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# Suspending and Expelling Children from Educational Opportunity: Time to Reevaluate Zero Tolerance Policies

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# SUSPENDING AND EXPELLING CHILDREN FROM EDUCATIONAL OPPORTUNITY: TIME TO REEVALUATE ZERO TOLERANCE POLICIES

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## INTRODUCTION

In 1998, school officials expelled ten-year-old honor roll student Shanon Borchardt Coslett when she accidentally brought her mother's lunch box to school and obediently reported to her teacher that it contained a paring knife.[1] Administrators claimed that Colorado's zero tolerance law required them to expel Shanon.[2] In 1999, high school junior Dustin Mitchell received a ten-day suspension for responding "[y]es!" to a question regarding the Columbine High School shooting posed in a teens-only Internet chat room: "[d]o you think such a tragedy could happen at your school?"[3] Although the school subsequently reduced Dustin's suspension to four days, he still suffered detrimental effects.[4] Dustin's suspension made him ineligible for the National Honor Society and caused him to miss statewide achievement tests used to place students in advanced college courses.[5] Both Shanon and Dustin's accounts illustrate how mandatory punishments issued under zero tolerance policies[6] often exclude innocent children from school for non-violent behavior that poses little or no threat to school safety.[7]

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1. *See Knife Gets Honor Student Expelled From Her School*, ORLANDO SENTINEL, Feb. 8, 1998, at A18 (discussing the administration's decision to expel Shanon Borchardt from school in accordance with zero tolerance policies employed at Twin Peaks Charter Academy).

2. *See id.* (explaining that the law left the administrators no choice but to expel the girl); *see also* COLO. REV. STAT. § 22-33-106(1)(d)(I) (1996 & Supp. 2000):

> The following shall be grounds for suspension or expulsion of a child from public school during the school year . . . [s]erious violations in a school building or in or on school property, which suspension or expulsion shall be mandatory; except that expulsion shall be mandatory for the following violations: carrying, bringing, using, or possessing a dangerous weapon without the authorization of the school or school district.

3. American Civil Liberties Union ["ACLU"], *ACLU Defends Missouri Honors Student Suspended for Remark in Internet Chat Room*, *available at* http://www.aclu.org/library/ycl99 (last modified Oct. 14, 1999).

4. *See id.* (explaining several negative results of Dustin Mitchell's suspension that affected his academic record and college options, including missing achievement tests used to place students in college preparatory classes).

5. *See id.* (demonstrating the detrimental effect that even a four-day suspension from school can have upon a student).

6. *See* Phillip Kaufman et al., INDICATORS OF SCHOOL CRIME AND SAFETY, 1998, U.S. DEP'T OF EDUC. & U.S. DEP'T OF JUST., Oct. 1998, app. A at 121 (defining a zero tolerance policy as one that "mandates predetermined consequences or punishments for specific offenses"); *see also* Harvard University Advancement Project and The Civil Rights Project, *Opportunities Suspended: The Devastating Consequences of Zero Tolerance and School Discipline Policies*, June 2000, at 1 [hereinafter AP/CRP] (defining zero tolerance policies as "nondiscretionary punishment guidelines").

7. *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 (2000) (asserting that zero tolerance policies employed throughout the United States

Part I of this Comment explains the nature of zero tolerance policies in public schools and examines their evolution, culminating in the federal Gun-Free Schools Act of 1994.[8] The 1994 Act only applies to public schools, not private schools; thus, this Comment only addresses zero tolerance policies in public educational institutions.[9] Part I also considers the effectiveness of legal challenges

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wrongly punish large numbers of harmless children); *see also* Kathleen M. Cerrone, Comment, *The Gun-Free Schools Act of 1994: Zero Tolerance Takes Aim at Procedural Due Process*, 20 PACE L. REV. 131, 133 (1999) (arguing that zero tolerance policies impose severe penalties on children who pose no risk to themselves or others, such as two fifth-grade students suspended for playing with a toy gun on the school bus); *accord Waupun Student Caught With Pistol*, MILWAUKEE SENTINEL, May 30, 1998, at A2 (describing the toy gun as a bright orange plastic toy); *see also* AP/CRP, *supra* note 6, at 1 ("These [zero tolerance] policies require that children in kindergarten through 12th grade receive harsh punishments, often for minor infractions that pose no threat to safety, and yet cause them and their families severe hardship.").

