

# **Have Zero Tolerance School Discipline Policies Turned into a Nightmare? The American Dream's Promise of Equal Educational Opportunity Grounded in *Brown v. Board of Education***

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## **Introduction: Education and The American Dream**

For most Americans and for many foreigners, there is a tacit understanding of some concept of “the American dream.”<sup>1</sup> While there is undoubtedly no consensus on what constitutes the American dream, and some might argue it is an illusory concept,

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<sup>1</sup> The American dream apparently needs little definition. In a recent article, Harvard President Lawrence H. Summers, in reference to the subject that elite American colleges now matriculate more children from upper-income families than from the middle or lower classes, was quoted as responding: “It’s very much of an issue of fundamental fairness ... . An important purpose of institutions like Harvard is to give everybody a shot at the American Dream.” David Leonhardt, *As Wealthy Fill Top Colleges, New Efforts to Level the Field*, N.Y. TIMES, Apr. 22, 2004, available at <http://www.nytimes.com/2004/04/22/education/22COLL.html> (last visited Mar. 5, 2005).

there is probably some agreement on the likely components of the American dream. Homeownership, employment opportunities, and personal freedoms are attractive elements. However, most might agree that the key component of the American dream is educational opportunity. As an African-American educator stated and what is perhaps obvious to many, "African-Americans have long understood that education, above all is the way to freedom and opportunity."<sup>2</sup>

The American dream, perhaps, reached its height for the hopeful in the early 20th century as some Americans attained great wealth, power, and prestige. This era was both glamorized and criticized in F. Scott Fitzgerald's novel *The Great Gatsby*, as the robber barons (industrialists, financiers, and entrepreneurs) described therein seemingly personified images of great opportunities for some to grow rich, prosper, and marry the person of his dreams.<sup>3</sup> By great contrast, many Americans and newly-arrived immigrants could only dream, as they sought jobs in the lower levels of employment offered in the industries and businesses of the robber barons.

In even sharper contrast, the majority of African-Americans were still trying to rise out of three centuries of slavery, make a living primarily as agricultural workers and household laborers, and avoid lynchings.<sup>4</sup> African-Americans could only dare to dream the American dream. In the early 20th century African-Americans faced the arduous tasks of living under segregation laws and de facto segregated socio-economic

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<sup>2</sup> Samuel Harvey, Jr., *Brown v. Board of Education of Topeka: 40 Years Later, New Challenges in Minority Education*, WOODSTOCK REPORT, no. 34, at 3-10 (June 1993), available at <http://www.georgetown.edu/centers/woodstock/report/r-fea34.htm> (last visited Mar. 5, 2005). See also W.E.B. DuBois, *THE SOULS OF BLACK FOLK* 202 (Signet Classic 1969) (1903). Dr. DuBois said in 1903, "It is in the public schools, however, which can be made, outside the homes, the greatest means of training decent self-respecting citizens."

<sup>3</sup> F. SCOTT FITZGERALD, *THE GREAT GATSBY* (Simon & Schuster Adult Publ'g Group 1995) (1925).

<sup>4</sup> See Booker T. Washington, *Up From Slavery*, W.E.B. DuBois, *The Souls of Black Folks*, James Weldon Johnson, *The Autobiography of An Ex-Colored Man*, in *THREE NEGRO CLASSICS* (Avon Books 1965).

conditions.<sup>5</sup> By its very nature, segregation (legal separation of the races) was designed to limit access to education, housing, and employment. Segregation, thus, was intended to, and did restrict African-Americans from the American dream.

Against this backdrop, the early 20th century legal mandate of “separate but equal,” from the Supreme Court’s turn of the century *Plessy v. Ferguson*<sup>6</sup> decision, not only permitted and allowed some states to require separate dining facilities, restrooms, and transportation, but also governed and restricted the educational options of African-Americans. In practice, the separate but equal mandate created gross and obvious disparities in schools that African-American children attended. Schools catering to only African-Americans had less trained and paid teachers, higher pupil-teacher ratios, fewer curricular and extra-curricular activities, and poor physical plants to which these students had to travel further and longer than white children.

In the mid-half of the 20th century, just some 50 years ago, the decision in the Supreme Court cases collectively known as *Brown v. Board of Education*<sup>7</sup> afforded African-American students the opportunity to not only attend integrated schools, but also to attend better schools and, presumably, attain a better education. Many advocated and believed the social interaction with white students would benefit African-American students with a positive psychological impact, such as increased self-esteem. This concept – the importance of social interaction and self-esteem – yes, the ability to dream the American dream – in fact, convinced the *Brown* court to overturn the separate but equal doctrine.<sup>8</sup>

In its aftermath, some would say all Americans, including white American children, benefited from a multicultural educational experience. This was not just in the areas from

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<sup>5</sup> *Id.*

<sup>6</sup> 163 U.S. 537 (1896).

<sup>7</sup> 347 U.S. 483 (1954).

<sup>8</sup> In *Brown*, the Court found in regard to children in grade and high schools, that the inability of black children to interact with white students in discussions, exchange of views and in general “solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone.” *Id.* at 494.

which the five *Brown* cases percolated – Delaware, Kansas, Virginia, South Carolina, and the District of Columbia. It was the entire nation that stood to benefit over the test of time.<sup>9</sup> While looking not only at the historical context of the Equal Protection Clause of the Fourteenth Amendment, but also at “public education in the light of its full development and its present place in American life throughout the Nation,”<sup>10</sup> the *Brown* court stated:

Today education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It 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. *Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.*<sup>11</sup> (emphasis added)

Indeed, the Supreme Court in the 1980s, three decades after *Brown*, followed this line of thought on the role of education in the lives of American children in its finding:

Public education is not a “right” granted to individuals by the Constitution. But neither is it

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<sup>9</sup> See Deborah S. Hyden, *Brown v. Board of Education: Implications for A Modern Era*, MISS. C. L. REV. (forthcoming 2004) (criticizing the premise that African-Americans must attend school with white children to attain the educational opportunity promised by *Brown*).

<sup>10</sup> *Brown*, 347 U.S. at 492-93.

<sup>11</sup> *Id.*

merely some governmental “benefit” indistinguishable from other forms of social welfare legislation from other forms of social welfare legislation. Both the importance of education in maintaining our basic institutions, and the lasting impact of its deprivation on the life of a child, mark the distinction.<sup>12</sup>

Thus, students may not have a clear property interest in attending school. The Supreme Court has been unwilling to find the right to attend school as a fundamental right, as it did in *Brown*, and the Court has recognized the importance of public education as central to a person’s ability to function in society and exercise other rights.<sup>13</sup>

Education is no less important in the 21st century than it was in the previous century, as enunciated in the *Brown* decision. In fact, education – and the opportunity that is a symbolic and perhaps realistic part of the concept known as the American dream – may be even more important within today’s global realities.<sup>14</sup> American democratic principles, at present, remain largely respected and often replicated by emerging nations and thus, the laws Americans fashion may be applied and also scrutinized by the rest of the world.<sup>15</sup> Instant worldwide access

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<sup>12</sup> *Plyler v. Doe*, 457 U.S. 202, 221 (1982).

<sup>13</sup> See also U.S. CONST. amend. XIV, §1; SAMUEL M. DAVIS & MORTIMER D. SCHWARTZ, *CHILDREN’S RIGHTS AND THE LAW*, 132-33 (1987) (“Equality has been the central theme of school law since at least 1954.”); *id.* 131 n.13 (citing *Brown v. Bd. of Educ.*, 327 U.S. 483 (1954); Kathleen M. Cerrone, *The Gun-Free Schools Act of 1994: Zero Tolerance Takes Aim at Procedural Due Process*, 20 PACE L. REV. 131, 134 (1999) (discussing students’ property interest in attending school).

<sup>14</sup> See *Dixon v. Alabama State Bd. of Educ.*, 294 F.2d 150, 157 (5th Cir. 1961) (recognizing education as “vital and, indeed, basic to civilized society”).

<sup>15</sup> Zero tolerance policies have crossed our borders to Canada. See Loraine Thompson, *One Incident is Too Many: Policy Guidelines for Safe Schools*, SSTA Research Rept. # 94-05 (1994), available at [http://www.ssta.sk.ca/research/school\\_improvement/94-05.htm](http://www.ssta.sk.ca/research/school_improvement/94-05.htm) (last visited Mar. 5, 2005) (reporting that Canadian students, parents, teachers and public agree that schools should be violence-free, safe places in which children can learn and grow and describing some of the causes of school violence,

to knowledge and information provided by the Internet and attendant technologies demonstrate the immediate importance and necessity for educated Americans and citizens of the world.

One might believe with present global thinking, global economy, and ever-changing ethnic landscape that all Americans – white, black, and other – understand the benefits of an integrated or multicultural K-12 school experience.<sup>16</sup> Even in the 21st century, education remains a (and some might say “the”) major element of the American dream, a lure that often gives hope to potential immigrants and to most Americans. Throughout America’s history, it is educational experiences in primary and secondary schools that have served as both the incubator and the stage for the American drama known as the democratic process.

Thus, 50 years after the landmark *Brown v. Board of Education* decision, the question is posed herein: Is the American dream’s promise of educational opportunity, grounded in *Brown*, being turned into a nightmare by school discipline policies collectively known as “zero tolerance”? If so, how can the public be awakened from this nightmare? How can America regain the hope of *Brown*, to permit not only African-American students, but all students, to achieve the education necessary to dream the American dream and thereby become healthy, educated, law-abiding, and productive citizens in the global economy?

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measures taken to combat violence, and guidelines to assist boards of education in developing and implementing safe school policies).

<sup>16</sup> It might also be true that all Americans should understand the benefits of an integrated multicultural experience in all educational environments including post-secondary schools, colleges, and professional schools. See *Grutter v. Bollinger*, 539 U.S. 306 (2003) (affirmative action efforts at the University of Michigan Law School upheld; the law school had a compelling interest in attaining a diverse student body and its admissions program was narrowly tailored to serve its compelling interest in obtaining the educational benefits that flow from a diverse student body and thus did not violate the Equal Protection Clause). However, since zero tolerance policies are largely limited to the K-12 elementary and secondary public schools, our discussion is therefore so limited to students in these grades. We also note that while private and parochial schools employ similar zero tolerance policies, different laws that permit policies under religious freedom often govern them.

Curiously, there are not many reported cases about zero tolerance policies as applied in American schools. Why? It is, perhaps, commonly believed that many parents often do not have the mindset, time, or means to pursue redress against the educational “system” beyond the administrative process through the courts, and the parents who do have the resources are often ostracized, frustrated, and unsuccessful.<sup>17</sup> Thus, the case law regarding zero tolerance policies has not developed well. Consequently, this article asserts the position that litigation alone does not afford a viable strategy to stem the continuing negative application and effects of zero tolerance policies.

Much of the information available on zero tolerance cases has been reported in the local and national media, usually after some absurd resolution of a school discipline case. There are developing think tanks and support groups that are exploring strategies to combat deleterious zero tolerance policies, including the Rutherford Project and Advancement Project that provide litigation support. It is within this context that this article intensively views zero tolerance policies and strategies for eliminating or limiting them, as it appears must be done.

The first section of this article provides some insight into the evolution of school discipline policies from the *Brown* era of the late 1950s to today’s era of zero tolerance. The second section provides a review of the history of zero tolerance policies from federal legislation aimed at controlling guns in schools to more expansive state and local policies. The third section is a lengthier discussion regarding problems of zero tolerance policies, as applied. It includes a look at the negative psychological effects on children, reduced educational opportunities and increased drop out rates, racial profiling of African-American students,<sup>18</sup> the disparate impact on students

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<sup>17</sup> IRWIN A. HYMAN & PATRICIA A. SNOOK, DANGEROUS SCHOOLS: WHAT WE CAN DO ABOUT THE PHYSICAL AND EMOTIONAL ABUSE OF OUR CHILDREN (Josey-Bass Publishers 1999).

<sup>18</sup> While there is also racial profiling of students of color in addition to African-American students, *i.e.*, Latino students, our focus herein is on African-American students on whose education the *Brown* decision was focused.

with learning disabilities, the criminalization of today's and tomorrow's youth, and the costs to society of these policies.

The fourth section takes a look at challenges to zero tolerance policies, including legal arguments, federal and state legislative initiatives, national and community think tanks, and proposed alternative forms or modifications of zero tolerance policies, such as restorative justice and violence prevention measures. Here, a case in point is provided for the need for change: zero tolerance in Georgia. Atlanta is often considered one of the most important cradles of the Civil Rights Movement, nationally and internationally. It is home to the Rev. Dr. Martin Luther King, Jr., the Rev. Dr. Joseph Lowery, and the Rev. Dr. Ralph David Abernathy, icons of the leadership of the Civil Rights Movement from the 1950s to the present. It is also home to the Honorable Maynard Holbrook Jackson, Jr., the late former Atlanta mayor and attorney, who is now properly recognized as one of the main architects of the affirmative action movement from the late 1960s to the present.

Georgia's dual-sided history – Southern slavery and segregation versus civil rights and affirmative action measures for business and education – provides an interesting backdrop for exploring the present and future of this state and the nation. African-Americans make up approximately 30 percent of Georgia's present population.<sup>19</sup> Georgia has the third largest African-American population of the states, and with the influx of Hispanics in the last decades, the state's minority population will near an estimated 50 percent by 2025.<sup>20</sup> In metropolitan Atlanta,

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<sup>19</sup> According to the U.S. Census Bureau's Quick Facts, the Black or African-American population was 28.7 percent in 2000 and the percentage of persons of Hispanic or Latino origin was 5.3 percent in 2000, a total of 34 percent; adding Asian (2.1 percent), Native Hawaiian and Pacific Islander (0.1 percent) and biracial and multiracial persons (1.4 percent) and "some other race" other than White (2.4 percent), the minority population in Georgia in the early 2000s was an estimated 40 percent. U.S. CENSUS BUREAU, GEORGIA QUICK FACTS, *available at* <http://quickfacts.census.gov/qfd/states/13000.html> (last visited Mar. 5, 2005).

<sup>20</sup> PAUL R. CAMPBELL, U.S. BUREAU OF THE CENSUS, POPULATION PROJECTIONS FOR STATES BY AGE, SEX, RACE AND HISPANIC ORIGIN: 1995

there are numerous shining examples of African-American successes in the attainment of the components of the American dream in terms of education, home-ownership, and personal satisfaction. The Georgia example provides an insightful backdrop for challenges to zero tolerance policies and the need to continue to make possible the promise for equal educational opportunity rooted in *Brown*.

Continuation of zero tolerance policies, as they are presently drawn, has increasingly negative implications, not only for African-Americans whose gains may be greatly eroded but also for our great society at-large. All Americans need to wake up and find a new way to allow our children to be children and to dream the American dream once again.

## **I. The Evolution of School Discipline from the *Brown* Era of the 1950s to Today's Zero Tolerance Policies**

### *A. School Discipline: The 1950s through the 1980s*

School discipline has traditionally been accomplished through corporal punishment, teacher-administrated discipline, and administrative proceedings. On the school side, the players may include teachers, administrators (principals, assistant principals, counselors), law enforcement personnel (school police, resource officers, local law enforcement personnel), and coaches (who may also be employed as teachers or administrators). Also on the school's side are the local or district school board members. Most likely, the school board members are elected officials (people often start political careers in this arena), while some serve by appointment. There may also be hearing officers and state education officials. The school board frequently will provide an attorney for the school officials.

On the student's side are the student, a parent or guardian, and perhaps a witness. The student may have an

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TO 2025 (1996), available at

<http://www.census.gov/population/www.popproj.html> (last visited Aug. 12, 2004).

attorney present at administrative proceedings but is not entitled to representation. Even if the student has the right to retain counsel, most families do not retain an attorney for school cases and none is gratuitously provided.<sup>21</sup>

To understand zero tolerance policies, it is helpful to understand the evolution of school discipline from the days of the *Brown* decision. The 1950s marked the beginning of the baby boom generation that has been loosely defined as the era between 1946 and 1964, when 80 million people were born in the United States.<sup>22</sup> During this time, great social changes and advocacy were occurring in the U.S. as well. It was the prime time for the post-*Brown* civil rights movement, along with the Vietnam anti-war movement and the women's rights movement. With a growing concern for individual rights, school officials in most parts of the country were revisiting school disciplinary measures that largely used corporal punishment coupled with public embarrassment to discipline students. In the larger school populations of the 1960s, corporal punishment was less acceptable and less effective, and into the 1970s school systems

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<sup>21</sup> Recognizing the deleterious effects of school board actions on children of color, in the early 1980s a national project of the National Association for the Advancement of Colored People, the Legal-Education Project, was housed in the Atlanta Office. This project, in which the author was actively involved as an advocate, trainer, and boardmember, along with Paula E. Bonds, Project Attorney, provided a liaison and informal referral office for families who sought attorneys for representation in school disciplinary hearings. Since families were often unable to afford attorneys, the project provided education and training for community members and families to assist students in these disciplinary hearings. In the late 1990s, we advocated for pro bono efforts on the part of the Atlanta legal community for representation in school discipline cases. The Atlanta Legal Aid Society, Inc. now supports such an effort, TeamChild Atlanta, an education law project that focuses on children involved with the Fulton County Juvenile Court, supported by volunteer lawyers from two local law firms. Atlanta Legal Aid Society, *2003 Annual Rept.* 26, available at <http://www.law.emory.edu/PI/ALAS/ar.pdf> (last visited July 16, 2004).

<sup>22</sup> See Alicia C. Insley, Comment, *Suspending and Expelling Children from Educational Opportunity: Time to Reevaluate Zero Tolerance Policies*, 50 AM. U. L. REV. 1039, 1043 (2001) (citing Troy Adams, *The Status of School Discipline and Violence*, 567 ANNALS AM. ACAD. POL. & SOC. SCI. 140 (2000)).

began to frequently use out-of-school suspensions and expulsions to rid schools of misbehaving students.<sup>23</sup>

According to a leading criminal law expert, as regards corporal punishment, to maintain reasonable discipline in schools and promote the child's education, teachers may use reasonable force on students without being subject to criminal liability for battery or for violating any special statute punishing cruelty to children so long as the punishment is not excessive.<sup>24</sup> Further, because the privilege is not a delegation of the parent's right to punish the child, the teacher can punish the schoolchild regardless of the parent's approval and even if the discipline is not on school grounds.<sup>25</sup> Thus, as long as the teacher's punishment of the student is reasonable to promote discipline and not to maliciously inflict pain, the teacher is not subject to criminal prosecution for student discipline.<sup>26</sup>

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<sup>23</sup> *Id.* at 1045.

<sup>24</sup> WAYNE R. LAFAVE, CRIMINAL LAW 537 (Thomson-West, 4th ed. 2003). See EDWARD C. BOLMEIER, LEGALITY OF STUDENT DISCIPLINARY PRACTICES (1976); CORPORAL PUNISHMENT IN AMERICAN EDUCATION (I. Hyman & J. Wise eds., 1979); Cynthia D. Sweeney, *Corporal Punishment in Public Schools: A Violation of Substantive Due Process*, 33 HASTINGS L.J. 1245 (1982). See also *Buchheit v. Stinson*, 579 S.E.2d 853 (Ga. Ct. App. 2003). In reversing, the appellate court found the trial court erred in its finding that the mother who slapped her daughter had committed an act of family violence under GA. CODE ANN. § 19-13-1 (2004) and simple battery under GA. CODE ANN. § 16-5-23 (2004). The latter statute specifically exempted corporal punishment from the definition of battery and thus the mother's act was not unreasonable discipline.

<sup>25</sup> *Ingraham v. Wright*, 430 U.S. 651, 664-70 (1977) (holding that the Eighth Amendment's prohibition against "cruel and unusual punishment" 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." The Court also stated that "[t]he schoolchild has little need for the protection of the Eighth Amendment," because "[p]ublic school teachers and administrators are privileged at common law to inflict only such corporal punishment as is reasonably necessary for the proper education and discipline of the child; any punishment going beyond the privilege may result in both civil and criminal liability").

<sup>26</sup> *Cleary v. Booth*, 1 Q.B. 465 (Eng. 1893). See also GA. CODE ANN. § 20-2-731 (2004).

Where school authorities used corporal punishment and students could not establish criminal liability, and where corporal punishment was not used against a student maliciously or excessively, students could base their challenge to such discipline on civil liability such as substantive individual and procedural rights. Thus, in the late 1970s and early 1980s, school authorities instituted in-school suspensions as an alternative to corporal punishment and exclusionary policies, while the Supreme Court in *Goss v. Lopez*<sup>27</sup> in 1975 defined the minimum due process rights of public school students. In-school suspension was, perhaps, more humane than expulsion and removing the student from school. The student could then work on academic assignments during the period of his/her punishment – thereby being punished for the school offense but not in his/her academic achievement.

In accordance with the due process requirements of *Goss v. Lopez*, students must have at least some informal hearing process at the school level. Subsequent hearings may occur before a hearing officer or the local or district school board. In concert with the premise of administrative law and, given the relatively short timeframe, the administrative processes must be and are usually exhausted before any court action is taken.<sup>28</sup>

*B. Zero Tolerance Was Introduced from Federal Legislation to Curb School Violence Due to Gun Use.*

In the late 1980s and early 1990s, school discipline became defined in terms of zero tolerance, a concept that grew out of state and federal drug enforcement policies in the 1980s.<sup>29</sup>

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<sup>27</sup> 419 U.S. 565 (1975).

<sup>28</sup> School suspensions for serious offenses may be imposed for up to 10 days; maximum suspensions and expulsions require an administrative hearing and afford the student the right to counsel. *Id.*

<sup>29</sup> Russ Skiba & Reece Patterson, *The Dark Side of Zero Tolerance: Can Punishment Lead to Safe Schools?* 80 PHI DELTA KAPPAN (Jan. 1999) (authors found the term “zero tolerance” first recorded use in the Lexis-Nexis national newspaper database was in 1983 when the Navy, suspecting drug abuse, reassigned 40 submarine crew members. After that the term was picked up and used in reference to other drug activities and it quickly was applied to a variety of issues including environmental pollution, trespassing,

What is “zero tolerance”? In the broad sense, commentators have defined zero tolerance policies as “administrative rules intended to address specific problems associated with school safety and discipline.”<sup>30</sup> Zero tolerance thus was initially defined as the administrative response to weapons, drugs, and violent acts of students occurring in the school setting – with the actual responses being punishment of the students, suspension, or expulsion. School authorities expanded the term to mean the “automatic expulsion of students who bring guns, knives, or items that look like weapons onto school grounds.”<sup>31</sup>

Over time and in the most broad and strict sense, zero tolerance has come to refer to school or district-wide policies that mandate predetermined and typically harsh consequences or punishments (such as suspension and expulsion) for a wide variety of and broadly defined school rule violations.<sup>32</sup> Various states, counties, and school districts developed their policies to meet local needs. In implementing them, administrators cast a wide net, treating with the same severity both minor and major

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skateboarding, racial intolerance, homelessness, sexual harassment and boom boxes), available at <http://www.pdkintl.org/kappan/kski9901.htm> (last visited Mar. 5, 2005).

<sup>30</sup>Tobin McAndrews, *Zero Tolerance Policies*, ERIC Dig. No. 146, Mar. 2001, available at <http://eric.uoregon.edu/publications/digests/digest146.html> (last visited Mar. 14, 2005).

