approximately 120,800 students received an expulsion with or without educational services during the academic year.[7] Even more concerning, the report revealed a disparity in the number of disciplinary incidents for minority students, indicating that while black students represented only 16% of enrollment nationally, but they made up 27% of all students referred to law enforcement and 31% of students arrested.[8]

An entire body of scholarship has been dedicated to the denigration of the current student discipline regime and the birth of the term "School-to-Prison Pipeline."[9] Scholars have hurled justifiable criticism at the zero tolerance approach to student discipline, relying on data that

[7] U.S. COMM'N ON CIVIL RIGHTS, BEYOND SUSPENSIONS: EXAMINING SCHOOL DISCIPLINE POLICIES AND CONNECTIONS TO THE SCHOOL-TO-PRISON PIPELINE FOR STUDENTS OF COLOR WITH DISABILITIES 3 (2019), https://www.usccr.gov/pubs/2019/07-23-Beyond-Suspensions.pdf [https://perma.cc/5WLH-CYJY] [hereinafter BEYOND SUSPENSIONS].

[8] *Id.* at 164.

[9] *See* Derek W. Black, *The Constitutional Limit of Zero Tolerance in Schools*, 99 MINN. L. REV. 823, 834-35 (2015) [hereinafter *The Constitutional Limit*]; Kevin P. Brady, *Zero Tolerance or (In)Tolerance Policies? Weaponless School Violence, Due Process, and the Law of Student Suspensions and Expulsions: An Examination of* Fuller v. Decatur Public School Board of Education School District, 2002 BYU EDUC. & L.J. 159, 160-62; Kathleen DeCataldo & Toni Lang, *Keeping Kids in School and Out of Court: A School-Justice Partnership*, 83 N.Y. ST. B.J. 26, 27-28 (2011); India Geronimo, *Systemic Failure: The School-to-Prison Pipeline and Discrimination Against Poor Minority Students*, 13 J.L. SOC'Y 281, 281-82 (2011); Hill, *supra* note 6, at 206-08; Alicia C. Insley, *Suspending and Expelling Children from Educational Opportunity: Time to Reevaluate Zero Tolerance Policies*, 50 AM. U. L. REV. 1039, 1070-72 (2001); Laura R. McNeal, *Managing Our Blind Spot: The Role of Bias in the School-to-Prison Pipeline*, 48 ARIZ. ST. L.J. 285, 285-86 (2016); S. David Mitchell, *Zero Tolerance Policies: Criminalizing Childhood and Disenfranchising the Next Generation of Citizens*, 92 WASH. U. L. REV. 271, 291 (2014); Sheena Molsbee, *Zeroing Out Zero Tolerance: Eliminating Zero Tolerance Policies in Texas Schools*, 40 TEX. TECH. L. REV. 325, 361 (2008); Jason P. Nance, *Dismantling the School-to-Prison Pipeline: Tools for Change*, 48 ARIZ. ST. L.J. 313, 315-18 (2016) [hereinafter *Dismantling the School-to-Prison Pipeline*]; Jason P. Nance, *Over-Disciplining Students, Racial Bias, and the School-to-Prison Pipeline*, 50 U. RICH. L. REV. 1063, 1063-64 (2016); *see, e.g.*, CATHERINE Y. KIM, DANIEL J. LOSEN & DAMON T. HEWITT, THE SCHOOL-TO-PRISON PIPELINE: STRUCTURING LEGAL REFORM 4 (2010) (defining the School-to-Prison Pipeline as "the confluence of education policies in underresourced public schools and a predominantly punitive juvenile justice system that fails to provide education and mental health services for our most at-risk students and drastically increases the likelihood that these children will end up with a criminal record rather than a high school diploma"); Black, *The Constitutional Limit*, *supra* note 9, at 834-35 (describing "how the school discipline system . . . increas[es] students' risk of contact with the criminal justice system and directly refer[s] students to the juvenile justice system").

shows it disproportionately affects students of color,[10] and arguing that it imposes a success barrier for at-risk students by placing them into the criminal justice system and pushing higher education out of reach.[11]

The criticism of the zero tolerance approach to student discipline is more than justified. It is critical to a student's academic and social-emotional learning that she remains in the classroom as a member of the existing social structure; exclusion from the classroom negatively affects scholastic performance and healthy social development.[12] It is now well-recognized that students who have received an out-of-school suspension or an expulsion are at an increased risk of dropping out of school altogether.[13] In fact, a student who has been suspended merely

[10] *See, e.g.*, U.S. DEP'T OF EDUC. OFFICE FOR CIVIL RIGHTS, CIVIL RIGHTS DATA COLLECTION: DATA SNAPSHOT (SCHOOL DISCIPLINE) 12-14 (2014) [hereinafter DATA SNAPSHOT: SCHOOL DISCIPLINE] (indicating that students of color received an out-of-school suspension at a rate up to three times as often as white students); Ruth B. Ekstrom, Margaret E. Goertz, Judith M. Pollack & Donald A. Rock, *Who Drops Out of High School and Why? Findings from a National Study*, 87 TCHRS. C. REC. 356, 364 (1986) (noting that one-third of students who drop out do so due to poor achievement and feelings of alienation, often resulting from disciplinary problems, suspension, or expulsion); Insley, *supra* note 9, at 1064-66, 1070-72 (describing how zero tolerance policies limit educational advancement and how such policies have led to the criminalization of students); Floyd D. Weatherspoon, *Racial Justice and Equity for African-American Males in the American Educational System: A Dream Forever Deferred*, 29 N.C. CENT. L.J. 1, 18 (2006) ("The strict enforcement of school policies on zero tolerance for various infractions has a direct correlation to African-American male students being expelled and/or suspended, which may encourage them to drop out of school permanently."); Molly Knefel, *The School-to-Prison Pipeline: A Nationwide Problem for Equal Rights*, ROLLING STONE (Nov. 7, 2013, 9:20 PM ET), http://www.rollingstone.com/music/news/the-school-to-prison-pipeline-a-nationwide-problem-for-equal-rights-20131107 [http://perma.cc/GS3J-WT96] (reporting that black, low-income disabled students are disproportionately targeted by excessive disciplinary actions).

[11] *See, e.g.*, Black, *The Constitutional Limit*, *supra* note 9, at 832-35 (describing exclusionary discipline as "de facto educational death penalties [rather] than as corrective or management tools"); Amanda Harmon Cooley, *The Impact of Marijuana Legalization on Youth & the Need for State Legislation on Marijuana-Specific Instruction in K-12 Schools*, 44 PEPP. L. REV. 71, 106-114 (2016) [hereinafter *The Impact of Marijuana Legalization*] (describing how zero tolerance school discipline results in harm to schoolchildren and negatively affects their ability for to educational access); Mitchell, *supra* note 9, at 291-92 (crediting zero tolerance policies as one cause of the school-to-prison pipeline).

[12] *See* DEREK W. BLACK, ENDING ZERO TOLERANCE: THE CRISIS OF ABSOLUTE SCHOOL DISCIPLINE 78-79 (Nancy E. Dowd ed., NYU Press 2016).

[13] *See, e.g.*, ALLIANCE FOR EXCELLENT EDUCATION, CLIMATE CHANGE: IMPLEMENTING SCHOOL DISCIPLINE PRACTICES THAT CREATE A POSITIVE SCHOOL CLIMATE 3 (2013), https://mk0all4edorgjxiy8xf9.kinstacdn.com/wp-content/uploads/2013/09/HSClimate2.pdf [https://perma.cc/4F3Z-LRZD] (describing the "positive correlation between the

one time is significantly more likely to drop out of school than a student who has never been suspended.[14]

Education experts have attempted to diagnose the affliction that bore the School-to-Prison Pipeline, but the reality is that the root of the discipline crisis in American schools is not singular.[15] We are left with a school discipline system that is damaged, ferrying the most at-risk students into an irreversible cycle of crime and ostracization.[16]

While scholars have opined about the shortfalls and undesirable consequences of exclusionary discipline practices and offered intriguing solutions for reform, the discussion surrounding the legal consequences of a school's active avoidance of discipline reform is scant.[17] This Article attempts to fill that void. By examining the unique school-pupil relationship inherent in the often-misconstrued doctrine of *in loco parentis*,[18] I argue that a school's active avoidance of discipline reform results in educational deprivations that raise Substantive Due Process concerns. The combined effect of compulsory education laws and the liberty interest inherent in the Fourteenth Amendment's Due Process Clause trigger a legal duty to reform broken educational practices.[19] The

number of suspensions and academic disengagement"); THE CIVIL RIGHTS PROJECT, SCHOOL SUSPENSIONS COST TAXPAYERS BILLIONS 1 (2016), https://www.civilrightsproject.ucla.edu/news/press-releases/featured-research-2016/school-suspensions-cost-taxpayers-billions/pr-rumberger-losen-hi-cost-discipline-2016.pdf [https://perma.cc/7UJJ-DGZ6] (discussing the "well-established fact" that suspension increases the likelihood of dropping out as well as increases the economic costs to taxpayers); Elizabeth Stearns & Elizabeth J. Glennie, *When and Why Dropouts Leave High School*, 38 YOUTH & SOC'Y 29, 54-55 (2006) (describing that results of the study demonstrate male students and African American students are more likely to leave school due to suspension, expulsion, or incarceration compared to other students because of an increased probability of disciplinary action against them).

[14] *See* Stearns & Glennie, *supra* note 13, at 29-57; Sarah Karp, *Black Male Conundrum*, CHI. REPORTER (June 22, 2009), https://www.chicagoreporter.com/black-male-conundrum/ [https://perma.cc/E8S8-3Y2M].

[15] *See* BLACK, *supra* note 12, at 29-46.

[16] *See* Black, *The Constitutional Limit*, *supra* note 9, at 832-35; Cooley, *The Impact of Marijuana Legalization*, *supra* note 11, at 106-11; Mitchell, *supra* note 9, at 291-92.

[17] *See, e.g.*, American Psychological Association Zero Tolerance Task Force, *Are Zero Tolerance Policies Effective in the Schools?: An Evidentiary Review and Recommendations*, 63 AM. PSYCHOL. 852, 859 (2008) (schools have a duty "to preserve the safety and integrity of the learning environment"); Derek W. Black, *Reforming School Discipline*, 111 NW. U. L. REV. 1, 46 (2016) ("[C]ourts should recognize students' constitutional right to education and limit attempts by the state to withdraw that education . . . .").

[18] *See* Morse v. Frederick, 551 U.S. 393, 413-14 (2007) (Thomas, J., concurring); *see also* State v. Pendergrass, 19 N.C. (2 Dev. & Bat.) 365, 365-66 (1837).

[19] *See infra* Part IV.

perpetuation of zero tolerance discipline violates this duty, under what I term the "Active Avoidance Doctrine."

The Article proceeds in four parts. Part II traces the progression of the systematic approach to student discipline, beginning with the use of corporal punishment and trending toward the involvement of more law enforcement and the criminalization of student behavior. Part III considers why the current student discipline structure is failing America's youth. It surveys the existing scholarship, outlines the research-driven and normative arguments for adopting a new student discipline system, and suggests alternative disciplinary models adopted in some state juvenile justice systems that would satisfy the duty to remedy the problems with the current system.

Joining the body of scholars opining that education should be a federally-recognized fundamental right, Part IV examines the evolving legal doctrine of *in loco parentis*, its application to contemporary student discipline policy, and its triggering of a duty to correct failed disciplinary systems. This Fourteenth Amendment duty could open schools up to legal liability for failing to heed the call for discipline reform. Part V addresses both the intended purpose and legal barriers to the application of the Active Avoidance Doctrine. In doing so, I offer a novel lens through which to view student discipline reform and argue that the adoption of alternative disciplinary tools should be a legal mandate, not a choice. This doctrine closes the analytical loop between the origins of the School-to-Prison Pipeline, the legal implications of schools' active avoidance of reform, and the devastating criminal justice effects it ultimately causes. In conclusion, I call for the use of the Active Avoidance Doctrine to dismantle failed disciplinary systems.

I. A BRIEF HISTORY OF STUDENT DISCIPLINE

To fully appreciate the deficits in the current approach to student discipline, it is instructive to look backward to where the practice began. This Part traces the origins of student discipline, recognizing the significant progress that has been made to improve upon the days of corporal punishment. Nonetheless, as socio-scientific research began to indicate that corporal punishment was ineffective and efforts were made to move away from the draconian practice, the number and severity of violent incidents at schools increased. School shootings became a real threat to modern-day students. These ingredients, and the passage of the Guns-Free Schools Act of 1994, left schools in a Catch-22 that

resulted in the one-size-fits-all, zero tolerance disciplinary approach of today.[20]

A. Corporal Punishment

Beginning in the 17th century, educators often resorted to violence as a means to discipline students.[21] In fact, many of the nation's earliest schoolhouses contained whipping posts and paddling devices, which teachers would use to punish students as a consequence of their misconduct.[22] This extreme method, known as corporal punishment, was intended to function as a deterrent to other students.[23] However, its effectiveness dwindled with the onset of the Baby Boomer generation, during which an astonishing eighty million children were born, resulting in a rapid increase in school size.[24] Where an entire student body had once fit comfortably into a one-room schoolhouse, it now required a large educational facility filled with dozens of classrooms.[25]

Historically, courts justified a school's use of corporal punishment by viewing it through the lens of common law doctrines such as *in loco parentis* and *parens patriae*.[26] Until the latter part of the 19th century,

[20] While the Article uses generalizations in characterizing the current approach to student discipline for the sake of its analysis, the author recognizes that many schools, including Washington Elementary School in Fayetteville, Arkansas, are already implementing more progressive and compassionate student disciplinary tools. *See* Julie Brannon, *FPS Adopts the Choose Love*, FAYETTEVILLE PUB. SCH. (Feb. 11, 2019), https://district.fayar.net/article/89169?org=fps [https://perma.cc/9D5C-5MTR] (explaining that in 2016, Fayetteville, Arkansas schools implemented the Choose Love program, which focuses on instilling character values in children, as part of its safety and security efforts); *see also* CCNY, INC., *Impact Findings of the BPSD's Character Development Initiative*, CHARACTER COUNTS! (July 2019), http://charactercounts.org/wp-content/uploads/2019/08/Overview-BPSD-Initiative-1.5-yr-Evaluation-Impact-7-2019.pdf [https://perma.cc/ZBE3-RW2R] (explaining that Buffalo, New York schools implemented the Character Counts initiative in 2017. After only 1.5 years of implementation, positive impacts like increased graduation rates and improvements in academic proficiencies are already being identified).

[21] Insley, *supra* note 9, at 1044.

[22] *Id.*

[23] *See* A. Troy Adams, *The Status of School Discipline and Violence*, 567 ANNALS AM. ACAD. POL. & SOC. SCI. 140, 144 (2000); *see also* Lynn Roy, *Corporal Punishment in American Public Schools and the Rights of the Child*, 30 J.L. & EDUC. 554, 555 (2001) (defining corporal punishment as "the willful and deliberate infliction of physical pain on the person of another to modify undesirable behavior").

[24] *See* Adams, *supra* note 23, at 144.

[25] *See id.*

[26] *See* Timothy Garrison, *From Parent to Protector: The History of Corporal Punishment in American Public Schools*, 16 J. CONTEMP. LEGAL ISSUES 115, 116 (2001).

compulsory education did not exist in the United States.[27] As a result, children received the education their parents chose for them.[28] Thus, under the doctrine of *in loco parentis*, a parent delegated part of his authority to his child's schoolteacher, who took the place of the parent during the school day and possessed the requisite authority to discipline the child.[29] By the beginning of the 20th century, however, all states had adopted systems of publicly financed, compulsory education.[30] Gradually, courts began to view the State, rather than the schoolteacher, as the protector and educator of its children.[31] Under the doctrine of *parens patriae*, the State itself could impose corporal punishment as a necessary means of maintaining order in its schools and fostering an environment in which students could receive a proper education.[32]

Not surprisingly, many have questioned the constitutionality of corporal punishment as a means of student discipline.[33] In *Ingraham v. Wright*, two junior high school students brought an action against school officials after each of them received severe paddling, causing one of the students to suffer a hematoma and the other to lose temporary use of his arm.[34] The students alleged that the use of paddling constituted cruel and unusual punishment in violation of the Eighth Amendment, as well as a deprivation of their due process rights under the Fourteenth Amendment.[35] Tracing the history of corporal punishment in schools, the Supreme Court noted that the prevalent rule allowed teachers to apply such force as "reasonably . . . necessary for [the student's] proper control, training, or education," but not so much as would be excessive or unreasonable.[36] Ultimately, it held that while

[27] *Id.* at 117.

[28] *Id.*

[29] Brian Jackson, *The Lingering Legacy of In Loco Parentis: An Historical Survey and Proposal for Reform*, 44 VAND. L. REV. 1135, 1144 (1991); *see* 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAW OF ENGLAND IN FOUR BOOKS 453 (J.B. Lippincott Co. 1894).

[30] Garrison, *supra* note 26, at 117.

[31] *See id.* at 118.

[32] *See id.* at 118-19; *see also* Ingraham v. Wright, 430 U.S. 651, 662 (1977) ("Although the early cases viewed the authority of the teacher as deriving from the parents, the concept of parental delegation has been replaced by the view more consonant with compulsory education laws that the State itself may impose such corporal punishment as is reasonably necessary 'for the proper education of the child and for the maintenance of group discipline.'").