8. *See generally* Gun-Free Schools Act of 1994, 20 U.S.C. §§ 8921-8923 (1994 & Supp. 2000). Section 8921(b)(1) requires that:

> [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 a school under the jurisdiction of local educational agencies in that State, except that such State law shall allow the chief administering officer of such a local educational agency to modify such expulsion requirement for a student on a case-by-case basis.

Section 8921(b)(2) provides, "[n]othing in this subchapter shall be construed to prevent a State from allowing a local educational agency that has expelled a student from such a student's regular school setting from providing educational services to such student in an alternative setting." Section 8921(b)(3) allows states one year from October 20, 1994 to comply with the Act. Section 8921(b)(4) clarifies that "the term 'weapon' means a 'firearm.'" Section 8921(c) requires that administrators construe the Act consistent with the Individuals with Disabilities Education Act ("IDEA"), 20 U.S.C. § 1400 (1970 & Supp. 2000), a subject omitted from discussion in this Comment. Under section 8921(d),

> [e]ach local educational agency requesting assistance from the State educational agency that is to be provided from funds made available to the State under this chapter shall provide to the State, in the application requesting such assistance—(1) an assurance that such local educational agency is in compliance with the State law required by subsection (b) of this section; and (2) a description of the circumstances surrounding any expulsions imposed under the State law required by subsection (b) of this section, including—(A) the name of the school concerned; (B) the number of students expelled from such school; and (C) the type of weapons concerned.

*Id.* Section 8921(e) requires each State to "report the information described in subsection (c) of this section to the [U.S. Secretary of Education] on an annual basis." 20 U.S.C. § 8921(e). Furthermore, Section 8922 details the "[p]olicy regarding criminal justice system referral" as follows: "[n]o funds shall be made available under this chapter to any local educational agency unless such agency has a policy requiring referral to the criminal justice or juvenile delinquency system of any student who brings a firearm or weapon to school served by such agency." 20 U.S.C. § 8922.

9. *See* U.S. DEP'T OF EDUC., GUIDANCE CONCERNING STATE AND LOCAL RESPONSIBILITIES UNDER THE GUN-FREE SCHOOLS ACT OF 1994, *available at* http://www.ed.gov/offices/OESE/SDFS/gfsaguidance.html (last visited Dec. 24, 2000) (explaining that private schools are not subject to the requirements of the

to the federal Act and state laws, as well as case law regarding school disciplinary issues. Lastly, Part I explores the utility of due process challenges to disciplinary decisions including those judgments made under zero tolerance policies.

Part II of this Comment identifies key problems regarding zero tolerance policies, detailing for context the devastating effects of such policies on students. Part II goes on to address the general ineffectiveness of zero tolerance policies and discusses the effect of the media on school safety issues and statistics on school safety. Part II also considers how the loss of educational opportunities such policies effectuate, the psychological harm these policies have upon children, and the resulting criminalization of youth. Finally, Part II addresses the division among states and courts regarding a state's duty to provide alternative education[10] for suspended[11] and expelled[12] students, the lack of which has proven to be one of the most damaging consequences of zero tolerance policies.[13]

This Comment integrates a great deal of scholarship on school disciplinary matters and recent scholarship on zero tolerance policies. Prior pieces focus on particular legal challenges[14] and

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Gun-Free Schools Act).

10. *See* AP/CRP, *supra* note 6, at 12 (explaining that "alternative education" programs should provide adequate and quality education as provided to students in regular schools). These alternative education programs serve at-risk students. *Id.*

11. *See* Patrick Pauken & Philip T.K. Daniel, *Race Discrimination and Disability Discrimination in School Discipline: A Legal and Statistical Analysis*, 139 EDUC. L. REP. 759, 760 (2000) (defining suspension as "short-term exclusion—usually ten days or less"). For example, the *Ohio Revised Code* limits suspensions to ten school days. OHIO REV. CODE ANN. § 3313.66(A) (Anderson 1996) ("The board of education . . . may adopt a policy granting assistant principals and other administrators the authority to suspend a pupil from school for a period of time as specified in the policy of the board of education, *not to exceed ten school days*.") (emphasis added).

12. *See* Pauken & Daniel, *supra* note 11, at 760 (differentiating expulsion from suspension by defining expulsion as a longer, sometimes permanent period of exclusion from school); *see also* ARIZ. REV. STAT. ANN. § 15-840(1) (West 1995 & Supp. 1999) (defining expulsion as "permanent withdrawal of the privilege of attending a school unless the governing board reinstates the privilege of attending the school.").