<sup>31</sup>Roger W. Ashford, *Can Zero-Tolerance Keep Our Schools Safe?* 29 NASP COMMUNIQUÉ (newsletter of the National Association of School Psychologists), June 2001 at 10 (citing K. Vail, *Ground Zero*, 182(6) AM. SCH. BD. J. 36-38 (1995)), available at <http://www.nasponline.org/publications/cq298zero.html> (last visited Mar. 5, 2005).

<sup>32</sup> See PHILLIP KAUFMAN ET AL., U.S. DEP'T OF EDUC. & U.S. DEP'T OF JUSTICE, INDICATORS OF SCHOOL CRIME AND SAFETY, app. A, at 121 (1998) (defines a zero tolerance policy as one that “mandates predetermined consequences or punishments for specific offenses”); see also Advancement Project & The Civil Rights Project, Harvard Univ., *Opportunities Suspended: The Devastating Consequences of Zero Tolerance and School Discipline Policies*, at 1 (2000) (defining zero tolerance policies as “nondiscretionary punishment guidelines”), available at [http://www.civilrightsproject.harvard.edu/research/discipline/opport\\_suspend.ed.php](http://www.civilrightsproject.harvard.edu/research/discipline/opport_suspend.ed.php) (last visited Mar. 5, 2005) [hereinafter “Opportunities Suspended”].

infractions to “send a message” to potential violators.<sup>33</sup> Most frequently, zero tolerance policies address drugs, weapons, violent incidents, smoking, and school disruptions by individual students in efforts to protect all students' safety and maintain a school environment that is conducive to learning.<sup>34</sup>

Zero tolerance policies have an inherent aspect of absoluteness for punishment, but paradoxically they also have subjectivity in their definitions of punishable behaviors.<sup>35</sup> Further, many student actions (or even non-actions) giving rise to school rule violations under zero tolerance are now considered criminal or delinquent acts. This characterization of student actions encourages referral to juvenile justice authorities and often involves punishment in addition to or bypassing the administrative school disciplinary hearing processes.<sup>36</sup> The evolution of seemingly simple policies with which most reasonable persons would agree and respect has led to unintended and often absurd consequences, a path from which reasonable persons have not yet found any measurable retreat.

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<sup>33</sup> McAndrews, *supra* note 30 (citing Russ Skiba & Reece Peterson, *The Dark Side of Zero Tolerance*, 80 PHI DELTA KAPPAN 5 (Jan. 1999)).

<sup>34</sup> NAT'L. ASS'N. OF SCH. PSYCHOLOGISTS, ZERO TOLERANCE AND ALTERNATIVE STRATEGIES: A FACT SHEET FOR EDUCATORS & POLICYMAKERS (2001), available at [www.naspcenter.org/factsheets/zt\\_fs.html](http://www.naspcenter.org/factsheets/zt_fs.html) (last visited Mar. 5, 2005).

<sup>35</sup> James M. Peden, *Through A Glass Darkly: Educating with Zero Tolerance*, 10 KAN. J.L. & PUB. POL'Y 369, 371 (2001) (“Zero tolerance is a term that is used to characterize an institution’s responses to breaches in the code of conduct which the institution recognizes as being fundamental to its operation. It carries with it a connotation of absolutism and inflexibility which implies that once parameters of conduct have been established for any particular institution, no activity that occurs outside those parameters will be allowed. A code of conduct premised on such a concept does not contemplate an individual’s intent.”).

<sup>36</sup> Gun-Free Schools Act of 1994, 20 U.S.C. §§ 8921-8923 (1994 & Supp. 2000).

*C. The Federal Gun-Free Schools Act of 1994  
Then and Now*

Student behaviors in schools escalated to more and more frequent violent forms in the 1980s and 1990s, and included offenses even greater, perhaps, than drug use in schools.<sup>37</sup> In response to the violence caused by the use of guns in schools by students, in 1994 the federal government under the Clinton administration passed the Gun-Free Schools Act of 1994, authorized by the Improving America's Schools Act of 1994.<sup>38</sup> Congress had passed The Gun-Free School Zones Act of 1990 earlier, but it did not specifically apply to students.<sup>39</sup> The later law, passed in response to growing national concern with school violence, and prompted particularly by several major incidents of school shootings, was the first instance that the federal government explicitly involved itself in student discipline.<sup>40</sup>

Using the strong arm of federal funding for public schools and addressing local accountability policies, the law required all states to enact legislation to enforce the federal gun-free schools law. Section 8921 (b) required:

[e]ach State receiving Federal funds under this chapter shall have in effect a State law requiring local educational agencies to expel from school for a period of not less than one year a student who is determined to have brought a weapon to

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<sup>37</sup> See *infra*, note 59.

<sup>38</sup> 20 U.S.C. § 8921 (1994).

<sup>39</sup> 18 U.S.C. § 922(q)(1)(A). This act forbids "any individual knowingly to possess a firearm at a place that the individual knows, or has reasonable cause to believe is a school zone." The term "school zone" is defined as "in, or on the grounds of, a public, parochial or private school" or "within a distance of 1,000 feet from the grounds of a public, parochial or private school." § 921(a)(25). The original act was declared unconstitutional as exceeding Congress' commerce clause authority because possession of a gun in a local school zone was not economic activity that substantially affected interstate commerce. *U.S. v. Lopez*, 514 U.S. 549 (1995). The act was reenacted and remains in force today as § 922(q)(2)(A) and provides: "It shall be unlawful for any individual knowingly to possess a firearm that has moved in or that otherwise affects interstate commerce at a place that the individual knows, or has reasonable cause to believe, is a school zone."

<sup>40</sup> See Cerrone, *supra* note 13, at 158.

school under the jurisdiction of local and educational authorities in that State ...<sup>41</sup>

By the end of 1995, all states adopted legislation consistent with this Act and required local school authorities to comply with its provisions.<sup>42</sup> Notably, a small number of states provided for expulsion for weapons possession but did not strictly follow the terms of the Gun-Free Schools Act.<sup>43</sup>

How was a “weapon” defined for purposes of the Gun-Free Schools Act? The Act defined a weapon as “a firearm as such term is defined in section 921 of title 18.”<sup>44</sup> It further defined a “firearm” as:

(A) ... any weapon (including a starter gun) which will or is designed to or may readily be converted to expel a projectile by the action of an explosive; (B) the frame or receiver of any such weapon; (C) any firearm muffler or firearm

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<sup>41</sup> 20 U.S.C. § 8921(a)(1) (repealed 1994).

<sup>42</sup> See Laura Beresh Taylor, Comment, *Preventing Violence in Ohio's Schools*, 33 AKRON L. REV. 311, 323 (2000).

<sup>43</sup> California's statute does not provide for mandatory expulsion of students determined to have possessed a firearm, but such students may be expelled by the governing board only if there is a recommendation by the principal, superintendent of schools, hearing officer or administrative panel, and only if “other means of correction are not feasible or have repeatedly failed to bring about proper conduct,” or “due to the nature of the act, the presence of the pupil causes a continuing danger to the physical safety of the pupil or others.” CAL. EDUC. CODE §§ 58915(b)(1)-(2) (West 1999). There are general provisions regarding expulsion but no specific sections for expulsion for possession of a firearm in Delaware, Florida, and Oklahoma's codes. See generally DEL. CODE ANN. tit. 14, § 4130 (1998); FLA STAT. Ch. 230.23 (1999), amended by 1999 Fla. Sess. Law Serv. 284 (West); OKLA. STAT. Tit. 70, § 5-118 (1999). A student in Massachusetts found in possession of a gun may be expelled, but there is no mandatory time period and “a principal may, in his discretion [after a hearing] decide to suspend rather than expel [the] student.” MASS. GEN. LAWS ch. 71, § 37H (1999). A student in Wisconsin who possesses a firearm at school is automatically suspended, not expelled, and a due process rule requires that the suspension cannot exceed five days without notice of a hearing. See WIS. STAT. §§ 120.13(1)(b)-(m) (1999).

<sup>44</sup> 20 U.S.C. § 8921(b)(4) (repealed 2002)

silencer; or (D) any destructive device. Such term does not include an antique firearm.<sup>45</sup>

It is important to note The Gun-Free Schools Act of 1994 did not proscribe any other type of weapon brought to school by a student other than a firearm as defined in 18 U.S.C. § 8921. Further, Congress excluded antique firearms from the definition of firearm for purposes of the Gun-Free Schools Act in accordance with the 18 U.S.C. § 8921 definition and presumably school children were not subject to discipline for bringing an antique firearm to school.

Congress repealed The Gun-Free Schools Act with the enactment of the No Child Left Behind Act of 2001. However, under No Child Left Behind, it re-enacted the Gun-Free Schools Act as 20 U.S.C. § 7151. The re-enactment, effective in 2002, added more specificity to the old version. Now, state laws must require local educational agencies not only to expel from school for a year a student who brings a firearm to school but also one who possesses a firearm at school. This was no small difference.<sup>46</sup>

In the new version of the law Congress made important clarifications relative to zero tolerance applications. First, there was a retreat from the use of the word “weapon” as the lawmakers substituted the term “firearm,” which had a clear statutory definition. Second, the new version mandated expulsion for mere possession of a firearm by a student at school, as opposed to the more active and intentional act of bringing a firearm to school. Third, for legal construction purposes, Congress clarified the definition of “school.” The 2002 version defines “school,” at least for purposes of state reporting requirements, as “any setting that is under the control and supervision of the local agency for the purpose of student activities approved and authorized by the local educational agency.”<sup>47</sup> The 1994 version did not provide a specific definition

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<sup>45</sup> 18 U.S.C. § 921(a)(3) (2004).

<sup>46</sup> See Michael A. Lawrence, *A New Case for Direct Congressional Regulation of Guns in School Zones*, 77 DENV. U. L. REV. 769 (2000).

<sup>47</sup> 20 U.S.C. § 7151(f) (2002).

of “school” but rather merely referred to expulsion for a student who brought a weapon to a “school under the jurisdiction of local educational agencies in that State.”<sup>48</sup>

Under the former version, one might have argued that bringing a gun to school should be confined to bringing the weapon into the school building and does not encompass any broader concept, such as bringing the weapon onto school grounds, school buses, or to other places. However, the 2002 version appears to support the argument for expulsion for bringing a firearm to school or merely possessing a firearm in “any setting.” That setting could include the entire school campus, athletic fields, parking lots, school buses, and any school-sponsored activity wherever such activity occurs. Thus, school authorities can extend zero tolerance application – at least for possession of a firearm at school – under federal law to students under school supervision on field trips, at athletic events, and at activities. This would be so regardless of whether such students are on their own school grounds or get there by their own or other than school-provided transportation.<sup>49</sup> There is, however, what appears to be perhaps a concession to the pro-gun lobby. In the 2002 version, a student who has a firearm in a locked vehicle on school property or a firearm authorized by the

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<sup>48</sup> § 8921(a) (repealed 2002).

<sup>49</sup> See, e.g., *Andy Follett vs. Downington Area School District When Policies are Blindly Applied* (high school junior’s account on his permanent expulsion for possession of a controlled substance and weapon found in his father’s car across the street from the school in a church parking lot as a result of an anonymous tip), available at <http://ztnightmares.com/cgi-bin/accept/display.cgi?ZT73+ads> (last visited Mar. 5, 2005).

The revised version of the Gun-Free School Act, if wholly adopted by a local jurisdiction would appear to preclude this effect today. See § 7151(f) (2002), which for the purpose of state reporting requirements defines the term “school” as “any setting that is under the control and supervision of the local educational agency for the purpose of student activities approved and authorized by the local educational agency” which could include a parking lot. Additionally, subsection (g) excepts the situation where “a firearm that is lawfully stored in a locked vehicle on school property, or it if it is for activities approved and authorized by the local educational agency and the local educational agency adopts appropriate safeguards to ensure student safety.”

local educational agency with appropriate safeguards for student safety is exempt.<sup>50</sup>

*D. States and Local Authorities Extended Zero Tolerance Policies for Firearms and Added Similar Measures for Drugs and Alcohol and Other School Rule Violations.*

Within the time proscribed by the Gun-Free Schools Act of 1994, most states had adopted legislation in compliance with the requirement of school expulsion for students who brought firearms to the school premises.<sup>51</sup> Finding drug use, possession, and distribution just as harmful to students as using or possessing weapons, some state legislatures and local school authorities adopted legislation extending zero tolerance policies to such other behaviors.<sup>52</sup> Notably, states passed laws with great variety. Some totally followed the federal law and others went further than the federal law with regard to the student behaviors, imposing the stricter disciplinary measure of expulsion for those behaviors and more expansive policies covering a wider range of student misconduct.<sup>53</sup>

First, some state and local policies broadened zero tolerance policies for weapons beyond firearms and included specific weapons, as well as look-alike weapons and objects construed as weapons.<sup>54</sup> Such an expansive definition of weapons in the school setting, and beyond what is commonly used even in criminal law, has often led to a ridiculous application of a zero tolerance policy.<sup>55</sup> Second, many state and

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<sup>50</sup> § 7151(f) (2002).

<sup>51</sup> Sasha Polakow-Suransky, *America's Least Wanted: Zero-Tolerance Policies and the Fate of Expelled Students*, in PUBLIC ASSAULT ON AMERICA'S CHILDREN: POVERTY, VIOLENCE, AND JUVENILE INJUSTICE 103 (Valerie Polakow ed., 2000) ("Within one year of [the Gun-Free Schools Act's] enactment all 50 states had introduced zero-tolerance legislation ...").

<sup>52</sup> *Id.*

<sup>53</sup> *Id.*

<sup>54</sup> Two fifth-graders in Muskego, Wis., were suspended for bringing an orange fluorescent toy gun on the school bus. *Waupon Student Caught With Pistol*, MILWAUKEE J. SENTINEL, May 30, 1998, at 2.

<sup>55</sup> Yolanda Rodriguez, *Tweety's Revenge? Girl May Leave Cobb School*, ATLANTA J. CONST., Oct. 2, 2000, at A1 (An 11-year-old girl was suspended for 10 days for violating the Cobb County, Georgia, school district's zero-

local authorities broadened zero tolerance policies to encompass not only illegal drug use and possession, but also legal drugs, including common over-the-counter medications and look-alike substances.<sup>56</sup>

It is, perhaps, the enforcement of zero tolerance to the expanded territories that has drawn the most public outcry and which appears to be the impetus for some retrenchment from those policies. School authorities extended what appeared to be a necessary, fair, limited, and specific response to school violence provided by federal law into areas neither contemplated nor addressed by the initial enactment.<sup>57</sup> The definition of what is an unsafe school varies from state to state, city to city, and among school districts; yet, zero tolerance policies have never been uniform, and the applications to and effects on students have

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tolerance weapons policy for taking a Tweety Bird novelty key chain to school; school officials insisted that the 9 3/4 inch chain attached to her pink Tweety Bird wallet fit its weapons category.); Jim Galloway, *Tweety Fan Wings Her Way to New School: Suspended Over Key Chain, Cobb Girl Takes Case to TV Talk Shows*, ATLANTA J. CONST., Sept. 28, 2000, at H1 (This case drew a lot of media attention when the girl appeared on national talk shows; her parents withdrew her from the public schools and with private assistance she was enrolled in a private school.); Mischa Gaus, *ACLU Sues Cobb Schools Over 'Zero Tolerance' Policy*, ATLANTA J. CONST., Oct. 28, 2000, at G4 (The American Civil Liberties Union of Georgia took on the case against Cobb County's reluctance to provide details regarding its zero tolerance policy.).

<sup>56</sup> See *Wagner v. Ft. Wayne Comm. Schs.*, 255 F. Supp. 2d 915 (N.D. Ind. 2003) (middle school student's challenge to expulsion for bringing caffeine pills to school and distributing them to other students did not violate her substantive due process rights or equal protection rights when students who took pills were merely suspended nor was school behavior code impermissibly vague).

<sup>57</sup> The definition of "weapons" was extended beyond guns and firearms to include knives, razors, slingshots, brass knuckles, and other inherently dangerous objects. See, e.g., N.M. STAT. ANN. § 22-5-4.7(c)(2) (Michie 1995) (a weapon is any destructive devise considered to be an explosive or incendiary device, bomb or grenade); NEV. REV. STAT. ANN. § 392.466(7)(b) (Michie 1995) (a blackjack, sling shot, billy, sand-club, sand bag, metal knuckles, dirk or dagger); WASH. REV. CODE ANN. §§ 9.41.280(1)(c)-(e) (West 1995) (dangerous weapons include nun chu ka sticks, throwing stars, and air guns).

been widespread and mostly harmful.<sup>58</sup> Because of the continuing inequities and harmful effects on school children caused by zero tolerance enforcement, particularly as it relates to discipline for actions where there is no violent act by a student (e.g., truancy, dress code violations), a case can yet be made in most jurisdictions to challenge these policies.

*E. The Gun Control Act Permitted  
Some Administrative Discretion in Enforcement, Yet Many  
State and Local Authorities Abandoned Administrative  
Discretion in School Discipline.*

Notably, in both the 1994 and 2002 versions of the Gun-Free Schools Act, while expulsion of students for bringing firearms to school was mandatory, the legislature left discretion up to the local authorities as regards punishment of the affected students. In relevant part the Act states:

... except that such State law shall allow the chief administering officer of a local educational agency to modify such expulsion requirement for a student on a case-by case basis if such modification is in writing.

(2) Construction

Nothing in this subpart shall be construed to prevent a State from allowing a local educational agency that has expelled a student from such a student's regular school setting from providing

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<sup>58</sup> Jane Elizabeth, *What is an unsafe school? Definition varies from state to state*, PITTSBURGH POST-GAZETTE, Aug. 23, 2003, at A1 (noting that under the reporting requirements of No Child Left Behind, Pennsylvania school districts reporting of dangerous incidents is uneven, inaccurate and skewed, locally and nationally, as districts seek to comply with the federal law), available at <http://www.post-gazette.com/localnews/20030823dangerous0823p2.asp> (last visited Mar. 5, 2005).

educational services to such student in an alternative setting.<sup>59</sup>

This federal legislation, thus, provided two extremely important ameliorative measures to local authorities. First, it allowed the chief administering officer the discretion to modify expulsions for students bringing or possessing weapons at school on a case-by-case basis. Secondly, it permitted a local educational agency to allow an expelled child to continue his or her studies in an alternative setting and to provide alternative educational programs. Thus, expulsion under the proviso of the Gun-Free Schools Act in either version did not mean the local school authorities had to expel a student for an entire year during which a student would receive no educational services.

As local authorities increase application of zero tolerance policies, it is notable that the Gun-Free Schools Act requires annual state and national reporting of specific information regarding expulsions thereunder including: “(A) the name of the school concerned; (B) the number of students expelled from such school; and (C) the type of firearms concerned.”<sup>60</sup> The accuracy, consistency, and timeliness of such reporting is questionable, but reporting serves as powerful evidence that states have zealously applied extended zero tolerance policies stemming from the Gun-Free Schools Act in both versions.<sup>61</sup>

In many jurisdictions, with the expanded application of zero tolerance disciplinary policies, school authorities removed or abdicated the authority of teachers and school administrators to interpret the definition of weapons and drugs found in the policies. Additionally, school authorities removed or abdicated their discretion to apply appropriate discipline to fit the actual offense by the student. Particularly in the later 1990s, after the

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<sup>59</sup> The earlier version, 20 U.S.C. § 8921, was repealed and 20 U.S.C. § 7151 (2002) was enacted which added the requirement in subsection (b)(2) that the modification be in writing.

<sup>60</sup> 20 U.S.C. § 7151(d)(2) (2002). The 2002 version changed the 1994 version’s references to weapons to firearms consistent with such other changes.

<sup>61</sup> Elizabeth, *supra* note 58 (reporting is uneven, inaccurate, and skewed, locally and nationally, as districts seek to comply with the federal law).

media covered shocking incidents of school violence, it frequently picked up on the shocking and dramatic applications of zero tolerance policies.<sup>62</sup> Increasingly, news accounts focused on ridiculous applications of zero tolerance where the reasonable thinking of school authorities was absent.<sup>63</sup>

Local zero tolerance policies that came about prior to or after the federal laws were arguably not well-drafted to balance the need for school safety with maintaining educational opportunity for students. Many state and local policies failed to make three important distinctions in their policies. First, the policies treated all children equally: there was no distinction for the imposition of punishment – expulsion or suspension – according to the age or grade of the child. Thus, the law treated a kindergarten student the same as a high-school-age child.<sup>64</sup> Second, there was no careful distinction, as there was in the federal legislation, regarding the type of weapon or drug that could trigger a violation. Thus, a school authority could punish a child for what appeared to be or was construed to be a weapon (toy gun, water pistol, spit ball) or what appeared to be or was construed to be a drug, illegal substance (over-the-counter drugs, such as aspirin, Tylenol, Midol), or even a look-alike substance.<sup>65</sup> Third, school policies made no distinctions

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<sup>62</sup> The most notable recent incidents of school violence occurred in suburban areas of major cities, Denver and Atlanta. At Littleton, Colo.'s Columbine High School, on April 20, 1999, two students killed 12 classmates and a teacher before committing suicide and at Conyers, Georgia's Heritage High School, six students were shot by a student reportedly depressed after a break-up with his girlfriend. N.Y. TIMES, *Pain Still Fresh 5 Years After Columbine Massacre*, Apr. 21, 2004, at B11, available at <http://www.nytimes.com/2004/04/21/education/21columbine.html> (last visited Mar. 5, 2005); Joey Ledford, *School Shooting in Rockdale; Terror Strikes on Seniors' Last Day of Classes; Gunfire Started a Mad Rush as Students Ran in All Directions, Leaving a Trail of Bookbags and Shoes in Their Wake*, ATLANTA J. CONST., May 20, 1999, at A14.

<sup>63</sup> See Dirk Johnson, *Schools' New Watchword: Zero Tolerance*, N.Y. TIMES, Dec. 1, 1999, at A1, available in 1999 WL 3052324.

<sup>64</sup> See Rochelle Carter, *Second-Grader Suspended for Gun in School*, ATLANTA J. & CONST. Sept. 30, 2000, at E1, available in 2000 WL 3726130 (Eight-year-old student was suspended for five days, after bringing a rusty BB gun to Atlanta elementary school due to teasing by other students.).

<sup>65</sup> See *Student Suspended After Police Dog Smells Drug*, WTOG-TV, Mar. 9, 2004 (Sixteen-year-old Savannah, Georgia, high school student suspended as

regarding the educational achievement, maturity, and psychological development or learning needs of the student. A straight-A student may be treated the same as a student with learning disabilities.<sup>66</sup>

Taken individually or together, the broadly or poorly written policies appeared to limit important areas of administrative discretion necessary for educators to effectively carry out school discipline and maintain safety, while carrying out the main purpose of school: education. Furthermore, while school administrators have discretion to modify expulsion and suspension mandates on a case-by-case basis, they simply do not for a variety of reasons. Some school officials may feel like they are “between a rock and a hard place”<sup>67</sup> and many do not want to

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part of zero tolerance policy for “passive participation” after school police aid their dog smelled marijuana and cocaine in his book bag), *available at* <http://wtoctv.com/global/story.asp?s=1698605&ClientType+Printable> (last visited Mar. 5, 2005); Melody Brumble, *Bossier School Board Upholds Advil Expulsion*, SHREVEPORT TIMES, Dec. 5, 2003, at A1 (high school student expelled for one year for having Advil, an over-the-counter pain reliever, and sent to alternative school where school superintendent found expulsion consistent with system’s zero tolerance policy covering possession of all prescription and non-prescription drugs), *available at* <http://www.shreveporttimes.com/html/AE0F03BF-76FC-4300-8564-69F1898F37C.shtml> (last visited Feb. 13, 2004).