[33] *See, e.g.*, *Ingraham*, 430 U.S. at 651 (considering the viability of middle school students' claims alleging that school officials violated their constitutional rights by implementing disciplinary corporal punishment).

[34] *Id.* at 657.

[35] *Id.* at 653.

[36] *Id.* at 661.

paddling did not constitute cruel and unusual punishment,[37] it did implicate the students' liberty interests under the Fourteenth Amendment.[38] While the majority of states[39] have now moved away from corporal punishment in schools, a number of them still permit teachers to apply "reasonable force" when disciplining students.[40]

B. Exclusionary Discipline

As corporal punishment decreased in popularity, schools began utilizing new disciplinary tools which addressed student misconduct more harshly and more uniformly. [41]

1. Out-of-School Suspensions and Expulsions

Initially, schools resorted to out-of-school suspensions and expulsions, which addressed misconduct by removing misbehaving students from school entirely rather than using physical force to punish

[37] *Id.* at 664 (reasoning that the Eighth Amendment "was designed to protect those convicted of crimes" and "does not apply to the paddling of children as a means of maintaining discipline in public schools").

[38] *Id.* at 674 (holding that "where school authorities, acting under color of state law, deliberately decide to punish a child for misconduct by restraining the child and inflicting appreciable physical pain . . . Fourteenth Amendment liberty interests are implicated").

[39] *See, e.g.*, CAL. EDUC. CODE § 49001 (2020) (prohibiting corporal punishment in schools); MASS. GEN. LAWS ANN. Ch. 71, § 37G (2020) (prohibiting corporal punishment in schools); NEB. REV. STAT. ANN. § 79-295 (2020) (prohibiting corporal punishment in public schools); N.M. STAT. ANN. § 22-5-4.3 (2020) (defining school disciplinary policies); VA. CODE ANN. § 22.1-279.1 (2020) (prohibiting corporal punishment in schools).

[40] *See Ingraham*, 430 U.S. at 661-63; *see, e.g.*, Betty Alvarado, *Texas School District to Begin Paddling as Punishment*, USA TODAY (July 21, 2017, 1:20 PM ET), https://www.usatoday.com/story/news/nation-now/2017/07/21/school-paddling/499177001/ [https://perma.cc/WT78-MUJM] (discussing a Texas school district's approved of a new policy allowing school officials to use paddles to punish disruptive students); Jess Clark, *Where Corporal Punishment Is Still Used in Schools, Its Roots Run Deep*, NPR ED (Apr. 12, 2017, 6:00 AM ET) https://www.npr.org/sections/ed/2017/04/12/521944429/where-corporal-punishment-is-still-used-its-roots-go-deep [https://perma.cc/KKL9-7XXW] (discussing a North Carolina high school's practice of paddling students). Tangentially, corporal punishment as a student discipline tool may have reflected the assumption that schools, in their parental role, were free to assume disciplinary measures that were utilized in the home. Notably, the legal movement away from corporal punishment in schools has not been matched by as strong of a movement away from parents' use of corporal punishment.

[41] *See* Adams, *supra* note 23, at 144-45.

them.[42] These exclusionary policies were attractive for several reasons.[43] First, they were a quick and efficient way to handle the increasing number of disruptive students.[44] Second, they were thought to be protective of the larger study body by excluding those students who engaged in problematic behavior.[45] Finally, they provided school administrators with a sense of control as student enrollment rates continued to skyrocket.[46]

Despite their advantages, advocates began to take issue with the way that states permitted school officials to enforce exclusionary policies at their own discretion.[47] These concerns gave rise to a number of Supreme Court cases in the 1970s, the most influential of which was the landmark case of *Goss v. Lopez*.[48] In *Goss*, a group of high school students were suspended from school for ten days without a hearing and subsequently brought charges against their school district, challenging the constitutionality of the temporary suspension on the grounds that it violated the Due Process Clause of the Fourteenth Amendment.[49] Finding in favor of the students, the Court held that states must adhere to minimum due process standards when prescribing and enforcing standards of conduct in schools.[50] In doing so, it reasoned that students have both a property interest in a public education[51] as well as a liberty interest in their reputation among fellow pupils and teachers,[52] neither of which the states may arbitrarily deprive them of without due process of law.[53]

---

[42] *Id.*

[43] *Id.*

[44] *Id.*

[45] *Id.* at 145 (comparing the exclusion of students to the incarceration of violent criminals, which "protects law-abiding citizens from predatory criminals").

[46] *Id.*

[47] *See id.*

[48] 419 U.S. 565 (1975).

[49] *Id.* at 565-66.

[50] *Id.* at 574 ("[Y]oung people do not 'shed their constitutional rights' at the schoolhouse door." (citing Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 506 (1969))).

[51] *Id.* at 573 (recognizing students' "legitimate claims of entitlement to a public education").

[52] *Id.* at 574-75 ("'Where a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him,' the minimal requirements of the [Due Process] Clause must be satisfied." (quoting Wisconsin v. Constantineau, 400 U.S. 433, 437 (1971))).

[53] *Id.* at 576.

2. In-School Suspensions

In response to lawsuits such as *Goss*, as well as social pressures to develop more humane disciplinary methods, schools began to use in-school suspensions, or "ISS programs," as an alternative to exclusionary policies.[54] These programs served many of the same functions as exclusion, such as removing disruptive students from the classroom and preventing them from engaging with the larger student body.[55] But unlike out-of-school suspensions and expulsions, ISS programs detained students on school grounds rather than forcing them to leave campus.[56] By doing so, they allowed teachers and administrators to ensure that the students were unable to pose a threat to the local community.[57] Another benefit of ISS programs is that they enable students to complete their regular class assignments at school.[58]

Nevertheless, schools implementing this approach have continued to face challenges.[59] Many critics argue that an in-school suspension is virtually no different than an out-of-school suspension because it similarly deprives a student of his property and liberty interests.[60] In response to this argument, courts have held that whether an in-school suspension amounts to a deprivation of a student's property interest depends on the extent to which the student is isolated from the educational process.[61] Where the in-school suspension completely deprives a student of any opportunity to learn, it could constitute as much a deprivation of education as an out-of-school suspension.[62] In

[54] *See* Adams, *supra* note 23, at 146.

[55] *See id.*

[56] *Id.*

[57] *Id.*

[58] *See* Brent E. Troyan, *The Silent Treatment: Perpetual In-School Suspension and the Education Rights of Students*, 81 TEX. L. REV. 1637, 1656 (2003).

[59] *See* Larry Bartlett & James McCullagh, *Exclusion from the Educational Process in the Public Schools: What Process is Now Due*, 1993 BYU EDUC. & L.J. 1, 15-17.

[60] *See, e.g.*, Laney v. Farley, 501 F.3d 577, 581 (6th Cir. 2007) (stating that an in-school suspension could deprive a student of educational opportunities in the same way as an out-of-school suspension); Wise v. Pea Ridge Sch. Dist., 855 F.2d 560, 565-66 (8th Cir. 1988) (challenging a student's in-school suspension as a violation of his Due Process rights); Dickens v. Johnson Cty. Bd. of Educ., 661 F. Supp. 155, 156-57 (E.D. Tenn. 1987) (alleging that school's "timeout" punishment violated student's substantive Due Process rights); Fenton v. Stear, 423 F. Supp. 767, 772 (W.D. Penn. 1976) (discussing whether student was "deprived of any in-school education" when he was placed on an 11-day in-school restriction).

[61] *See, e.g.*, *Laney*, 501 F.3d at 581 ("Whether an in-school suspension deprives a student of that interest in educational benefits depends on the extent of her exclusion from the educational process.").

[62] *See id.*

contrast, where a student is allowed to complete regular assignments and other academic tasks during the suspension, it does not implicate the student's property interest.[63] As a general matter, courts have been reluctant to hold that in-school suspensions are detrimental to a student's liberty interest.[64]

3. Zero Tolerance Policies

In recent decades, schools have abandoned in-school suspensions in favor of a "get tough" approach to student discipline.[65] The term "zero tolerance" came to life in the 1980s during the Reagan era and the war on drugs campaign.[66] New zero tolerance legislation during this period removed judges' sentencing discretion and demanded mandatory sentences for certain drug-related offenses regardless of context.[67]

Zero tolerance policies emerged into the realm of public education when Congress passed the Gun-Free Schools Act of 1994 ("GFSA").[68] After a series of school shootings beginning with the one at Columbine High School, the public became increasingly concerned about violence

[63] *See, e.g.*, *id.* at 584 (holding that a one day in-school suspension did not implicate a student's property interest when she was required to complete school work during the suspension); *Wise*, 855 F.2d at 566 (holding that an in-school suspension program did not implicate a student's property interest in his education when he completed all of his regular class assignments and did not fall behind in his studies as a result of the suspension); *Dickens*, 661 F. Supp. at 156-59 (holding that a student's in-school suspension did not amount to a "total exclusion from the educational process" when a school temporarily placed him in "timeout" but permitted him to remain in the classroom, complete assignments, and attend other classes); *Fenton*, 423 F. Supp. at 772-73 (holding that a student's in-school suspension did not deprive him of his property interest in an education when he was required to complete school work during the suspension).

[64] *Laney*, 501 F.3d at 583 (citing *Fenton*, 423 F. Supp. at 773).

[65] *See* BEYOND SUSPENSIONS, *supra* note 7, at 63-83.

[66] McNeal, *supra* note 9, at 288.

[67] *Id.*

[68] *See* Peter Follenweider, Comment, *Zero Tolerance: A Proper Definition*, 44 J. MARSHALL L. REV. 1107, 1111-13 (2011).

among students,[69] and the GFSA was aimed at minimizing what was perceived to be a grave risk to student safety.[70]

In order to receive federal education funds, the GFSA required states to adopt zero tolerance policies mandating at least a one-year expulsion and an automatic referral to law enforcement for any public school student who brought a dangerous weapon to school.[71] The GFSA defined a weapon as a firearm or gun, bomb, grenade, rocket, missile, or mine.[72] However, with amendments to the GFSA, local school officials retained discretion to modify the expulsion requirement on a case-by-case basis.[73]

By 1998, almost all states had adopted zero tolerance policies.[74] However, the range of conduct prohibited under many of these policies went far beyond the intended scope of the Act.[75] Many states began to create policies that prohibited not only the possession and use of weapons, but also comparatively minor offenses, such as fighting, possession of over-the-counter medication, and vandalism.[76]

Recently, schools have expanded these policies even further and are now willing to punish students for that which extends beyond the "truly dangerous and criminal behavior by students" to include "infractions

[69] *See, e.g.*, *In re* J.D., 170 Cal. Rptr. 3d 464, 466-67 (Ct. App. 2014) (noting schools' "increased concern" after several infamous school shooting incidents and citing statistics about the prevalence of school violence); *In re* Gregory M., 627 N.E.2d 500, 502 (N.Y. 1993) ("The extreme exigency of barring the introduction of weapons into the schools by students is no longer a matter of debate."); *In re* Angelia D.B., 564 N.W.2d 682, 689 (Wis. 1997) ("With the growing incidence of violence and dangerous weapons in schools, [protecting students and teachers] has become increasingly difficult."); Aaron J. Curtis, *Tracing the School-to-Prison Pipeline from Zero-Tolerance Policies to Juvenile Justice Dispositions*, 102 GEO. L.J. 1251, 1253 (2014) (noting the public and school administrators' focus on school violence after dangerous events, including the Columbine school shooting).

[70] *See* Follenweider, *supra* note 68, at 113-114.

[71] Gun-Free Schools Act of 1994, 20 U.S.C. § 8921 (1994).

[72] 18 U.S.C. § 921(a)(3)-(4) (2018); 20 U.S.C. § 8921 (2018); ERICA R. MEINERS, RIGHT TO BE HOSTILE: SCHOOLS, PRISONS, AND THE MAKING OF PUBLIC ENEMIES 32 (Routledge 2007).

[73] 20 U.S.C. § 7961(b)(1) (2018); MEINERS, *supra* note 72, at 32.

[74] *See* Follenweider, *supra* note 68, at 1113 (noting that by 1998, "ninety-four percent of schools had adopted policies for weapons or firearms; eighty-seven percent for incidents involving alcohol; and seventy-nine percent mandated automatic suspensions for tobacco or violence-related events").

[75] *See* Mitchell, *supra* note 9, at 278-79.

[76] *Id.* (describing the broad scope of conduct prohibited under zero tolerance policies).

that pose little or no safety concerns,"[77] such as cheating, running in the hallway, dress code violations, and foul language.[78] In some instances, schools have even applied zero tolerance policies to off-campus behavior, expelling students for content they posted online while in the privacy of their own homes.[79] As a result of schools' willingness to punish students for virtually any form of misconduct, regardless of the severity, today's suspension and expulsion rates have reached an all-time high.[80] and disproportionately affect minority students. In fact, the U.S. Department of Education's Office of Civil Rights' website indicates

[77] ADVANCEMENT PROJECT & THE CIVIL RIGHTS PROJECT AT HARV. UNIV., OPPORTUNITIES SUSPENDED: THE DEVASTATING CONSEQUENCES OF ZERO TOLERANCE AND SCHOOL DISCIPLINE 1 (2000) [hereinafter OPPORTUNITIES SUSPENDED]; *see also* Catherine Y. Kim, *Policing School Discipline*, 77 BROOK. L. REV. 861, 862 (2012) ("Today, police officers routinely patrol public school hallways on a full-time basis . . . and school officials refer a growing number of youth to the juvenile and criminal justice systems for school-based misconduct."). Two extreme examples include five high school students getting arrested for felony assault when they accidentally hit their school bus driver while playfully throwing peanuts at each other and a student being incarcerated in a local juvenile detention center for wearing the wrong color socks. *See* ADVANCEMENT PROJECT, AM. CIVIL LIBERTIES UNION OF MISS., MISS. STATE CONFERENCE OF THE NAACP & MISS. COAL. FOR THE PREVENTION OF SCHOOLHOUSE TO JAILHOUSE, HANDCUFFS ON SUCCESS: THE EXTREME SCHOOL DISCIPLINE CRISIS IN MISSISSIPPI PUBLIC SCHOOLS 3-4 (2013).

[78] Black, *The Constitutional Limit*, *supra* note 9, at 835-36 (proposing a causal connection between zero tolerance policies and the increase in suspension and expulsion rates). In addition, more recently, schools have begun tacking what Amanda Cooley refers to as "shaming punishments" onto other forms of discipline. *See* Amanda Harmon Cooley, *An Efficacy Examination and Constitutional Critique of School Shaming*, 79 OHIO ST. L.J. 319, 320-22 (2019) [hereinafter *An Efficacy Examination*]. School shaming is "a disciplinary method of publicizing a student's alleged wrongful behavior in the school community, 'where such behavior is perceived to have violated a social norm.'" *Id.* at 325 (citing Leah Chan Grinvald, *Shaming Trademark Bullies*, 2011 WIS. L. REV. 625, 665 (citing ERIC A. POSNER, LAW AND SOCIAL NORMS 76 (2000))).

[79] *See, e.g.*, Austin Carroll, *Indiana High School Student, Expelled for Tweeting Profanity*, HUFF. POST (Mar. 25, 2012, 1:32 PM), https://www.huffingtonpost.com/2012/03/25/austin-carroll-indiana-hi_n_1378250.html [https://perma.cc/4PHY-Q4J4] (describing how a high school from Indiana was expelled following tweets which included profanity posted from home to his personal account); Kristine Phillips, *Two White Catholic School Students Expelled for Racist Texts Are Suing for $1 Million*, WASH. POST (Dec. 9, 2016), https://www.washingtonpost.com/news/education/wp/2016/12/07/two-white-catholic-school-students-expelled-for-racist-texts-are-suing-for-1-million [https://perma.cc/B4N3-TJFA] (describing two teens who were expelled following "racially insensitive" social media posts).

[80] *See* Black, *The Constitutional Limit*, *supra* note 9, at 836-37; *see also* Barbara Fedders, *Schooling at Risk*, 103 IOWA L. REV. 871, 891-92 (2018) (explaining the increase in suspensions as "based not on more, or more serious, student misbehavior, but instead on schools expanding the range of behaviors permitting or requiring suspension").

that Black students received out-of-school suspensions three times as often as white students.[81]

C. School Resource Officers, Armed Teachers, and the Police State in K-12 Schools

Among the most commonplace safety measures used in schools today are weapons deterrence[82] and the use of campus security and police officers.[83] Most schools today use security cameras and metal detectors to monitor their hallways and control what comes into the school building.[84] They also conduct searches on student lockers and bags, especially in large urban middle and high schools.[85]

School districts and local law enforcement joined forces to ensure that more campuses had a security guard presence,[86] and officers routinely began carrying firearms at school. [87] Many states also adopted statutory

[81] DATA SNAPSHOT: SCHOOL DISCIPLINE, *supra* note 10, at 3.