13. *See* AP/CRP, *supra* note 6, at 11 (noting the "[l]oss of [e]ducational [o]pportunities" as one of the most detrimental consequences stemming from zero tolerance policies).

14. *See generally Recent Developments in the Law, Primary and Secondary Education*, 29 J.L. & EDUC. 495 (2000) (detailing legal challenges regarding the following issues: civil rights, student conduct, student discipline, and torts); Cary Silverman, *School Violence: Is it Time to Hold School Districts Responsible for Inadequate Safety Measures?*, 145 EDUC. L. REP. 535 (2000) (discussing legal challenges based on negligence, tort, breach of contract, and statutory claims against school districts in regard to violence on school grounds); Ronald Susswein, *The New Jersey School Search Policy Manual: Striking the Balance of Students' Rights of Privacy and Security After the Columbine Tragedy*, 34 NEW ENG. L. REV. 527 (2000) (focusing on the legality of searching students and their belongings on school grounds); Cerrone, *supra* note 7 (suggesting that zero tolerance policies often violate students' procedural due process rights).

specific effects of school disciplinary methods,[15] including zero tolerance policies.[16] This Comment goes one step further, exploring the viability of several legal approaches, as well as the negative effects of zero tolerance policies,[17] to conclude that even if the policies violate no federal or state laws, they warrant serious reevaluation and reform.

## I. BACKGROUND

### *A. The History of Zero Tolerance Policies*

#### *1. Disciplinary methods from the 1960s to the 1990s*

Zero tolerance policies employed in schools throughout the United States are predetermined, nondiscretionary, disciplinary consequences for certain actions.[18] Although such policies have existed for a relatively short time period,[19] understanding the greater evolution of such harsh disciplinary measures aids in comprehending the notion that current school violence and disciplinary issues "do

15. *See generally* Troy Adams, *The Status of School Discipline and Violence*, 567 ANNALS AM. ACAD. POL. & SOC. SCI. 140 (2000) (discussing the historical evolution of school discipline and the varying effects of methods ranging from corporal punishment to zero tolerance); Lawrence T. Kajs et al., *The Use of Peer Mediation Program to Address Peer to Peer Student Conflict in Schools: A Case Study*, 146 EDUC. L. REP. 605 (2000) (suggesting practice approaches to school discipline such as peer mediation programs); Gina E. Polley & Francine Cullari, *Peer Mediation in the Classroom—A New Initiative for the State Bar of Michigan*, 79 MICH. B.J. 1192 (2000) (detailing positive and negative disciplinary techniques and recommending peer mediation to increase school safety and create a peaceful learning environment).

16. *See generally* Marsha L. Levick, *Zero Tolerance: Mandatory Sentencing Meets the One Room Schoolhouse*, 8 KY. L.J. 2 (2000) (suggesting that children should receive different responses to misbehavior than zero tolerance that resembles mandatory sentencing sanctions issued for adults); *see also* Ira M. Schwartz et al., *School Bells, Death Knells, and Body Counts: No Apocalypse Now*, 37 HOUS. L. REV. 1, 13-14 (2000) (discussing the responses of legislators and school administrators to school violence including zero tolerance policies).

17. *See* Cerrone, *supra* note 7, at 133 (asserting that zero tolerance policies cause children to suffer detrimental effects by banning them from educational opportunities); *see also* Tebo, *supra* note 7, at 44 (arguing that zero tolerance policies overlook children's underlying problems that often require counseling, not punishment).

18. *See* Kaufman et al., *supra* note 6, app. A at 121 (defining a zero tolerance policy as one that "mandates predetermined consequences or punishments for specific offenses"); *see also* AP/CRP, *supra* note 6, at 1 (defining zero tolerance policies as "nondiscretionary punishment guidelines"). For purposes of this Comment, suspensions and expulsions, often for minor infractions, will be considered under the umbrella of zero tolerance policies. *See* AP/CRP, *supra* note 6, at 45 n.1 (clarifying that zero tolerance policies include unduly harsh and strict punishments, as well as general mandatory punishments which fail to consider individual circumstances).