<sup>66</sup> Perry Zirkel, *Zero Tolerance Expulsions*, 83 NASSP BULL. 610, 101-05 (Nov. 1999) (reporting that 12-year-old Adam L., an A-student, observed by teacher filing his nails with a miniature Swiss Army knife received a one-year expulsion). *See also* Cherry Henault, *Zero Tolerance in Schools*, 30 J.L. & EDUC. 547 (2001).

<sup>67</sup> Joan M. Wasser, *Note: Zeroing in on Zero Tolerance*, 15 J.L. & Pol. 747, 770-72 (1999) (discussing reasons administrators do not use their discretion to modify school suspension and expulsion mandates even when circumstances seem to warrant leniency, in that they: 1) believe zero tolerance policies abolish their discretion or considerations militate against leniency under any circumstances; 2) do not realize they have discretion as a choice, regardless of the circumstances and punish students more severely than is justified by their conduct; 3) understand their options but choose to follow zero tolerance prescriptions to the letter either to send a clear message to all students or they have an ongoing relationship with school boards that review their decisions; 4) maintain that uniformly treating students who break a school rule ensures fairness and using discretion will favor students who get good grades versus those who struggle academically; 5) fear of litigation despite risk of media

use their discretion.<sup>68</sup> If they have the power to exercise discretion in school discipline, there may be some party who is not pleased and who might sue the school system. Some (maybe most) school officials would likely err on the side of strict enforcement.<sup>69</sup> Increasingly, some school officials are siding with students and trying to find ways to avoid the imposition of zero tolerance.<sup>70</sup>

Juvenile laws have evolved throughout the history of America from the viewpoint of children as property of their parents, to enactment of the protective child labor laws of the 1920s, to the development of juvenile delinquency institutions of

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embarrassment for punishing minor offenses and seeming silly; and 6) believe they are ensuring school safety).

<sup>68</sup> See Opportunities Suspended, *supra* note 32, at 4-5.

<sup>69</sup> W. Michael Martin, *Does Zero Mean Zero? Balancing Policy with Procedure in the Fight Against Weapons in School*, 187(3) AM. SCH. BD. J. 39-4. (Mar. 2000) (suggesting that school district acknowledge only certain special circumstances that can be taken into account for determining the appropriate consequence of a weapons policy violation, i.e., age of the offender, ability of the offender to comprehend the requirements of the policy, intent of the offender, effect of the presence of the weapon (whether another party was threatened or frightened), and the past disciplinary record of the offender. He suggests also that school on-site administrators be discouraged from "rushing to judgment in determining whether or not possession of a particular weapon falls under a mandatory expulsion requirement." He also suggests that principals avert communication pitfalls in administering zero tolerance weapons policies by not diluting the policy message, being clear about the consequences, being careful with evidence, taking time to do things right, preparing a communication plan for school employees and the public, coordinating responses to the media and not saying "no comment." These measures, he opines, help balance the rights of the students and responsibilities of the school authorities in keeping school safe and meeting the community's concerns.), *available at* <http://www.asbj.com/security/contents/0300martin.html> (last visited Mar. 14, 2005).

<sup>70</sup> Dean L. Kalahar, *Inside the Classroom: Zero Tolerance or Hidden Agenda?*, Nov. 9, 2002 (In a leading education news source, author states: "It is a sad commentary on the state of our schools when administrators and teachers exercise a zero tolerance model of judgment to promote safety and control discipline inside the classroom. ... Anyone truly concerned with providing a world class education for children must expose and demand an end to liberal social policy experiments disguised as zero tolerance programs in schools.), *available at* <http://www.educationnews.org/inside-the-classroom-Zero-tolerance-or-hidden-agenda.htm>. (last visited Nov. 13, 2001).

the 1930s, to the protective “best interests of the child” policies of the 1970s.<sup>71</sup> Through the expansion and applications of zero tolerance policies of the 1990s, America is now at war with its youth – seeing them as delinquents at best and criminals at worst – as their often minor, adolescent acts occur or originate in the only place other than their homes. And for those acts, America is excluding many youths from school and from obtaining an education.

*F. The Gun Control Act Allowed for  
Alternative Education Placement  
Many State and Local Policies Did Not.*

The Gun Control Act of 1994 provided that local authorities, after imposing mandatory suspension or expulsion of students for firearm possession, could provide alternative educational measures. Many states or local jurisdictions, however, did not do so.<sup>72</sup> As found in a recent study:

Whether alternative education is discretionary or mandatory varies state-by-state; ... 26 States require, by law, that school districts make alternative education opportunities available to students suspended or expelled. In 18 States, it is within the discretion of school districts to provide alternative education.<sup>73</sup>

For example, in Michigan, a state with initially one of the harshest zero tolerance statutes, the enactment did not provide for alternative education for students expelled for weapons violations.<sup>74</sup>

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<sup>71</sup> See JOSEPH GOLDSTEIN ET AL, *BEYOND THE BEST INTERESTS OF THE CHILD* (The Free Press 1973).

<sup>72</sup> See Insley, *supra* note 22, at 1066-69.

<sup>73</sup> *Opportunities Suspended*, *supra* note 32, at 14.

<sup>74</sup> MICH. COMP. LAWS. ANN. § 380.1311 (West 2004); See also, Paul M. Bogos, “*Expelled. No Excuses. No Exceptions.*” *Michigan’s Zero-Tolerance Policy in Response to School Violence: M.C.L.A. Section 380.1311*, 74 U. DET. MERCY L. REV. 357, 387 (arguing that while Michigan’s policy is an effective deterrent to school violence, it is harmful to society because unlike a majority of states it does not require a school district to provide alternative

Some states provide alternative educational programs – whether optional or mandated. Some local jurisdictions – usually larger or urban school districts – provide alternative programs or schooling for students not only expelled and suspended, but also for those who have other reasons (pregnancy, age, work, and parenting) to be separated from the regular school environment.<sup>75</sup> Given the mobility of citizens, need for productivity, and role of education, should students' educational options following expulsion or suspension depend on a local decision to provide alternative education? Or, should all children subject to zero tolerance policies by the federal legislation's mandate be afforded mandated alternative education?

Some may see alternative education as a way to avoid having dangerous youth who are expelled from being on the streets and, perhaps, from being even more dangerous. Should there be a balancing of the need for school safety provided by zero tolerance weapons policies and state-required alternative educational programs, at least for compulsory school age children? It would seem that is the only conclusion if educational opportunity was the goal for society.

## II. Problems with Applications of Zero Tolerance

The extensive use and application of zero tolerance policies, on the one hand, has been deemed justified as good educational policy “by the implicit or explicit recognition that security must be a fundamental concern for public schools” because “schools must be safe places for children to learn.”<sup>76</sup>

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education to students of compulsory attendance, but noting that some large school districts do opt to fund alternative education programs).

<sup>75</sup> See, e.g., ARIZ. REV. STAT. ANN. § 15-841 (West 1995); GA. CODE ANN. § 20-2-751 (West 1995); N.M. STAT. ANN. § 22-5-4.7 (Michie 1995); N.D. CENT. CODE § 15-49-13 (1994); TEX. EDUC. CODE ANN. § 37.007(e) (West 1995).

<sup>76</sup> William Haft, *More Than Zero Tolerance: The Cost of Zero Tolerance and the Case for Restorative Justice in Schools*, 77 DENV. U. L. REV. 795, 797 (2000) (citing Todd A. DeMitchell, *Security Within the Schoolhouse Gate: An Emerging Fundamental Value in Educational Policy Making*, 120 Ed. L Rep.

Zero tolerance policy trends have also been consistent with “get tough on crime” criminal law policies. On the other hand, while expulsion and suspension may be necessary tools for maintaining school safety, overuse and overapplication of these tools is viewed by some advocates as counter to “the fundamental purpose of public education – the purpose of preparing children to live in a democratic society.”<sup>77</sup>

Zero tolerance policies sweep not just the students whose acts are obviously dangerous and arguably criminal. They also pick up the children who are what most reasonable people (including some teachers and school officials) would believe are basically good children who may have made an error in judgment or exercised the judgment of a child or adolescent, in many cases without regard to the consequences of their actions.<sup>78</sup> That is, perhaps, what is most troubling about zero tolerance.

In this section, the problems with zero tolerance policies are examined: the elimination of consideration of the student’s intent, the psychological damage being done to children, the decreased educational opportunities and elevated dropout rates, the racial and ethnic profiling, the impact on students with learning disabilities, the criminalization of our youth, and the costs to society. By applying zero tolerance policies, school authorities are criminalizing child-like behaviors at school, and thereby relegating the children punished to a life without or with lesser education. The net effect is that the fabric of our society is

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379, 382 (1997) (security now joins equity, efficiency, liberty, and equality as a fundamental educational value)).

<sup>77</sup> Haft, *supra* note 76, at 797.

<sup>78</sup> Chris Adams, *Teen Faces Expulsion and Felony for Lending Girlfriend Medicine*, KTRK-TV, Oct. 8, 2003 (Student arrested with felony charge in juvenile and faced with expulsion for lending his asthma inhaler to his girlfriend who was suffering an asthma attack at school; principal says student was warned, and school lacks discretion and the potentiality of allergic reactions as reasons for school actions.), *available at* [http://abclocal.go.com/ktrk/news/100803\\_local\\_inhaler.html](http://abclocal.go.com/ktrk/news/100803_local_inhaler.html) (last visited Mar. 5, 2005). *See also* Catherine Seipp, *Asthma Attack: When “Zero Tolerance” Collides with Children’s Health*, Reasonline, Apr. 2002 (school discipline policies that require students to keep their asthma inhalers in the school office jeopardize their health when needed in emergencies), *available at* <http://reason.com/0204/fe.cs.asthma.html> (last visited Mar. 5, 2005).

eroded by such children facing life without much hope for achieving economically and within the law-abiding community.<sup>79</sup> That is not the American dream reinforced in *Brown*; that is a nightmare.

*A. Student Intent Was Eliminated in Most Zero Tolerance Policy Enforcement.*

Most reasonable persons would agree a student who makes a bomb or brings a gun to school for the purpose of injuring anyone should be removed from the school with haste. However, should this apply to the case where the gun is in the student's car, in the parking lot, and the student is not aware that it is in the car?<sup>80</sup> Does it apply to a toy gun or a water pistol, which cannot conceivably cause much serious bodily harm?<sup>81</sup> While the Gun-Free Schools Act addressed possession of firearms in schools, what other types of weapons should a school disciplinary policy include? To what extent is the student's knowledge, intent, or *mens rea* to commit a violation of the discipline policy to be taken into account?

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<sup>79</sup> Judith A. Browne, *Derailed: The Schoolhouse to Jailhouse Track*, Advancement Project (2003) (exploring how zero tolerance policies "have morphed into the schoolhouse to jailhouse track"), available at <http://www.advancementproject.org> (last visited Mar. 5, 2005)

<sup>80</sup> *Seal v. Morgan*, 229 F.3d 567 (6th Cir. 2000), *reh'g and suggestion for reh'g en banc denied* (Dec. 20, 2000) (student expelled from high school after friend's knife was found in glove compartment of his car brought 42 U.S.C. § 1983 action against board of education and court rejected board's claim that "scienter" is not required by zero tolerance policy because the requirement of conscious possession is not a mere technicality. The Court stated at 575-76: "No student can use a weapon to injure another person, to disrupt school operations, or, for that matter, any other purpose if the student is totally unaware of its presence. Indeed, the entire concept of possession – in the sense of possession for which the state can legitimately prescribe and mete out punishment – ordinarily implies knowing or conscious possession.") *See also Butler v. Rio Rancho Public Schools Bd. of Educ.*, 341 F.3d 1197 (10th Cir. 2003); *but see Bundick v. Bay City Indep. Sch. Dist.*, 140 F. Supp. 2d 735 (S.D. Tex. 2001) (distinguishing *Seal*).

<sup>81</sup> *Wappon Student Caught With Pistol*, *supra* note 54 (reporting that two fifth-graders were suspended for bringing an orange fluorescent toy gun on the school bus).

In criminal law, intent to do wrong is a key element.<sup>82</sup> However, in zero tolerance policies, the student's intent is generally irrelevant. Students may unwittingly and inadvertently break a rule; they may not intend to do the ultimate act they are accused of doing.<sup>83</sup> They are children – ranging from kindergarten (age five) to high school (up to age 18) – and under the common law and in accordance with state statutes, they may or may not have criminal capacity.<sup>84</sup> Clearly, they have a wide range of actual educational levels, as well as social and psychological maturity. They certainly do not think like adults are presumed to think and most school-age children are inherently incapable of adult-level thinking.

Under our principles of criminal law, to commit a crime, children like adults must commit an act or omission and have a certain state of mind – *mens rea* or “guilty mind” or *scienter* or “criminal intent.” At some ages children may be presumed incapable of forming the requisite intent to commit crimes.<sup>85</sup> Yet, without regard to a child's mental capacity or intent, responding to increased reports of violent acts by children, legislatures lowered the age for consideration of specified acts under juvenile laws and by juvenile authorities, thereby turning these children over to the adult criminal justice system for

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<sup>82</sup> LaFave, *supra* note 24, at 239 (“what is required of crimes in the way of the mental part, variously called *mens rea* (‘guilty mind’) or *scienter* or ‘criminal intent’”).

<sup>83</sup> See, e.g., *Knife Gets Honor Student Expelled from Her School*, ORLANDO SENTINEL, Feb. 8, 1998, at A18 (where fifth-grader Shanon Borchardt Coslett was expelled under mandatory policy, after reporting to teacher at Twin Peaks Charter Academy in Longmont, Colorado, that she found a paring knife in her mother's lunchbox that she picked up by mistake and brought to school).

<sup>84</sup> LaFave, *supra* note 24, at 485 (“At common law, children under the age of seven are conclusively presumed to be without criminal capacity, those who have reached the age of fourteen are treated as fully responsible, while as to those between the ages of seven and fourteen there is a rebuttable presumption of criminal incapacity. Several states have made some change by statute in the age of criminal responsibility for minors. In addition, all jurisdictions have adopted juvenile court legislation providing that some or all criminal conduct by those persons under a certain age must or may be adjudicated in the juvenile court rather than in a criminal prosecution.”).

<sup>85</sup> *Id.* at 489.

adjudication and punishment.<sup>86</sup> In the past, juvenile judges and/or district attorneys had the discretion to bind over or refer (also known as “waiver”) a child who committed a violent act to the state to be tried as an adult. Some states now have mandated waiver of juveniles – by judges, prosecutors, or the legislature – to criminal court for adult adjudication for certain serious acts committed by juveniles.<sup>87</sup> As a result, children do not receive treatment but are only considered for punishment. Thus, when a child commits acts in the school context that could arguably fall within the definition of an act adjudicated as an adult crime, there is no cause for any school authority to exercise discretion or to look at the child’s intent – even when such action might be appropriate.

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<sup>86</sup> See GA. CODE ANN. § 15-11-30.2(a) (West 2004) (Georgia statute permitting judicial discretion to transfer to other courts juvenile delinquency cases based on conduct designated a crime or public offense under the laws).

<sup>87</sup> See § 15-11-28 (b)(2)(A) (known as Georgia’s 7 Deadly Sins, crimes for which youths 14 and over must be tried in superior court exclusively as adults, include murder, voluntary manslaughter, rape, aggravated sodomy, aggravated child molestation, aggravated sexual battery, and armed robbery if committed with a firearm); see also § 15-11-30.2(b) (covering conduct occurring while child was confined in a youth development center, including murder, voluntary manslaughter, aggravated assault, and aggravated battery). This type of statute is known as “legislative waiver” where “no discretion by either the prosecutor or the juvenile court judge is involved in the determination of whether the juvenile is to be dealt with instated by the criminal courts. At one time this variety of waiver was exceedingly rare, but today it is to be found in about two-thirds of the states.” LaFave, *supra* note 24, at 491. See also § 15-11-63 (Designated Felony Acts, “constitutes a second or subsequent offense under subsection (b) of Code Section 16-11-123 if committed by a child 13 to 17 years of age;” includes the designated felony act of carrying or possessing a weapon on school property; § 15-11-63 (B) includes these designated felonies if done by a child 13 or more years of age: kidnapping or arson in the first degree; aggravated assault, arson in the second degree, aggravated battery, robbery, armed robbery not involving a firearm, or battery where the victim is a teacher or other school personnel; attempted murder or attempted kidnapping; hijacking a motor vehicle; any other acts if done by an adult would be a felony if the child has previously been three times adjudicated for them as delinquent acts; and trafficking in cocaine, illegal drugs, marijuana, or methamphetamine. For these acts, a child can be committed up to 60 months, with a minimum to be spent at a Youth Development Campus).

Ironically, when a child who commits a violent act in the school context is tried as an adult, the child's intent becomes a relevant element to be proven by the state "beyond a reasonable doubt." The case is usually different when a child commits a violent or potentially violent act in a school situation and the case remains in the school context with punishment relevant to the child's education – expulsion or suspension. In the latter, a child who commits an error of judgment, has a dalliance of thought, or is unable to determine what constitutes a "weapon" in a school situation is subject to zero tolerance – strict liability. The child's intent is neither a subject to be proven by the authorities nor is the child required to have knowledge of the act for which she is punished – exiled or banished from the school.<sup>88</sup>

School authorities appear to not want to determine the child's "intent" and seem to prefer blind administration of zero

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<sup>88</sup> See *Bundick v. Bay City Indep. Sch. Dist.*, 140 F. Supp. 2d 735 (S.D. Tex. 2001) (student claimed he did not know the machete was in his toolbox in his truck, found as a result of the alert by a regularly sniffing school dog and that he lacked the requisite culpable mental state to justify his expulsion, which argument the court admitted had a "virtuous appeal" but distinguished the case upon which the student relied, *Seal v. Morgan*, 229 F.3d 567, 581 (6th Cir. 2000), holding that a school board may not expel a student without determining first whether the student "intentionally committed" the acts giving rise to the expulsion. The Bundick court noted that the *Seal* decision was a split one and preferred to follow the dissenting opinion on the law of scienter in the school context. The court stated: "Scienter is not a requirement of the school district's policy, and that policy is entitled to deference. Moreover, scienter 'can be imputed from the fact of possession.'" *Id.* at 585. Thus, the student's due process claims were dismissed, as were his equal protection and § 1983 claims.). See also *Butler v. Rio Rancho Pub. Sch. Bd. of Educ.*, 341 F.3d 1197, 1201 (10th Cir. 2003) (upholding a New Mexico high school student's one-year suspension for driving to school a borrowed car that contained his brother's knife, gun, ammunition, and drug paraphernalia. The student claimed ignorance of the car's contents when the school security guard noticed the car in the parked in the school lot did not have a permit and "observed the butt end of a knife sticking up from between the passenger seat and the center console." The court found the school's decision proper as it was based on finding that the student "should have known" he was bringing a weapon onto school property and the school had a legitimate interest in providing a safe environment for students and staff.).

tolerance policies.<sup>89</sup> Is this an abdication of adult responsibility couched in terms of administrative constraints? Does a community supportive of such policies not want to give discretion to the school authorities to determine the child's intent? Does the community want to impose on the child in this context the same penalties that the adult system would impose? Most likely, it does not.

As one scholar has noted:

The adult criminal justice system has three goals of punishment: deterrence, incapacitation, and retribution. The premise of adult punishment is that adults, as rational decision makers, are capable of making cost benefit analyses that deter them from misbehaving because of the impact of criminal sanctions. Retribution is appropriate because we place a high value on "getting even" with serious offenders. Incapacitation simply makes everyone feel safe.<sup>90</sup>

As another scholar opined: "Viewed against this backdrop, mandatory school expulsion – and the ever-increasing likelihood of a follow-up referral to juvenile court – suddenly looks a lot like an adult sanction."<sup>91</sup> For these reasons, there seems to be cause for examination and proof of the child's intent or knowledge.<sup>92</sup>

Zero tolerance applications in cases of student behaviors – aggressive or some other type of antisocial or threatening behaviors that trigger student discipline – without regard to addressing the student's intent, may be even more troubling than applications of zero tolerance to weapons possession or drug use or possession. Why? First, zero tolerance extension to the frequent and usual student behaviors – minor, disruptive

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<sup>89</sup> Adams, *supra* note 78 (principal quoted as using fact that statute did not call for discretion in charging with a felony and potential expulsion student who lent his asthma inhaler to his girlfriend).

<sup>90</sup> Marsha L. Levick, *Zero Tolerance: Mandatory Sentencing Meets The One Room Schoolhouse*, 8 KY. CHILD. RTS. J. 2, 3 (June 2000).

<sup>91</sup> *Id.* at 6.

<sup>92</sup> See, e.g., *Butler* 341 F.3d at 1201.

behaviors, such as tardiness, class absences, disrespect, and noncompliance – has increased the number of students disciplined and disciplinary incidents. This often results in expulsions when they add up to a certain amount of infractions.<sup>93</sup> Second, zero tolerance application to student speech or expression is particularly disturbing when the expelled or suspended student was responding to a class assignment. A student may be disciplined for expressing something the teacher, another student, parent, or school authority figure considers harmful (terroristic, threatening, bullying, harassing), but may not, in fact, be harmful to anyone.<sup>94</sup> Without any regard to the student's intent, school authorities may chill the student's speech and punish him or her.

What is happening to our democratic principles and basic constitutional protections believed to be inviolate under the First Amendment, absent advocacy for the violent overthrow of the government? It appears courts and administrative tribunals are

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<sup>93</sup> See Russell J. Skiba, *Zero Tolerance, Zero Evidence: An Analysis of School Disciplinary Practice*, Ind. Educ. Policy Ctr., Policy Research Rept. #SRS2, 6 (Aug. 2000).

<sup>94</sup> See, e.g., *Doe v. Pulaski County Spec. Sch. Dist.*, 306 F.3d 616 (8th Cir. 2002) (finding 8th grade student intended to communicate intent in letter describing how he would rape and murder a classmate that reasonable recipient would perceive letter as a threat so that expulsion did not violate the First Amendment); *LaVine v. Blaine Sch. Dist.*, 257 F.3d 981 (9th Cir. 2001) (upholding emergency expulsion of student after he showed teacher a poem he had written which was filled with imagery of violent death and suicide and the shooting of fellow students as not violative of the First Amendment, although school's placement and retention of negative documentation in student's file and not allowing student to return to class after determining student was not threat to others or self was found an abuse of discretion of school authorities); *Demers v Leominster Sch. Dep't*, 263 F. Supp. 2d 195 (D. Mass. 2003) (finding public school officials did not violate eighth grade student's privacy, free speech, and procedural due process rights in light of his prior disciplinary record by temporarily suspending him after teacher asked him to draw a picture depicting how he felt being asked to leave a class and his drawing depicted a school surrounded by explosives, children hanging out windows crying for help, with the explosives labeled and the amount; also a picture of the school superintendent with a gun pointed at his head and explosives at his feet and notes about his wanting to die and hating life). See also, Lynda Hils, "Zero Tolerance" for Free Speech, 30 J. L. & EDUC. 365 (2001).

more willing to examine what is going on in the minds of the people (teachers, students, and administrators) who read, hear, and interpret the offending student's speech or behavior, over, or without regard to, the child's knowledge or intent.<sup>95</sup> The primary justifying cause for this erosion of First Amendment rights in the school context appears to be that judicial deference is given to the administrative authority of school officials and their educational mission, a reason which needs to be further challenged.<sup>96</sup>

*B. Are the applications of Zero Tolerance Policies  
Tantamount to Child Abuse?*

Some leading child psychologists assert that zero tolerance discipline policies psychologically damage school children.<sup>97</sup> The negative effects on our nation, states, and communities – especially minority communities – and families from state and local school policies known as “zero tolerance” are immediate, disastrous, and long-term. Are zero tolerance policies then arguably tantamount to child abuse? By the presence and imposition of these policies, our children are losing respect for adults, the educational system, and the legal system. Students are afraid to go to school, not only because of the threat of violence at school, but also because of the threat of zero tolerance policies being used against them.<sup>98</sup>

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<sup>95</sup> See *supra* note 87.