[82] In 1990, Congress passed the Gun-Free School Zones Act, which made it unlawful for "any individual knowingly to possess a firearm" in a school zone. 18 U.S.C. § 922(q)(2)(A) (2018). After facing a constitutional challenge in the U.S. Supreme Court in United States v. Lopez, 514 U.S. 549 (1995), the Court held that the law exceeded Congress' authority under the Commerce Clause. *Id.* at 551. The law was amended to forbid the possession in a school zone of a firearm that "has moved in or that otherwise affects" interstate commerce. 18 U.S.C. § 922(q)(2)(A). The law does not appear to prohibit school districts from allowing teachers or other school officials to carry or discharge firearms on campus pursuant to a district-sanctioned security program. At the state level, "almost all states prohibit guns in K-12 schools, but only 40 states and Washington DC extend this prohibition to people who have been granted a permit to carry a concealed weapon." *Guns in Schools*, GIFFORDS LAW CTR. TO PREVENT GUN VIOLENCE, http://smartgunlaws.org/guns-in-schools-policy-summary/ (last visited Aug. 31, 2020) [http://perma.cc/5CUF-6L5R].

[83] SIMONE ROBERS, JANA KEMP, JENNIFER TRUMAN & THOMAS D. SNYDER, U.S. DEP'T OF EDUC. & U.S. DEP'T OF JUSTICE, INDICATORS OF SCHOOL CRIME AND SAFETY: 2012, 86-88 (2013) (noting that 43% of K-12 and 28% of primary schools reported the presence of one or more security staff at their school at least once a week in 2009–2010).

[84] *Id.* at 84 (reporting that 84% of high schools, 73% of middle schools, and 51 percent of primary schools reported that they used security cameras to monitor their schools).

[85] *See id.* at 86; Jason P. Nance, *Random, Suspicionless Searches of Students' Belongings: A Legal, Empirical, and Normative Analysis*, 84 U. COLO. L. REV. 367, 369-70 (2013).

[86] According to the National Center on Education Statistics, 43% of schools reported the presence of one or more security guards, security personnel, School Resource Officers ("SROs"), or sworn law enforcement officers at their schools at least once a week during the 2009–2010 school year. ROBERS ET AL., *supra* note 83, at 86-88.

[87] *Id.* at 88.

mechanisms that allowed for the arming of teachers during the school day, charging classroom teachers with quasi-security guard duties.[88]

In a relatively short period of time, school officials became law enforcement partners, transforming what at one time would have been a school-student matter into a public safety matter with potentially life-changing negative consequences for the student.[89] As a result of this police presence in K-12 schools, schools began pushing a troubling number of students out of school and into the criminal justice system.[90] This is particularly problematic in light of the Supreme Court's trend of recognizing that the ongoing psychological and physical development of youthful offenders requires that the Court treat them differently than adults when it comes to criminal justice under the Constitution.[91] Even Congress recognized key distinctions evidenced by scientific research.[92] which supports different treatment for adolescents in the criminal justice system based on their impressionable and continually developing brains.[93]

The cost of this approach is enormous to both the students subject to it and to society. One study showed that juvenile incarceration is "the single most significant factor in predicting whether a youth will offend again — more so than family difficulties or gang membership."[94] Others indicate that one arrest will reduce the odds of a student matriculating through graduation.[95] Finally, taxpayers and society in general suffer

[88] Danielle Weatherby, *Opening the "Snake Pit": Arming Teachers in the War Against School Violence and the Government-Created Risk Doctrine*, 48 CONN. L. REV. 119, 128-29 (2015) (arguing that the teachers' approach to school safety opens schools up to legal liability under the government-created risk doctrine).

[89] *See* RICHARD A. MENDEL, NO PLACE FOR KIDS: THE CASE FOR REDUCING JUVENILE INCARCERATION 14 (2011) ("[A]n alarming number of students [are] being arrested and referred to the juvenile justice system for disorderly behavior that was once considered routine and handled informally within the schools.").

[90] *See, e.g.*, Miller v. Alabama, 567 U.S. 460, 468-69 (2012) (describing fourteen-year-old Miller's conviction of life without parole); Roper v. Simmons, 543 U.S. 551, 557 (2005) (noting that police arrived at the defendant's high school to arrest him).

[91] *See Miller*, 567 U.S. at 479; *Roper*, 543 U.S. at 569-70.

[92] *See, e.g.*, 18 U.S.C. § 5043 (2018); CAL. WELF. & INST. CODE § 211 (2020); GA. CODE ANN. § 17-3-2.1 (2012); IOWA CODE ANN. §§ 232.22, 356.3 (2017); MONT. CODE ANN. § 45-5-622 (2018).

[93] Amy Fettig, *The Movement to Stop Youth Solitary Confinement: Drivers of Success & Remaining Challenges*, 62 S.D. L. REV. 776, 779-80 (2017).

[94] NELL BERNSTEIN, BURNING DOWN THE HOUSE: THE END OF JUVENILE PRISON 7 (2014) (summarizing a study of 35,000 juvenile offenders and explaining that "those who were incarcerated as juveniles were twice as likely to go on to be locked up as adults as those who committed similar offenses and came from similar backgrounds but were given an alternative sanction or simply not arrested").

[95] MENDEL, *supra* note 89, at 12.

when students do not continue in school. A 2016 study from UCLA's Civil Rights Project quantified the full social cost in dollars and cents of exclusionary discipline practices, concluding that the cost of tenth grade suspensions totaled over thirty-five billion dollars to taxpayers.[96]

II. WHY ZERO TOLERANCE DISCIPLINE IS FAILING AMERICA'S YOUTH

In recognition of this causal link between exclusionary discipline, poor academic performance, and the propensity for crime,[97] since the late 1990s, scholars have identified the existence of a metaphorical "pipeline" from public schools to carceral institutions.[98] The School-to-Prison Pipeline refers to the trend of removing students from school through punitive measures and ultimately placing them on a path to incarceration.[99] The metaphor gained traction in the early 2000s as more authorities called attention to zero tolerance discipline and the school discipline crisis, recognizing the role that administrators play in a student's trajectory from the schoolhouse to the prison cell.[100] The Pipeline became more of a reality as schools increased the outsourcing of student discipline to law enforcement officers.[101]

What began with the passage of the GFSA as a means of deterring weapons, violence, and drugs on campus has morphed into a system of automatic arrests for even minor infractions.[102] Schools invoking zero

---

[96] THE CIVIL RIGHTS PROJECT AT UCLA, THE HIGH COST OF HARSH DISCIPLINE AND ITS DISPARATE IMPACT 2 (June 2, 2016), https://escholarship.org/uc/item/85m2m6sj [https://perma.cc/9BBF-3EGL].

[97] *Id.*

[98] Ken McGrew, *The Dangers of Pipeline Thinking: How the School-to-Prison Pipeline Metaphor Squeezes Out Complexity*, 66 EDUC. THEORY 341, 343 (2016).

[99] Nancy A. Heitzeg, *Education or Incarceration: Zero Tolerance Policies and the School to Prison Pipeline*, F. ON PUB. POL'Y 1, 1 (2009); Nance, *Dismantling the School-to-Prison Pipeline*, *supra* note 9, at 318-19. The pipeline conjures up directional imagery, sending a student immediately from school to prison. Although the school-to-prison pipeline sounds like a direct link, the data support a more web-like model. MEINERS, *supra* note 72, at 31-32; Russell J. Skiba, Mariella I. Arredondo & Natasha T. Williams, *More Than a Metaphor: The Contribution of Exclusionary Discipline to a School-to-Prison Pipeline*, 47 EQUITY & EXCELLENCE EDUC. 546, 546 (2014). This web — rather than the pipeline — perspective permits the connections between the "historic, systemic, and multifaceted nature of the intersections of education and incarceration." MEINERS, *supra* note 72, at 32. However, under either metaphor for the disciplinary crisis, the implications are the same, and how we label it is not necessarily critical to the issue.

[100] *See* Skiba et al., *supra* note 99, at 548.

[101] Peter Price, *When Is a Police Officer an Officer of the Law? The Status of Police Officers in Schools*, 99 J. CRIM. L. & CRIMINOLOGY 541, 548-50 (2009) (finding that between 1999 and 2003 police presence in schools had increased nearly 30%).

[102] Kim, *supra* note 77, at 880; *see* OPPORTUNITIES SUSPENDED, *supra* note 77.

tolerance policies may refer even minimal disruptions to law enforcement officers who possess significant discretion to arrest students for disturbing the classroom environment.[103]

The research shows that schools disproportionately suspend, expel, and arrest poor students and students of color.[104] While school officials are more likely to grant leniency to middle to upper-class white students, the data reflects a system in which the most vulnerable student populations suffer the harsh consequences of zero tolerance discipline more often than their upper-class white peers.[105] While schools suspend and expel black students three times more than white students,[106] there is little evidence to suggest that black students engage in more deviant behaviors than white students. In the absence of such evidence, the reason for the disparity in the above statistics seems to be implicit bias at a systemic level.[107]

Despite the fact that these students would most benefit from educational and counseling services, schools wielding zero tolerance disciplinary tools isolate and punish these students through removal, contributing to a worsening of their mental and emotional states and

---

[103] *See* Price, *supra* note 101, at 549.

[104] BEYOND SUSPENSIONS, *supra* note 7, at 6-7; McGrew, *supra* note 98, at 358.

[105] BEYOND SUSPENSIONS, *supra* note 7, at 63-75 (explaining that racial minorities, students with disabilities, and students of lower socioeconomic status are suspended and expelled more frequently than their white peers); DATA SNAPSHOT: SCHOOL DISCIPLINE, *supra* note 10, at 1-3; Kayla Crawley & Paul Hirschfield, *Examining the School-to-Prison Pipeline Metaphor*, OXFORD RES. ENCYCLOPEDIA, CRIMINOLOGY & CRIM. JUST. 1, 9 (June 2018), https://oxfordre.com/criminology/abstract/10.1093/acrefore/9780190264079.001.0001/acrefore-9780190264079-e-346 [https://perma.cc/93RW-2XNT]; *School-to-Prison Pipeline [Infographic]*, ACLU (Aug. 12, 2019), https://www.aclu.org/issues/juvenile-justice/school-prison-pipeline/school-prison-pipeline-infographic (last visited Aug. 31, 2020) [https://perma.cc/J69H-7L5D] (stating that while black students account for only 16 percent of public school enrollment, they account for 42% of students with more than one suspension).

[106] DATA SNAPSHOT: SCHOOL DISCIPLINE, *supra* note 10, at 3.

[107] *See* RECLAIMING MICHIGAN'S THROWAWAY KIDS: STUDENTS TRAPPED IN THE SCHOOL-TO-PRISON PIPELINE, ACLU 31 (2009), http://www.njjn.org/uploads/digital-library/resource_1287.pdf [https://perma.cc/GF79-GF6Z] (indicating that suspension and other classroom exclusionary procedures increase the likelihood that African-American male students who live in urban areas will engage in criminal activities in their communities, which increases their likelihood of future contact with the justice system); Tyree Robinson, *The Effects of Racial Exclusionary Disciplinary Practices on African American Male Students: Alternatives to Suspensions and Expulsions*, *in* THE HANDBOOK OF RESEARCH ON BLACK MALES: QUANTITATIVE, QUALITATIVE, AND MULTIDISCIPLINARY 669 (Theodore S. Ransaw et al. eds., Mich. State Derek Press 2019).

perpetuating their feelings of hopelessness.[108] Because the research shows that suspended students are more likely to misbehave again, leading to more discipline and increasing the likelihood that the student will disengage from school and have a negative interaction with law enforcement outside of school, these at-risk students are the ones that most frequently enter into the Pipeline.[109]

Moreover, although schools remove a suspended student from class under the guise that classroom climate will improve, zero tolerance policies and high rates of suspensions foster fear and disengagement among all students, even those with no history of misconduct.[110] Students distracted by the fear of discipline face a barrier to full participation in their own education.[111] Additionally, students perceive the disciplinary procedures themselves as unfair, and that perception invites more negativity, including resentment, revolt, and disengagement.[112] There is a rich correlation "between effective classroom management, school environment, and educational outcomes."[113] Harsh disciplinary procedures, like automatic suspensions, lead to harsh school climates, and harsh school climates beget more disruptive behavior, which leads to more suspensions — continuing the cycle.[114] Suspension and expulsion do not address the school climate crisis, and the students who remain in the classroom merely fill the void left by the suspended student with more disruptive behavior.[115] Schools have a responsibility to remedy a dysfunctional climate that invites disruption; they cannot simply blame the students for the disruptive behavior.[116]

Finally, a negative school climate impacts the teachers in the classroom. Just as students disengage from a negative school climate,

---

[108] Russel J. Skiba & Kimberly Knesting, *Zero Tolerance, Zero Evidence: An Analysis of School Disciplinary Practice*, 92 NEW DIRECTIONS FOR YOUTH DEV. 17, 29-30, 33-34 (2001).

[109] Pedro Noguera, *Schools, Prisons, and Social Implications of Punishment: Rethinking Disciplinary Practices*, 42 THEORY INTO PRAC. 341, 342 (2003); *see also* Skiba et al., *supra* note 100, at 546-64; *School-to-Prison Pipeline [Infographic]*, *supra* note 105 (indicating that students who commit a discretionary violation that results in a suspension or expulsion are nearly three times more likely to be in contact with the juvenile justice system the following year).

[110] *See* BLACK, *supra* note 12, at 156.

[111] *See id.*

[112] *Id.* at 182.

[113] *Id.* at 157.

[114] *Id.*

[115] *Id.*

[116] *See id.*

teacher frustration and dissatisfaction also increase, leading to more incidents of teacher absence and teacher turnover.[117] Given the correlation between high rates of suspension and expulsion, increased teacher absenteeism and turnover, and the negative impact on school climate, it is clear that exclusionary discipline has become a success barrier in the worst instances to high academic performance.[118] Professor Black suggests that discipline reform is a necessary policy intervention to ensure that all students have the opportunity to receive an adequate education.[119]

III. THE ACTIVE AVOIDANCE DOCTRINE AND THE DUTY TO REFORM STUDENT DISCIPLINE

It is uncontroverted that zero tolerance discipline is leaving all students, including those with no history of misconduct, worse off.[120] Indeed, the U.S. Department of Education's Commission on Civil Rights' 2019 report was rich with social science detailing the negative impact of exclusionary discipline in our nation's schools.[121]

The failure to reform such a broken educational practice causes constitutional deprivations. "Students can . . . challenge whether dysfunctional school environments that lead to high levels of school exclusion are consistent with the state's obligation to deliver equal and quality educational opportunities."[122] This guiding principle is what forms the basis of the Active Avoidance Doctrine.

Despite this principle, in practice, students seeking redress from their schools for constitutional violations by school officials face an uphill battle. Courts have been overwhelmingly deferential to schools, hesitant to meddle into local school district policies and practices.[123] Moreover,

---

[117] *Id.* at 183.

[118] *See id.*

[119] *Id.* at 195.

[120] *See supra* Part II.

[121] *See generally* BEYOND SUSPENSIONS, supra note 7, at 3 (discussing exclusionary school discipline policies' negative and disparate impact on students of color and students with disabilities).

[122] BLACK, *supra* note 12, at 102.

[123] *See, e.g.*, Ingraham v. Wright, 430 U.S. 651, 681-82 (1977) (granting deference to school officials in assessing the constitutionality of student discipline); *see also* Cynthia L. Estlund, *Freedom of Expression in the Workplace and the Problem of Discriminatory Harassment*, 75 TEX. L. REV. 687, 772-73 (1997) (explaining that courts justify limitations on students' constitutional rights based on the need to maintain school order and discipline); Gilbert A. Holmes, *Student Religious Expression in School: Is It Religion or Speech, and Does It Matter*, 49 U. MIAMI L. REV. 377, 414-15 n.216 (1994) (observing the Supreme Court's consistent limitation of student rights).

while schools are bound to perform within constitutionally proscribed limits,[124] the legal framework for school-based liability claims is stacked against the student, making it almost impossible for students to successfully challenge a school's tortious or unconstitutional conduct.[125] School liability claims generally take two forms: (1) a tort-based action that is often summarily dismissed due to governmental immunity and (2) other affirmative defenses[126] and actions based in federal constitutional law.[127] To date, neither type of claim assumes that schools owe an affirmative duty to protect their students.[128]

While students challenging the individual application of zero tolerance discipline policies have lodged constitutional as-applied challenges with some success,[129] there has yet to be a legal challenge premised upon a school district's active avoidance of discipline reform. This is because the former challenges are rooted in a school's action targeted at a specific student, while the latter would be premised upon a currently unrecognized duty to change the *status quo*, cease the practice of exclusionary discipline, and make sweeping reforms.

This recognition of an affirmative constitutional duty is what forms the basis of what I call the Active Avoidance Doctrine, a new litigation theory distinctive to what has been argued before. The difficulty with

---

[124] New Jersey v. T.L.O., 469 U.S. 325, 336-37 (1985) (noting that schools are bound by the First and Fourth Amendments); W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 637-38 (1943) (stating that school actors must "perform within the limits of the Bill of Rights").

[125] *See* Josie Foehrenbach Brown, *Developmental Due Process: Waging a Constitutional Campaign to Align School Discipline with Developmental Knowledge*, 82 TEMP. L. REV. 929, 930-31 (2009) ("Public schools are critical sites in children's legal socialization. Serving close to ninety percent of our country's elementary and secondary students, public schools imprint better and worse versions of the Constitution-in-practice on children's nascent legal consciousness.").