19. *See* Adams, *supra* note 15, at 147 (noting that the shift toward zero tolerance policies began in the late 1980s and early 1990s).

not exist in a vacuum but are part of the developing sociological landscape."[20]

Between 1946 and 1964, eighty million people were born in the United States.[21] This baby-boom generation led to tremendous growth in school populations in the 1960s,[22] coinciding with instability caused by the civil rights, women's rights, and Vietnam protest movements.[23] School administrators soon realized they needed a new approach to discipline, concluding that antiquated disciplinary techniques such as corporal punishment[24] lacked the effectiveness they once had in less populated schools.[25] From the Puritan settlement of the Massachusetts Bay Colony in the seventeenth century through the nineteenth century in the United States, schoolhouses and classrooms often contained whipping posts and paddling devices.[26] When a student misbehaved, the teacher whipped or paddled him in front of other students to show them the consequences of misconduct.[27] Administrators used these techniques as deterrents for other students in the classroom.[28] This function of corporal punishment lost its effectiveness, however, in the larger schools of the 1960s where students were less likely to observe disciplinary measures that more often occurred in the principal's office.[29] Instead, in the 1960s and 1970s, school systems began to

20. *Id.* at 144 (recognizing that contemporary disciplinary practices exist in part due to historical developments in the United States, such as population growth and political and social movements).

21. *See id.* (acknowledging the effects of the population growth from the 1940s through the 1960s on society, and more specifically, the impact of the baby-boom generation on educational practices and procedures).

22. *See id.* (noting that the baby-boom generation increased the number of children in the United States, thus enlarging the number of students attending public schools).

23. *See id.* (explaining that traditional disciplinary techniques such as corporal punishment did not control the rebellious behaviors of students that resulted from overpopulated schools and social unrest in the 1960s).

24. *See* Irwin A. Hyman & Eileen McDowell, *An Overview*, *in* CORPORAL PUNISHMENT IN AMERICAN EDUCATION 4 (Irwin A. Hyman & James H. Wise eds., 1979) (defining corporal punishment as the infliction of pain, such as paddling or hitting a student's body, by a teacher or other school official as a penalty for disapproved behavior).

25. *See* Adams, *supra* note 15, at 144-45 (explaining that corporal punishment set an example for other students in a "one-room schoolhouse," but lacked similar value in schools operating under a large hierarchical structure of authority).

26. *See* Hyman & McDowell, *supra* note 24, at 5 (noting that a whipping post in Sunderland, Massachusetts was built into the schoolhouse floor in 1793).

27. *See id.* (reporting that nineteenth century classrooms prominently exhibited paddling devices to remind students of corporal punishment).

28. *See* Adams, *supra* note 15, at 143-44 (noting that in a "one-room schoolhouse," children might have been deterred by observing another student's punishment).

29. *See id.* at 144 (describing the evolution of school disciplinary practices in educational facilities of the 1960s).

frequently use out-of-school suspensions and expulsions as a way to remove disruptive students from school.[30]

By the late 1970s and early 1980s, school districts changed their approach and began to use in-school suspensions[31] as an alternative to exclusionary policies following lawsuits such as *Goss v. Lopez*, which challenged expulsions and suspensions on due process grounds.[32] Schools also responded to social pressure to develop more humane disciplinary methods for youth through in-school suspensions.[33] In-school suspensions provided an alternative to out-of-school suspensions by removing disruptive children from the classroom, but keeping them in school and working on academic assignments during the period of their punishment.[34]

The now prevalent and even stricter approach to school discipline known as zero tolerance policies did not emerge until the late 1980s and early 1990s.[35] At this time, schools began to abandon the rehabilitative model and instead employ rigid, "get-tough" policies in response to the public's perception of increasing violence in schools.[36] Throughout the 1990s, as the public became increasingly disturbed and outraged by violence in American schools, federal and state policymakers and school officials worked to strengthen and expand zero tolerance policies.[37] Although this shift towards get-tough policies encompassed increased preventative security measures such as police guards, metal detectors, and locker searches, this

30. *See id.* at 144-45 (describing the school atmosphere in the 1960s and 1970s as one of "swelling school enrollments, and increased student unrest," and comparing the practice of removing incorrigible students from school to protect the student population to the incapacitation and removal of dangerous criminals to protect society in general).

31. *See* FREDRIC H. JONES, POSITIVE CLASSROOM DISCIPLINE 298 (1987) (defining an in-school suspension as a "time out for an extended period, usually a half day or full day, in a private study area" with assigned school work completed under academic supervision).

32. *See* Goss v. Lopez, 419 U.S. 565, 572-73, 581 (1975) (requiring due process protections for students expelled or suspended from school).

33. *See* Adams, *supra* note 15, at 146 (noting that in-school suspension programs seemed less severe because the child remained in school and continued to receive educational instruction). Adams also indicates that in-school suspensions "were a response to growing litigation [a]s child advocacy groups fought for children's rights." *Id.*

34. *See* JONES, *supra* note 31, at 298-99 (explaining that in-school suspensions keep children in an educational atmosphere, but isolate them from other students due to misbehavior).