<sup>96</sup> Public school students enjoy First Amendment protection and do not “shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.” *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969) (upholding students’ right to wear black armbands in protest against the Vietnam War). However, students First Amendment rights “are not automatically coextensive as adults in other settings’ and must be ‘applied in light of the special characteristics of the school environment.’”); *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 266 (1988) (holding school principal could censor school newspaper) (quoting *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 682 (1986) (holding school could punish students for making lewd remarks in school).

<sup>97</sup> HYMAN & SNOOK, *supra* note 17.

<sup>98</sup> See JUNE L. ARNETTE & MARJORIE C. WALSEBEN, OFFICE OF JUSTICE PROGRAMS, U.S. DEP’T OF JUSTICE, JUVENILE JUSTICE BULL., COMBATING FEAR AND RESTORING SAFETY IN SCHOOLS (Apr. 1998) (examining the effects of the invasions of schools, formerly safe havens for children, with

This is not just a problem for a few children. It has become a problem for many children and many communities – urban, suburban, and rural. Some see zero tolerance policies as governmental policies geared toward lifelong behavior modification and a vital part of “a far more insidious program of intimidation, control, and cultural transformation.”<sup>99</sup> What has happened to the “best interests of the child” approach that recognizes that at least some children need treatment and not necessarily punishment for delinquent and antisocial acts?<sup>100</sup> Considering that school authorities are less likely to take seriously child abuse in schools and report it to law enforcement authorities as such, and that many local school authorities still adhere to the “spare the rod, spoil the child” corporal punishment mentality, it is conceivable there will be a disregard of the impact of violent acts committed on children in the school setting in some schools and communities.<sup>101</sup> With such thinking by school and other authorities under the rubric of school safety, violence on children would more likely be condoned or defended. Consequently, the advancement of any argument that zero tolerance policies used on school children amounts to mental cruelty and actionable physical child abuse would not likely succeed. However, this argument merits careful further consideration and, perhaps, testing in litigation.

For example, to combat the possession and use of illegal drugs in schools, some school districts permit random drug raids. This means schools may permit a police S.W.A.T. team, armed with guns and a drug-sniffing dog, to enter school property, put the students on lock-down, and subject them to strip searches,

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community violence, bullying, gangs, possession, and use of weapons, and substance abuse and documents concerns of students, parents, and educators).

<sup>99</sup> Berit Kjos, *Zero Tolerance For Non-Compliance: Ten Steps Toward Lifelong Behavior Modification* (arguing that using “zero tolerance” policies to shock, embarrass, and intimidate dutiful students into compliance with irrational rules fits the plan [for lifelong behavior modification]), available at <http://www.crossroad.to/text/articles/zerotol.html> (last visited Mar. 5, 2005).

<sup>100</sup> See, e.g., GOLDSTEIN ET AL., *supra* note 71.

<sup>101</sup> Skiba, *supra* note 93 (noting that student perceptions of the effectiveness of school disciplinary actions are often significantly at odds with perceptions of teachers and administrators, causing fear and resentment in students and may escalate, rather than deter school disruption).

pat downs, and lay downs, just like street criminals.<sup>102</sup> On the one hand, some argue this is a permissible way to control drug use, sale, and possession in schools. On the other hand, consider the psychological damage to the majority of the children from the militaristic law enforcement techniques employed to catch the behaviors of a few children.<sup>103</sup>

Additionally, one should consider that these actions in the school setting at best disrupt the educational process and at worst substantially deter a child from seeking education in this scary context. Educational psychologists find that “in some cases, extreme school disciplinary procedures, such as strip searches, have produced stress symptoms severe enough to warrant a diagnosis of posttraumatic stress disorder.<sup>104</sup> It may very well be “the school punishments that are central to zero tolerance policies have not been studied enough to determine whether they yield benefits sufficient to outweigh the well-documented and troubling side-effects of punishment procedures.”<sup>105</sup>

Yet, the courts apparently disregard the best interests of the children, or in deference to administrative authority, find these policies and actions acceptable. School administrators and educators, however, should understand the negative psychological impact on students, particularly adolescents in

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<sup>102</sup> The principal of a South Carolina High School, suspecting drugs, allowed the local SWAT team with guns and a drug-sniffing dog to sniff and search students and their book bags and detain students. It was broadcast on television from the school’s videotape, followed by a more-shocking, detailed broadcast of the police videotape. ACLU News Release, *South Carolina Students Were Terrorized by Police Raid With Guns and Drug Dogs, ACLU Charges* (Dec. 15, 2003), available at <http://www.aclusc.org/Page/PressRel/p031215cp.html> (last visited Mar. 5, 2005).

<sup>103</sup> *Id.* According to Rev. Jackson, students as young as 14 were terrorized when subjected to police handcuffing and holding guns to their heads, body searches, as well as large dogs sniffing their book bags and persons, when no drugs or weapons were found during the sweep and no charges were filed against any student.

<sup>104</sup> I. A. Hyman & D.C. Perone, *The Other Side of School Violence: Educator Policies and Practices that may Contribute to Student Misbehavior*, 36 J. SCH. PSYCHOL. 7-27 (1998).

<sup>105</sup> Skiba, *supra* note 93, at 15.

high school at the critical time in their lives when they should develop strong bonds with adults, not conflict.<sup>106</sup> In *Brown*, the Court based its opinion in large part on the negative psychological effects of segregation on African-American school children. The Court opined that regardless of equalization of tangible aspects of education – physical facilities, curricula, teacher qualifications, and transportation – “separation of the children from others of similar age and qualification solely because of their race generates a feeling of inferiority as to their status in the community. The Court further noted that this may “affect their hearts and minds in a way unlikely ever to be undone.”<sup>107</sup> There, the highest court recognized that the negative impact of state action on the part of public school authorities might support a case for corrective action.<sup>108</sup>

Segregated and re-segregated schools today may not necessarily foster an inferiority complex in any specific racial group. However, lack of interaction with a diversity of people (race, class, ethnicity) may still lead to an American society that is negatively affected in its hearts and minds with ignorance and intolerance, two attributes averse to our democratic principles.<sup>109</sup> To the extent the use of zero tolerance often leads to an irrational disposition for a child who commits an infraction due to lack of judgment (or judgment reflective of the child’s developmental stage, age, and experience), it is likely to be as psychologically harmful to the affected child as were the segregated schools to African-American children in the *Brown* era. As legally mandated segregation did in public schools of the 1950s, the lack of tolerance in today’s school environment erodes the democratic ideals that many of us believe, at least in principle, public schools are supposed to convey to our children and communities.

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<sup>106</sup> See *Opportunities Suspended*, *supra* note 32 (referring to noted Yale psychologist James Comer and Harvard psychiatrist Dr. Alvin Poissant’s suggestions that “exclusionary punishments actually intensify certain adolescents’ conflicts with adults”).

<sup>107</sup> *Brown v. Bd. of Educ.*, 347 U.S. 483, 495 (1954).

<sup>108</sup> *Id.* at 495-96 (Supreme Court delayed, but ordered, further action on formulating decrees to carry out its decision).

<sup>109</sup> See SHERYLL CASHIN, *THE FAILURES OF INTEGRATION: HOW RACE AND CLASS ARE UNDERMINING THE AMERICAN DREAM* (Public Affairs 2004).

The negative and harmful psychological effects on school children of zero tolerance policies may also occur when a student is separated from the general student population by expulsion, not for violation of the law, but for a misapplied application of a policy. For example, when a child, who has otherwise been a good child (e.g., an Eagle Scout or a straight-A student), is punished for lack of judgment, forgetfulness, or clear ignorance and is expelled or suspended under a zero tolerance policy and school authorities (all adults) claim they had no choice, the child is searching for fairness.<sup>110</sup> However, when as a consequence a school removes the child from the school setting for a number of days, weeks, or even a year, she cannot attend classes with students and teachers to which she has been accustomed, she cannot start or complete work for a semester or critical school year, and she cannot take or reschedule critical exams that affect her future. Ultimately, that child is hurt, harmed, and even confused. If an alternative setting is made available to the child, the teachers may not be addressing this child's specific learning needs or level. If that child has learning difficulties or arrives with stress from family and home situations, that child could benefit from interventions to get on track in her education, but is excluded from the very institution that could and should offer help.<sup>111</sup> Is that child not being abused? Zero tolerance policies, as

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<sup>110</sup> The example here illuminates the criticism that automatic punishments "that do not take into account extenuating or mitigating circumstances, "represent a lost moment to teach children about respect, and a missed chance to inspire their trust in authority figures." *Opportunities Suspended*, *supra* note 32, at 11 (citing Gil Noam, N.Y. TIMES, Dec. 1, 1999). See *Scout Suspended from School*, ATLANTA J. & CONST. 1, May 25, 2000 (Savannah, Georgia, high school student who kept in his car an ax and pocketknife used for Boy Scout activities and cell phone his father gave him for safety, suspended automatically for 10 days, sent to alternative school, and suspended until fall, thereby potentially missing band trip to perform at the White House and chance to study in summer honors program).

<sup>111</sup> Gail Morrison, *'Zero Tolerance' Policies Becoming Sticky Webs* (school psychologist's view that many students who are not aggressive or violent are getting stuck in the zero tolerance web: "While zero tolerance policies provide schools a needed accountability system regarding student behavior, our findings highlight the importance of considering two factors: First, students' misbehavior is the result of a variety of stresses and risks that need to be addressed. Secondly, ordinary, or at times extraordinary, efforts by schools and families can intervene in students' lives before exclusion is

applied, have the record of and continuing potential for detrimental psychological effects when used indiscriminately on students. That is tantamount to child abuse, giving good cause for reform.

### C. Criminalization of Our Youth

Troubled children need treatment and preservation of their educational options, some would argue. However, others would argue troubled children who act out their problems by violent acts in schools need incarceration. Zero tolerance policies have clearly changed the nature of school discipline. In the past, school authorities handled most student discipline primarily and only at the school level or through the school administrative processes. With the enactment of the Gun-Free Schools Act, to receive federal funds the legislature required schools to develop policies “requiring referral to the criminal justice or juvenile delinquency system of any student who brings a firearm or weapon to ... school.”<sup>112</sup> Despite statistics showing a decrease in juvenile crime, the new type of criminal, the “superpredator,” fashioned by politicians and the media in the late 1980s and early 1990s as a response to the then-growing and more brutal crimes committed by a small number of young people, has lived on, as legal researchers have opined.<sup>113</sup>

Student discipline now goes beyond the school administrative processes with increasing frequency to the juvenile justice or adult justice system.<sup>114</sup> Courts now treat

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necessary, helping these students manage the many constraints they face on a day-to-day basis.”), *available at* <http://www.instadv.ucsb.edu/93106/2003/May12/zero.html>. (last visited Mar. 14, 2005).

<sup>112</sup> 20 U.S.C. § 8922 (a)(1994), re-enacted as 20 U.S.C. § 7157(h) (2002). *See also* GA. CODE ANN. § 20-2-756 (2004) (Georgia statute permits the school administration, disciplinary hearing officer, panel of school officials, or local board of education, to report the incident when any alleged criminal action by a student occurs to the appropriate law enforcement agency or officer for investigation to determine if criminal charges or delinquent proceedings should be initiated).

<sup>113</sup> Browne, *supra* note 79.

<sup>114</sup> *Opportunities Suspended*, *supra* note 32, at 13 (finding that school districts “are simply transferring their disciplinary authority to law enforcement

school discipline matters more often in a criminal-like manner, whereas in the past juvenile courts handled these matters like delinquency cases with children enjoying protections for their status, receiving treatment – including education – as opposed to punishment. Now, actions formerly considered childish or adolescent acts, even actions where there is no violence, such as having a pager at school, have taken on or been given criminal definition, along with criminal consequences.<sup>115</sup> Now, instead of addressing discipline of students at the school level, our children are being treated as criminals – in the scheme of the criminal justice system – and without much of the legal protections afforded to adults charged with criminal violations.<sup>116</sup> Most

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officials.” Report further finds that 41 states require schools to report students to law enforcement agencies for various conduct committed in school, fail to monitor implementation of referrals, and “perhaps unintentionally, set off an explosion in the criminalization of children for understandable mistakes or ordinary childhood behavior.”).

<sup>115</sup> Sara Rimer, *Unruly Students Facing Arrest, Not Detention*, N.Y. TIMES, Jan. 4, 2004, at 1 (City and suburban schools nationwide are increasingly sending students to the juvenile justice system for adolescent behaviors such as “shouting at classmates and violating the dress code” that used to be handled by school administrators. Cites a juvenile judge, James Ray, of the Lucas County, Ohio, Juvenile Court: “We’re demonizing children.”); *Parents Say School’s Zero Tolerance Dress Code Too Extreme*, ASSOCIATED PRESS, KTRK-TV Houston (Sept. 23, 2003), available at [http://abclocal.go.com/ktrk/news/92903\\_APstate-dresscode.html](http://abclocal.go.com/ktrk/news/92903_APstate-dresscode.html) (last visited Feb. 13, 2004) (parents complained when Duncanville, Texas, high school zero tolerance student code, which permits suspension of high school students for any violation, including dress code for shirts untucked, resulted in 700 suspensions in the beginning of the school year).

<sup>116</sup> See Cerrone, *supra* note 13, at 164-75 (charting state laws complying with the Gun-Free Schools Act of 1994, all which track the federal law regarding punishment of immediate expulsion of the student is found in possession of a weapon at school and differentiating the state laws on the basis of due process afforded the student from no due process protections to formal due process, including a hearing with the right to cross-examine witnesses). See also *Opportunities Suspended*, *supra* note 32, at 14 (citing concerns in the discipline of students for nonviolent conduct: “In many instances, students are arrested and taken from school without prior notification to parents. Consequently, students may be detained and questioned without understanding their legal rights. There is additional concern that statements made by accused students to school officials may later be used against the, without prior warning, in criminal or juvenile delinquency cases.”).

states, including Georgia, impose harsh sanctions for possession of guns at or near a school, including imprisonment.<sup>117</sup>

*D. Decreased Educational Opportunities and Elevated Dropout Rates*

Students who are suspended or expelled are more likely to drop out of school.<sup>118</sup> Why? The most likely consequence of suspension is additional suspension, and additional suspension leads to expulsion. If expulsion is for a year, this does not necessarily neatly span just one school year. For example, if a child is expelled during the spring of the school year, the one year may run until the spring of the next school year. The child may possibly miss a year in regular school (even if alternative school is provided) and return in the fall of the next year. However, if the expulsion occurs during the fall or winter, the end of the year for which the student is expelled may not so clearly or neatly coincide with the school system's calendar and placement back on the educational track may not be as clear or as smooth.

This is where problems often occur. Perhaps this is a particularly more disturbing consequence for the child who was a good student with academic potential or an otherwise good but "at risk" child who got caught with a zero tolerance violation. Studies have shown students expelled from school under zero tolerance policies get into trouble with the law and get arrested within one year.<sup>119</sup> Getting any student back on track is not easy

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<sup>117</sup> See, e.g., GA. CODE ANN. § 16-11-127.1 (2004); MASS. GEN LAWS ch. 269, § 10(j) (2004); MD. CODE ANN., CRIM. § 36a (2004); MICH. COMP. LAWS ANN. § 750.237(a)(4) (West 2004); MINN. STAT. ANN. § 609.66 (West 2004); N.J. STAT. ANN. § 2c:39-5(3) (West Supp. 1994); N.Y. PENAL LAW § 265.06 (McKinney 1994); WASH. REV. CODE ANN. § 9.41.280 (West 1995). Some states made weapons possession on school property a felony. See ARK. CODE ANN. §§ 5-73-119 (2)(a)-(b) (Michie 1994).

<sup>118</sup> See *Opportunities Suspended*, supra note 32 (citing Lawrence M. DeRidder, "being suspended or expelled is one of the top three school-related reasons for dropping out," *How Suspension and Expulsion Contribute to Dropping Out*, EDU. DIG. (Feb. 1991)).

<sup>119</sup> Linda Bernard & Jeffrey Nutt, *School Expulsion Law Too Costly*, DET. NEWS, Oct. 13, 1994, at 11A; see also WILLIAM S. DAVIDSON ET AL., *ALTERNATIVE TREATMENTS FOR TROUBLED YOUTHS* (Plenum Press 1990).

– particularly if that student was psychologically damaged, entered a growth spurt period and did not feel comfortable in classes with younger students, or the student did not productively spend his time away from school while on expulsion (particularly where no meaningful alternative education was provided).<sup>120</sup> It is easy to conclude that such student is not likely to return to the classroom in the school, but will most likely graduate to the classroom of life. And that life is not likely to be productive or law-abiding, as the lack of education or sellable skills precludes opportunities. In fact, when students are expelled and not in any alternative educational setting provided by the state, they are not subject to the state truancy laws and have limited options outside of those presented in the streets where they may commit crimes against society.<sup>121</sup>

Thus, the short-term effects of zero tolerance policy applications include uneducated, undereducated, unskilled young adults who still must be expected to live productive law-abiding lives. Ultimately, many of them may turn to a life of crime. As a long-term consequence, society loses productive citizens and communities pay the price of incarceration.<sup>122</sup>

In the context of *Brown*, what does this mean? While African-Americans have made some gains since the 1950s in this society, as measured by the indicia of the American Dream – income, homeownership, and education – the gap between their achievements and whites’ achievements are still wide and widening according to recent reports. It is estimated that high school graduation parity of blacks and whites will be reached in

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<sup>120</sup> Browne, *supra* note 79 (“Students face the emotional trauma, embarrassment and stigma of being handcuffed and taken away from school, and later to be placed on an ankle-monitoring device. These youth must then serve time on probation with no slip-ups, whether they are big or small.”).

<sup>121</sup> Bogos, *supra* note 74 (arguing that Michigan’s zero tolerance law mandating expulsion for students possessing guns is an effective short-term solution to school violence but needs a provision guaranteeing an alternative education for such students to be an effective long-term solution for society).

<sup>122</sup> See, e.g., *id.* at 386 (finding that students who get arrested after expulsion from public schools sent to Michigan prisons cost taxpayers more than \$23,000 a year, as opposed to the \$5,000 per student cost; thus state-mandated alternative education programs may still be more fiscally sound and state might require parents to pay a portion of alternative education placements).

2013, six decades after *Brown*, and college graduation parity may not be reached until 2075, over 200 years after the end of slavery.<sup>123</sup> Due to zero tolerance, the education gap is widening even more and that is due to more incidents involving African-American and other minority children than white children.

*E. Racial Profiling of African-American Students – The Disparate Impact of Zero Tolerance Policies*

In celebration of the 50th anniversary of the *Brown* decision, there have been numerous studies, reports, and commentaries on the education of African-American students over the last 50 years. Numerous accounts lead to the same issue and conclusion: School authorities disproportionately target African-American (and Latino) students for discipline.<sup>124</sup> Much like the minority experience in other settings, minority students are subject to racial profiling in the application of zero tolerance policies. In the context of *Brown*'s promise of equal educational opportunity, it is not hard to find that these policies do not further the legal or democratic principles of equal educational opportunity. It is found with clear and convincing evidence that minority students receive more harsh punitive measures (suspension, expulsion, corporal punishment) and less mild

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<sup>123</sup> Betsy Leondar-Wright, *New Report: The State of the Dream, Black-White Gaps Still Wide – Some Even Widening – Since King's Death*, Jan. 15, 2004 (referencing Dedrick D. Muhammad, Attieno Davis, Meizhu Lui and Betsy P. Leondar-Wright, *The State of the Dream 2004: Enduring Disparities in Black and White* (report for United for a Fair Economy, an independent national non-profit), available at <http://www.faireconomy.org> (last visited Mar. 5, 2005), also available at <http://webmail.aol.com/fmsg.adp?folder+SU5CT1g+&uid+8121047> (last visited Mar. 5, 2005).

<sup>124</sup> CHARLES J. OGLETREE, JR., ALL DELIBERATE SPEED: REFLECTIONS ON THE FIRST HALF CENTURY OF BROWN V. BOARD OF EDUCATION 302 (W.W. Norton & Co. 2004); La Griffe du Lion, *Racial Disparities in School Discipline* (June 2001), available at <http://www.lagriffedulion.f2s.com/discipline.htm> (last visited Mar. 5, 2005); La Griffe du Lion, *Closing the Racial Learning Gap* (Jan. 2004), available at <http://www.lagriffedulion.f2s.com/gap.htm> (last visited Mar. 5, 2005).

discipline than their non-minority peers, even controlling for socio-economic status.<sup>125</sup>

Looking closer at the issue, progress for African-Americans after *Brown* and school desegregation has, on the one hand, been defined as greater high school completion, better test scores, greater college enrollment, obtaining a college degree, and career success. However, on the other hand, some would look at other factors:

First, while African-American educational attainment has improved the amount of education needed to have a real chance in life has grown even more. Second, general trends do not reflect how really awful educational conditions are in some schools, in some regions, and for some groups, including African-Americans in urban areas. And third, the gap between white and African-American achievement remains substantial.<sup>126</sup>

Desegregation may not have been the only key to social and economic gains of African-Americans in the last five decades. Educational opportunity has definitely been a key to these gains. It seems imminently clear that with the disproportionate expulsions and suspensions of African-American students from school, African-American families who have benefited from the effects of education after *Brown* may very well lose their gains in social, economic, and community development. Most minority children attend public schools that

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<sup>125</sup> Mark Hornbeck, *Expulsion Rate Worries Schools. Study: African-American Students Kicked Out More Often and for Longer than Whites*, DETROIT NEWS, Feb. 26, 2003 (discussing the Michigan state report for the 2001-02 school year finding that African-American students were expelled from Michigan public schools at almost double the rate of their share of school enrollment), available at <http://www.detnews.com/2003/schools/0302/26/c01-94636.htm> (last visited Mar. 5, 2005).

<sup>126</sup> Harvey, Jr., *supra* note 2, at 1.

are mostly in urban and suburban communities.<sup>127</sup> Even the African-American children who attend private schools cannot escape zero tolerance and racist interpretations of these policies, as “children of color are more likely to be arrested regardless of what school they go to or what the offense might be.”<sup>128</sup> Minority children are clearly being profiled for application of zero tolerance policies and bearing a disproportionate brunt of its effects.<sup>129</sup>

In a recent Michigan study, perhaps the most insightful study to date, the effects of zero tolerance on African-American youths were pronounced.<sup>130</sup> The study verifies the trend that school authorities are expelling African-American children significantly more than other students, with much of this due to

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<sup>127</sup> It has been our observation that urban schools have a host of challenges including less-qualified, less experienced, and more mobile faculty; overcrowding due to less tax support and building new schools; influx of immigrants increasing their population; lack of counselors; lack of mental health professionals and other support services; use of metal detectors; and calling in law enforcement on suspicions and threats.