[126] Weatherby, *supra* note 88, at 129.

[127] *Id.*

[128] *See* Patel v. Kent Sch. Dist., 648 F.3d 965, 973 (9th Cir. 2011) (finding that a school had no duty to protect a disabled student from sexual encounters with another peer while at school, the Court explained that "[a]t least seven circuits have held that compulsory school attendance alone is insufficient to invoke the special-relationship" doctrine giving rise to a duty to protect).

[129] *See, e.g.*, Goss v. Lopez, 419 U.S. 565 (1975) (holding that the Due Process Clause protects students facing temporary suspensions from public school); Seal v. Morgan, 229 F.3d 567 (6th Cir. 2000) (finding for student on Substantive Due Process claim where court found zero tolerance policy irrational and vague when student was expelled for possessing a knife he did not know was in his mother's car); Murphy v. Ft. Worth Indep. Sch. Dist., 258 F. Supp. 2d 569 (N.D. Tex. 2003) (indicating that a student alleged to have made terroristic threats successfully challenged zero tolerance policy on procedural Due Process basis).

the Active Avoidance Doctrine is that it necessarily assumes that schools owe a duty to their students to effectuate discipline reform, but courts are relentless in refusing to subscribe any school-owed duty.[130]

The U.S. Constitution is a charter of negative, not positive, rights which restricts government power "rather than imposing even the most minimal affirmative duties."[131] Indeed, the Due Process Clause "forbids the State itself to deprive individuals of life, liberty, or property without 'due process of law,' but its language cannot be extended to impose an affirmative obligation on the State to ensure that those interests do not come to harm through other means."[132] Consequently, a child who suffers a physical injury due to the negligence of school officials has limited options to seek legal redress against the school for its part in causing those injuries.[133]

With respect to discipline reform, the Active Avoidance theory of recovery assumes that schools have a duty to protect students by remedying that which they know to be broken. With a robust body of literature supported by empirical data, crediting exclusionary discipline as one of the primary causes of the School-to-Prison Pipeline,[134] schools should be charged with at least constructive notice[135] of the harm

---

[130] *See Patel*, 648 F.3d at 973.

[131] Rebecca Aviel, *Compulsory Education and Substantive Due Process: Asserting Student Rights to a Safe and Healthy School Facility*, 10 LEWIS & CLARK L. REV. 201, 204 (2006) (quoting Bowers v. DeVito, 686 F.2d 616, 618 (7th Cir. 1982)). *But see* Nancy E. Dowd, *Children's Equality Rights: Every Child's Right to Develop to Their Full Capacity*, 41 CARDOZO L. REV. 1367, 1398-99 (2020) (stating that "[t]his positive rights argument is especially powerful for education. It assures a floor of opportunity, and therefore equity among citizens").

[132] DeShaney v. Winnebago Cty. Dep't of Soc. Servs., 489 U.S. 189, 195 (1989); *see also* Harris v. McRae, 448 U.S. 297, 317-18 (1980) ("Although the liberty protected by the Due Process Clause affords protection against unwarranted government interference with freedom of choice in the context of certain personal decisions, it does not confer an entitlement to such funds as may be necessary to realize all the advantages of that freedom.").

[133] *See* Weatherby, *supra* note 88, at 129.

[134] *See supra* Part III.

[135] *See* Lipsett v. Univ. of P.R., 864 F.2d 881, 902 (1st Cir. 1988) (finding constructive notice of sexual harassment where university officials failed to investigate or take reasonable measures to stop the sexual harassment directed against a student); U.S DEP'T OF EDUC. OFFICE FOR CIVIL RIGHTS, REVISED SEXUAL HARASSMENT GUIDANCE: HARASSMENT OF STUDENTS BY SCHOOL EMPLOYEES, OTHER STUDENTS, OR THIRD PARTIES 13 (2001) (defining the constructive notice standard as "knew, or in the exercise of reasonable care, should have known"); *see also* Bella v. Davis, 531 F. App'x 457, 460 (5th Cir. 2013) (indicating that some states, including New York and Louisiana, have implemented a constructive notice standard, under which schools may be held liable for negligent supervision if a school is on constructive notice of prior similar conduct

caused by perpetuating these policies. The Active Avoidance Doctrine suggests that the perpetuation of zero tolerance policies produces a crime-enabling cycle that places students at risk, resulting in an educational deprivation that poses actionable Fourteenth Amendment problems.

A. As-Applied Constitutional Challenges to Zero Tolerance Policies

To appreciate how the Active Avoidance Doctrine could impose liability on schools for shirking the duty to reform student discipline, it is important to recognize that the application of zero tolerance policies to individual students has proven to have at least some constitutional implications. Indeed, students harmed by the application of zero tolerance policies have, at the very least, a mechanism to challenge such application on both procedural and substantive due process grounds.[136]

Procedural due process challenges to exclusionary discipline practices, including zero tolerance policies, implicate either property interests, which are derived from state statutes or constitutions, or liberty interests.[137] A student who is expelled pursuant to a zero tolerance policy may have a claim for a violation of a property interest if her state's constitution guarantees a free public education.[138] A student challenging the application of a zero tolerance policy on these grounds typically argues that the school failed to provide adequate notice, an impartial hearing, or the right to be heard before suspending or expelling her pursuant to a zero tolerance policy.[139] Generally, courts

by the student responsible for injury to another student); LaValley v. Ne. Clinton Cent. Sch. Dist., 130 A.D.3d 1276, 1277 (N.Y. App. Div. 2015).

136 U.S. CONST. amend. XIV (prohibiting the government from depriving "any person of life, liberty, or property, without due process of law"); U.S. CONST. AMEND. V (prohibiting the federal government from depriving persons of "life, liberty, or property, without due process of law"); Poe v. Ullman, 367 U.S. 497, 541 (1961) (Harlan, J., dissenting) ("Were due process merely a procedural safeguard it would fail to reach those situations where the deprivation of life, liberty or property was accomplished by legislation which by operating in the future could, given even the fairest possible procedure in application to individuals, nevertheless destroy the enjoyment of all three.").

137 Mathews v. Eldridge, 424 U.S. 319, 334-35 (1976) (providing a three-part balancing test for determining how much process is due); Goss v. Lopez, 419 U.S. 565, 572-73 (1975).

138 *Goss*, 419 U.S. at 579.

139 *Id.* at 581 (holding that schools must provide "rudimentary precautions against unfair or mistaken findings of misconduct and arbitrary exclusion from school" for suspensions of ten days or less including "oral or written notice of the charges against him and, if he denies them, an explanation of the evidence the authorities have and an opportunity to present his side of the story").

deem students to have received adequate notice of a zero tolerance policy as long as the policy is published in the student handbook.[140] A student asserting a procedural due process challenge alleging a violation of a liberty interest must demonstrate that the student's "good name, reputation, honor, or integrity is at stake because of what the government is doing to him."[141] This type of challenge is rarely successful.[142] However, the Supreme Court has recognized that suspensions and expulsions "could seriously damage the students' standing with their fellow pupils and their teachers as well as interfere with later opportunities for higher education and employment."[143]

A student alleging that a zero tolerance policy violates her substantive due process rights must demonstrate that the "mandatory nature" of the policy is "excessive" and "lack[s] a rational connection to legitimate educational goals."[144] These claims are successful only when the challenged zero tolerance policy is an "extraordinary departure from established norms" and is "wholly arbitrary."[145] Consequently, challenges to zero tolerance policies typically survive judicial scrutiny as long as the school defendants assert some reasonable justification for them.[146]

Because the school's burden is so low, very few of these claims have succeeded.[147] But this trend does not negate the fact that exclusionary

---

[140] *See In re* Expulsion of Polonia, No. C7-95-1523, 1996 WL 45169, at *2 (Minn. Ct. App. Feb. 6, 1996).

[141] *Goss*, 419 U.S. at 574 (citing Wisconsin v. Constantineau, 400 U.S. 433, 437 (1971)); Bd. of Regents v. Roth, 408 U.S. 564, 573 (1972).

[142] *See* Dean Hill Rivkin, *Legal Advocacy and Education Reform: Litigating School Exclusion*, 75 TENN. L. REV. 265, 284 (2008); *see, e.g.*, C.S.C. v. Knox Cty. Bd. of Educ., No. E2006-00087-COA-R3CV, 2006 WL 3731304 (Tenn. Ct. App. Dec. 19, 2006) (holding that a Tennessee school board had not violated the Procedural Due Process rights of a group of students who had been subject to long-term suspension and placed in an alternative school, as TN statutes do not mandate that suspended or expelled students have the right to attend an alternative school).

[143] *Goss*, 419 U.S. at 575.

[144] Insley, *supra* note 9, at 1056; *see also* Adams, *supra* note 23, at 145-47; William Haft, *More Than Zero: The Cost of Zero Tolerance and the Case for Restorative Justice in Schools*, 77 DENV. U. L. REV. 795, 800-02 (2000); J. Kevin Jenkins & John Dayton, *Students, Weapons, and Due Process: An Analysis of Zero Tolerance Policies in Public Schools*, 171 ED. L. REP. 13, 30 (2003); James M. Peden, *Through a Glass Darkly: Educating with Zero Tolerance*, 10 KAN. J.L. & PUB. POL'Y 369, 384-87 (2001).

[145] Insley, *supra* note 9, at 1057 (citing Dunn v. Fairfield Cmty. High Sch., 158 F.3d 962, 966 (7th Cir. 1998)).

[146] *Id.*

[147] Seal v. Morgan, 229 F.3d 567, 575 (6th Cir. 2000) ("In the context of school discipline, a substantive due process claim will succeed only in the 'rare case' when there is no 'rational relationship between the punishment and the offense.'" (quoting

discipline results in educational deprivations, which is why the recognition of a duty here would result in more just outcomes. The disciplinary regulations governing eligible students with disabilities under the Individuals with Disabilities Education Act ("IDEA") further bolster this argument.[148] Students with disabilities are guaranteed substantive due process through the provision of a Free Appropriate Public Education ("FAPE") in the Least Restrictive Environment ("LRE").[149] The Department of Education recently admonished schools that the disciplinary removal of students with disabilities may "result in a child not receiving a meaningful educational benefit or FAPE."[150]

B. The Active Avoidance Doctrine

The Active Avoidance theory of recovery is premised upon a school's perpetuation of exclusionary discipline practices, which are known to endanger students and diminish a positive learning environment.[151] This shirking of what I propose is a legal duty to reform broken educational practices results in deprivations of guaranteed rights that raise substantive due process concerns.

The imposition of a duty on state actors has been the topic of an entire body of scholarship.[152] Scholars have criticized the Court's repeated insistence that schools owe no constitutionally protected legal duty to their students, refusing to interpret the Constitution's due process guarantees coupled with compulsory education laws as triggering

Rosa R. v. Connelly, 889 F.2d 435, 439 (2d Cir. 1989)) (internal quotes omitted)); *see* Wood v. Strickland, 420 U.S. 308, 326 (1975) ("It is not the role of the federal courts to set aside decisions of school administrators which the court may view as lacking a basis in wisdom or compassion.").

148 *See* 20 U.S.C. §§ 1400(d)(1)(A), 1412(a)(1) (2018) (characterizing duties to students as affirmative); 34 C.F.R. §§ 300.320(a)(4), 300.324(a)(2)(i)-(b)(2) (2020) (describing disciplinary action appropriate for students with disabilities).

149 20 U.S.C. §§ 1412(a)(1)-(5).

150 U.S. DEP'T OF EDUC., DEAR COLLEAGUE LETTER (Aug. 1, 2016), https://sites.ed.gov/idea/files/dcl-on-pbis-in-ieps-08-01-2016.pdf [https://perma.cc/RE4T-A57P].

151 *See supra* Part III. As previously mentioned, under the Federal Individuals with Disabilities Education Act, eligible students with disabilities must be afforded a free appropriate public education ("FAPE") under the Fourteenth Amendment. As applied to discipline, when schools impose disciplinary removals, such as suspensions, on students with disabilities, there is a "deprivation of the FAPE provision" and therefore a Fourteenth Amendment violation.

152 *See, e.g.*, Emily Suski, *The Privacy of the Public Schools*, 77 MD. L. REV. 427, 430-32 (2018) [hereinafter *The Privacy of Public Schools*] (arguing that "the public/private binary fails with respect to public schools" and that "[t]he consequence of this privacy is that school authority is privileged over student rights").

affirmative obligations.[153] This Article joins that body of scholarship in advocating for the recognition of an affirmative duty owed by public schools to their students.

Nonetheless, the avenues available to parents suing a school for damages are purposefully limited because of the historically ample discretion afforded to school officials. Generally, absent the school's waiver of its own sovereign immunity, schools and teachers cannot be sued in their official capacity for their own negligence.[154] Injured parties may, however, bring a federal cause of action against a school district, as an arm of the government, under 42 U.S.C. § 1983 ("Section 1983").[155] Such a claim provides an avenue by which a plaintiff can sue a government entity in federal court for the deprivation of her constitutional rights.[156] Section 1983 holds liable anyone acting under color of state law who "subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and [federal] laws."[157] A § 1983 claimant must satisfy two elements: (1) she was "deprived of an existing federal right," and (2) "the deprivation occurred under color of state law."[158]

The § 1983 framework has traditionally been utilized by litigants claiming that the school's unconstitutional conduct in one specific instance resulted in their injuries.[159] To date, however, no litigant has

---

[153] *See, e.g.*, Emily Suski, *The School Civil Rights Vacuum*, 66 UCLA L. REV. 720, 724 (2019) [hereinafter *The School Civil Rights Vacuum*] (arguing that the Court's failure to find an affirmative duty is based on "misconceptions about both families and schools"); Note, *A Right to Learn?: Improving Educational Outcomes Through Substantive Due Process*, 120 HARV. L. REV. 1323, 1324 (2007) (arguing that the Court "has imposed an affirmative duty . . . when the state has first undertaken to restrain the liberty of an individual").

[154] Many states statutorily bar suits against municipalities. Plaintiffs seeking to recover against a school district based on a state law negligence theory should check to see if their jurisdiction provides sovereign immunity to school districts. *See* Phillip Buckley, *Barriers to Justice, Limits to Deterrence: Tort Law Theory and State Approaches to Shielding School Districts and Their Employees from Liability for Negligent Supervision*, 48 LOY. U. CHI. L.J. 1015, 1021-22 (2017).

[155] *See* 42 U.S.C. § 1983 (2018). *See generally* Susan S. Bendlin, *Shootings on Campus: Successful § 1983 Suits Against the School?*, 62 DRAKE L. REV. 41 (2013) (providing an in-depth exploration of a school district's duty under section 1983).

[156] *See supra* note 155; *see also* Deborah Austern Colson, Note, *Safe Enough to Learn: Placing an Affirmative Duty of Protection on Public Schools Under 42 U.S.C. Section 1983*, 30 HARV. C.R.-C.L. L. REV. 169, 171 (1995).

[157] 42 U.S.C. § 1983; Howlett v. Rose, 496 U.S. 356, 358 n.1 (1990); Colson, *supra* note 156, at 172.

[158] Colson, *supra* note 156, at 172.

[159] *See id.*

pursued a claim based on the theory that the school's zero tolerance policy propelled the student (or a group of students) into a crime-enabling cycle, which deprived them of educational access.

The potential for liability under the Active Avoidance Doctrine is premised upon two foundational legal principles. First, state constitutions' guarantees of free, public education are recognized property interests protected under the procedural prong of the Due Process Clause.[160] In some cases, the states have guaranteed their citizens a level of high quality education, making the property interest even stronger.[161] Second, the combination of compulsory education laws, which obligate students to attend school during certain hours, and the *in loco parentis* doctrine should implicate the substantive prong of the Due Process Clause to the extent an Active Avoidance claimant alleges an educational deprivation.[162] The combined effect of these principles supports the conclusion that public schools and their minor students are in a special relationship pursuant to which schools owe at least a limited legal duty to their students to effectuate reform.[163]

1. *In Loco Parentis* and the Legal Duty to Reform Broken Educational Practices

The Active Avoidance Doctrine assumes a legal duty that originates from the *in loco parenti*s doctrine, giving rise to a special relationship between public schools and their students.[164] The Supreme Court has recognized a "special relationship" sufficient to trigger a legal duty in a limited number of circumstances.[165] In the landmark case *DeShaney v. Winnebago County Department of Social Services*, the Court held that a special relationship existed when a state entity confines a person in its custody against her will, rendering that person unable to care for

---

[160] *See* Karen Swenson, *School Finance Reform Litigation: Why Are Some State Supreme Courts Activist and Others Restrained?*, 63 ALB. L. REV. 1147, 1148 (2000) ("All fifty state constitutions contain provisions guaranteeing a right to free public education.").

[161] *See* Areto A. Imoukhuede, *Enforcing the Right to Public Education*, 72 ARK. L. REV. 443, 452-53 (2019) (citing the guarantees to "high quality" public education in the Illinois and Florida constitutions).

[162] *See* Aviel, *supra* note 131, at 204.

[163] *See* Suski, *The Privacy of Public Schools*, *supra* note 152, at 480 (explaining that "[t]he right of children to be free from harm should be a corollary to a schools' duty to protect children"); Weatherby, *supra* note 88, at 130-31.