35. *See* Adams, *supra* note 15, at 147 (describing the emergence and evolution of zero tolerance policies starting from the late 1980s).

36. *See id.* (referring to zero tolerance policies as "reminiscent of sixteenth-century draconian practices").

37. *See* Cerrone, *supra* note 7, at 132 (indicating that public pressure contributed to congressional action culminating in the Gun-Free Schools Act of 1994); *infra* Part I.A.2 (discussing the Gun-Free Schools Act of 1994, 20 U.S.C. §§ 8921-8923).

Comment only focuses upon zero tolerance policies as the most pervasive cause of injustice for students.[38] This Comment will now explore the various legal avenues by which opponents of the zero tolerance approach have challenged such policies, beginning with an analysis of the federal Gun-Free Schools Act of 1994.[39]

*2. The Federal Gun-Free Schools Act of 1994 and its aftermath*

The zero tolerance approach to school discipline was given the federal seal of approval when Congress passed the Gun-Free Schools Act of 1994.[40] This Act conditions federal funding for public schools on each state's adoption of legislation requiring at least a one-year expulsion for any student who brings a firearm to school.[41] Yet, the same clause in the Act also provides a discretionary exception to this seemingly mandatory policy: "State law shall allow the chief administering officer of such local educational agency to modify such expulsion requirement for a student on a case-by-case basis."[42] The Act also notes that the term "weapon" means only a firearm, defined as a weapon that will eject a projectile such as a bullet or pellet by an explosive action, or a weapon that is designed to do so or can be readily converted to do so.[43] Additionally, the Act explicitly states that it does not prevent states from providing alternative educational services for students expelled in conjunction with the Act.[44] Lastly, it

38. *See* Adams, *supra* note 15, at 147 (dividing get-tough approaches to school discipline into: (1) detection measures, such as professional security guards; and (2) punishment measures, such as zero tolerance policies); *see generally* David Doty, *By the Book:* Fuller v. Decatur Public School Board of Education School District 61 *and the Essential Elements of Student Due Process in K-12 Expulsion Proceedings*, 151 EDUC. L. RPT. 353, 353 (2001) (discussing detection measures such as metal detectors, dress codes, and student profiling); Douglas Stewart, Ph.D. et al., *Maintaining Safe Schools*, 151 EDUC. LAW RPT. 363, 364 (2001) (listing preventative techniques such as security cameras, metal detectors, and school uniforms).

39. *See infra* Part I.A.2.

40. *See* 20 U.S.C. § 8921(b), (e) (making federal funding contingent on states enacting policies that: (1) impose at least a one-year expulsion penalty on any student who brings a gun to school; and (2) require school officials to refer students found in possession of a firearm on school grounds to the criminal justice or juvenile delinquency systems).

41. *See* 20 U.S.C. § 8921(b)(1) (conditioning federal funding on state legislation mandating an automatic one-year expulsion of any student who brings a weapon to school).

42. *Id.*

43. *See* 20 U.S.C. § 8921(b)(4) (noting that the definition for a firearm is defined in 18 U.S.C. § 921); *see also* 18 U.S.C. § 921(a)(3) (noting that the definition includes starter guns, the frame or receiver, any firearm silencer, any firearm muffler, and any destructive device, but excludes antique firearms). "Destructive devices" include explosives, poisonous gases, bombs, grenades, certain rockets, certain missiles, mines, or similar devices. 18 U.S.C. § 921(a)(4).

44. *See* 20 U.S.C. § 8921(b)(2) (allowing local educational agencies to provide education for expelled students in an alternative setting).

requires local educational bodies to maintain a policy of referring students who bring a firearm or weapon to school to the criminal justice or juvenile delinquency system.[45]

Following the enactment of the Act, almost all states complied with the federal statute by enacting zero tolerance policies by 1995 and the remaining states complied shortly thereafter.[46] Since then, the

45. *See* 20 U.S.C. § 8922(a) ("No funds shall be made available under this chapter to any local educational agency unless such agency has a policy requiring referral to the criminal justice or juvenile delinquency system of any student who brings a firearm or weapon to a school served by such agency.").