<sup>128</sup> Browne, *supra* note 79.

<sup>129</sup> Bobby Iafolla, *School to Prison Pipeline* (New “zero tolerance” approaches to discipline have almost doubled the number of students suspended annually in the last 30 years, from 1.7 million to 3.1 million, while the total number of students enrolled in elementary and high schools has stayed flat since 1970 - at about 50 million. Minorities have been disproportionately punished. According to the Department of Education's Office of Civil Rights, black students are 2.6 times more likely to be suspended than white students. The Department of Education's Office of Special Education Programs showed a similar racial inequality in the percentage of students suspended for more than one day from 1972 to 2000. For white students, the percentage rose from 3.1 percent to 5.09 percent; for black students, it rose from 6 percent to 13.2 percent.), *available at* <http://www.weeklydig.com/dig/content/3765.aspx> (last visited Sept. 11, 2003).

<sup>130</sup> CENTER FOR EDUCATIONAL PERFORMANCE & INFORMATION, SCHOOL SAFETY PRACTICES REPT., 2001-2002 SCHOOL YEAR (the official Michigan agency that collects and analyzes school data), *available at* <http://www.michigan.gov/cepi/0,1607,7-113-990-58152--,00.html> (last visited Mar. 5, 2005); Appendix, School Safety Practices Report, 2001-2002, *also available at* [http://www.michigan.gov/documents/Appendix\\_58206\\_7.pdf](http://www.michigan.gov/documents/Appendix_58206_7.pdf) (last visited Mar. 5, 2005).

zero tolerance policies.<sup>131</sup> The Center for Educational Performance and Information, Michigan's state agency that collects and analyzes school statistics, issued its report for the 2001-02 school year on expulsions, which were not consistently defined throughout the state and, in effect, may be considered generally as "any time a child is sent home from school for misbehavior."<sup>132</sup> The report found black students in Michigan public schools are expelled at a rate nearly double their share of the population and for longer periods than their white classmates.<sup>133</sup> Black students, who make up about 20 percent of the students in Michigan, received 38 percent of all expulsions.<sup>134</sup> More than 60 percent of those tossed out of school were expelled for at least 180 days.<sup>135</sup> By comparison, white students, who are 73 percent of the state's student body, were

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<sup>131</sup> Hornbeck, *supra* note 125. Michigan schools statewide reported 16,793 physical assaults, 975 weapons found on school property, 101 suicide attempts and two drive-by shootings during the year. Four students died -- three from suicide and one from natural causes. There were 375 bomb threats, 113 arsons, 2,923 larcenies and 3,076 cases of vandalism. The report says that while the cumulative numbers appear frightening, most districts in the state reported a low number of crime-related incidents. "Given the data that was reported, schools are relatively safe places to be for our students," said Lani Gerst Elhenicky, spokeswoman for the Center for Educational Performance and Information. "This is a first-time report that should help policy makers and get people to start looking at what happens in schools." Other data in the report show: of those expelled, 35 were caught with handguns and 260 were kicked out for having other dangerous weapons. Also, 350 were expelled for physical assaults and 304 for drug violations. Ninth-graders were expelled most often, accounting for one-quarter of all expulsions. Follow-up reports show a quarter of students were not referred to any alternative school or other program or agency after being expelled. Property damage from school vandalism cost \$1 million during the year.

<sup>132</sup> *Id.*; CENTER FOR EDUCATIONAL PERFORMANCE & INFORMATION, SCHOOL SAFETY PRACTICES REPT., 2001-2002 SCHOOL YEAR 26 (the official Michigan agency that collects and analyzes school data), *available at* <http://www.michigan.gov/cepi/0,1607,7-113-990-58152--,00.html> (last visited Mar. 5, 2005); Appendix, School Safety Practices Report, 2001-2002, *available at* [http://www.michigan.gov/documents/Appendix\\_58206\\_7.pdf](http://www.michigan.gov/documents/Appendix_58206_7.pdf) (last visited Mar. 5, 2005).

<sup>133</sup> CTR. FOR EDUC. PERF. & INFO., *supra*, note 130, at 22-23.

<sup>134</sup> *Id.* at 22.

<sup>135</sup> *Id.* at 17.

tagged with 54 percent of expulsions, and over half were short term, or less than 180 days.<sup>136</sup>

Recognizing African-American students are disproportionately affected by zero tolerance, national civil rights leaders and organizations, such as the Rev. Jesse Jackson's P.U.S.H. (People United to Save Humanity), have become involved in defending these children against zero tolerance cases.<sup>137</sup> Rev. Jackson, most notably, shed light not only on the racial implications, but also the tremendous problems of zero tolerance when he became involved in a case in Decatur, Illinois, when seven black high school students were expelled after a brief fight (17 seconds) at a football game in which there were no guns, drugs, weapons, or injuries.<sup>138</sup>

In a South Carolina case where the local S.W.A.T. team terrorized students, and at the principal's invitation searched the students with guns and a drug-sniffing dog, the ACLU investigation found that while black students made up less than a quarter of the student body, two-thirds of the 107 students caught in the sweep were black.<sup>139</sup> The ACLU took up the students' case after opining that the Decatur, South Carolina, school system racially targeted these students. It filed a federal suit against the police and school officials on the basis of constitutional violations against unreasonable search and use of excessive force and sought damages and an injunction against future raids.<sup>140</sup> Zero tolerance enforcement is clearly a civil

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<sup>136</sup> *Id.* at 22-24.

<sup>137</sup> *Fuller v. Decatur Pub. Sch. Bd. Of Educ. Sch. Dist. 61*, 78 F. Supp. 2d 812 (C.D. Ill. 2000) (students expelled for two years for "gang-related" fight in the bleachers during high school football game).

<sup>138</sup> Bob Wing & Terry Kekeher, *Zero Tolerance: An Interview with Jesse Jackson on Race and School Discipline*, 3(1) *Color Lines* (Spring 2000), available at [http://www.arc.org/C\\_Lines/CLArchive/story3\\_1\\_01.html](http://www.arc.org/C_Lines/CLArchive/story3_1_01.html) (last visited Mar. 5, 2005).

<sup>139</sup> ACLU, *South Carolina Students Were Terrorized by Police Raid With Guns and Drug Dogs, ACLU Charges* (Dec. 15, 2003), available at <http://www.aclu.org/Page/PressRel/p031215cp.html>.

<sup>140</sup> *Carl Alexander Jr. v. Goose Creek Police Dep't.* was filed by the ACLU on behalf of the plaintiffs in the U.S. District Court, Charleston Division, in South Carolina in 2003.

rights issue – perhaps the most compelling issue to be addressed in the context of *Brown* in the new millennium.<sup>141</sup>

*F. The Impact on Students With Disabilities*

The Gun-Free Schools Act of 1994, while providing no direction on due process for most students subject to school discipline, did refer to adherence to the Disabilities Education Act, which required some procedural safeguards for students with disabilities.<sup>142</sup> While specific application of zero tolerance policies to students with learning disabilities, or so-called “special education” students, is beyond the scope of this discussion, it is important to recognize that zero tolerance policies are tempered to some extent by application of laws for learning disabled children.<sup>143</sup> However, in reality, many children may have unaddressed learning disabilities.

Expulsion results in the denial of educational services, presenting specific legal as well as ethical dilemmas for students with disabilities.<sup>144</sup> Children in the educational system who fight an uphill battle against their learning disabilities may be further discouraged from learning because of misapplied discipline. In either case, zero tolerance policies have disproportionately and adversely impacted students with disabilities.<sup>145</sup>

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<sup>141</sup> See, e.g., National Association of Secondary School Principals, *Statement on the Civil Rights Implications of Zero Tolerance Programs before the United States Commission on Civil Rights*, Feb. 18, 2000 (advocating that discretion is needed to ensure equal treatment of students), available at [http://www.principals.org/publicaffairs/ps\\_zero\\_tol.html](http://www.principals.org/publicaffairs/ps_zero_tol.html) (last visited Feb. 13, 2003).

<sup>142</sup> 20 U.S.C. § 1400 et seq. (2000); see 10 U.S.C. § 8923 (1994).

<sup>143</sup> See e.g., *Magyar v. Tucson Unified Sch. Dist.*, 958 F. Supp. 1423 (D. Ariz. 1997).

<sup>144</sup> *Opportunities Suspended*, supra note 32, at 11-18.

<sup>145</sup> *Id.* Appendix II, Legal Protections for Students Facing Zero Tolerance Policies, for legal bases for challenging zero tolerance applied to students with learning disabilities.

*G. Costs To Society*<sup>146</sup>

Congress via state legislatures and local school authorities achieved today's zero tolerance policies, rooted in federal legislation aimed at stemming violence caused by guns at schools, through the tie to federal funding for public schools. Clearly, there are costs associated with these policies – real, increasing, and great economic costs to society – beyond the social costs of psychological abuse to school children and erosion of the understanding and appreciation of American democratic principles created by zero tolerance policies. This is not just a problem for a few children in a few communities. It is a problem for many children and many communities – urban, suburban, and rural. It is a problem for all children in all communities. Zero tolerance policies are eroding the American dream because they are complex, costly, and generally ineffective.<sup>147</sup> The costs are foreboding and should be contained.

What are the costs? How are they compounded? How do you determine them today and tomorrow? Here, there are, perhaps, two distinct cost areas. The first area includes the direct and consequential costs to society of supporting an uneducated, undereducated, or unskilled person. The second area is the cost to local school systems for zero tolerance enforcement.

In 1998, a Vanderbilt University economist, Prof. Mark A. Cohen, calculated the cost to American taxpayers of a young person who drops out of high school and enters a life of crime and drugs. Those costs amounted at present value to between \$1.7 million and \$2.3 million.<sup>148</sup> The costs to society for the

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<sup>146</sup> Thanks to Dr. Willie Belton, Professor at Economics, Georgia Institute of Technology, for his helpful insights into this issue.

<sup>147</sup> National Association of School Psychologists, *Zero Tolerance and Alternative Strategies: A Fact Sheet for Educators and Policymakers*, available at [http://naspcenter.org/factsheets/zt\\_fs.html](http://naspcenter.org/factsheets/zt_fs.html) (last visited Mar. 5, 2005).

<sup>148</sup> See National Center for Juvenile Justice's invoice for one lost youth to the American public, adaptation of Cohen's *The Monetary Value of Saving a High-Risk Youth*, J. of Quantitative Criminology, 14(1), in *Juvenile Offenders and Victims: 1999 National Report* (Pittsburgh, PA; National Center for Juvenile Justice, 199), p.82. (Categories of the invoice included: crime for juvenile and adult career, drug abuse, and costs imposed for the high school

support of an uneducated, undereducated, and unemployed person could initially include public support (welfare and job training) and unemployment payments (where the person may have been employed). Secondary, or perhaps consequently, costs for uneducated young people occur when those who cannot find or do not seek legal work encounter the juvenile or adult justice system and, most likely, “graduate” to the adult penal system. Third, there are costs for increased funding for the juvenile justice system (courts, detention centers, and alternative programs), as schools are dumping the cases formerly handled by the school administrative system into the juvenile justice system.<sup>149</sup> The exact amount America spends on juvenile justice is not known, but available data estimates the cost of juvenile courts and correction to be in excess of between \$10 billion and \$15 billion a year, a growing figure despite the drop in juvenile crime since 1993.<sup>150</sup>

Fourth, there are the costs of graduating uneducated or undereducated people from the juvenile justice system to the expanding adult criminal justice system, adult prison system, and educating or training them for the world of work. Notably, there are less available jobs for uneducated or undereducated people in a world with more reliance on technology and its attendant required education and skill. Additionally, American companies have been exporting jobs for both skilled and unskilled workers, due in part to the higher cost of American labor.

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dropout. The largest “expenditures” calculated included costs for crime victims, criminal justice, resources devoted to the drug market, and lost wage productivity.), invoice *available at* <http://www.ncjrs.org/html/ojjdp/nationalreport99/toc.html> (last visited Mar. 14, 2005).

<sup>149</sup> See Rimer, *supra* note 115 (finding few statistics available, but anecdotal evidence from juvenile judges and court administrators in Ohio, Virginia, Kentucky, and Florida are “complaining that their courtrooms are at risk of being overwhelmed by student misconduct cases that should be handled in schools”).

<sup>150</sup> Richard A. Mendel, *Less Hype, More Help: Reducing Juvenile Crime, What Works -- and What Doesn't*, YOUTH POLICY FORUM 50 (2000) (hereinafter *Less Hype, More Help*), *available at* <http://www/aypf.org/Mendel/index.html> (last visited Mar. 14, 2005).

These conditions present economic and social challenges. They contribute to the widespread phenomena of uneducated, undereducated, unskilled, and unemployed youth turning to a criminal life, or in the now familiar and widely-used terminology, these young people are on “the school to prison pipeline” or “schoolhouse to jailhouse track.”<sup>151</sup> Children who are being pushed out of schools because of criminalization of their behavior under zero tolerance are ending up in prison.<sup>152</sup> And, unmistakably, minority youths – particularly African-Americans – are treated more harshly than white youths at every step of the justice process and are paying the price with their lives discounted, and ending up in prison.<sup>153</sup>

The second cost area for zero tolerance enforcement is to the school systems. What are the costs to the schools systems? How can these costs be identified and quantified? Tracing the possibilities and steps of enforcement helps to identify cost areas.

Generally, school discipline cases are first handled administratively within the school system – from the principal’s office to a hearing authority (hearing officer, administrative judge, school board). However, cases originating in the school are now often sent to the state juvenile court system in lieu of or in addition to going primarily through the administrative process,

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<sup>151</sup> Iafolla, *supra* note 129; Browne, *supra* note 79.

<sup>152</sup> See THE INTOLERABLE BURDEN (First Run/Icarus Films 2003). This documentary, directed by Chea Prince and produced by Constance Curry, documents the educational experiences of the youngest eight of thirteen rural Mississippi sharecroppers’ children, the only black children who integrated white public schools in response to a “freedom of choice” plan designed by the school board in compliance with the Civil Rights Act of 1964 and the massive white resistance then and now giving rise to the school to prison pipeline in Drew, Mississippi.

<sup>153</sup> Mendel, *supra* note 150, at 61 (African-American youth constitute only 15 percent of the U.S. population ages 10 to 17, but they account for: 26 percent of juvenile arrests nationwide; 30 percent of delinquency referrals to juvenile courts; 33 percent of delinquency cases formally petitioned (i.e., charged) in juvenile courts; 40 percent of juveniles committed to out-of-home placements by juvenile courts; 46 percent of juveniles waived to criminal court; and 60 percent of juveniles serving time in adult prisons (citing *Juvenile Offenders and Victims: 1999 National Report* 192 (Pittsburgh, PA: National Center for Juvenile Justice, 1999)).

and may require the involvement of teachers and administrators. This increased adjudication costs taxpayers. If the child is not returned to the school system and is of compulsory school age, the child must be educated in the child detention system or in an alternative setting if the school system so permits.<sup>154</sup> If the child is adjudicated as an adult (because state law permits or requires waiver to the adult system), is found guilty, and is of compulsory education age, the child must be educated in either an isolated juvenile detention facility or in the adult penal system.

If a public school system litigates a disciplinary matter, the costs to the school system as identified by a leading attorney who represents school boards include: (1) loss of time from distraction by litigation for school officials from their other duties – litigation related tasks and in public relations; (2) serious public perception concerns; (3) damages and insurance concerns, particularly where insurance contains a reservation of rights measure and where school districts are self-insured; and (4) attorneys fees and court costs.<sup>155</sup> The full and actual cost of school discipline to taxpayers is as yet unknown, but it is real and merits further evaluation. Public funds could be better spent educating and uplifting tomorrow's citizens through educational systems more focused on educational opportunity than punishment.

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<sup>154</sup> If the child is not placed in an alternative education setting or committed to the juvenile or adult system and is of compulsory education age, the child's options are another public school system, private, or parochial school, or home schooling or no school. Placement in private or parochial school and in another public school system is made more difficult because most state laws require or permit the child's education records, including disciplinary records, to be transferred to the new school. *See, e.g.*, GA. CODE ANN. § 20-2-751.2 (2004).

<sup>155</sup> *See* David M. Pederson, *A Homemade Switchblade Knife and A Bent Fork: Judicial Place Setting and Student Discipline*, 31 CREIGHTON L. REV. 1053, 1102-04 (1998).

### III. Challenges to Zero Tolerance Policies and the Georgia Case for Reform

Zero tolerance school discipline policies, for the reasons set forth herein, in much of their present forms and applications must be challenged and changed. The first question posed in this section is whether the policies, as they stand, successfully meet their purpose – curbing and deterring school violence. Since zero tolerance emanated largely from federal legislation and was extended through state and local policies, it is helpful to examine whether the present climate is favorable for change and the opportunities for federal and state legislative changes. Along these lines, since policies are being developed to challenge or ameliorate the negative aspects and effects of zero tolerance, it is helpful to take a look at the actions of advocacy groups in this area and others as well as alternative student discipline measures that are on the horizon that may add some promise for change. Finally, a case in point is offered to shed additional light on this subject: Georgia and its zero tolerance policies, its cases, and its need and opportunity for challenges and change.

#### A. *Is Zero Tolerance Effective?*

Is zero tolerance effective for its purported purpose – to deter, curb, and prevent school violence? There is no or little evidence that removing students from school makes a positive contribution to school safety.<sup>156</sup> There has been an increasing rate of suspensions and expulsions throughout the country,<sup>157</sup> even though school violence generally has been stable or declining.<sup>158</sup> If the schools, which are often the safest places

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<sup>156</sup> Ashford, *supra* note 31 (whether zero tolerance policies make schools safe depends on how many and how often students bring weapons to school and whether the policies can reduce those numbers).

<sup>157</sup> OFFICE OF JUVENILE JUSTICE & DELINQUENCY PROGRAMS, U.S. DEP'T. OF JUSTICE, JUV. JUST. BULL., JUVENILE ARRESTS 2000, Washington, D.C.

<sup>158</sup> Mendel, *supra* note 150 (reporting that juvenile crime remains a critical concern in our society. However, the facts are: 1) In recent years, juvenile crime rates have gone *down*, not up; by 1998 (latest data available), the juvenile homicide rate had declined by 52 percent from its 1993 high - bringing the youth murder rate to its lowest level since 1987. The combined rates for all serious violent offenses (murder, rape, robbery, and aggravated assault) declined 32 percent for youth ages 15-17 from 1994-98 and 27

children can be during a day, are not kept safe by virtue of these policies, then why are they maintained?

In the late 1990s, there were several well-publicized and disturbing incidents of school violence in which a number of people died and were wounded, most notably in Columbine, Colorado, and Conyers, Georgia. However, this is not the norm. Some of the lessons learned from these dramatic incidents demonstrate that zero tolerance policies may have done little to prevent or curb the violence. One scholar found common threads in the demographics of multiple-victim school shootings but no one factor.<sup>159</sup> Some of the common attributes of cases of school

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percent for children 14 and under two). Juvenile crime rates did soar in the late 1980s and early 1990s, but even at the peak only a tiny fraction of youth were involved in serious violence. In 1992, for instance, five percent of juveniles ages 10-17 were arrested, and only nine percent of these arrests were for a violent offense. Thus, less than one-half of one percent of juveniles were arrested for a violent offense in 1992 (or any other year). 3) Crime is not getting younger: 10-12 year-olds' percentage of all juvenile violent crime arrests has remained at or near eight percent for 15 consecutive years. While very young offenders often receive intense media attention, they account for only a small (and stable) percentage of juvenile crime. 4) Despite intense media coverage of school shootings in Columbine and other communities over the past three years, there is no school violence epidemic. The number of people killed in school violence episodes has dropped by more than 50 percent over the past six years. In a nation with roughly 50 million school children, only 26 people died in school violence during the 1998-99 American school year, less than one-third the number of Americans (88) who were killed by lightning in 1996.).

<sup>159</sup> Cerrone, *supra* note 13, at 148-49. ("The most unsettling incidents of school gun violence have been chillingly similar. Their description is crucial to developing an understanding of the type of behavior that should be targeted by the law and eliminated altogether. The profile has been described as follows: 'A deeply troubled student. An unresolved grievance, real or imagined. No clue how to handle the anger or pain. A breakdown or rejection of parental supervision. Access to guns.'") (citing Matthew Hay Brown et al., *Why Do Kids Kill? Contrary to Perceptions, School Violence is Not Rising. But Amid a Shocking Spate of Multiple Schoolyard Killings, A Profile of Child Killers is Emerging*, HARTFORD COURANT, Mar. 26, 1998, at A1); Randall Sullivan, *A Boy's Life, Part 2*, 796 ROLLING STONE, Oct. 1, 1998, at 46. Most of the recent incidents of weapons violence in schools have involved multiple-victim school shootings by white teenagers in rural communities or small towns. The most dangerous and destructive students have fit this profile: They have been 'depressed boy[s] of above-average intelligence, who suffered an inferiority complex and [were] enthralled by violent images from

violence are: (1) a deeply troubled student who is clinically depressed and suicidal, (2) white males in rural communities or small towns, (3) a breakdown or rejection of parental supervision, and (4) access to guns.<sup>160</sup>

Despite common stereotypical beliefs by some about urban school children and African-American children, the profile of a gun-toting student who was likely to go on a killing rampage was not an urban black male, but was more likely to be a rural or small town white male who had readier access to guns.<sup>161</sup> Studies show that while zero tolerance policies may give some public assurances that something was being done to curb school violence, they really had little effect.<sup>162</sup> Additionally, a recent national study that monitors prior health risk behaviors that contribute to the leading causes of death, disability, and social problems among youths and adults in the United States, indicates there has been no change in most behaviors that contribute to

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film or television.’ (citing Lynne Lamberg, *Preventing School Violence: No Easy Answers*, 1998 JAMA 404 (Aug. 5, 1998).

<sup>160</sup> Cerrone, *supra* note 13, at 149.

<sup>161</sup> According to a 1996 poll by Louis Harris & Associates, Children in rural settings have a ‘far readier access to guns than black urban youths. *See id.* (citing Matthew Hay Brown et al.). *See also* American Psychological Association Report on Violence and Youth, identifying four factors contributing to youth violence as: 1) early involvement with drugs and alcohol; 2) easy access to weapons, especially handguns; 3) association with anti-social, deviant peer groups; and 4) pervasive exposure to violence in the media. AM. PSYCHOL. ASSN. COMM. ON VIOLENCE & YOUTH, REPORT ON VIOLENCE & YOUTH (1993). Other common reasons associated with teenage weapons violence include: 1) the breakdown of the family unit, and 2) exposure of children to violence and mature subject matter at increasingly earlier ages. Michael D. Resnick et al., 278 JAMA 823, at 1 (Sept. 10, 1997), *available at* 1997 WL 13337815.

<sup>162</sup> Mendel, *supra* note 150, at 36-37 (finding zero tolerance policies do not reduce juvenile crime. “After peeling rhetoric from hard fact, the evidence reveals that the alarming forecasts and hyperbolic commentary so commonplace during the 1990s were irresponsible and misplaced. Juvenile crime is not rising inexorably, violent acts are not being committed by ever-younger children, and our schools are not being overrun by a cadre of lawless and desperate teen menaces. Most important, there is no evidence that the current and coming generation of people is any less moral or more violence-prone than young people of earlier generations.”).

youth violence from 1991 to 2003 in the United States.<sup>163</sup> Is there any outcry to change federal zero tolerance legislation? Would state and local authorities be amenable to changes?