[164] *See* Weatherby, *supra* note 88, at 131-34.

[165] *See* DeShaney v. Winnebago Cty. Dep't of Soc. Servs., 489 U.S. 189, 199-200 (1989).

herself.[166] Consequently, state entities have an affirmative duty to protect people who are incarcerated or institutionalized, as they are in the custody of the state and unable to care for themselves.[167] Some courts have also imposed an affirmative duty in the state foster care system.[168]

The application of *in loco parentis* and the special relationship theory to public schools is not as well-defined, and the potency of the doctrine has waxed and waned. Courts have allowed schools to invoke the doctrine as a source of power to discipline students, make and enforce rules, and generally maintain a functioning school environment. However, the flip-side of the doctrine — the imposition of duties on the one standing *in loco parentis* to the child — has been less discussed.[169]

Dating as far back as the Code of Hammurabi,[170] the legal doctrine of *in loco parentis* or "in the place of the parent"[171] imposes parental-like status and responsibilities on a person or entity and, in the case of a public school, a government actor.[172] While the doctrine has evolved

166 *Id.*

167 *Id.* at 198-99.

168 D.R. *ex rel.* L.R. v. Middle Bucks Area Vocational Tech. Sch., 972 F.2d 1364, 1372 (3d Cir. 1992) (noting that "some courts have imposed a constitutional duty to protect foster children by analogy to involuntarily institutionalized individuals" and citing such cases).

169 *See* Susan Stuart, *In Loco Parentis in the Public Schools: Abused, Confused, and in Need of Change*, 78 U. CIN. L. REV. 969, 981 (2010) ("[T]he Court's authoritarian tendencies remain focused on the school districts' right to discipline and not on the concomitant duty to protect . . . .").

170 *Id.* at 972 (citing Alan F. Edwards, Jr., *In Loco Parentis: Alive and Kicking, Dead and Buried, or Rising Phoenix?* 2, 4 (1994), https://files.eric.ed.gov/fulltext/ED375720.pdf [https://perma.cc/V3TU-PART]) (exploring the historical roots of the term *in loco parentis*).

171 John E. Rumel, *Back to the Future: The In Loco Parentis Doctrine and Its Impact on Whether K-12 Schools and Teachers Owe a Fiduciary Duty to Students*, 46 IND. L. REV. 711, 713 (2013) ("The doctrine, according to its generally accepted common law meaning, refers to a person who has put himself in the situation of a lawful parent by assuming the obligations incident to the parental relation without going through the formalities necessary to legal adoption. It embodies the two ideas of assuming the parental status and discharging the parental duties.").

172 *See* Megonnell v. Infotech Sols., Inc., No. 1:07-cv-02339, 2009 WL 3857451, at *9 (M.D. Pa. Nov. 18, 2009) (quoting Niewiadomski v. United States, 159 F.2d 683, 686 (6th Cir. 1947)).

over time and its vigor has ebbed and flowed,[173] its earliest purpose at common law was the discharge of parental duties to the state.[174]

The doctrine has had many permutations.[175] Schools have traditionally used the doctrine as a hall pass to discipline students for bad behavior, invoking the doctrine as a shield to liability in corporal punishment cases.[176] The argument goes that the power that comes with parental-like control also grants schools wide discretion with respect to how to discharge those powers.[177] The doctrine "was readily imported from England as protection for public school teachers who saw the need to corporally punish students in their charge. This protection took the form of a broad, although not unlimited, defense in criminal and civil suits for assault and battery."[178]

---

[173] As of June 2009, the following federal statutes use the terminology *in loco parentis*: 5 U.S.C. § 6381 (2006 & Supp. II. 2008) (Family & Medical Leave Act); 8 U.S.C. § 1232 (2018) (Aliens & Nationality); 10 U.S.C. §§ 1126, 1482 (2018) (Armed Forces); 18 U.S.C. §§ 115, 879, 1116 (2018) (Crimes & Criminal Procedure); 20 U.S.C. §§ 932, 1232h, 7801, 9402 (2018) (Education); 22 U.S.C. §§ 213, 2708 (2018) (Foreign Relations); 25 U.S.C. § 231 (2018) (Indians); 29 U.S.C. § 2611 (2018) (Labor); 33 U.S.C. § 902 (2018) (Navigation & Navigable Waters); 37 U.S.C. §§ 401, 481 (2018) (Pay & Allowances of the Uniformed Services); 38 U.S.C. § 1901 (2018) (Veterans' Benefits); 42 U.S.C. §§ 1301, 1437d, 2000c-6, 2000d, 2000e, 9858n (2018) (Public Health & Welfare).

[174] *See* Rumel, *supra* note 171, at 714 (citing 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 441 (1765)) ("[The father] may also delegate part of his parental authority, during his life, to the tutor or schoolmaster of his child; who is then *in loco parentis*, and has such a portion of the power of the parent committed to his charge, viz. that of restraint and correction, as may be necessary to answer the purposes for which he is employed.").

[175] Stuart, *supra* note 169, at 978 (noting the number of permutations to the *in loco parentis* doctrine).

[176] *See* Todd A. DeMitchell, *The Duty to Protect: Blackstone's Doctrine of In Loco Parentis: A Lens for Viewing the Sexual Abuse of Students*, BYU EDUC. L.J. 17, 18-19 (2002); John C. Hogan & Mortimer D. Schwartz, *In Loco Parentis in the United States 1765-1985*, 8 J. LEGAL HIST. 260, 261-62 (1987); Stuart, *supra* note 169, at 974-75; Brian Jackson, Note, *The Lingering Legacy of In Loco Parentis: An Historical Survey and Proposal for Reform*, 44 VAND. L. REV. 1135, 1144 (1991).

[177] Rumel, *supra* note 171, at 714 (citing State v. Pendergrass, 19 N.C. (2 Dev. & Bat.) 365, 365-66 (1837)) ("One of the most sacred duties of parents, is to train up and qualify their children, for becoming useful and virtuous members of society; this duty cannot be effectually performed without the ability to command obedience, to control stubbornness, to quicken diligence, and to reform bad habits . . . . The teacher is the substitute of the parent; . . . and in the exercise of these delegated duties, is invested with his power.").

[178] Stuart, *supra* note 169, at 975 (quoting Perry A. Zirkel & Henry F. Reichner, *Is the In Loco Parentis Doctrine Dead?*, 15 J.L. & EDUC. 271, 273 (1986)). *See generally* Elementary Education Act 1870, 33 & 34 Vict. c. 75 (Eng.).

The early application of the *in loco parentis* doctrine came at a time when the modern-day version of public schooling was just being imagined, and parents were voluntarily relinquishing their children to the custody of school officials in lieu of homeschooling.[179] Courts fell in line with the school's assertion of power, and *in loco parentis* vested in schools the power to discipline and control students with little fear of judicial backlash.[180]

The earliest case applying the *in loco parentis* doctrine was the 1837 case *State v. Pendergrass*, in which a six-year-old North Carolina girl sued a school teacher for assault and battery after he whipped her with a switch, leaving marks on her body.[181] The *Pendergrass* court found in favor of the schoolteacher, claiming that schools enjoy broad "discretionary power in the infliction of punishment upon their pupils" and refusing to hold them "responsible criminally, unless the punishment be such as to occasion permanent injury to the child; or be inflicted merely to gratify their own evil passions."[182] For the next near-century, the line of cases following *Pendergrass* were almost entirely corporal punishment cases, and in 1977, the Supreme Court finally articulated the controlling test for when to absolve schools of liability pursuant to the *in loco parentis* doctrine:

> The prevalent rule in this country today privileges such force as a teacher or administrator "reasonably believes to be necessary for (the child's) proper control, training, or education." To the extent that the force is excessive or unreasonable, the educator in virtually all States is subject to possible civil and criminal liability.[183]

While the *in loco parentis* doctrine gave schools license to use corporal punishment as a disciplinary tool, the doctrine also applied in other

---

[179] *See* Stuart, *supra* note 169, at 971 (explaining that *in loco parentis* doctrine "was envisioned during a time of either home-schooling tutors or small residential, private schools. The doctrine is now anachronistic in an era of involuntary delegation occasioned by compulsory attendance laws and of large public schools with responsibilities that often go beyond educational function. As a consequence, courts started to drift away from *in loco parentis*, and it may well have died a natural death, especially with the decisions in *Tinker v. Des Moines Independent Community School District* and *New Jersey v. T.L.O*" (italics added)).

[180] *See id.* at 975-76.

[181] State v. Pendergrass, 19 N.C. (2 Dev. & Bat.) 365, 367 (1837).

[182] *Id.*

[183] Ingraham v. Wright, 430 U.S. 651, 661 (1977).

contexts. Even today, schools routinely invoke *in loco parentis* with varying degrees of success in First and Fourth Amendment cases.[184]

In 1985, however, the landscape changed with the landmark case, *New Jersey v. T.L.O*, in which the Court substantially weakened the potency of the doctrine.[185] After a student challenged a school official's search of her purse as a violation of her Fourth Amendment privacy rights, the school defended its actions under the cloak of *in loco*

[184] *See, e.g.*, Safford Unified Sch. Dist. No. 1 v. Redding, 557 U.S. 364, 383, 398 (2009) (Thomas, J., concurring) (explaining that "schoolteachers and administrators had almost complete discretion to establish and enforce the rules they believed were necessary to maintain control over their classrooms" — discretion that the "judiciary was reluctant to interfere" with); Morse v. Frederick, 551 U.S. 393, 413-14 (2007) (explaining the history behind the use of *in loco parentis* in the court system); Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 654-56 (1995) ("[W]e do not, of course, suggest that public schools as a general matter have such a degree of control over children as to give rise to a constitutional 'duty to protect' . . . ." (citing DeShaney v. Winnebago Cty. Dept. of Soc. Servs., 489 U.S. 189, 200 (1989))); Washington v. Seattle Sch. Dist. No. 1, 458 U.S. 457, 481 (1982) ("No single tradition in public education is more deeply rooted than local control over the operation of schools . . . ." (quoting Milliken v. Bradley, 418 U.S. 717, 741-42 (1974))); C.R. v. Eugene Sch. Dist. 4J, 835 F.3d 1142, 1151 (9th Cir. 2016) (citing Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 684 (1986)) (upholding a School District's *in loco parentis* authority to punish a student for sexually-harassing speech that occurred during dismissal because it was reasonable for the school to "be concerned with its students' well-being as they begin their homeward journey at the end of the school day"); D.O.F. v. Lewisburg Area Sch. Dist. Bd. of Sch. Dirs., 868 A.2d 28, 33 (Pa. Commw. Ct. 2004) (noting that "local school boards have broad discretion in determining school disciplinary policy" and that a court may not act as "a 'super' school board" by "substitut[ing] its own judgment for that of the school district").

While not a direct focus of this Article, the author could imagine a zero tolerance carve-out for threatening speech only when that speech rises to the level of an imminent safety concern for students and school officials. *See* MARY ELLEN O'TOOLE, CRITICAL INCIDENT RESPONSE TEAM, NATIONAL CENTER FOR THE ANALYSIS OF VIOLENT CRIME, FBI ACADEMY, THE SCHOOL SHOOTER: A THREAT ASSESSMENT PERSPECTIVE 5 (1999); *see also* Wynar v. Douglas Cty. Sch. Dist., 728 F.3d 1062, 1062 (9th Cir. 2013) (upholding the school's disciplinary response to a student's internet speech which implied that the student was planning a school shooting); Kowalski v. Berkeley Cty. Sch., 652 F.3d 565, 573 (4th Cir. 2011) (upholding the school's disciplinary response to a student's online post which falsely accused another student of being a "slut" and having herpes and posted photographs depicting a sign across the student's pelvic area, which stated, "Warning: Enter at your own risk" and labeling her picture as a "whore").

[185] *See generally* New Jersey v. T.L.O., 469 U.S. 325 (1985) (explaining how the invocation of *in loco parentis* as an excuse for Fourth Amendment violations is "in tension with the contemporary reality and the teachings of the Court"). Arguably, the concept of *in loco parentis* began to wane and school discretion began to be questioned as early as 1969. *See* Tinker v. Des Moines, 393 U.S. 503, 506 (1969) (explaining that students do not "shed their constitutional rights . . . at the schoolhouse gate").

parentis.[186] Reexamining the scope of the doctrine, the Court concluded that:

> The concept of parental delegation as a source of school authority is not entirely consonant with compulsory education laws. Today's public school officials do not merely exercise authority arbitrarily conferred on them by individual parents; rather, they act in furtherance of publicly mandated educational and disciplinary policies. . . . In carrying out searches and other disciplinary functions pursuant to such policies, school officials act as representatives of the State, not merely as surrogates for the parents, and they cannot claim the parents' immunity from the strictures of the Fourth Amendment.[187]

Since *T.L.O.*, the *in loco parentis* doctrine as a whole has been on shaky ground, and many scholars have questioned its continued existence in the public school context altogether.[188] Courts applying the doctrine understood that *in loco parentis* was no longer "the source of school officials' general authority over pupils" and could not "generally cloak school officials with the immunities of parents."[189] Ultimately, the doctrine still operates to a certain extent today, even though the scope of a school's duties remain unclear.[190]

A decade after *T.L.O.*, the U.S. Supreme Court seemed to backpedal from *T.L.O.*, invoking the *in loco parentis* doctrine as a means to diminish students' Fourth Amendment privacy rights in finding that a Vernonia School District's Student Athlete Drug Policy calling for

---

186 *T.L.O.*, 469 U.S. at 336.

187 *Id.* at 336-37.

188 *See* Stuart, *supra* note 169, at 979 (noting that "the Court seemed to abandon *in loco parentis* for a more modern treatment of the student-school relationship whereby a school's disciplinary actions are guided by norms set out in school rules and the law, definitive benchmarks as well as hallmarks of modern public education").

189 Webb v. McCullough, 828 F.2d 1151, 1156 (6th Cir. 1987).

190 Morse v. Frederick, 551 U.S. 393, 416 n.6 (2007) (Thomas, J., concurring) ("At least nominally, this Court has continued to recognize the applicability of the *in loco parentis* doctrine to public schools."); Andreozzi v. Rubano, 141 A.2d 639, 641 (Conn. 1958) ("A teacher stands *in loco parentis* toward a pupil. He must maintain discipline, and if a pupil disobeys his orders it is his duty to use reasonable means to compel compliance." (italics added)); Conley v. Bd. of Educ., 123 A.2d 747, 752 (Conn. 1956); Straiton v. New Milford Bd. of Educ., No. DBDCV106003255S, 2012 WL 1218160, at *6 (Conn. Super. Ct. Mar. 13, 2012) (citing Sheehan v. Sturges, 2 A. 841, 842 (Conn. 1885)).

random drug testing was constitutional.[191] While the students' participation in the athletic program was factually distinct because it was voluntary, the Court seemed to depart from the legitimate governmental interest test it articulated in *T.L.O.*, admitting that "[c]entral, in our view, to the present case is the fact that the subjects of the Policy are (1) children, who (2) have been committed to the temporary custody of the State as schoolmaster."[192] But the Court made it a point to offer a caveat: "[W]e do not, of course, suggest that public schools as a general matter have such a degree of control over children as to give rise to a constitutional 'duty to protect.'"[193]

Because of the flip-flop nature of the Court's invocation of *in loco parentis*, lower courts have struggled with its application. The Third Circuit's decision in *D.R. ex rel. L.R. v. Middle Bucks Area Vocational Technical School* is an important marker in the judiciary's hesitation to find any legal duty.[194] In *Middle Bucks*, female students brought a Fourteenth Amendment claim against their school arguing that the school failed to protect them from the physical, sexual, and verbal abuse they suffered at the hands of other students.[195] In dismissing their claims, the Third Circuit refused to find a special relationship between the school and their students, which gave rise to a duty to protect, reasoning that students are different from prisoners and the involuntarily committed, where a special relationship does exist "because of the full time severe and continuous state restriction of liberty in both environments."[196] While compulsory attendance laws require school attendance, they do not require that students attend a specific school, and parents can even choose homeschooling over attending state-funded schools.[197]

But as recently as 2012, a Connecticut Superior Court reiterated the early judicial philosophy rooted in *in loco parentis*: "[a] teacher stands *in loco parentis* toward a pupil. He must maintain discipline, and if a pupil disobeys his orders it is his duty to use reasonable means to

191 *See* Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 665 (1995) ("[W]hen the government acts as guardian and tutor the relevant question is whether the search is one that a reasonable guardian and tutor might undertake.").

192 *Id.* at 654.

193 *Id.* at 655.

194 *See generally* D.R. *ex rel.* L.R. v. Middle Bucks Area Vocational Tech. Sch., 972 F.2d 1364 (3d Cir. 1992) (finding that a school did not owe a duty to protect a student from being harmed by others).

195 *Id.* at 1366.

196 *Id.* at 1371.