46. *See, e.g.*, U.S. DEP'T OF EDUC. & U.S. DEP'T OF JUST., ANNUAL REPORT ON SCHOOL SAFETY, 1998, at 6. A comprehensive list of compliance in all fifty states and the District of Columbia is as follows: ALA. CODE § 16-1-24.3 (1995 & Supp. 1999) (stating that when the school determines a student brought a weapon to school or on school grounds, the student must be expelled from school for one-year and the expulsion must be reported to the criminal justice or juvenile delinquency system; however, school officials can modify the expulsion on a case-by-case basis) [This language follows the language of the Gun-Free Schools Act, 20 U.S.C. §§ 8921-8923, and hereinafter, will be referred to as "following the federal law"]; ALASKA STAT. § 14.03.160 (Michie 1998 & Supp. 2000) (following the federal law); ARIZ. REV. STAT. ANN. § 15-841(B-G) (West 1991 & Supp. 1999) (following the federal law, but expanding the offenses required for expulsion to include "continued open defiance of authority, continued disruptive or disorderly behavior . . . or excessive absenteeism," and omitting referral to law enforcement); ARK. CODE ANN. § 6-18-503(B)(ii) (Michie 1999) (following federal law, but omitting referral to law enforcement). Arkansas law also makes weapons possession on school grounds a felony offense. ARK. CODE ANN. § 5-73-119(a)(2)(A)-(B) (Michie 1994 & Supp. 1999). In California, the law does not require mandatory expulsion of students determined to have possessed a firearm or weapon on school grounds; however, students can be expelled by a governing board following the recommendation of the principal, superintendent, hearing officer or administrative panel, and only when "other means of correction are not feasible or have repeatedly failed to bring about proper conduct," or "[d]ue 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 § 48915(b)(1)-(2) (West 1995 & Supp. 2001); *see also* COLO. REV. STAT. § 22-33-106 (2000) (following federal law, but adding several offenses such as continued, willful disobedience or open defiance, destruction or defacing school property, habitual disruptiveness, drug possession or use, robbery, and assault; however, there is no requirement for referral to law enforcement); CONN. GEN. STAT. § 10-233d (1999) (following federal law, but omitting referral to law enforcement and providing for application for early readmission); Delaware law provides general provisions regarding the expulsion of students, however the statute provides no specific provision to deal with firearm or weapon possession. DEL. CODE ANN. tit. 14, § 4130 (1999); *see also* D.C. CODE ANN. §§ 31-451, 31-452, 31-453 (1997) (following federal law); Florida law provides general provisions regarding expulsion, as well as the superintendent's discretion to waive the school board's recommendations; however, the statute provides no specific expulsion or suspension provision regarding firearm or weapon possession. FLA. STAT. ANN. ch. 230.23(6) (Harrison Supp. 1999); *see also* GA. CODE ANN. 20-2-751.1 (1996 & Supp. 2000) (following federal law, but omitting referral to law enforcement); HAW. REV. STAT. ANN. § 302A-1134(b) (Michie 1996 & Supp. 1998) (following federal law); IDAHO CODE § 33-205 (Michie 1995 & Supp. 2000) (following federal law); 105 ILL. COMP. STAT. ANN. § 5/10-22.6(d) (West 1998) (following federal law, but omitting referral to law enforcement); IND. CODE ANN. § 20-8.1-5.1-10(c)-(g) (Michie 1997) (following federal law); IOWA CODE ANN. § 280.21B (West 1996) (following federal law, but omitting referral to law enforcement); KAN. STAT. ANN. § 72-89a02 (1992 & Supp. 2000) (following federal

percentage of schools with such policies has never fallen below seventy-five percent,[47] and in 1998, nine out of ten public schools