*B. The Climate Today for Reform of Zero Tolerance Policies: Is a Retreat from Zero Tolerance Policies Possible? Who Will Lead the Charge? What are the Federal and State Possibilities for Reform? What Other Reforms are Possible?*

Public policy cannot be viewed in a vacuum. If, as asserted herein, it is a time to change zero tolerance policies, is there real hope for such change? Is there legal precedent that is supportive? Is the political climate favorable to changing public policy as it regards school discipline?

Zero tolerance policies that have developed and been applied now for over a decade may be ripe for change as the experiences with them have revealed their inefficacy, as well as their effects. Several policy issues have surfaced that impact the climate for change. But most notably, two factors arguably have the greatest impact: (1) the movement away from mandatory sentencing guidelines and (2) the USA PATRIOT Act and other anti-terrorist measures.

Developed and expanded during the same era as Congress and state legislatures enacted federal and state mandatory sentencing guidelines requiring judges to sentence adult offenders found guilty or who pleaded guilty to set punishments, zero tolerance was the “get tough on crime” measure for youthful offenders.<sup>164</sup> As mandatory sentencing guidelines removed judicial discretion from the exclusive purview of judges and prosecutors, fashioned on Congressional

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<sup>163</sup> CTRS. FOR DISEASE CONTROL & PREVENTION, U.S. DEP'T OF HEALTH & HUMAN SERVS., NATIONAL YOUTH RISK BEHAVIOR SURVEY: 1991 – 2003 (finding trends in youths 9th through 12th grade in public and private high schools throughout the U.S. for these risk factors: 1) Carried a weapon, decreased, 1991-1997, no change, 1997 – 2003; 2) Carried a gun, decreased, 1993 – 2001, no change, 2001 – 2003; 3) In a physical fight, decreased 1991 – 2003; 4) Injured in a physical fight, no change, 1991 – 2003; and 5) Attempted suicide, no change, 1991-2003), *available at* <http://www.cdc.gov/yrbss> (last visited Mar. 5, 2005).

<sup>164</sup> *See, e.g., Mendel, supra* note 150, at 1.

and state legislatures' beliefs on what the public wanted, zero tolerance policies took away the perception that punishment should fit the crime so the public and school environment could feel safe. In removing the judge's opportunity to evaluate an individual's character, proclivity for recidivism, future criminal behavior, and potential for rehabilitation in setting appropriate punishment, public policy did not appear to be based on any hard data or value the rights of the individual involved.

After years of experiencing mandatory sentencing guidelines, the American Bar Association's Justice Kennedy Commission – appointed by President Dennis Archer, the first African-American ABA President – recommended, and the House of Delegates approved, repealing mandatory minimum sentences, providing for guided discretion in sentencing and other measures. This was done to ensure federal “sentencing systems provide appropriate punishment without overreliance on incarceration.”<sup>165</sup> With the influential and powerful ABA looking thoroughly at mandatory sentencing and adopting resolutions for broad reform, the criticisms of mandatory sentences have been clearly heard. The Kennedy Commission found: mandatory sentences have not deterred or reduced crimes, especially drug-related crimes; prisons are overcrowded with inhumane conditions; there is a need for new and larger detention facilities, which have attracted the interest of the private sector; warehousing of criminals (adult and youth) is now a growth industry and provides economic development opportunities for poor, rural communities; and there is gross

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<sup>165</sup> ABA, Justice Kennedy Comm'n., *Reports with Recommendations to the ABA House of Delegates* (Aug. 2004) available at <http://www.abanet.org/crimjust/kennedy/JusticeKennedyCommissionReportsFinal.pdf> (last visited Mar. 5, 2005). The four sets of recommendations, approved by ABA House of Delegates, addressed: 1) punishment, incarceration, and sentencing; 2) racial and ethnic disparity in the criminal justice system; 3) clemency, sentence reduction, and restoration of rights; and 4) prison conditions and prisoner reentry. It was recommended that there be guided discretion in sentencing, consistent with *Blakely v. Washington*, 542 U.S. 1174 (2004), “while allowing courts to consider the unique characteristics of offenses and offenders that may warrant an increase or decrease in a sentence.”

racial discrimination in the criminal justice system.<sup>166</sup> Thus, mandatory sentencing and waiver by statute or prosecutorial permission or discretion of youthful offenders who commit certain crimes to the adult criminal justice system, added to zero tolerance policy enforcement, clearly demonstrate that today's youths are on the prison pipeline. They are disproportionately African-American males.<sup>167</sup>

The events of September 11, 2001, (9/11) when terrorists attacked America, caused many Americans, perhaps too readily, to relinquish individual freedoms for the perceived benefits of increased security and antiterrorism measures, such as those covered by the USA PATRIOT Act.<sup>168</sup> Many would opine that our individual liberties have been eroded by national intelligence measures that permit identification, racial and ethnic profiling, warrantless personal searches, use of wiretapping and access to private records, among other things, by government intelligence agencies in the interest of personal and national security.<sup>169</sup> School security procedures were heavily increased around the country after the Columbine shooting in 1999, even though gun violence had been a serious problem in urban schools long preceding that incident. School security has also likely been

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<sup>166</sup> *Id.*

<sup>167</sup> See Johanna Wald, *The Failure of Zero Tolerance*, Aug. 29, 2001, available at [http://dir.salon.com/mwt/feature/2001/08/29/zero\\_tolerance/index.html?pn=2](http://dir.salon.com/mwt/feature/2001/08/29/zero_tolerance/index.html?pn=2) (last visited Mar. 5, 2005).

<sup>168</sup> The Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 (USA PATRIOT Act) was signed into law by President Bush on October 26, 2001. The Act involved numerous changes to U.S. laws which significantly increased surveillance and investigative powers of many government agencies. For example, the Act lowered the standard to obtain a court order to conduct foreign surveillance, allowed "roving" wiretaps to be applied to a particular person rather than a particular telephone, and provided authorities investigating national security threats enhanced access to certain records, including library records.

<sup>169</sup> See American Civil Liberties Union, at <http://www.aclu.org> (last visited Mar. 5, 2005) (supporting rights to privacy and opposing the PATRIOT Act, which allows, among other things, FBI access without a warrant or probable cause, to medical, student, and credit records). See also *FAHRENHEIT 9/11* (Miramax Films 2004) (motion picture documentary about President George W. Bush's administration in post-9/11 America).

stepped up in the war on terrorism's all-around climate of fear and security. Given the overall national climate at this juncture, there would not appear to be much support for a return to the era when schoolchildren were allowed to "sow their wild oats" and not suffer serious consequences for their violations of school rules, not to mention, violent acts.

While recent developments may bode well for a climate favorable for reforming zero tolerance policies, "it is not unlikely that zero tolerance policies will disappear anytime soon, nor is it clear that they should."<sup>170</sup> School violence and drug use, while not as widespread or common as believed, are still no longer unusual occurrences in schools, be they urban, rural, suburban, private, or parochial. Weapons, particularly handguns, are readily available and instructions for making bombs and using explosives are also readily available on the Internet.

What then are public policies that would salvage our children's future educational opportunities and divert them from the prison track? The federal government – Congress and President George W. Bush – appear to have already spoken loudly on this issue with the enactment and support of No Child Left Behind Act of 2001, which incorporates and clarifies zero tolerance policies and gives directions to the states regarding federal education policies that support school safety measures.<sup>171</sup> Absent repeal of all zero tolerance measures, some of the public

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<sup>170</sup> Wasser, *supra* note 67, at 773.

<sup>171</sup> No Child Left Behind Act of 2002, Pub. L. No. 107-110, 115 Stat. 1425 (2002), codified at 20 U.S.C. §§ 6301-6578. Included in the No Child Left Behind Act of 2001 were the amendments to the Safe & Drug-Free Schools & Communities, Title IV, Part A, which included new programs with appropriations, including grants, for: community service for expelled or suspended students; a school security and technology resource center; a national center for school and youth safety; grants to reduce alcohol abuse; grants for mentoring programs; and local plans for safe and drug-free schools. It also included new accountability requirements of reporting individual schools' truancy rates and frequency, seriousness and incidences of violence, and drug-related offenses, as well as prevention programs. U.S. DEP'T OF EDUC., PRELIMINARY OVERVIEW OF PROGRAMS AND CHANGES INCLUDED IN THE NO CHILD LEFT BEHIND ACT OF 2001, *available at* [http://www.ed.gov/nclb/overview/intro/progsum/sum\\_pg3.html#readingfirst](http://www.ed.gov/nclb/overview/intro/progsum/sum_pg3.html#readingfirst) (last visited Mar. 14, 2005).

policy options described hereinafter include: (1) increasing and clarifying administrative discretion, (2) encouraging greater evaluation of student intent, and (3) mandating statewide alternative educational programs. Additionally, to supplement zero tolerance student disciplinary policies, measures – such as peer reviews, mediation, and restorative justice schematics – could be added to provide optional support for dealing with appropriate infractions of student codes. Finally, the option to maintain the status quo and do nothing remains, based on belief that any change would undermine zero tolerance.

What then can be suggested and expected from the states as reforms to zero tolerance policies? Some advocates for zero tolerance reforms might urge policy makers to look at school violence from ethical, moral, metaphorical, psychological, and legal stances and weigh the severity of the student's act against the amount of permissible harm in determining punishment.<sup>172</sup> Some lawmakers may take a neutral, yet potentially helpful, position by relegating reform to a study committee.<sup>173</sup> Some lawmakers may assume the intransigent posture and make no reforms to zero tolerance statutes.<sup>174</sup>

It has been suggested that good public policy reforming zero tolerance would guard against the most pernicious effects of zero tolerance policies, provide for access to education for those who violate student discipline policies, and address the disparate

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<sup>172</sup> See, e.g., Edward G. Rozycki, *School Violence, Punishment, and Justice*, available at <http://mywebpages.comcast.net/erozycki/SchoolViolence.html> (last visited Mar. 5, 2005).

<sup>173</sup> Former state legislator, former superior court judge, and child advocate, Bettianne Hart, Esq. (Appellate Division Chief, Fulton County District Attorneys Office), suggested in a conversation with the author on July 14, 2004, that because numerous laws affecting juveniles in Georgia -- such as, age restrictions on drivers licenses, curfews, establishment of paternity, and legitimation of children by teenage parents -- interact with the rights of schoolchildren, a comprehensive study should be undertaken or supported by the Georgia Legislature in considering zero tolerance reform.

<sup>174</sup> See Kim L. Hooper, *113<sup>th</sup> General Assembly: Bill to Restore Student, Parent Rights Shelved*, INDIANAPOLIS STAR, Jan. 29, 2004 (Indiana Legislature refused to pass and sent proposed bill to summer study committee that would require schools to allow students and parents legal representation during expulsion hearings and allow them to appeal expulsions in the courts), available in 2004 WL 16605564.

treatment of students of color.<sup>175</sup> Additional suggestions that would appear to positively affect student discipline and preserve safe schools include: (1) using penal code definitions of guns, knives, and drugs versus administrative interpretations; (2) creating disciplinary guidelines for administrators, permitting discretion based on students' grades, disciplinary record, and age but narrowing the scope of discretionary operation; (3) designating less severe remedies for K-5 offenders; (4) creating harsher penalties for weapons use versus mere possession on school property; (5) providing alternative education and requiring the disciplined student to attend these programs; (6) encouraging schools and districts to administer punishments equally, based on reported and analyzed data collected, especially with regard to race, ethnicity, and gender and giving schools incentives to self-monitor and self-correct disparate treatment; (7) investing in teacher development to appropriately discipline students and manage classrooms; and (8) mobilizing resources for violence prevention.<sup>176</sup> Each of these measures addresses the criticisms of inequitable and ineffective discipline policies.

Legislators who find it is time to curb irrational, unfair, and inequitable school discipline under zero tolerance laws might merely propose more specificity. They might find helpful the three-tiered approach to student discipline adopted by Texas, described as:

There, legislation sets out three levels of violations and the appropriate responses, ... At the most serious level are four offenses that merit expulsion: bringing a gun, bringing a knife with a blade long enough to reach the heart, bringing drugs the nature and amount of which could constitute a felony, and aggravated assault. Students expelled for these reasons are required to attend a county alternative school.

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<sup>175</sup> Wasser, *supra* note 67, at 774.

<sup>176</sup> *Id.* at 774–78.

At the second level, offenses including simple assault, misdemeanor drug possession, use of alcohol and a few other violations net the student temporary removal from school. Students are required by state law to attend an alternative setting in their own school district and are required to complete their normal school work.

At the lowest level are offenses for which school officials have discretion to determine the severity of the offense and the punishment.<sup>177</sup>

Lawmakers might also advocate for state policies that address the children's best interests by taking into account the psychological issues relative to school discipline and consider the measures to make a sensible school discipline policy suggested by school psychologists.<sup>178</sup> Such measures, particularly in controlling guns in schools, school psychologists have found include: (1) receiving input from the community, parents, teacher, and principals, regarding standards for acceptable and unacceptable behavior; (2) deciding how to treat gray areas (e.g., how to treat toy or unloaded guns); (3) allowing principals discretion in enforcing the policy; (4) including an appeals process, with prompt referral to a hearing officer to avoid having a child stay in an alternative setting; and (5) reviewing school disciplinary policies each year to determine if areas need clarification or revision.<sup>179</sup>

It is also important to add that although federal and state statutes mandate school disciplinary policies, there are still a lot of local differences in the policies and in enforcement, and the differences matter. Because today's students and families are quite mobile and the need for education so critical, a strong case can be made for state-level policy changes that call for more

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<sup>177</sup> See Margaret Graham Tebo, *Zero Tolerance, Zero Sense: School Violence is a Hot-Button Issue But are Strict, Inflexible Policies the Answer? Some Say Yes, While Others Insist That All-Or-Nothing Punishment Merely Alienate Students*, 86 A.B.A J. 40, 46 (Apr. 2000).

<sup>178</sup> See Rebecca Jones, *Absolute Zero*, 184 (10) AM. SCH. BOARD. J., 29-31 (1997).

<sup>179</sup> McAndrews, *supra* note 30.

uniformity in local student discipline policies. Thus, children in rural, suburban, and urban school districts and their families could be on notice and conform to policies that meet their needs and provide for school safety without regard to where they live or attend school.

Additionally, it may be time to involve the community directly in student discipline – the village, so to say. This approach is advocated by those who wish to reform zero tolerance by adding alternative dispute resolution measures that take away (or allow sharing of) the responsibility of educators and administrators for student discipline.<sup>180</sup> Perhaps this approach is the answer for some educators who do not want to determine which incidents and students pose real threats to school safety, claiming they are already overburdened with the social problems students bring to school.<sup>181</sup> Thus, leading child advocates suggest the use of an independent community group, such as a committee of independent decision-makers – child psychologists, student peer leaders, or peer juries.<sup>182</sup>

There is growing support for supplementing zero tolerance with such other alternative disciplinary measures for appropriate school discipline infractions. The case for restorative justice and other forms of alternate dispute resolution within the school community and outside the court system has formed from the belief that zero tolerance policies are so entrenched in the American psyche that there is no changing them and only alternatives, such as restorative justice, are possible.<sup>183</sup> Restorative justice “demands focus on restoration of the community” with its goal as responding to “reparation for the

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<sup>180</sup> Christina L. Anderson, *Double Jeopardy: The Modern Dilemma for Juvenile Justice*, 152 U. PA. L. REV. 1181, 1204-1219 (2004).

<sup>181</sup> Tebo, *supra* note 177.

<sup>182</sup> *Id.* (referring to Prof. Bernadine Dohrn’s, of the Children and Family Justice Center at Northwestern University School of Law, recommendations that school disciplinary measures be fair, equitable, and individualized, and who recommends using peer juries to hear disciplinary cases, setting up smaller schools where all students are known to adults in charge, removing guns from children’s environments, creating high-quality alternative schools to accommodate students who must be expelled, and keeping schools open until 6 p.m. for extracurricular programming).

<sup>183</sup> Anderson, *supra* note 180, at 1182.

injuries the offense has caused” and requires that “the justice process devote as much attention to those injured by crime – both individual victims and the community—as to the offender.”<sup>184</sup> Advocates have also recommended victim-offender mediation, another form of restorative justice, to supplement zero tolerance.<sup>185</sup>

Other advocates have advanced another alternative to zero tolerance policies: a holistic approach, to strike a balance with the interests of students, educators, and the courts, to create violence-free schools that are still free. This approach attacks “the economic, sociological, and psychological aspects of the problem, rather than just pursuing draconian legal and constitutional remedies with untold future societal effects.”<sup>186</sup> Similarly, as regards gun control in school, one writer in the aftermath of the fatal school shootings in Columbine, Colo., suggested the involvement of the entire community is required to fashion a disciplinary solution that will work.<sup>187</sup>

Other supplemental approaches to zero tolerance include violence prevention and planning, which some educators believe can break the cycle of violence in school.<sup>188</sup> Additionally, efforts

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<sup>184</sup> Haft, *supra* note 76, at 805 (citing GORDON BAZEMORE & LODE WALGRAVE, *RESTORATIVE JUVENILE JUSTICE: REPAIRING THE HARM OF YOUTH CRIME* 59 (1999)).

<sup>185</sup> Haft, *supra* note 76, at 807-11. But, he finds limitations should be set in the school setting for victim-offender mediation and recommends students should not generally serve as mediators because of the imbalance of power with regard to the victim, who may be further victimized by the process. Similar problems of power exist for student mediators, who may also have issues of competence, in that they may be unaware of the legal implications of an offender’s action.

<sup>186</sup> Victoria J. Dodd, *Students Rights: Can We Create Violence-Free Schools That Are Still Free?* 34 *NEW ENG. L. REV.* 623, 633 (Spring 2000).

<sup>187</sup> Diana Degette, *When the Unthinkable Becomes Routine*, 77 *DENV. U. L. REV.* 615, 617 (2000) (urging that the common sense solution to controlling the use of guns in public schools was not one clear-cut solution fitting “every case into a pre-determined box” but a recognition that “each person is a part of the solution” and that in this nation of weapons, to succeed solutions must embrace the entire community on a common ground – Congress, parents, neighbors, clergy, schools, school leaders, health professionals, law enforcement officials, community initiatives and weapons manufacturers).

<sup>188</sup> Ashford, *supra* note 31.

like conflict resolution, behavior management, screening, and early identification of troubled children, coupled with implementation of effective discipline plans to deal with disruptive behaviors – including behavior support teams and individualized responses, emergency and crisis planning – should be included in the scheme.<sup>189</sup> Violence awareness and reduction curriculum should also be a component.<sup>190</sup>

Changes to zero tolerance policies have been brought about because of the efforts of many individuals and a growing number of advocacy groups that have been working to reform or eradicate them. These groups include parent groups, educators, school psychologists, and other mental health professionals.<sup>191</sup> Attorneys have collectively weighed in on all sides. Those supporting ameliorative changes to strict school discipline policies include the American Bar Association, Lawyers Committee on Civil Rights, The Advancement Project, and The Harvard Civil Rights Project.<sup>192</sup> This cause has been championed by groups along the entire spectrum of political thought, from the conservative Rutherford Institute to the more liberal American Civil Liberties Union. Civil rights groups, including the Southern Regional Council and the Rev. Jesse Jackson's P.U.S.H. (People United to Save Humanity), have been actively involved, particularly when the disciplined students are African-Americans and their attention has made the issues and harms of

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<sup>189</sup> R. Skiba & R. Peterson, *The Dark Side of Zero Tolerance*, 80 PHI DELTA KAPPAN 372-78 (1999).

<sup>190</sup> See Loraine Thompson, *One Incident is Too Many: Policy Guidelines for Safe Schools*, SSTA Research Report # 94-05 (1999), at [http://www.ssta.sk.ca/research/school\\_improvement/94-05.htm](http://www.ssta.sk.ca/research/school_improvement/94-05.htm) (Canadian approach).

<sup>191</sup> See NAT'L ASS'N. OF SCH. PSYCHOLOGISTS *Zero Tolerance and Alternative Strategies: A Fact Sheet for Educators and Policymakers*, at [http://www.naspcenter.org/factsheets/zt\\_fs.html](http://www.naspcenter.org/factsheets/zt_fs.html). See also John H. Holloway, *Research Link: The Dilemma of Zero Tolerance*, 59 Educ. Leadership 4 (Dec. 2001-Jan. 2002), at <http://www.ascd.org>.

<sup>192</sup> A.B.A. *Votes to Oppose School 'Zero Tolerance' Policies*, A.B.A. Press Release (Feb. 19, 2001), at <http://www.abanet.org/media/feb01/zerotolerance.html>; see also ABA *Opposes 'Zero Tolerance' Policies*, 61 OR. ST. B. BULL. 53 (2001).

zero tolerance nationally known.<sup>193</sup> Because school discipline cases are mostly reported in local and national media and not legal journals, individuals and advocacy groups have effectively connected to work on changes to these policies.<sup>194</sup>

There may not be currently a huge groundswell of support nationwide for a complete retreat from zero tolerance policies. It would, however, appear that the word is out that these policies have not only fueled the war on our youths in school, but that even in some of the worst cases of student behavior, the costs to society of not educating our youth are too great. While there is limited support for a total eradication of zero tolerance policies, at least as they address firearms and controlled substance drugs, a growing number of advocates support many of the suggested changes discussed herein. The question now is whether those supportive of and able to make changes see the urgency, so that our children of today, whose childhood is not long, may enjoy the opportunities of a future as educated people.

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<sup>193</sup> See *Fuller v. Decatur Pub. Sch. Bd. Of Educ. Sch. Dist. 61*, 78 F. Supp. 2d 812, 826 (C.D. Ill. 2000), *decision aff'd on other grounds*, 251 F.3d 662, (7<sup>th</sup> Cir. 2001), the case impacted by Rev. Jackson and his civil right's organization's (P.U.S.H.) involvement. Applying Illinois law, the court rejected claims of African-American high school students expelled based on their participation in a gang-related fight in the bleachers during high school football game that their procedural and substantive due process rights were violated through the school board's adoption of a zero tolerance policy toward violence, since such policy had not been used against other students; The Rutherford Institute, a civil liberties organization, provides free legal services to people whose constitutional and human rights have been threatened or violated, including students' rights, has provided representation to several students expelled or suspended under zero tolerance policies. Rutherford Institute Litigation Report, at

[http://www.rutherford.org/resources/litigation\\_report.asp](http://www.rutherford.org/resources/litigation_report.asp).

<sup>194</sup> See, e.g., Zero Tolerance Nightmares, at [www.ztnightmares.com](http://www.ztnightmares.com) (a collection of accounts submitted by parents, students and community members collected on the website); Linda Starr, *Stop Tolerating Zero Tolerance*, Education World (Apr. 16, 2002), at [http://www.education-world.com/a\\_issues/issues303.shtml](http://www.education-world.com/a_issues/issues303.shtml) (educator's Internet newsletter account); End Zero Tolerance, at <http://endzerotolerance.com> (a website whose mission is "to be a comprehensive and up-to-date national resource for those interested in learning more about the negative impact of Zero Tolerance upon students, families and society.").