197 3 JAMES RAPP, EDUCATION LAW § 8.03 (Matthew Bender & Co. 2019).

compel compliance."[198] With this, the Court reigned in the school's ability to shield itself from constitutional violations.[199]

Again, in 2013, the Third Circuit grappled with the reach of the *in loco parentis* doctrine in an important student rights case.[200] While it recognized that *in loco parentis* "certainly cloaks public schools with some authority over school children," it limited the scope of the doctrine, explaining "that control, without more, is not analogous to the state's authority over an incarcerated prisoner or an individual who has been involuntarily committed to a mental facility."[201] Citing its earlier precedent of *Middle Bucks*, the dissenting opinion explained that while "the State exercises *in loco parentis* authority over children during school hours, the parents 'remain the primary caretakers' over their children."[202] Accordingly, the dissent echoed the "central premise" from *Middle Bucks* that, "unlike a prisoner or the involuntarily committed, [a student] is not subjected to 'full time severe and continuous state restriction.'"[203] These holdings are rooted in the thinking that schools are more of an extension of the state rather than a substitute parent and neglect to consider a middle-of-the-road approach to the school's role in caretaking.[204]

A public school's assumption of *in loco parentis* status should come with both power and responsibility. The Active Avoidance Doctrine simply transfers that principle into the realm of exclusionary discipline, which is now a known negative correlative to learning.[205]

Professor Emily Suski has pointed out that "courts have not engaged with the idea that schools' authority must be balanced against

---

198 Straiton v. New Milford Bd. of Educ., No. DBDCV106003255S, 2012 WL 1218160, at *6 (Conn. Super. Ct. Mar. 13, 2012) (citing Andreozzi v. Rubano, 141 A.2d 639, 641 (Conn. 1958); Conley v. Bd. of Educ., 123 A.2d 747, 752 (Conn. 1956); Sheehan v. Sturges, 2 A. 841, 842 (Conn. 1885)).

199 *See id.*

200 *See* Morrow v. Balaski, 719 F.3d 160, 168-69 (3d Cir. 2013).

201 *Id.*

202 *Id.* at 188.

203 *Id.*

204 *See* D.R. *ex rel.* L.R. v. Middle Bucks Area Vocational Technical Sch., 972 F.2d 1364, 1383-84 (3d Cir. 1992) (Sloviter, C.J., dissenting) ("There is no doubt that this case falls between *DeShaney* and *Estelle/Youngberg*."); Suski, *The Privacy of Public Schools*, *supra* note 152, at 479 (arguing that "[b]ecause of mandatory attendance laws, students in school fall somewhere in the middle of the spectrum on which *Estelle-Youngberg* and *DeShaney* exist" (italics added)).

205 *But see* Stuart, *supra* note 169, at 981 ("[T]he Court's authoritarian tendencies remain focused on the school districts' right to discipline and not on the concomitant duty to protect, except in rationalizing the expansion of school district discretion to control and discipline.").

obligations arising from the state's [caretaking] purpose for restraining them by requiring students to go to school."[206] She recently identified the fundamental misconception, inherent in the Court's treatment of students' Fourteenth Amendment duty-to- protect cases, "that the family is properly responsible for all the care of children even when children are in school."[207] This, she explains, is based on a theory of family caretaking absolving schools of any caretaking or custodial relationship with students.[208] Ultimately,

> [b]ecause parents protect and care for children, schools do not have the responsibility to do so. Parents, they say, have this ability to protect children even when they are in school because the children "remain resident in their home . . . so they may turn to persons unrelated to the state for help."[209]

She cites the existence of civil rights laws like Title IX, which "prohibit[s] sex discrimination at all levels of education" as evidence of the fallacy of the judiciary's assumption that parents alone can protect their children.[210]

Moreover, some states have expressly charged schools with *in loco parentis* authority.[211] For example, Pennsylvania's statutory code grants school officials "the same authority as to conduct and behavior over the pupils attending . . . school . . . as [their] parents"[212] and "[t]he rights *and liabilities* arising out of an *in loco parentis* relationship are . . . exactly the same as between parent and child."[213] Many state statutes also explicitly impose caretaking responsibilities by identifying teachers and other school staff as mandatory reporters of suspected child abuse or neglect.[214] These laws essentially require schools to assume the protection of their students.[215]

---

206 Suski, *The Privacy of Public Schools*, *supra* note 152, at 480.

207 Suski, *The School Civil Rights Vacuum*, *supra* note 153, at 741.

208 *See id.* at 742.

209 *Id.* (alteration in original).

210 *Id.* at 743.

211 *See, e.g.*, 105 ILL. COMP. STAT. 5/34-84a (1965) (explaining that a "principal has the same latitude . . . as the student's actual parent would have" in some circumstances); N.J. STAT. ANN. § 18A:37-1 (1968); 24 PA. STAT AND CONS. STAT. ANN. § 13-1317 (1963) (explaining that students "submit to the authority of teachers" while in school); W. VA. CODE ANN. § 18A-5-1 (2008) (explaining that teachers stand *in loco parentis* toward students at school).

212 24 PA. STAT AND CONS. STAT. ANN. § 13-1317.

213 T.B. v. L.R.M., 786 A.2d 913, 917 (Pa. 2001) (emphasis added).

214 Suski, *The School Civil Rights Vacuum*, *supra* note 153, at 743 n.122.

215 *Id.* at 743.

This caretaking relationship cannot be selectively employed. The courts often invoke this special relationship between the school and its students as a reason to excuse potential constitutional violations, reasoning that the school has pedagogical and disciplinary interests that justify its suppression of student speech, suspicion-less searches, or other actions that raise constitutional concerns.[216] When courts allow schools to use this special relationship status as a shield to liability but overlook any protective duty that arises from the relationship, they are enabling unbridled school authority and neglecting their role in enforcing state constitutional guarantees to public education.

In conclusion, it simply defies logic and violates fundamental notions of fairness to apply the in *loco parentis doctrine* as a shield to liability without also allowing parents to invoke the doctrine as a sword that charges schools with protective duties. If parents were truly capable of protecting children during the school day, the incidents of bullying and school violence would not be on the rise.[217] Because schools have the power to teach, inculcate, and influence students, the Active Avoidance theory of recovery presumes at least a limited duty to reform broken practices that are known to result in educational deprivations.

2. Crafting an Active Avoidance Framework

While the need to charge schools with a duty to protect seems intuitive given the legal and social misconceptions raised by Professor Suski, the extent of that duty is less clear.[218] Realizing that the recognition of a duty "can only increase the potential for promoting systemwide school reforms," she has proposed a "limited and specific"

---

[216] *Id.* at 743-44 (first citing Morse v. Frederick, 551 U.S. 393, 408 (2007); and then citing Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 665 (1995)) (explaining that schools selectively invoke a protective function when convenient to justify possible First and Fourth Amendment violations).

[217] *See* EDUCATOR'S SCH. SAFETY NETWORK, VIOLENT THREATS AND INCIDENTS IN SCHOOLS: AN ANALYSIS OF THE 2018-2019 SCHOOL YEAR (2019), https://static1.squarespace.com/static/55674542e4b074aad07152ba/t/5d79760e23c1aa028e158caf/1568241167705/2018-2019+Violence+2Threats+and+Incidents+in+Schools+Report+-+The+Educator%27s+School+Safety+Network+-+www.eSchoolSafety.org.pdf [https://perma.cc/3Q6R-TQ3U] (finding that schools saw 279 violent incidents during the 2017-18 school year, up 113% from the previous school year); *Learning from Student Voice: Bullying Today*, YOUTH TRUTH (2018), https://youthtruthsurvey.org/bullying-today/ [https://perma.cc/8CMH-MYRN] (finding that one in three students experienced bullying in the 2017–18 school year — up from just over one in four students in the two years prior).

[218] *See* D.R. *ex rel.* L.R. v. Middle Bucks Area Vocational Technical Sch., 972 F.2d 1364, 1383 (3d Cir. 1992) (Sloviter, C.J., dissenting) ("There is no doubt that this case falls between *DeShaney* and *Estelle/Youngberg*.").

school duty to "respond reasonably . . . [by] develop[ing] meaningful substantive responses . . . to student harms."[219] She proposes a burden-shifting framework that presumes a breach of the duty to protect once a student plaintiff demonstrates "that the school knew or should have known of" the complained-of harm and "did little or nothing to remedy it."[220] Her framework would then shift the burden to the school to prove that it acted reasonably.[221]

At first glance, this framework provides a more balanced approach to school liability cases. Similar to the Title VII context, where a presumption of discrimination attaches after the employee establishes her *prima facie* case, assuming a deprivation of a discrimination-free workplace,[222] Professor Suski's burden-shifting approach assumes an educational deprivation, which has already been recognized and safeguarded in the special education context with the IDEA's FAPE requirement.[223]

The difficulty arises in the second part of the analysis. Because the level of judicial review over these claims is currently akin to rational basis review, it will be easy for the school to satisfy its burden.[224] Much like in the employment discrimination context, where the employer's assertion of a legitimate, non-discrimination reason for the adverse employment action has become *pro forma*,[225] here the school's burden of proving that it acted reasonably under the circumstances could prove to be a mere formality. This is problematic for two reasons. First, courts

---

[219] Suski, *The School Civil Rights Vacuum*, *supra* note 153, at 767-69 (citing Suski, *The Privacy of the Public Schools*, *supra* note 152, at 482-83) (proposing a legal framework for school failure to protect claims to those situations in which "school[s] knew or [reasonably] should have known of the student's harm").

[220] *Id.*

[221] *Id.*; *see* Suski, *The Privacy of the Public Schools*, *supra* note 152, at 483 (explaining that a reasonable response is one that "would be one calculated to address the cause of the harm so that it will not continue. It need not be a perfect response. This standard recognizes, therefore, that not all significant harm to children can be prevented").

[222] *See* McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973).

[223] *See supra* notes 151–152.

[224] We see this most clearly in the nation's public school finance litigation where there are state-by-state legal battles to achieve more equitable funding but no federal-level right to equitable or even adequate funding levels for public school nationally.

[225] *See* Tex. Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 254-55 (1981) (holding that an employer does not need to prove by a preponderance of the evidence that its articulated reason was, in fact, the true motivation behind the decisions); Richard Ford, *Bias in the Air: Rethinking Employment Discrimination Law*, 66 STAN. L. REV. 1381, 1406 (2014) (noting that "under the *McDonnell Douglas* structure . . . employer[s] will be able to assert a valid nonpretextual, nondiscriminatory reason for [their] actions even . . . if race or sex was also a motivat[ing] [factor]").

have already shown themselves to be wary of meddling into local school officials' decision-making.[226] To the extent the courts are hesitant to second-guess the discretionary authority of school officials, the "reasonable response" prong of Professor Suski's test would almost certainly limit the number of successful claims. Second, the students subject to exclusionary discipline practices are statistically disadvantaged students — those that are most disenfranchised and least empowered with resources to prosecute a legal cause of action.[227] The practical reality of this burden-shifting framework is that it doubly disadvantages the less powerful of the parties, making it almost impossible for students to overcome the presumption that the educational institution acted reasonably.

One common criticism of Title VII's *McDonnell Douglas* burden-shifting framework is that it places the burden on the employee to disprove a mental state.[228] In other words, upon the employer's offering of a legitimate, non-discriminatory reason for the adverse employment action, the employee must disprove this assertion, offering evidence that the asserted reason was pretext — or a cover-up — for a discriminatory state of mind.[229] This burden is extremely difficult, often requiring the plaintiff to find smoking-gun evidence of discriminatory animus.[230]

---

[226] *See, e.g.*, Milliken v. Bradley, 418 U.S. 717, 741-42 (1974) ("No single tradition in public education is more deeply rooted than local control over the operation of schools; local autonomy has long been thought essential to both the maintenance of community concern and support for public schools and to quality of the educational process."); San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 49-50 (1973) (discussing the meaning of "local control" and deference given to a school's decision-making process); Wright v. Council of Emporia, 407 U.S. 451, 469 (1972) (discussing why the district court was justified in finding that the city's separate school system would interfere with the desegregation of schools).

[227] Lydia Nussbaum, *Realizing Restorative Justice: Legal Rules and Standards for School Discipline Reform*, 69 HASTINGS L.J. 583, 642 (2018).

[228] *See* Ford, *supra* note 225, at 1391-406.

[229] McDonnell Douglas Corp. v. Green, 411 U.S. 792, 804 (1973).

[230] The author notes that while the *McDonnell Douglas* burden-shifting framework was initially created to relieve plaintiffs from having to disprove an employer's state of mind through "smoking gun" evidence, in practice the framework has not proven to serve this purpose. The burden of proving intentional discrimination, even with circumstantial evidence, is high in practice as courts are hesitant to interfere with the business decisions of employers. Thus, the intent of *McDonnell Douglas* becomes a wishful-thinking exercise that in practice, disadvantages the plaintiff and makes it very difficult for Title VII plaintiffs to overcome summary judgment. *See* Henry L. Chambers, Jr., *Recapturing Summary Adjudication Principles in Disparate Treatment Cases*, 58 SMU L. REV. 103, 135 (2005) (highlighting how courts appear to have little reservation in summarily dismissing employment discrimination cases); Ann C. McGinley, *Credulous*

To remedy the potential limitations of Professor Suski's proposed framework and compensate for the fact that the current level of review is akin to Rational Basis review, [231] I would suggest adding a heightened burden of proof to the school's showing that is triggered only when the student first proves that the school knew of an *actual, persistent harm*. In that case, instead of requiring the school to demonstrate that it acted reasonably in light of the circumstances, the school must demonstrate a heightened level of due diligence, satisfying the court that it considered a number of possible responses to the complained-of harm but chose the approach it took after careful consideration, thought, and counsel. This puts the onus on the school to demonstrate a calculated, thorough, and holistic decision-making process, precluding the school from perpetuating a one-size-fits-all response to student discipline.[232] To the extent that the legal cards are already stacked against students seeking to redress educational deprivations, this heightened burden provides a more even playing field.

IV. BARRIERS TO SUCCESS ON AN ACTIVE AVOIDANCE CLAIM

The application of these principles to school discipline is certainly not seamless and requires a nuanced examination of both the research surrounding the known effects of exclusionary discipline and the resulting legal deprivation. First, it is well-established that exclusionary discipline results in a school climate that perpetuates misconduct, isolates students, and negatively affects learning outcomes.[233] Second, the legal right implicated by these disciplinary practices is the right to

Courts and the Tortured Trilogy: The Improper Use of Summary Judgment in Title VII and ADEA Cases, 34 B.C. L. REV. 203, 229-32 (1993) (discussing the perversion of the *McDonnell Douglas* framework and criticizing the rampant use of summary judgment in Title VII cases); Laurens Walker, *The Other Federal Rules of Civil Procedure*, 25 REV. LITIG. 79, 89-90 (2006) (explaining how production burden works against plaintiffs generally, including in summary judgment).

[231] *See, e.g.*, San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 1-2, 35 (1973) (stating that there is no explicit right to education under the U.S. Constitution and therefore rational basis review is the appropriate standard of review).

[232] *See* U.S. DEP'T OF EDUC., WIDE SCOPE, QUESTIONABLE QUALITY: THREE REPORTS FROM THE STUDY ON SCHOOL VIOLENCE AND PREVENTION 7 (2002), http://www2.ed.gov/offices/OUS/PES/studies-school-violence/3-exec-sum.pdf [https://perma.cc/L35N-5WZY] (highlighting that lack of funding is responsible for the inadequate training of teachers necessary to address school violence); Derek W. Black, *Educational Gerrymandering: Money, Motives, and Constitutional Rights*, 94 N.Y.U. L. REV. 1385, 1386-87 (2019) ("Public school funding is in worse condition than it has been in decades. In real dollar terms, school funding in most states is lower today than it was before the 2008 recession.").

[233] *See supra* Part III.

public education guaranteed by all fifty state constitutions.[234] Together, the Active Avoidance doctrine I propose preserves the argument that a school's active avoidance of discipline reform results in educational deprivations that raise substantive due process concerns. But with it comes pushback and challenges. This theory of recovery faces two major barriers to success: the reality that the Court has never recognized education as a fundamental right meriting heightened scrutiny and the absence of a direct causal chain to establish a plaintiff's standing.

A. No Heightened Scrutiny for Educational Deprivation Claims

Despite the normative arguments for discipline reform, the majority of schools continue to employ destructive exclusionary practices.[235] The Active Avoidance theory of recovery submits that zero tolerance discipline amounts to an educational deprivation that is cognizable under the Fourteenth Amendment. It is important to recognize, however, that the Supreme Court has never recognized public education as a fundamental right that would be subject to heightened judicial scrutiny. Absent the recognition of a fundamental right, due process claims are subject to Rational Basis or "arbitrary and capricious" review,[236] which makes success of an Active Avoidance claim difficult but not impossible.[237]

1. Arguing for Heightened Scrutiny Against the Backdrop of a Disinclined Bench

Recognition of public education as a fundamental right, while certainly advantageous, is not necessarily imperative for success on an Active Avoidance claim. But the argument that public education should

[234] Swenson, *supra* note 160, at 1148 ("All fifty state constitutions contain provisions guaranteeing a right to free public education.").

[235] Kerrin Wolf, Mary K. Kalinich & Susan L. DeJarnatt, *Charting School Discipline*, 48 URB. L. 1, 1 (2016) (tracking the increased reliance on exclusionary school discipline practices).

[236] Washington v. Glucksberg, 521 U.S. 702, 722 (1997) (explaining that, with respect to Due Process claims, rational basis review requires a challenged statute to bear only a "reasonable relation to a legitimate state interest"); *Arbitrary and Capricious*, BOUVIER LAW DICTIONARY (Wolters Kluwer 2012) (defining arbitrary and capricious as a standard of review in which a judicial decision "should be reversed only if evidence has been ignored or badly used").