law); KY. REV. STAT. ANN. § 158.150(2) (Banks-Baldwin 2000) (following federal law, but omitting referral to law enforcement); LA. REV. STAT. ANN. § 17:416(C)(2)(a)(i), (b)(i), (c)(i) (West 1995 & Supp. 2001) (following federal law); ME. REV. STAT. ANN. tit. 20-A, § 1001, § 1001(9-A) (West 1993 & Supp. 2000) (following federal law); MD. CODE ANN., [EDUC.] § 7-305(e) (1999 & Supp. 1999) (following federal law, but omitting referral to law enforcement). In Massachusetts, a student may be expelled for firearm possession, but "a principal may, in his discretion [after a hearing] decide to suspend rather than expel [the] student." MASS. GEN. LAWS ch. 71, § 37H, 37H(c) (1999 & Supp. 2000); *see also* MICH. STAT. ANN. § 380.1311(2) (Michie 1995) (following federal law, except that expulsion is permanent, subject to possible reinstatement); MINN. STAT. ANN. § 121A.44 (West 2000) (following federal law, but omitting referral to law enforcement); MISS. CODE ANN. § 37-11-18 (1999 & Supp. 2000) (following federal law, but omitting referral to law enforcement); MO. ANN. STAT. § 160.261(3) (West 2000) (following federal law, but omitting referral to law enforcement and requiring a one-year "suspension" or a permanent expulsion); MONT. CODE ANN. § 20-5-202(2)-(4) (1999) (following federal law, but omitting referral to law enforcement); Nebraska only imposes a one-year expulsion if the student knowingly and intentionally possessed a weapon, and omits referral to law enforcement. NEB. REV. STAT. § 79-263 (1996); *see also* NEV. REV. STAT. § 392.466(2) (1997) (following federal law, but omitting referral to law enforcement); N.H. REV. STAT. ANN. § 193:13(III-IV) (1999) (following federal law, but omitting referral to law enforcement); New Jersey omits referral to law enforcement, and only imposes the one-year expulsion if the student knowingly possesses a firearm or has been convicted or adjudicated delinquent for firearm possession. N.J. STAT. ANN. § 18A:37-7 (West 1999); N.M. STAT. ANN. § 22-5-4.7(A) (Michie 1998) (following federal law, but omitting referral to law enforcement); N.Y. EDUC. LAW § 3214(3)(d) (McKinney 1995 & Supp. 2000) (following federal law, but requiring a one-year "suspension"); North Carolina has no specific provision to expel a student for firearm possession, but makes it a felony to have a firearm on school property. N.C. GEN. STAT. § 14-269.2(b) (1999); *see also* N.D. CENT. CODE § 15.1-19-10 (1993 & Supp. 1999) (following federal law, but omitting referral to law enforcement); OHIO REV. CODE ANN. § 3313.66 (Anderson 1999) (following federal law, but omitting referral to law enforcement); Oklahoma provides general provisions for expulsion, but does not have a specific section regarding expulsion for firearm or weapon possession. OKLA. STAT. ANN. tit. 70, § 5-118 (West 1997); OR. REV. STAT. § 339.250(6) (1997)(following federal law); 24 PA. CONS. STAT. § 13-1317.2(a) (1995 & Supp. 2000) (following federal law); R.I. GEN. LAWS § 16-21-18 (1996) (following federal law, but omitting referral to law enforcement and requiring a one-year "suspension"); S.C. CODE ANN. § 59-63-235 (Law Co-op. 1995 & Supp. 2000) (following federal law); S.D. CODIFIED LAWS § 13-32-4 (Michie Supp. 2000) (following federal law); TENN. CODE ANN. § 49-6-3401(g) (1996 & Supp. 2000) (following federal law, but omitting referral to law enforcement); TEX. EDUC. CODE ANN. § 37.007(e) (Vernon 1996 & Supp. 2001) (following federal law, but omitting referral to law enforcement); UTAH CODE ANN. § 53A-11-904(2)(a)-(c) (2000) (following federal law, but omitting referral to law enforcement); VT. STAT. ANN. tit. 16, § 1166 (1995 & Supp. 2000) (following federal law); VA. CODE ANN. § 22.1-277.01 (Michie 2000) (following federal law, but omitting referral to law enforcement); WASH. REV. CODE ANN. § 28A.600.420 (West 1997 & Supp. 2001) (following federal law, but omitting referral to law enforcement); W. VA. CODE §§ 18A-5-1-a(a), 18A-5-1-a(g) (Michie 1997 & Supp. 2000) (following federal law, but omitting referral to law enforcement); WIS. STAT. ANN. § 120.13(1)(c)(2) (West 1999) (following federal law); WYO. STAT. ANN. § 21-4-305 (Michie 1999) (following federal law).

47. *See* U.S. DEP'T OF EDUC. & U.S. DEP'T OF JUST., *supra* note 46, at 6 (noting that the majority of public schools have zero tolerance policies targeting specified acts); *see also* Schwartz et al., *supra* note 16, at 14 (referring to statistics compiled by the U.S. Department of Education and U.S. Department of Justice indicating that the

reported zero tolerance policies for firearms and weapons.[48] In fact, by 1998 the percentage of schools with zero tolerance polices for specified infractions was as follows: ninety-four percent for firearms, ninety-one percent for other weapons, eighty-eight percent for drugs, eighty-seven percent for alcohol, and seventy-nine percent for violence and tobacco.[49] In contrast to the listed offenses, the original language of the Gun-Free Schools Act of 1994 only encouraged zero tolerance policies for possessing a firearm or other explosive device.[50]