### C. Challenges to Zero Tolerance in the Courts

For the past decade, reported cases involving zero tolerance policies were largely in the local or national media, not in the law books, as school discipline cases frequently made the headlines in local media outlets, through the wire services and Internet sources. Many accounts concerned a student who had been disciplined in a questionable manner that seemingly did not fit the student's act; the stories on violent acts by students seemed shorter and the discipline less questionable.<sup>195</sup> Where the discipline was "unfit," the media followed the student's case through its resolution, and often editors weighed in on the side critical of the fairness of the discipline meted out to the student under the zero tolerance policy.<sup>196</sup> In many cases, the school board or committee upheld the disciplinary action; in fewer cases it seemed the school authority treated the student fairly; and in even fewer cases did the matter reach a court.<sup>197</sup>

There are relatively few reported court cases involving school discipline, probably for several reasons. School discipline matters are primarily handled in administrative proceedings that have usually been unreported, at least in traditional written legal reports.<sup>198</sup> The courts in which juveniles usually appear are not

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<sup>195</sup> Christian Science Monitor, *Zero Sense?* (Mar. 16, 1998), at <http://www.csmonitor.com/durable/1998/03/16/edit/edit.2.html>; Neil Steinberg, *Fad for 'Zero Tolerance' Is Leaving a Moral Void*, CHI. SUN-TIMES (May 17, 1998), at <http://www.oblivion.net/news/9805/980517il.html>; Sally Kalson, *Let's Deep-Six Zero Tolerance*, POST-GAZETTE (Nov. 4, 1998), at <http://www.post-gazette.com/columnists/19981104kalson.asp>; Laura Green, *Zero Tolerance has its Limits: A Student's Suspension is Cut So His School Won't Lose Money*, HERALD-TRIBUNE (Feb. 13, 2003), at <http://www.heraldtribune.com/apps/pbcs.dll>; Christine Wolff, *Has Zero Tolerance in Schools Gone Too Far? Kids' Violence May Be Causing Overreaction*, CINCINNATI ENQUIRER (May 22, 1999), at [http://enquirer.com/editions/1999/05/22/loc\\_has\\_zero\\_tolerance.html](http://enquirer.com/editions/1999/05/22/loc_has_zero_tolerance.html); Kari Lydersen, *Zero Tolerance for Teens* (July 1, 2003), at <http://www.alternet.org/story/16305>.

<sup>196</sup> See *supra* note 64.

<sup>197</sup> See *infra* note 198.

<sup>198</sup> See, e.g., *P.H. v. Bd. of Educ. Of the Borough of Bergenfield*, EDU #7381-00 (2000) [decided by commissioner of education], at [http://www.edlawcenter.org/ELCPublic/StudentRights/SRPPublications/PH\\_merits.htm](http://www.edlawcenter.org/ELCPublic/StudentRights/SRPPublications/PH_merits.htm) (New Jersey Commissioner of Education concluded from both a

courts of record. Additionally, it may be posited that few families can bear the expense of litigating these matters that may involve difficult constitutional claims and require attorneys. Few cases have reached the courts, but those cases that have been litigated demonstrate the common law, statutes, facts, and theories used to uphold zero tolerance applications.<sup>199</sup>

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legal and educational policy perspective that a student permanently expelled student for slashing another student's coat with a box-cutter and for possession of four box-cutters and a Swiss army knife must be provided with an alternative education program until age 19. The Commissioner stressed "the importance of providing educational services to students who present serious disciplinary problems" although it may be more challenging, it is "more imperative that we fulfill our responsibilities to these children both for their sake and for society's."); Alternative education was extended until age 20 in a subsequent opinion on December 3, 2003, at [http://www.edlawcenter.org/ELCPublic/elcnews\\_031209\\_StateBoardRuling.htm](http://www.edlawcenter.org/ELCPublic/elcnews_031209_StateBoardRuling.htm).

<sup>199</sup> *Goss v. Lopez*, 419 U.S. 565 (1975). Students facing temporary suspensions from public school are protected by the due process clause; these protections include the right to receive written or oral notice of the charges against them and the opportunity to present their version of what happened to cause the suspension.

Students expelled for **weapons possession or use**: *Bundick v. Bay City Indep. Sch. Dist.*, 140 F. Supp. 2d 735 (S.D. Tex. 2001) (finding student's expulsion for having a machete at school was reasonable and wrote interesting analysis of intent and scienter.); *Colvin v. Lowndes County, Miss. Sch. Dist.*, 114 F. Supp. 2d 504 (N.D. Miss. 1999) (remanding case upon finding violation of disabled child's rights under IDEA, where child was expelled for bringing Swiss army knife to school.); *Doe v. Superintendent of Schs. of Worcester*, 653 N.E.2d 1088 (D. Mass. 1995) (ruling that the state did not have to provide an alternative education to a student who brought to school a lipstick case that contained a small knife blade); *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).

Students expelled for **speech, expression or writings** in violation of school discipline policies: *Doe v. Pulaski County Special Sch. Dist.*, 306 F.3d 616 (8th Cir. 2002) (eighth-grader expelled for writings unsuccessfully challenged zero tolerance policy based on First Amendment.); *Doe v. Pulaski County Special Sch. Dist.*, 263 F.3d 833 (8th Cir. 2001) (court found no first amendment violation by school's expulsion of student who wrote a threatening note to former girlfriend); *Demers v. Leominster Sch. Dep't.*, 263 F. Supp. 2d 195 (D. Mass. 2003) (eighth-grader's § 1983 constitutional rights of free speech, privacy, and due process were not found violated, where

Court challenges to student discipline may be counterintuitive in that time is often of the essence as regards the student involved because quick positive resolution of the matters at the local level would permit the student to do what students are supposed to do, namely, return to school. However, because the students may have no appeal, or lose their appeal either at the administrative level or in court, there may be no return to school,

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on request of school officials he drew pictures school found threatening in light of his history and parents sent him to a private day school).

Students expelled for making **terroristic threats**: *Brian A. v. Stroudsburg Area Sch. Dist.*, 141 F. Supp. 2d 502 (M.D. Pa. 2001) (student's case against school district for permanent expulsion for making terroristic bomb threat was dismissed.) *But see Murphy v. Ft. Worth Indep. Sch. Dist.*, 258 F. Supp. 2d 569 (N.D. Tex. 2003) (student successfully challenged zero tolerance policy on procedural due process basis for making alleged terroristic threats).

Student expelled for **conspiracy to commit violent acts**: *Remer v. Burlington Area Sch. Dist.*, 286 F. 3d 1007 (7th Cir. 2002) (student lost procedural and substantive due process challenges to 4-year expulsion due to involvement in conspiracy to commit violent acts on officials from which he withdrew.)

Students expelled for **drug use or possession**: *Ratner v. Loudoun County Pub. Schs.*, 16 Fed. Appx. 140, 2001 WL 855606 (4th Cir. 2001) (where concurring opinion states that middle school student, suspended for knife possession, failed on his challenge to zero tolerance policy based on due process under § 1983); *Wagner v. Fort Wayne Comty. Schs.*, 255 F. Supp. 2d 915 (N.D. Ill. 2003) (Dismissing on school district's summary judgment motion middle school student's civil rights challenge under § 1983 to expulsion for bringing caffeine pills to school and distributing them to other students; court found no violation of student's substantive or procedural due process rights, no impermissible vagueness of rule against improper use of over-the-counter medication, and no violation of student's equal protection rights where other students merely suspended for taking the pills); *Rinker v. Sipler*, 264 F. Supp. 2d 181, (M.D. Pa. 2003) (upholding search and seizure under zero tolerance where student was suspended for marijuana use); *Hammock v. Keys*, 93 F. Supp. 2d 1222 (S.D. Ala. 2000) (student expelled after marijuana found in her car).

Students expelled for **fighting**: *Fuller v. Decatur Pub. Sch. Bd. Of Educ. Sch. Dist. 61*, 78 F. Supp. 2d 812, 823 (C.D. Ill. 2000) (applying Illinois law) (rejecting claims of African-American high school students expelled based on their participation in a gang-related fight in the bleachers during high school football game that their procedural and substantive due process rights were violated through the school board's adoption of a zero tolerance policy toward violence, since such policy had not been used against other students.).

particularly if the student is permanently expelled, has no alternative education provided, and reaches the age above compulsory education.<sup>200</sup> Others simply may not return to school for a wide variety of reasons. They may have fallen behind in their lessons and cannot catch up or complete the semester's work, or they are older and entered the work world, or were referred to the juvenile or adult criminal justice system.

Although state and local authorities derived and fashioned their own zero tolerance school discipline policies from federal gun control legislation, Congress did not provide any statutory constraint on the federal courts to review cases. Zero tolerance discipline statutes and policies are not uniform and there is no one way to litigate challenges to them or to articulate upholding them. However, the Supreme Court in a series of opinions has articulated a standard for federal court review of local school board decisions and there is significant judicial deference to local authorities.<sup>201</sup> Legal attacks on zero tolerance statutes, rules, or policies may depend on the judicial arena in which the case is litigated – federal or state courts or before other bodies. The argument against application of zero tolerance may hinge on whether there is a violation of the student's rights on the basis of the federal or a state's constitution.

The standards of a court reviewing public school decision-making may be rooted in state law. For example, in Nebraska the state district court may review whether the substantial rights of the student may have been prejudiced by a board decision if it is:

- (1) In violation of constitutional provisions;
- (2) In excess of the statutory authority or jurisdiction of the board;
- (3) Made upon an unlawful procedure;

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<sup>200</sup> See, e.g., *D.B. v. Clarke County Bd. of Educ.*, 469 S.E.2d 438 (Ga. Ct. App. 1996). Most expulsions happen in ninth grade. At this time, students are 14 or 15 and if disciplinary actions are unresolved or not favorably resolved, the student may reach the age above compulsory education and not return to school.

<sup>201</sup> Pederson, *supra* note 155, at 1054.

- (4) Affected by other error of law;
- (5) Unsupported by competent, material, and substantial evidence in view of the entire record as made on review; or
- (6) Arbitrary or capricious.<sup>202</sup>

Clearly children have fewer rights than adults, and while in school children do not have the same rights as they might have in other settings.<sup>203</sup> In accord with federal court articulations, courts give tremendous deference to school officials in determining the appropriate treatment of children who violate school policies, as part of their overall responsibility for education. However, with this deference, it may be argued, comes a greater “responsibility of educational administrators to consider the social and educational consequences of the policies.”<sup>204</sup>

While only a brief discourse is provided herein on the legal challenges to zero tolerance under the U.S. Constitution, it appears these challenges generally contain allegations that the state or local authorities’ actions violate the student’s rights to: (1) procedural due process under the Fourteenth Amendment, (2) substantive due process under the Fourteenth Amendment, and (3) equal protection under the Fourteenth Amendment. Other federal constitutional challenges may be that the policy should be rendered void for vagueness or that it is overbroad.<sup>205</sup> Depending on the facts of the case, it might be asserted that due to the state’s actions the student is denied the right to an education, there has been an infringement on the student’s First Amendment rights, or there has been an infringement on their Seventh Amendment rights against illegal search and seizure.

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<sup>202</sup> *Id.* (citing NEB. REV. STAT. § 79-291 (2004)).

<sup>203</sup> *See Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 655-66 (1995).

<sup>204</sup> Haft, *supra* note 76, at 800.

<sup>205</sup> *See Opportunities Suspended*, *supra* note 32 (*see* Appendix II, Legal Protections for Students Facing Zero Tolerance Policies, for a more detailed legal discourse on challenges to zero tolerance policies).

Starting with *Tinker v. Des Moines Independent School District*<sup>206</sup> in 1969, the Supreme Court permitted judicial scrutiny of school authorities' disciplinary decisions and stated its rule for substantial deference to the authority of the local school officials. *Goss v. Lopez*<sup>207</sup> is the seminal case on the rights of students to procedural and substantive due process in school disciplinary proceedings. In *Goss v. Lopez*, the Fifth Circuit held that because suspension or expulsion deprives a student so completely of his or her property interest to attend school and has such great potential for negatively impacting the child both when receiving punishment and later in life, such punishment can only be imposed if accompanied by the procedural safeguards guaranteed by minimum due process.<sup>208</sup> The Supreme Court in *Goss v. Lopez*, however, while indicating formal procedures beyond mere notice and opportunity to be heard may be required for expulsions or long-term suspensions, failed to express more guidance on the issue. In a later case, *Board of Curators of the University of Missouri v. Horowitz*,<sup>209</sup> the Supreme Court held less stringent procedural due process applied to academic dismissals than to disciplinary expulsions, but said nothing more about long-term expulsions or suspensions for disciplinary violations.

Generally, the courts will uphold a school board's decision to expel or suspend a student unless there is a showing the school board acted in an "unconstitutional, illegal, arbitrary, capricious, [or] unreasonable" manner, or in a manner "unsupported by a preponderance of the evidence."<sup>210</sup> As held in

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<sup>206</sup> 393 U.S. 503 (1969). (student's expulsion for wearing black arm bands in protest of Vietnam War violated his rights of free speech under the First Amendment because school officials had no reason to anticipate such action would substantially interfere with the school's work or other students' rights).

<sup>207</sup> 419 U.S. 565 (1975).

<sup>208</sup> *Id.*

<sup>209</sup> 435 U.S. 78 (1978).

<sup>210</sup> *Legal Rights of Children*, *supra* note 29, § 24.11 (citing *Bd. of Educ. of Rogers, Ark. v. McCluskey*, 458 U.S. 966 (1981), *reh'g denied* 458 U.S. 1132 (1981)).

*Wood v. Strickland*,<sup>211</sup> school officials are not held personally liable under Title 43 U.S.C. § 1983 for violating students' constitutional rights, thereby enjoying a qualified immunity from personal liability and vested with substantial discretion to interpret their own policies. Notably, the *Wood* majority imposed personal liability only on school officials with impermissible intentions.<sup>212</sup> This would occur if the school official knew or reasonably should have known the action he or she took within his or her sphere of responsibility would violate the constitutional rights of the affected student or injure another student.<sup>213</sup>

Further in *Ingraham v. Wright*,<sup>214</sup> the Supreme Court held the cruel and unusual punishment clause of the Eighth Amendment did not apply to corporal punishment imposed as school discipline.<sup>215</sup> Although the case involved a liberty interest, due process did not require a hearing before a school authority could administer corporal punishment.<sup>216</sup> If students could be beaten or whipped without constitutional protections, their person and property were certainly without protection in and around public schools. Thus, in *New Jersey v. T.L.O.*,<sup>217</sup> the Supreme Court held that while the Fourth Amendment prohibited unreasonable searches and seizures conducted by public school officials, the standard for authorizing searches in public schools was reasonableness in inception and scope, a less rigorous standard than in criminal settings. Thus, the Court held that under ordinary circumstances, the school official's search of a student would be justified at its inception "when there are reasonable grounds for suspecting that the search will turn up evidence that the student has violated or is violating either the law or the rules of the school."<sup>218</sup> The Court said the search

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<sup>211</sup> 420 U.S. 308 (1975) (Two Mena, Arkansas, students expelled for spiking the punch at meeting at school of an extracurricular organization attended by parents at students).

<sup>212</sup> *Id.* at 322 .

<sup>213</sup> *Id.*

<sup>214</sup> 430 U.S. 651 (1977).

<sup>215</sup> *Id.*; See Pederson, *supra* note 155 (discussing a line of cases).

<sup>216</sup> *Wright*, 430 U.S. at 682.

<sup>217</sup> 469 U.S. 325 (1985).

<sup>218</sup> *Id.* at 342.

would be permissible in scope when the measures adopted by the school officials are reasonably related to the objectives of the search and not excessively intrusive in light of the student's age and sex and the nature of the offense.<sup>219</sup> Note that the requirement of a warrant for permissible criminal searches and seizures is absent. However, the majority of the Court at that time found public school searches and seizures required probable cause (however low it may be).<sup>220</sup> The *T.L.O.* decision is important not only for its definition of a public school student's rights under the Eighth Amendment:

[B]ut it also marks a clear recognition by the Supreme Court that the courts have no business weighing the relative importance or lack of importance of a particular school disciplinary rule. This function is a function committed to local school officials.<sup>221</sup>

In the opinion in *Bethel v. Fraser*,<sup>222</sup> the Court strayed even further from its prior articulations in *Tinker* that students do not shed their constitutional rights at the schoolhouse door and *Goss*'s recognition of some minimum due process rights.<sup>223</sup> Here, the Court upheld a student's three-day suspension for giving a nomination speech for a fellow student laden with sexual metaphor and thus removing his name from potential graduation speakers.<sup>224</sup> The school officials found the speech obscene in its traditional meaning as violating the school district's rule, which prohibited any conduct that materially and substantially interferes with the educational process, including the use of obscene language.<sup>225</sup> The Court did not rely on an analysis of the facts under the *Tinker* standard, but concluded the school board did have the authority to decide what was appropriate speech in the school. Here, again, while *Fraser* did

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<sup>219</sup> *Id.* (upholding search of 14-year-old female high school student for cigarettes and later finding evidence of possession of marijuana).

<sup>220</sup> See Pederson, *supra* note 155, at 1053.

<sup>221</sup> *Id.* at 1076

<sup>222</sup> 478 U.S. 675 (1986).

<sup>223</sup> *Id.*, *Goss v. Lopez*, 435 U.S. 78 (1975).

<sup>224</sup> *Bethel*, 478 U.S. at 685.

<sup>225</sup> *Id.* at 675, 679.

not completely overrule *Tinker*, the Court's ruling demonstrated the constitutional rights of public school students are not the same as adults' rights in other settings.

In a more recent case, *Vernonia School District 47J v. Acton*,<sup>226</sup> the Supreme Court found individualized suspicion of drug use in public schools was not necessary before drug testing of student athletes was permissible. Here the Court upheld the validity of the school district's policy authorizing random urinalysis drug testing of students who participate in a school district's athletic programs. This case may be cited for recognizing that public school officials stand not merely in *loco parentis* for students but exercise their duties as state actors. While students have constitutional rights in schools, those rights are fewer. They may properly be diminished by the state adult officials who have authority over their education without intrusion by anyone, even the courts or their own parents who have turned them over to the state to be educated. In the context of permissible school searches, as articulated by Justice Scalia in writing the Court's opinion in *Vernonia*, "[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."<sup>227</sup>

If imposition of zero tolerance discipline is viewed as a civil rights issue, as suggested by two leading scholars,<sup>228</sup> and particularly if there are racial issues, then challenges may be brought on the basis of equal protection in the Fourteenth Amendment and Title VI of the Civil Rights Act of 1964. These both prohibit discrimination on the basis of race, color, and national origin. Due process challenges on the basis of vagueness have been generally ineffective.<sup>229</sup> Clearly, there are many

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<sup>226</sup> 515 U.S. 646 (1995).

<sup>227</sup> *Id.* at 665.

<sup>228</sup> Daniel J. Losen & Christopher Edley Jr., *The Role of Law in Policing Abusive Disciplinary Practices: Why School Discipline Is a Civil Rights Issue*, 230–55, in *Zero Tolerance* (William Ayers, Bernardine Dohrn & Rick Ayers eds., The New Press 2001).

<sup>229</sup> See *Myers v. Arcata Union High Sch. Dist.*, 75 Cal. Rptr. 68 (1969) (high school district governing board's "dress policy" concerning hair styles, which provided that "extremes of hair style are not acceptable," found

avenues for legal challenges, and to preserve a child's right to an education, the appropriate challenges should be vigorously pursued.<sup>230</sup>

*D. The Case For A Challenge:  
Georgia And Zero Tolerance*

Some might argue that education for Georgia children has come a long way from the 1950s when school segregation was the law, to *Brown*-mandated desegregation and a defiant Georgia Gov. Eugene Talmadge, who fired anyone wishing to follow that Supreme Court order.<sup>231</sup> My journey to the study of

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unconstitutionally vague and standardless, thus violating the student's freedom of expression under the First and Fourteenth Amendments. The court went on to say: "The importance of an education to a child is substantial; see, e.g., *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954)), and the state cannot condition its availability upon compliance with an unconstitutionally vague standard of conduct." *Id.* at 69.

<sup>230</sup> Insley, *supra* note 22 (author reviews scholarship on school disciplinary matters and zero tolerance policies, further explores the viability of several legal approaches and negative effects of zero tolerance policies, and concludes that even if the policies violate no federal or state laws, they warrant serious reevaluation and reform).

<sup>231</sup> See, e.g., Langston Hughes, leading African-American poet, from LANGSTON HUGHES, *Selected Poems of Langston Hughes*, 572-73 (Arnold Rampersad ed., Alfred A. Knopf, Inc. 1983):

**Governor Fires Dean**

I see by the papers  
Where Governor Talmadge get real mad  
Cause one of Georgia's teachers  
Thinks Democracy ain't bad.  
The Governor has done had him  
Kicked plumb out of school  
Just because the that teacher  
Believes in the Golden Rule.  
Governor Talmadge says that white folks  
And black folks cannot mix  
Unless they want to put  
The sovereign State of Georgia  
In an awful kind of fix.  
The Governor says equality  
(Even just in education)  
Is likely to lead us all  
Right straight to ruination –  
So I reckon Governor Talmadge

zero tolerance policies started with my involvement with the NAACP's Legal-Education Project in the mid-1980s, when this civil rights organization took a community approach to providing information and training for representing children in school discipline matters. I then traversed the topic during my two-year stint as a pro hac juvenile court judge during the mid-1990s. At that time, my awareness of the growing convergence of student discipline cases and juvenile justice actions increased, as I noticed more cases in the Fulton County Juvenile Court involving student actions in their schools. I also noticed school officials who, while not condoning the acts of the students involved, were willing to advocate for some leniency for the children due to the student's academic achievement, school leadership, and need for educational opportunity.

The Juvenile Court of Fulton County, based in the City of Atlanta and then led by now television Judge Glenda Hatchett along with local bar leaders, was exerting a good deal of effort to keep children in school through such efforts as the Atlanta Bar Association's Truancy Project. However, the increase in cases coming from school situations to the juvenile court was a signal for me that our efforts were being undermined. There seemed to be an increasing outcry to criminalize the acts of students occurring in schools or stemming from school-related situations.

Around this time in 1995, Georgia enacted its version of the Gun-Free Schools Act by mandating immediate expulsion for at least 12 months when a student is determined to have brought a weapon to school.<sup>232</sup> It also added to the federal definition of weapon; gave the local board of education the authority to modify the expulsion requirement on a case-by-case basis; provided for placement in alternative education by a hearing officer, tribunal, panel, superintendent or local board of

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Must be a Hitler man  
Cause that's just what Hitler'd say  
If he ruled the land.  
Ain't it funny how some white folks  
Have the strangest way  
Of acting just like Hitler  
In the U.S.A.?

<sup>232</sup> GA. CODE ANN. § 20-2-751 (1995).

education; and respected the rights of students with disabilities.<sup>233</sup> Georgia had in place a 1979 school discipline statute, which these requirements supplemented.<sup>234</sup>

Also within this timeframe, two Georgia school cases caught my attention, one in which the Georgia Court of Appeals held that permanent expulsion from a school system was acceptable and the Supreme Court of Georgia denied further appellate review.<sup>235</sup> Both cases involved African-American children, which I found particularly troubling because of the importance of education to the child, the community, this state, and to our society. In this effort to shed light on what I know is the underlying cause for the school to prison pipeline in Georgia, it is my hope that all Georgia public school students, particularly African-American students, have rights that the white man is bound to respect<sup>236</sup> and that the growing intolerance for children – often young African-American males, many of school age, and now characterized as “predators” – be curbed.<sup>237</sup> The two decisions were handed down in the first half of 1996, right before Atlanta was to host the summer Olympic Games and the state was to welcome the world. These cases addressing school discipline in Georgia are particularly insightful of the law and policies in this state, evidence racial profiling, and perhaps demonstrate the disregard for maintaining educational opportunities for Georgia children.