[237] *See, e.g.*, Romer v. Evans, 517 U.S. 620, 635-36 (1996) (finding that a Colorado constitutional amendment that prohibited the creation of anti-discrimination protections for the LGBTQ population failed constitutional muster even under Rational Basis review).

be a recognized fundamental right is well-supported by the rhetoric of the Supreme Court and courts at every level recognizing the importance of public education to the survival of our democracy.[238] The Supreme Court has said that, "education has a fundamental role in maintaining the fabric of our society," and "education is perhaps the most important function of state and local governments" and "the very foundation of good citizenship."[239] It has consistently recognized that public schools are vitally important "in the preparation of individuals for participation as citizens," and as vehicles for "inculcating fundamental values necessary to the maintenance of a democratic political system."[240] The Ninth Circuit has said that "[e]ducational opportunity is crucial to the development of tomorrow's leaders" and that education is "of paramount importance for the training of our nation's workforce."[241] The Fifth Circuit has said that "[s]tripping a child of access to educational opportunity is a life sentence to second-rate citizenship."[242] Even state courts have recognized that public education "enables [children] to achieve their potential and fully participate now and in the future in the social, economic, and educational opportunities of our . . . nation."[243]

---

238 Plyler v. Doe, 457 U.S. 202, 221 (1982) (recognizing "the public schools as a most vital civic institution for the preservation of a democratic system of government" and "the primary vehicle for transmitting 'the values on which our society rests'" (citations omitted)); Goss v. Lopez, 419 U.S. 565, 576 (1975) ("[E]ducation is perhaps the most important function of state and local governments." (citing Brown v. Bd. of Educ., 347 U.S. 483, 493 (1954))); Lee v. Macon Cty. Bd. of Educ., 490 F.2d 458, 460 (5th Cir. 1974).

239 *Plyler*, 457 U.S. at 221; Brown v. Bd. of Educ., 347 U.S. 483, 493 (1954); *see also* San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 113 (1973) ("[T]he pivotal position of education to success in American society and its essential role in opening up to the individual the central experiences of our culture lend it an importance that is undeniable." (quoting *Developments in the Law — Equal Protection*, 82 HARV. L. REV. 1065, 1129 (1969))); Wisconsin v. Yoder, 406 U.S. 205, 213 (1972) ("[P]ublic schools rank[] at the very apex of the function of a State.").

240 Ambach v. Norwick, 441 U.S. 68, 76-77 (1979).

241 Doe v. Kamehameha Sch./Bernice Pauahi Bishop Estate, 470 F.3d 827, 841 (9th Cir. 2006).

242 *Lee*, 490 F.2d at 460; *see also* PRESTON ELROD & R. SCOTT RYDER, JUVENILE JUSTICE: A SOCIAL, HISTORICAL AND LEGAL PERSPECTIVE 63 (3d ed. 2011) (noting school's importance as a "major socializing institution" and "primary determinant of both economic status and social status").

243 Neeley v. W. Orange-Cove Consol. Indep. Sch. Dist., 176 S.W.3d 746, 787 (Tex. 2005); *see also* Opinions of the Justices, 624 So. 2d 107, 149 (Ala. 1993) ("The public school is the great highway to knowledge-to enlightened citizenship." (citation omitted)).

Indeed, public schools serve a purpose that is essential to the success of every child and critical to the vitality of our democracy.[244] From the earliest days of the common school to our modern-day system of public schooling, the country has expected that education will equip citizens for economic survival and growth, teach them behavioral and social norms, and sustain the nation's democratic institutions.[245] When disciplinary tactics disable schools from serving these essential purposes, they are "restrain[ing] students' liberty to no end and violat[ing] their Fourteenth Amendment rights."[246]

The Fourteenth Amendment forbids the State to deprive any person of "life, liberty, or property without due process of law."[247] While "[p]rotected interests in property are normally 'not created by the Constitution, . . . they are created and their dimensions are defined' by an independent source such as state statutes or rules entitling the citizen to certain benefits."[248]

The recognized property interest in public education is derived from state constitutions, all of which guarantee at least some minimal substantive right to public education.[249] Some state constitutions guarantee a high-quality education.[250] These guarantees obligate the states to provide something more than just a free public education; they obligate these states to provide public education of a high quality.[251] Therefore, a challenge under the Active Avoidance Doctrine that zero tolerance policies deprive students of a property interest arises from the fact that states are constitutionally bound to provide at least some level

[244] Professor Nancy Dowd recently articulated the important theoretical values served by recognizing children's rights generally and included in those values "the social value of investing in children as future citizens, building their human capital; [and] the moral argument of value of children as human beings who cannot flourish without support." Nancy E. Dowd, *John Moore Jr.:* Moore v. City of East Cleveland *and Children's Constitutional Arguments*, 85 FORDHAM L. REV. 2603, 2611 (2017).

[245] Suski, *The Privacy of Public Schools*, *supra* note 152, at 438-40.

[246] *Id.* at 480.

[247] U.S. CONST. amends. V, XIV.

[248] Goss v. Lopez, 419 U.S. 565, 572-73 (1975) (citing Bd. of Regents v. Roth, 408 U.S. 564, 577 (1972)).

[249] Swenson, *supra* note 160, at 1148 ("All fifty state constitutions contain provisions guaranteeing a right to free public education."); *see Goss*, 419 U.S. at 572-73; *see also* Plyler v. Doe, 457 U.S. 202, 221-23 (1982); San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 35, 65 (1973) (stating that there is no explicit right to education under the U.S. Constitution).

[250] Imoukhuede, *supra* note 161, at 452-53 (citing the guarantees to "high quality" public education in the Illinois and Florida constitutions).

[251] *Id.*

of public education.[252] Moreover, for litigants seeking to vindicate educational rights under the Due Process Clause, the claim is bolstered by the fact that compulsory education laws and *in loco parentis* status restrain a student's liberty, creating affirmative duties on schools. Just as parents can be charged for criminal neglect for failing to provide the basic life necessities to their children, school officials should be liable for failing to provide the minimal guarantees of public education. This premise is only strengthened by the *in loco parentis* doctrine.

Exclusionary disciplinary practices implicate liberty interests because they "could seriously damage the students' standing with their fellow pupils and their teachers as well as interfere with later opportunities for higher education and employment."[253] Zero tolerance discipline results in ostracization, isolation, and shaming.[254] In some cases, students subject to repeated suspensions are reassigned to a facility for students that have also posed a behavioral problem.[255] This is problematic because research shows that students learn and grow from being in a supportive group environment.[256] Removing disruptive students from the classroom sends the message to other students that the offending student is a problem, and if exclusionary discipline is a repeated practice, the offending student will be outcasted and perceived as a detriment to the group. This results in the very type of damage to the student's standing with his fellow pupils and teachers and even future employers envisioned by the *Goss* Court.

While scholars and education experts overwhelmingly advocate for the Court's recognition of public education as a constitutionally protected right, it is unlikely this Court will do so. The majority of this bench, led by conservative Chief Justice John Roberts, has been unwavering in its suspicion of claims seeking to extend the notion of

---

[252] *See Goss*, 419 U.S. at 581.

[253] *Id.* at 575.

[254] Cooley, *An Efficacy Examination*, *supra* note 78, at 320-22 (discussing the non-deterrent, non-rehabilitative, and non-reformative nature of school shaming punishments).

[255] Miranda Johnson & James Naughton, *Just Another School?: The Need to Strengthen Legal Protections for Students Facing Disciplinary Transfers*, 33 NOTRE DAME J.L. ETHICS & PUB. POL'Y 69, 72 (2019) (tracking the rise of alternative education facilities with the increased implementation of zero tolerance policies).

[256] *See* BLACK, *supra* note 12, at 78, 156-57; Johnson & Naughton, *supra* note 255, at 75-78 (highlighting that student placement in alternative schools is associated with negative results that include reduced academic achievement, reduced likelihood of graduation on time, fewer years of schooling, increased risk of depression, and increased likelihood of arrest as an adult).

substantive due process.[257] Despite this reality, the Court's application of Rational Basis review is necessarily fatal to an Active Avoidance claim.

2. Analyzing an Active Avoidance Claim

The application of the proposed "duty to protect" framework introduced in Part IV.A assumes either the recognition of a fundamental right to education, triggering a heightened scrutiny analysis, or the application of a more searching rational basis review, akin to what the Court applied in *Romer v. Evans* and *Cleburne v. Cleburne Living Center*.[258] Recognizing that *Romer* and *Cleburne* fell under the umbrella of equal protection, rather than due process, they nonetheless support the proposition that there are situations when government action is so unjustified given government-stated purposes that they fail even rational basis review.

A student asserting an Active Avoidance claim can certainly prove that schools know or should know about the harms of exclusionary discipline.[259] There is an abundance of widely-available literature, research, and discussion criticizing it. The U.S. Departments of Justice and Education and the Commission on Student Violence have published reports that unequivocally support this conclusion;[260] criminal justice and education law scholars have written about the harmful effects of exclusionary discipline for decades;[261] even the mass

[257] Obergefell v. Hodges, 135 S. Ct. 2584, 2616 (2015) (Roberts, C.J., dissenting); *see* Whole Woman's Health v. Hellerstedt, 136 S. Ct. 2292, 2327 (2016) (Thomas, J., dissenting); City of Chicago v. Morales, 527 U.S. 41, 85 (1999) (Scalia, J., dissenting) (noting that "the entire practice of using the Due Process Clause to add judicially favored rights to the limitations upon democracy set forth in the Bill of Rights (usually under the rubric of so-called 'substantive due process') is in my view judicial usurpation").

[258] Romer v. Evans, 517 U.S. 620, 635-36 (1996) (applying rational basis review to invalidate a state constitutional amendment that prohibited anti-discrimination protections for the LGBTQ community); City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 433 (1985) (applying rational basis review to invalidate a zoning ordinance that affected group homes for the mentally ill).

[259] *Cf.* Juliana v. United States, 339 F. Supp. 3d 1062, 1100 (D. Or. 2018) (finding that the federal government was on notice of the dangers of greenhouse gas emissions when plaintiffs proffered uncontradicted evidence showing that the government has historically known about the dangers of greenhouse gases, given the wealth of materials and research addressing this issue).

[260] *See* U.S. DEP'TS OF EDUC., JUSTICE, HOMELAND SEC., & HEALTH AND HUMAN SERVS., FINAL REPORT OF THE FEDERAL COMMISSION ON SCHOOL SAFETY 68 (2018), https://www2.ed.gov/documents/school-safety/school-safety-report.pdf [https://perma.cc/ALG4-XWDB] [hereinafter FEDERAL AGENCY REPORT ON SCHOOL SAFETY].

[261] *See supra* Part III.

media has investigated and reported the harmful effects of the School-to-Prison Pipeline.[262]

At the very least, school administrators should be expected to stay abreast of trends and best practices and should have at least a working knowledge of the ongoing conversation surrounding exclusionary discipline and the School-to-Prison Pipeline.[263]

Having established the knowledge requirement, an active avoidance plaintiff can allege simply that the school continued to apply these harmful disciplinary practices. By maintaining the *status quo* and continuing to apply zero tolerance, the school did nothing to remedy the known problems with its disciplinary practices.

The burden then shifts to the school to prove — pursuant to the heightened due diligence standard I proposed above — that it considered options for reform but dismissed each of them for good reason. The school can prove this through documentary and expert evidence.

One justification the school might proffer for its rejection of reform is the cost. The financial burden of implementing wide-scale reform, it may argue, simply did not outweigh the cost of continuing its current practices.[264] But, the use of zero tolerance policies and other exclusionary discipline practices results in both individual and societal

---

[262] *See* Knefel, *supra* note 10.

[263] For example, under the Eighth Amendment, courts may hold prison officials responsible for acting in "deliberate indifference" to inmate "health or safety," especially where the "risk of harm [to inmates] is obvious." Hope v. Pelzer, 536 U.S. 730, 738 (2002); Farmer v. Brennan, 511 U.S. 825, 834 (1994). In the specific context of a prison's use of prolonged solitary confinement, prison administrators may act in "deliberate indifference" to the obvious substantial risk of serious harms by failing to have a working knowledge of the ongoing conversation and debate surrounding the substantial harms inherent in the practice and use of prolonged solitary confinement. Shoatz v. Wetzel, No. 2:13-cv-0657, 2016 WL 595337, at *6 (W.D. Pa. Feb. 12, 2016); Wilkerson v. Stalder, 639 F. Supp. 2d 654, 680 (M.D. La. 2007); *see also* ASSOC. OF STATE CORR. ADM'RS, REFORMING RESTRICTIVE HOUSING: THE 2018 ASCA-LIMAN NATIONWIDE SURVEY OF TIME-IN-CELL 89 (2018), https://law.yale.edu/sites/default/files/documents/pdf/Liman/asca_liman_2018_restrictive_housing_revised_sept_25_2018_-_embargoed_unt.pdf [https://perma.cc/2UXS-G2WF]; NAT'L COMM'N ON CORR. HEALTH CARE, POSITION STATEMENT: SOLITARY CONFINEMENT (ISOLATION) 3-4 (2016), https://www.ncchc.org/filebin/Positions/Solitary-Confinement-Isolation.pdf [https://perma.cc/7V57-TL9X].

[264] Phillip Leon M. v. Greenbrier Cty. Bd. of Educ., 484 S.E.2d 909, 915 (W. Va. 1996) (recognizing the challenge of funding alternative discipline programs but rejecting cost as a legitimate basis for denying students' educational access); Black, *Reforming School Discipline*, *supra* note 17, at 28-29 (recognizing schools' failure to reform school discipline simply to avoid financial cost).

harm that can be quantified in dollars and cents.[265] "People without a high school diploma earn less, have more health problems, and are more likely to get into trouble with the law. That means less tax revenue and higher health care and criminal justice costs for all of us."[266]

Another consideration the school may raise at this stage of the analysis is the threat of school violence, which arguably justifies the perpetuation of zero tolerance discipline. But, even the Federal Bureau of Investigation ("FBI") and other agencies[267] charged with studying school violence have cautioned that "all threats are NOT created equal" and that a one-size-fits-all approach to school violence "is exaggerated -- and perhaps dangerous, leading to potential underestimation of serious threats, overreaction to less serious ones, and unfairly punishing or stigmatizing students who are in fact not dangerous."[268]

The Active Avoidance Doctrine and this Article's criticism of exclusionary discipline certainly appreciates circumstances that do require harsh disciplinary penalties, including suspension or expulsion, as a necessary protective measure to ensure the safety of others. The point is not that it is *never* appropriate to remove a student from the school environment for the safety of others. Instead, the school's

---

[265] *School Suspensions Cost Taxpayers Billions*, CIVIL RIGHTS PROJECT (June 1, 2016), https://www.civilrightsproject.ucla.edu/news/press-releases/featured-research-2016/school-suspensions-cost-taxpayers-billions [https://perma.cc/MY9U-753G].

[266] *Id.*

[267] The Department of Education's Commission on School Safety Final Report stated a consensus that came out of an April 2018 Department of Justice and Department of Education summit on school discipline that "exclusionary discipline practices have negative outcomes that fall disproportionately on certain demographic groups" and that "exclusionary discipline practices are associated with negative academic outcomes and increased behavioral problems." FEDERAL AGENCY REPORT ON SCHOOL SAFETY, *supra* note 260, at 68-69 (first citing Emily Arcia, *Achievement and Enrollment Status of Suspended Students: Outcomes in a Large Multicultural School District*, 38 EDUC. & URB. SOC'Y 359 (2006); and then citing Sheryl A. Hemphill, John W. Toumbourou, Todd I. Herrenkohl, Barbara J. McMorris, & Richard F. Catalano, *The Effect of School Suspensions and Arrests on Subsequent Adolescent Antisocial Behavior in Australia and the United States*, 39 J. ADOLESCENT HEALTH 736 (2006)); *see also* CORINNE DAVID-FERDON, ALANA M. VIVOLO-KANTOR, LINDA L. DAHLBERG, KHIYA J. MARSHALL, NEIL RAINFORD & JEFFERY E. HALL, CTRS. FOR DISEASE CONTROL AND PREVENTION, A COMPREHENSIVE TECHNICAL PACKAGE FOR THE PREVENTION OF YOUTH VIOLENCE AND ASSOCIATED RISK BEHAVIORS 9 (2016), https://www.cdc.gov/violenceprevention/pdf/yv-technicalpackage.pdf [https://perma.cc/8Z58-DKGN] (citations omitted) (explaining that one risk factor associated with youth violence is a "weak connection to school," and that "youth who are arrested, particularly before age 13, have a heighten[ed] risk for future violence and crime, school dropout, and substance abuse").

[268] O'TOOLE, *supra* note 184, at 5.

disciplinary reaction should be specific to the student and the circumstances and proportional to the offense.

Finally, the school may seek to justify its avoidance of reform based on a flawed cost-benefit calculation, arguing that the negative long-term effect it may have on some students' success in an academic setting simply does not outweigh the mitigating effect is has on the one student plotting a school shooting or the lives saved by the application of a zero tolerance policy to the student who is caught bringing a weapon to school. While it may seem counter-intuitive, the research refutes this claim for two reasons.