In the first case, *D.B. v. Clarke County Bd. of Educ.*,<sup>238</sup> D.B., a 12-year-old girl, sued the school board raising the issue of whether the school board could lawfully expel her permanently from a county’s public schools.<sup>239</sup> Here, D.B. possessed a knife on school property after a fight in which she

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<sup>233</sup> GA. CODE ANN. §§ 20-2-751(a), 20-2-751.1 (1995) (adding to the “Public School Disciplinary Tribunal Act,” enacted in 1979).

<sup>234</sup> GA. CODE ANN. § 20-2-750 (2004) (The Public School Disciplinary Tribunal Act).

<sup>235</sup> *D.B. v. Clarke County Bd. of Educ.*, 469 S.E.2d 438 (Ga. App. 1996); *C.B. v. Driscoll*, 82 F.3d 383 (11th Cir. 1996).

<sup>236</sup> *Plessy v. Ferguson*, 163 U.S. 537, 563 (1896) (Harlan, J., dissenting).

<sup>237</sup> Kari Lydersen, *Zero Tolerance for Teens* (July 1, 2003), at <http://www.alternet.org/rights/16305>.

<sup>238</sup> *D.B.*, 469 S.E.2d at 438.

<sup>239</sup> *Id.*

stabbed another student. An administrative disciplinary hearing was held, after which a *de novo* evidentiary hearing took place.<sup>240</sup> The local school board unanimously voted to permanently expel D.B. and, after appealing to the State Board of Education and the Superior Court unsuccessfully, D.B. appealed to the Court of Appeals.<sup>241</sup> She claimed the punishment was unlawful and her due process rights were violated because she did not have notice of permanent expulsion. The Court of Appeals held permanent expulsion for disciplinary reasons was not contrary to the law because the constitutional right to a free public education may be limited; Georgia laws and the local board policy did not prohibit permanent expulsion; and there was no violation of the state's compulsory attendance law.<sup>242</sup> The court found the student was notified that permanent expulsion was possible and permissible because the school board code of conduct put students on notice.<sup>243</sup> The code states that for weapons infractions "the principal will recommend to the disciplinary hearing officer that the student be expelled" and defines expulsion as "losing the privilege of continuing school for the remainder of the grading period, year, *or longer*."<sup>244</sup>

In the second Georgia case, *C.B. v. Driscoll*,<sup>245</sup> a case under 42 U.S.C. § 1983 from the Middle District of Georgia – an area not near metropolitan Atlanta and perhaps more representative of the real Georgia – the Eleventh Circuit defined the rights of public school students in Georgia. The plaintiffs were two minors, T.P. and C.B., at Greene-Taliaferro Comprehensive High School. The defendants were the former high school principal (Driscoll) and superintendent (Corry). The district court granted summary judgment to the defendants and the Eleventh Circuit affirmed the summary judgment "in light of

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<sup>240</sup> *Id.* at 439.

<sup>241</sup> *Id.*

<sup>242</sup> *Id.* at 440.

<sup>243</sup> *Id.* at 439-40.

<sup>244</sup> *Id.* at 441 (emphasis supplied by court); *See also* GA. CODE ANN. § 20-2-751 (1) (1995), the statute which was in effect at the time and at present provides: "Expulsion" means expulsion of a student from public school beyond the current school quarter or semester."

<sup>245</sup> 82 F.3d 383 (11th Cir. 1996).

the exceedingly limited rights of public school students facing school discipline.”<sup>246</sup>

Here, plaintiff T.P. in a fight at the school failed to calm down, re-attacked another student, screamed obscenities and threats, and continued her acts into the principal’s office where she injured the principal.<sup>247</sup> The police took her to the police station and her mother retrieved her.<sup>248</sup> Driscoll discussed the matter over the telephone with her mother and suspended T.P. for up to nine days. There was no formal hearing prior to the suspension. T.P. was enrolled in a neighboring school district.

As regards plaintiff C.B., another student told the assistant principal Johnson that C.B. was going to make a drug sale at school. Another student told Johnson that C.B. hid the drugs in his coat. Johnson and Driscoll went to C.B., asked him to empty his pockets, and found what appeared to be marijuana. They had a conference with C.B.’s grandparents and referred the case to the police for investigation and testing of the substance. The school did not suspended C.B. at this time. Driscoll met with a Georgia Bureau of Investigations agent. The school then suspended C.B. for nine days for having a look-alike illegal substance and assigned to an alternative school pending drug testing. He withdrew from the school. Later tests showed the substance was not marijuana.

The school policies were found in the school handbook. As the court noted, in accordance with *Goss v. Lopez*, the law requires the school to give a student a hearing if the punishment is up to 10 days.<sup>249</sup> In determining what constituted a permissible search, the court applied the standard from *New Jersey v. T.L.O.* that the school official must have reasonable grounds to suspect the search will reveal evidence of a violation of law or school rules, including possession of illegal drugs and substances that appear to be illegal drugs.<sup>250</sup> The school handbook allowed for

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<sup>246</sup> *Id.* at 385.

<sup>247</sup> *Id.*

<sup>248</sup> *Id.*

<sup>249</sup> *Goss v. Lopez*, 419 U.S. 565, 582 (1975) (only a “rudimentary” hearing is required).

<sup>250</sup> *New Jersey v. T.L.O.*, 469 U.S. 325, 342-43 (1985).

discipline for what appeared to be drug look-alikes, although there was no description of what appearance was required.<sup>251</sup>

What were the students' constitutional claims? T.P. claimed the school's actions violated procedural and substantive due process. On the issue of procedural due process, T.P. asserted she had no notice of the hearing and the principal made the suspension decision before the telephone conference. *Goss v. Lopez* requires a student suspended for less than ten days to have oral or written notice of charges and, if charges are denied, an opportunity to explain evidence against him and afford him an opportunity to present his side.<sup>252</sup> A student can be removed from school only after a hearing, unless his continued presence is dangerous or disruptive.<sup>253</sup> In T.P.'s case, the court deemed the "hearing" to have been conducted with her mother and Driscoll by telephone, which satisfied procedural due process requirements because there was time to modify or reverse the decision.<sup>254</sup>

For her substantive due process claim, T.P. argued the nine-day suspension injured her and was "shocking and abusive nature."<sup>255</sup> The court found this argument without merit in that the suspension decision was an executive decision and public school attendance is a state-created, not a fundamental right.<sup>256</sup>

C.B.'s constitutional claims were based on Fourth Amendment search and seizure requirements and alleged procedural and substantive due process violations.<sup>257</sup> C.B. claimed the school administrators lacked reasonable grounds to search him in that they had no firsthand knowledge, and that an unreliable informant, not an anonymous student, reported his actions, and those reports lacked corroboration.<sup>258</sup> The court deemed this matter a question of law and found the school authorities met the requirement that there be sufficient

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<sup>251</sup> *C.B. v. Driscoll*, 82 F.3d 383, 386 (11th Cir. 1996).

<sup>252</sup> *Goss*, 419 U.S. at 581.

<sup>253</sup> *Id.* at 582.

<sup>254</sup> *C.B.*, 82 F.3d. at 386-87.

<sup>255</sup> *Id.* at 387.

<sup>256</sup> *Id.* (citing *Plyler v. Doe*, 457 U.S. 202, 221 (1982)).

<sup>257</sup> *Id.* at 388-89.

<sup>258</sup> *Id.* at 388.

probability and not certainty for reasonable suspicion. C.B. also made a vagueness challenge, which the court dismissed.<sup>259</sup>

On his procedural due process claim, C.B. alleged the principal suspended him without a hearing.<sup>260</sup> The court found only a rudimentary hearing is required for short-term suspensions from school and what C.B. had was sufficient under the law.<sup>261</sup> On the substantive due process claim, T.P. alleged she was suspended and sent to an alternative school, but she should have been permitted to remain in her home school.<sup>262</sup> The court found both acts were proper executive decisions, and C.B. was neither denied his right to a public education nor did he have any right to choose his own school.<sup>263</sup>

Several amendments to the Georgia school discipline laws have followed these decisions, largely in 1997 and 1999 (effective July 1, 2000).<sup>264</sup> After a schoolteacher was shot and killed by a 16-year-old student after breaking up a fight between two students, the Georgia Legislature passed the School Safety Act in 1997.<sup>265</sup> This included several new measures, including required notification by superior courts to school systems and teachers of students age 17 or older who are convicted of a

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<sup>259</sup> While there was no strong vagueness challenge by these plaintiffs to the school rules, in footnote 4, the court found that school rules need not be as detailed as a criminal code with criminal sanctions. Given the effects of mandatory zero tolerance policies and potential consequences of referral to the juvenile and adult justice system, could a vagueness challenge prevail? Or, should school rules be more detailed or clear? We have found no reported cases to suggest that this is a winning point.

<sup>260</sup> *C.B. v. Driscoll*, 82 F.3d 383, 388 (11th Cir. 1996).

<sup>261</sup> *Id.*

<sup>262</sup> *Id.* at 389.

<sup>263</sup> See, e.g., *Doe v. Bagan*, 41 F.3d 571, 576 (10th Cir. 1994); *Zamora v. Pomeroy*, 639 F.2d 662, 670 (10th Cir. 1981).

<sup>264</sup> See Janet L. Bozeman, *Elementary and Secondary Education: Require Local School Boards to Implement A Comprehensive Charter Education Program For All Grade Levels...* 16 GA. ST. U. L. REV. 116, 128 (1999) (discussing 1999 amendments); Usha Ramachandran, *School Safety Act: Require Superior Courts to Notify Local School System When A Juvenile or Student Over Seventeen Is Convicted of a Felony Or Criminal Offense...* 14 GA. ST. U. L. REV. 155 (1997) (discussing 1997 amendments).

<sup>265</sup> See Ramachandran, *supra* note 264, at 155.

felony and juveniles, ages 13 to 17, who commit a crime under the superior court's exclusive jurisdiction.<sup>266</sup>

Known as the "A Plus Education Reform Act of 2000," the Georgia Legislature posed the amendments in 1999, which became effective July 1, 2000, to help local boards of education "improve the student learning environment by improving student behavior and discipline."<sup>267</sup> These amendments seemed to focus on the importance of using codes of conduct, developed with parental input and made age-appropriate, to "create the expectation that students will behave themselves in such a way so as to facilitate a learning environment for themselves and other students, respect each other and school district employees, obey student behavior policies adopted by the local board of education, and obey student behavior rules adopted by individual schools."<sup>268</sup> The amendments also called for student support services, progressive discipline processes, parental involvement processes, and reflected the state's preference for the reassignment of "disruptive students to alternative educational settings rather than to suspend or expel such students from school."<sup>269</sup>

On the one hand, taken overall, these amendments place Georgia school disciplinary policies, at least at the state level, in a fairly good light in that they allow administrative discretion, reflect the state's preference for reassigning disruptive students to alternative educational settings rather than to suspend or expel such students from school, provide for a disciplinary hearing process before tribunals with constitutional protections, and provide for notice to students and parents or guardians of disciplinary policies through codes of conduct and for age-appropriate measures, such as not subjecting children in kindergarten to fifth grade to disciplinary hearings before

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<sup>266</sup> GA. CODE ANN. § 15-6-36 (2004) (also providing for statewide expulsion or suspension if the student committed a felony).

<sup>267</sup> GA. CODE ANN. § 20-2-735 (a) (2000); *see also* Bozeman, *supra* note 260, at 128.

<sup>268</sup> GA. CODE ANN. § 20-2-735 (b) (2000).

<sup>269</sup> GA. CODE ANN. §§ 20-2-735 (c)–(f) (2000); GA. CODE ANN. § 20-2-768 (2004).

tribunals.<sup>270</sup> Additionally, Georgia policies address teacher, administrative, school bus driver, and community safety concerns, and there are specific issues of conduct, such as bullying, that are defined by statute.<sup>271</sup> Notably, the state most recently allowed for training programs in conflict management and resolution and in cultural diversity for voluntary implementation by local school boards.<sup>272</sup> On the other hand, however, a wide net has been cast by statute to capture many other types of specified and non-specific student behaviors that could spark student discipline, such as “disruptive behavior,” and local school boards still have latitude to define unspecified student behavior for purposes of disciplinary infractions.<sup>273</sup>

While Georgia laws may show some sensitivity and limitations on the harshest aspects of zero tolerance policies, what remains of great concern is that its school officials still have plenary review of student actions and, if they so deem, they may still resort to ridiculous, unnecessary, unfair, and perhaps racist enforcement of zero tolerance policies. How far then can it be said that the education of African-Americans in Georgia has progressed since the last century? The great scholar W.E.B. DuBois writing about The Negro Common School in Georgia in 1926 said:

It has long been a commonplace saying among those discussing the Negro problem in the United States that education would solve it. It has also been an assumption that the work of education among Negroes was in satisfactory condition.<sup>274</sup>

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<sup>270</sup> GA. CODE ANN. § 20-2-759 (2004).

<sup>271</sup> GA. CODE ANN. §§ 20-2-751.4 (2000) (bullying), 20-2-751.6 (2000) (violence against teachers, school bus drivers, other school officials and employees) (2004). See also Salatheia Bryant, *HISD Bullies Meet Zero Tolerance: HISD Hopes to End Student Harassment*, HOUSTON CHRONICLE A24 (Oct. 22, 2001), at

<http://www.chron.com/cs/CDA/story.hts/metropolitan/1095769>.

<sup>272</sup> GA. CODE ANN. § 20-2-739 (1999).

<sup>273</sup> GA. CODE ANN. § 20-2-758 (2004) (other causes of action not prohibited).

<sup>274</sup> W.E.B. DUBOIS, A READER 109 (Meyer Weinberg ed., Harper Torchbooks 1970).

The proliferation and application of zero tolerance policies in Georgia in this century, demonstrate that while education may still solve many problems for African-Americans, the education system is not in a satisfactory condition. This is demonstrated by the lack of regard by the school system and the courts for the continued education of a 12-year-old student who has been disciplined in a public school. D.B.'s case serves as a reminder that a student may still be subjected to permanent expulsion and may not be placed in an alternative educational setting. How would she fare today, years later with the evolution of zero tolerance policies, case law, legislative enactments, local school authorities' experiences, and growing advocacy efforts? Would education solve her problems?

Georgia's public schools, grades K-12, are approximately 38 percent African-American children, as contrasted with 52 percent white children.<sup>275</sup> Taken with Hispanic (six percent) and Asian (two percent) and multiracial children (two percent), 48 percent, or almost half, of Georgia's children are now minorities.<sup>276</sup> The youth risk behaviors among Georgia high school students for death, disability, and nonsocial behaviors are about the same as the national averages according to the CDC survey.<sup>277</sup> Because local school boards retain independence to adopt student codes of conduct containing disciplinary policies consistent with federal and state statutes, there is no guarantee D.B. would be educated, depending on where she lived. In 2003, Georgia spent \$279,841,168 on juvenile justice which included expenses for the supervision, detention, a wide variety of

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<sup>275</sup> GOVERNOR'S OFFICE OF STUDENT ACHIEVEMENT, 2002-2003 STATE OF GA., K-12 REPORT CARD, at <http://reportcard.gaosa/yr2003>. Formerly known as the Office of Education Accountability, the Governor's Office of Student Achievement was established July 1, 2000 by GA. CODE ANN. § 20-14-25 (2000) to improve student achievement and completion and publishes annual accountability reports.

<sup>276</sup> *Id.*

<sup>277</sup> CTRS. FOR DISEASE CONTROL & PREVENTION, U.S. DEP'T. OF HEALTH & HUMAN SERVS., GEORGIA: 2003 YOUTH RISK BEHAVIOR SURVEY (YRBS) RESULTS, available at [www.cdc.gov/yrbs](http://www.cdc.gov/yrbs) (19 percent reporting they carried a weapon in the last month; 31 percent were in a physical fight during the last year; 8 percent attempted suicide during the last year; as opposed to national figures respectively for these behaviors of 17.1 percent, 33 percent, 8.5 percent).

treatment and education services for youths referred to the Department of Juvenile Justice by the courts, and for assistance for at-risk youths through collaborative efforts with other public, private, and community entities.<sup>278</sup> While it is not possible to predict an outcome for D.B. today, it is possible she might still be permanently precluded from obtaining an education in Georgia. That very possibility does not bode well for Georgia's future.

#### **IV. Conclusion: It is Going to Take a Village To Arouse Us From This Nightmare and Resume the American Dream.**

Zero tolerance school discipline policies have been in effect in most states for a decade. As shown herein, during this time these policies have resulted in many reported inequities, led to unfair and often ridiculous results for many students, and have violated the rights of individual students. Their long-term effects are all not fully known. It can be strongly posited that if zero tolerance policies in their expanded forms, scope, and execution remain in effect, the future for our educational system, citizenry, and society at large will be devastated "since their impact is most keenly felt by those who, as adults, will know and be acclimated to a system of justice that does not focus on the individual, but only the institution."<sup>279</sup> Schools do not dream the American dream; only individuals can dream the America dream.

One view stemming from the equal protection argument found in *Brown* is students who do not violate any specific law but who violate a zero tolerance policy are deprived of the educational opportunity to learn the democratic process with their peers. Yet, the other view is that there remains good reason to support zero tolerance policies because although they may inhibit some individual student's activity, their overall deterrent effect on school violence justifies their continued existence. Is there a middle ground to support revisiting and revamping these policies to make their effects less idiotic, inequitable, harsh, and,

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<sup>278</sup> GA. DEP'T. OF JUV. JUST., ANNUAL OPERATING BUDGET, *available at* <http://www.djj.state.ga.us/djjstats.htm>.

<sup>279</sup> Peden, *supra* note 35, at 370.

yes, racist, while addressing the underlying reasons for these policies?

Parent and community groups are increasingly becoming educated and educating themselves on how to combat cases where zero tolerance discipline is imposed on their children. Advocacy groups are united in purpose and by communication through increasing public workshops, Internet communications, and increasing public battles both at the administrative and court levels. Some advocate for self-preservation, charging that parents should wake up and protect themselves and their own children from zero tolerance.<sup>280</sup> Having little faith in the court system or administrative process for parents and their children to win the battle against zero tolerance applications, they advocate for arming oneself with knowledge, friends, and perhaps an attorney before your child is affected thereby, ready to take measures immediately to protect your child. They suggest parents not live blindly and recognize that their children (yes, even the good ones) experiment with drugs, and have legal drugs in their book bags, and that they are “read the riot act” – told about the harshest laws that could be imposed against them – each year when they receive their student handbooks. Therefore, they suggest parents go through book bags, review the school rules with their children, share stories of daily school events and, if necessary, spread the word in their community. They suggest that if your child uses legal drugs – prescription or over the counter – parents must tell the school because the child can be punished for the acts of their parents.

With all the information readily available about the apparent and immediate dangers of zero tolerance, is it going to take student, parent, and community outrage to effectuate changes? At the core of American values are the legal and social mechanisms to address the government with our grievances. Federal and state legislatures and local school boards enacted zero tolerance policies, whereas the children affected by them do not and cannot vote. Although at certain times in our history

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<sup>280</sup> See *End Zero Tolerance in Our Public Schools, Parent Guide to School Expulsion*, at [http://endzerotolerance.com/guide\\_donna.pdf](http://endzerotolerance.com/guide_donna.pdf). See also *Parents' Rights*, [www.ztnightmares.com](http://www.ztnightmares.com).

children engaged in civil disobedience – African-American children and other young people in the 1960s and 1970s – to focus attention on civil rights, the Vietnam war, peace, and other issues, the children of this generation (perhaps due to the intolerance of zero tolerance) have not by individual or group activism assembled to raise opposition to these policies. The voices of youth have been heard at critical times in our nation's history and this may be an opportune time to hear from them. Perhaps, as at other times, these young people may be supported by parents (presumably adults); perhaps, their parents will not support them. Perhaps, their activism will mirror community values; it may not.

Parents, presumably voters and taxpayers, can and should influence legislators and school board officials, and they can certainly lift their voices to urge local reforms. As leading scholars have advocated, erasing zero tolerance is appropriately viewed as a civil rights issue<sup>281</sup> and challenges to these policies are both necessary and urgent. The battles against zero tolerance policies may appropriately be waged in the courts, in federal and state legislatures, before local school boards, in schools, and even in our homes.

Perhaps the people of America are waking up from the nightmare and regaining the opportunity to peacefully dream the American Dream. African-American children, due to the prevalence of racial profiling and their relegation to poorer, less-funded rural and urban school systems, still lag behind in educational opportunities. There should be careful monitoring of any retreat from the harsh aspects of zero tolerance policies to determine if it is slower in school systems populated by minority children where there may be a lack of political and financial power, parental involvement, and teachers who love them and discipline them as if they were their own children. The case remains for demanding constitutional protections against unreasonable searches and seizures, for procedural and substantive due process, and for equal protection under the American law, so that all children, but particularly those of color, can have the promise of educational opportunity.

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<sup>281</sup> See Losen & Edley, Jr., *supra* note 228, at 230–55.

To live up to the promise of America as rooted in *Brown*, regardless of whether the child is white, African-American, Latino, Asian, or of another ethnic persuasion, America must be committed to allowing that child to dream the American dream and have the opportunity to attain it. To summarize, as one scholar aptly put it:

... in our zeal to embrace the future, we must not forget that some truths of the past are enduring. Children are still children. Teenagers are emotionally maturing children – they are not simply miniature versions of fully-formed adults. Serious and violent crime committed even by children requires prompt and serious disciplinary measures that both promote public safety and give the offending youth the opportunity to rejoin his community, and or society, in a productive way. But so long as we cling to notions of justice and fairness as hallmarks of American society, we must continue to extend those principles to children who misbehave, at school, at home, or in the street. The uniqueness of each individual child as they make their way through childhood is a treasure to behold; their capacity for growth, change, and the acquisition of knowledge is staggering. We cannot hope to mold them into tolerant, forgiving and thoughtful adults if we don't lead and show the way by example. As Alex Kotlowitz wrote in a recent op-ed piece critical of zero tolerance policies, and quoting another educator about the process of educating children: "It takes time, it takes patience, it takes the willingness to make exceptions."<sup>282</sup>

If the time is not taken to treat each child as important, the full force continuation of zero tolerance policies in our schools will shatter the American dream in Georgia and in America in the short future. Hopefully, this discourse might add

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<sup>282</sup> Levick, *supra* note 90, at 6.

to the arsenal of legal and social weapons for lawyers, community advocates, parents, educators, administrators, and policy-makers to revisit and revamp these invidious policies known as zero tolerance. These policies have led to unintended and negative consequences for too many students whose educational dreams have been turned into nightmares. In the immortal words of Atlanta's leader who had an American dream, the Rev. Dr. Martin Luther King, Jr.:

We are all caught in an inescapable network of mutuality, tied in a single garment of destiny. Whatever affects one directly, affects all indirectly.<sup>283</sup>

We can dream together, or we can scream together.

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<sup>283</sup> MARTIN LUTHER KING, JR., *A Christmas Sermon On Peace* (Dec. 24, 1967), in *A TESTAMENT OF HOPE: THE ESSENTIAL WRITINGS & SPEECHES OF MARTIN LUTHER KING, JR.* 253, 254 (James Melville Washington ed., Harper & Row 1986).