First, even though the number of school shootings is staggering and more children die because of gun violence at school than ever before, the statistical risk of a shooting at any particular school is still relatively low.[269] The far majority of students will never experience a school shooting. To the contrary, nearly three million of all K-12 students received out-of-school suspensions or expulsions as a result of exclusionary discipline, putting far more students at risk from a one-size-fits-all disciplinary approach. This does not mean, of course, that a school could not remove a student who posed a true threat to students or school officials.[270] Instead of relying on exclusionary discipline exclusively, schools should apply it selectively as merely one tool in its behavioral management toolbox.

Second, the research supports the conclusion that exclusionary discipline isolates already troubled students, making them more vulnerable to depression, school dropout, and suicidal and homicidal behaviors.[271] Most of the current guidance offering best practices for student discipline suggests activities, instruction, and resources that

[269] James Alan Fox & Emma E. Fridel, *The Menace of School Shootings in America*, *in* THE WILEY HANDBOOK ON VIOLENCE IN EDUCATION: FORMS, FACTORS, AND PREVENTIONS 15, 20 (Harvey Shapiro ed., 2018) ("Less than 1 [percent] of murders of children and adolescents occur at school, where they typically spend more than one quarter of their waking hours during a calendar year.").

[270] *See* Bell v. Itawamba Cty. Sch. Bd., 799 F.3d 379, 400 (5th Cir. 2015) (finding a true threat sufficient to justify disciplinary action where a student recorded a rap song, which he intended to reach the school community, describing violent acts against two named school coaches); Jones v. Arkansas, 64 S.W.3d 728, 736 (Ark. 2002) (concluding that a rap song that described the murder of a fifteen-year-old female student and her family, which was written by a male student and delivered to the female student, was a true threat); J.S. v. Bethlehem Area Sch. Dist., 807 A.2d 847, 858-59, 869 (Pa. 2002) (holding that a school district did not violate a student's free speech rights by disciplining him for posting a website that contained derogatory comments about his school principal and his math teacher and that sought funds to hire a hitman to kill the teacher).

[271] DAVID-FERDON ET AL., *supra* note 267, at 9.

emphasize community-building and inclusion, rather than removing a problem student from his or her community.[272] This is precisely why some scholars have suggested restorative justice as a guide for student discipline and many states have already begun practicing restorative justice in their criminal justice systems. Ultimately, without satisfactorily establishing that it considered reform and dismissed it for good reason, the school will fail to prove that it exercised due diligence.

Having established that exclusionary discipline may result in educational harms, schools avoiding discipline reform are depriving students of an entitlement to educational access and shirking their duty to protect students from known harms. While the Court has not yet recognized a "duty to protect," the time is ripe for the courts to intervene. After all, the Supreme Court has recognized that education:

> is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. 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.[273]

Should the Court choose to do so, a school's active avoidance of discipline reform may run afoul of the Fourteenth Amendment's guarantees.

Despite the reality that this Court is unlikely to recognize education as a fundamental right, a plaintiff's Active Avoidance claim may still prevail under Rational Basis review. The strength of the claim would depend on the egregiousness of the facts. A prime example of a sufficiently egregious case comes from a September 2019 incident in an Orlando, Florida charter school during which a school resource officer handcuffed and arrested a six-year-old girl after she had a temper tantrum in school.[274] That school could not point to any reasonably related government justification for fostering a disciplinary system which criminalizes a six-year-old's misbehavior.[275] While this incident would likely support a private right of action under 42 U.S.C. § 1983

---

[272] *See supra* notes 255–256 and accompanying text.

[273] Plyler v. Doe, 457 U.S. 202, 223 (1982).

[274] Mariel Padilla, *Officer Under Investigation After Arresting 6-Year-Olds, Chief Says*, N.Y. TIMES (Sept. 23, 2019), https://www.nytimes.com/2019/09/22/us/6-year-old-arrested-orlando-florida.html [https://perma.cc/EV3Y-CDS9].

[275] *See id.*

and it certainly was appropriate and legally prudent that the school fired the rogue officer, it is illustrative of the problem with schools' perpetuation of zero tolerance discipline policies.[276] While this is one of the more egregious examples, it exemplifies the dangers of criminalizing student behavior and highlights the need for student discipline reform.

B. The Attenuation Problem

Another potential barrier to success on an active avoidance claim is that the alleged harm may be too remote and far-removed from the school's actions to satisfy the injury-in-fact requirement of a standing inquiry. While the injury articulated by an active avoidance plaintiff — the deprivation of educational access — may seem too speculative to support a class action, an individual plaintiff may have more success proving that a school's continued application of exclusionary discipline practices to that student has hindered her ability to attain educational access.

Just recently, the District of Oregon considered the attenuation issue in *Juliana v. United States* in which twenty-one students between the ages of eight and nineteen sued the Federal Government and numerous executive agencies alleging Fifth Amendment violations as a result of the government's decision to permit, and in many cases subsidize, the continued use of fossil fuels that cause climate change.[277] When the government moved for summary judgment, arguing that the plaintiffs lacked standing to sue, the District Court held that the Plaintiffs established genuine issues of material fact sufficient to survive defendant's motion.[278]

In determining that the students had articulated an injury-in-fact, the court reiterated the rule that the fact that a harm is widely shared by a large class of individuals does not necessarily render it a generalized grievance, so long as "the party bringing suit shows that the action injures him in a concrete and personal way."[279] The plaintiffs had established an injury-in-fact by providing "specific facts," of immediate and concrete injuries in the form of sworn affidavits attesting to their specific injuries (emotional and psychological trauma, lost recreational opportunities, lost economic security, etc.), in addition to numerous, extensive expert declarations showing those injuries were linked to

[276] *See id.*

[277] Juliana v. United States, 339 F. Supp. 3d 1062 (D. Or. 2018).

[278] *Id.* at 1096.

[279] *Id.* at 1088 (citing Massachusetts v. EPA, 549 U.S. 497, 517 (2007)).

fossil fuel-induced climate change.[280] The students also demonstrated, through expert declarations, that their injuries were likely to continue if current climate conditions remained unchanged.[281]

Concerning causation, the court noted that although a defendant's action need not be the sole source of injury to support standing, the "line of causation between the defendant's action and the plaintiffs' harm must be more than attenuated."[282] The court ultimately found that the students provided sufficient evidence showing that causation for their claims was more than attenuated by proffering uncontradicted evidence that the government knew of the dangers of greenhouse gases but continued to take steps promoting a fossil fuel-based energy system, thus increasing greenhouse gas emissions.[283] With respect to redressability, the court explained that the inquiry was whether a substantial likelihood existed that the court could provide meaningful relief.[284] Because the students sought remedies in the form of declaratory and injunctive relief which the court could award, the court held that a genuine issue of material fact existed regarding standing, which was sufficient to withstand the government's motion for summary judgment.[285]

Although this case was decided on summary judgment, *Juliana* serves as some indication that active avoidance plaintiffs may have standing to allege an Active Avoidance claim against the government, thereby challenging its active avoidance of school discipline reform.[286] Since the *Juliana* court concluded that students had adequately alleged standing to challenge the government's inaction regarding climate change because they demonstrated particular, concrete injuries, that the cause of these injuries was "fairly traceable" to the government's actions, and that the courts had the ability, at least partially, to remedy these injuries,[287] Active Avoidance plaintiffs likely can allege injury in fact, causation, and redressability sufficient to establish standing.

Regarding injury-in-fact, Active Avoidance plaintiffs can establish particular and concrete injuries. It is well-established that exclusionary discipline results in a school climate that perpetuates misconduct,

[280] *Id.* at 1090.

[281] *Id.*

[282] *Id.* (citing Native Vill. of Kivalina v. ExxonMobil Corp., 696 F.3d 849, 867 (9th Cir. 2012)).

[283] *Id.* at 1093.

[284] *Id.* at 1094.

[285] *Id.* at 1096.

[286] *Id.* at 1094.

[287] *Id.* at 1087.

isolates students, and negatively affects learning outcomes and academic performance.[288] Further, research supports the conclusion that the use of disciplinary removals ultimately places students in the School to-Prison Pipeline.[289] Thus, Active Avoidance plaintiffs can establish particular and concrete injuries, namely educational deprivation and emotional and psychological trauma. Further, the fact that the alleged injury — educational deprivation — could be shared by a large class of students does not necessarily render the injury "a generalized grievance" when "the party bringing suit shows that the action injures him in a concrete and personal way."[290] The plaintiffs in *Juliana* demonstrated this through sworn affidavits attesting to their personal injuries, ranging from emotional trauma to lost recreational opportunities, and expert declarations showing those injuries were linked to fossil fuel-induced climate change.[291] Similarly, Active Avoidance plaintiffs can prove concrete and personal injuries to satisfy the injury-in-fact requirement through personal testimony of students' specific injuries, likely ranging from lost educational opportunity to emotional trauma, and by the wealth of expert statements readily available which link those injuries to exclusionary discipline practices.

With respect to causation, Active Avoidance plaintiffs should have little issue proving causation. They can establish that the cause of their injuries is "fairly traceable" to the school's actions by providing "uncontradicted evidence showing that [schools have] historically known about the dangers" of zero tolerance policies but have "continued to take steps promoting" an exclusionary discipline system, thus perpetuating the School-to-Prison Pipeline.[292] The abundance of widely available literature criticizing exclusionary discipline and evidencing its dangers[293] suggests that schools are aware of the dangers of zero tolerance practices but disregard the dangers and continue to

[288] *See* DAVID-FERDON ET AL., *supra* note 267, at 25; McGrew, *supra* note 98, at 343.

[289] Heitzeg, *supra* note 99, at 1; Nance, *Dismantling the School-to-Prison Pipeline*, *supra* note 9, at 318.

[290] Jewel v. National Sec. Agency, 673 F.3d 902, 909 (9th Cir. 2011); *Juliana*, 339 F. Supp. 3d at 1088 (quoting Massachusetts v. EPA, 549 U.S. 497, 517 (2007)).

[291] *Juliana*, 339 F. Supp. 3d at 1087.

[292] *Id.* at 1090-91.

[293] *See, e.g.*, Black, *The Constitutional Limit*, *supra* note 9, at 833 (describing exclusionary discipline "as de facto educational death penalties [rather] than . . . corrective or management tools"); Cooley, *The Impact of Marijuana Legalization*, *supra* note 11, at 107 (describing how zero tolerance school discipline results in harm to schoolchildren and negatively affects their educational access and attainment); Mitchell, *supra* note 9, at 291 (crediting zero tolerance policies as one cause of the school-to-prison pipeline).

enforce them. Given the ongoing conversation surrounding exclusionary discipline and the School-to-Prison Pipeline, a student's injuries are likely "fairly traceable" to a school's disciplinary actions, sufficient to establish causation.[294]

Finally, regarding redressability, there is a "substantial likelihood" that courts can provide meaningful relief to Active Avoidance plaintiffs.[295] The *Juliana* court held that a District Court had the power to declare a violation of a plaintiffs' constitutional rights and to remedy past wrongs through the implementation of a plan to combat climate change.[296] This type of judicial intervention is precisely the remedy sought by Active Avoidance plaintiffs: a declaration that the government has violated students' due process rights and an order requiring schools to develop a plan to reform disciplinary practices. As this remedy is "clearly within a district court's authority," active avoidance plaintiffs can establish redressability.[297] Accordingly, *Juliana* serves as some indication that students bringing Active Avoidance claims can satisfactorily allege injury in fact, causation, and redressability sufficient to establish standing.[298]

Although the standing issue must still be fully litigated at trial, the *Juliana* decision provides insight into how a federal district court would view the standing of a group of plaintiffs bringing an Active Avoidance claim. Like the students in *Juliana* who established genuine issues of material fact as to whether they had standing to sue the government for Fifth Amendment violations relating to the government's fossil fuel policies, students bringing an Active Avoidance claim may be able to survive the summary judgment stage of a due process claim through evidence that a school's continued application of exclusionary discipline practices has injured at least one student's ability to attain educational access, that the school knew of these realities and did nothing to remedy them, and that it is within the court's authority to declare a constitutional violation and provide relief to the student's claim.

Ultimately, large-scale reform often occurs incrementally, with the law first providing actors with notice of what is and is not legal. While the Active Avoidance theory of recovery may require several attempts before achieving success in the courts, other efforts at reform have taken

[294] *Juliana*, 339 F. Supp. 3d at 1087 (citing Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992)).

[295] *Id.* at 1094.

[296] *Id.* at 1094-95.

[297] *Id.* at 1095.

[298] *Id.* at 1094.

a similar path. For example, same-sex marriage, sex-stereotyping prohibitions, and abortion rights took years of litigants' efforts, the results of which created a patchwork of law that, in the aggregate, created a new legal standard. The same is true for education reform. The Active Avoidance doctrine contemplates a slow and systematic litigation strategy that will take patience and perseverance to successfully navigate.

CONCLUSION

While America's public education crisis presents a panoply of knotty thorns, scholars generally agree that one of the problems most deeply affecting minority, low income, and other at-risk students is the current approach to student discipline.[299] Student suspension and expulsion is at an all-time high; [300] zero tolerance policies dictate harsh punishments for minor offenses; and quasi-police forces are patrolling the hallways of America's school buildings. [301]

The number of shooting incidents on K-12 campuses was at an all-time high in 2018.[302] Homicide is the third leading cause of death among persons aged ten to twenty-four years, and the majority of those deaths are caused by gun violence.[303] Schools, law enforcement, and families are right to take the threat seriously and respond in a timely and appropriate manner. But to villainize every six-year-old who brings a squirt gun to school or who picks up a stick and pretends that it is a weapon signals to both the individual child subject to the discipline and

[299] BLACK, *supra* note 12, at 78; Black, *Reforming School Discipline*, *supra* note 17, at 3 (citing DANIEL LOSEN ET AL., CTR. FOR CIVIL RIGHTS REMEDIES, ARE WE CLOSING THE SCHOOL DISCIPLINE GAP? 6 (2015), https://civilrightsproject.ucla.edu/resources/projects/center-for-civil-rightsremedies/school-to-prison-folder/federal-reports/are-we-closing-the-school-discipline-gap/AreWeClosingTheSchoolDisciplineGap_FINAL221.pdf [https://perma.cc/R2PH-2F24]); Fedders, *supra* note 80, at 873-74; Nussbaum, *supra* note 227, at 585.

[300] *See* MELISSA DILIBERTI, MICHAEL JACKSON, SAMUEL CORREA & ZOE PADGETT, U.S. DEP'T OF EDUC., CRIME, VIOLENCE, DISCIPLINE, AND SAFETY IN U.S. PUBLIC SCHOOLS: FINDINGS FROM THE SCHOOL SURVEY ON CRIME AND SAFETY: 2017–18 12 (2019), https://nces.ed.gov/pubs2019/2019061.pdf [https://perma.cc/5ECZ-MSNS].

[301] *See 2018 Tables and Figures*, *Table 233.70*, NAT'L CTR. FOR EDUC. STATISTICS (2018), https://nces.ed.gov/programs/digest/d18/tables/dt18_233.70.asp [https://perma.cc/8YYK-T3RA].

[302] *See CHDS K-12 School Shooting Database*, *Incidents by Year*, CTR. FOR HOMELAND DEF. AND SEC., https://www.chds.us/ssdb/incidents-by-year (last visited Sept. 1, 2020) [https://perma.cc/2L2Q-Q3EJ]; *see also* Robby Soave, *More Cops in Schools Is the Wrong Answer to Mass Shootings*, REASON (Feb. 15, 2018, 8:28 AM), https://reason.com/blog/2018/02/15/parkland-florida-shooting-cops-schools [https://perma.cc/XZK3-VAYZ].

[303] DAVID-FERDON ET AL., *supra* note 267, at 8.

his peers that their behavior is either good or bad and, when bad, subject to harsh one-size-fits-all punishments.

The FBI said it best:

> All threats are NOT created equal. . . . Some threats can herald a clear and present danger of a tragedy on the scale of Columbine High School. Others represent little or no real threat to anyone's safety. Neither should be ignored, but reacting to both in the same manner is ineffective and self-defeating . . . . In the shock-wave of recent school shootings, this reaction may be understandable, but it is exaggerated -- and perhaps dangerous, leading to potential underestimation of serious threats, overreaction to less serious ones, and unfairly punishing or stigmatizing students who are in fact not dangerous.[304]

A school that treats all threats as equal falls into the fallacy formulated by Abraham Maslow: "If the only tool you have is a hammer, you tend to see every problem as a nail."[305]

Ultimately, when states guarantee even a basic level of education to their citizens, they must follow through on their promise. With exclusionary discipline contributing to a crime-enabling cycle that has resulted in a Pipeline which deprives students of the opportunity to thrive in an educational environment, the active avoidance of discipline reform may amount to a Fourteenth Amendment violation. Should schools refuse to heed the overwhelming call for discipline reform because it is the right thing to do, perhaps they will be compelled into reform by the looming threat of legal liability. With the adoption of novel legal approaches like the Active Avoidance Doctrine, schools may finally dismantle what has long been recognized as a crippled disciplinary system.

---

304 O'TOOLE, *supra* note 184, at 5 (alteration in original).

305 *Id.*