Under the federal Act, states must maintain current zero tolerance policies regarding firearms or weapons such as bombs or other explosives,[51] but states could legally abandon zero tolerance policies regarding other misbehavior including drugs, alcohol, tobacco, or other misconduct unspecified by the Act. A guidance document issued by the Department of Education notes that the federal Act establishes the minimum punishment states must impose for firearm possession, not the maximum; thus, state legislators, state educational agencies, and local educational agencies may broaden federal definitions of offenses and punishments.[52] However, under the federal Act, state law must allow local and state educational agencies and officials to modify the one-year expulsion requirement when

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percentage of schools with zero tolerance policies has never fallen below seventy-five percent).

48. *See* U.S. DEP'T OF EDUC. & U.S. DEP'T OF JUST., *supra* note 46, at 6 (noting that ninety-four percent of schools reported zero tolerance policies for firearms, and ninety-one percent for weapons other than firearms).

49. *See id.* at 6-7 (demonstrating that most public schools enacted zero tolerance policies by the 1996-97 academic year, with nine out of ten schools enacting such policies for firearms and weapons other than firearms). In addition, in the 1996-97 academic year, public schools employed the following additional techniques to increase security: ninety-six percent required visitors to sign in to enter the school building, eighty percent maintained a closed-campus lunch policy that prohibited students from leaving school for lunch, seventy-eight percent had formal school violence prevention programs, fifty-three percent controlled access to school buildings, twenty-four percent controlled access to school grounds, nineteen percent performed drug sweeps, six percent had law enforcement personnel in school for thirty or more hours per week, four percent conducted random metal detector checks, and one percent used metal detectors on a daily basis. *Id.*

50. *See* 20 U.S.C. § 8921(b)(4) (clarifying that the word "weapon" means a firearm); *cf.* 20 U.S.C. § 8922(a) (denying funding to local educational agencies that fail to maintain a policy of reporting students to the criminal justice or juvenile justice system for bringing a "firearm or weapon" to school).

51. *See* 20 U.S.C. § 8921(b)(4) (referring to 18 U.S.C. § 921 for the definition of a firearm). Firearms include a gun's frame or receiver, any firearm silencer, any firearm muffler, starter guns, and any destructive device, but excludes antique firearms. 18 U.S.C. § 921(a)(3). "Destructive devices" include explosives, poisonous gases, bombs, grenades, certain rockets, certain missiles, mines, or similar devices. 18 U.S.C. § 921(a)(4).

52. *See generally* U.S. DEP'T OF EDUC., *supra* note 9 (outlining guidance and framework for similar state-enacted policies).

evaluating each individual case.[53] Therefore, school officials are not required to expel students under federal law.[54] In conclusion, challenging zero tolerance policies by challenging the Gun-Free Schools Act of 1994 implicates state interpretations of the Act, rather than the Act itself, although, as noted, states can legally interpret the Act in an expansive manner.[55] Therefore, challenging the Act at the federal or state level will likely yield little success.

### *B. Challenging State Interpretations of the Gun-Free Schools Act of 1994*

The Gun-Free Schools Act of 1994 allows the chief administering officer of a local educational agency to modify the automatic expulsion requirement on an individual basis.[56] Yet, administrators often fail to use this discretionary authority to limit mandatory expulsions and instead, have chosen to use this discretion to expand zero tolerance policies to require suspensions and expulsions of children for a myriad of infractions.[57] For example, in Arizona, students can be expelled for several offenses in addition to firearm possession, such as open defiance of authority, disruptive or disorderly behavior, or excessive absenteeism under zero tolerance policies.[58] Under Colorado zero tolerance law, students can be expelled for willful disobedience, persistent defiance of authority, and destruction or defacement of school property.[59] These laws demonstrate that administrators have added offenses other than

53. *See* 20 U.S.C. § 8921(b)(1) ("State law shall allow the chief administering officer . . . to modify such expulsion requirement for a student on a case-by-case basis.").

54. *Id.*

55. *See generally* U.S. DEP'T OF EDUC., *supra* note 9 and accompanying text (allowing states enacting similar laws to be more expansive than the federal mandate).

56. *See* 20 U.S.C. § 8921(b)(1) ("State law shall allow the chief administering officer of such local educational agency to modify such expulsion requirement for a student on a case-by-case basis," indicating that Congress intended school administrators to exercise discretion in each individual case).

57. *See* Nadine Strossen, ACLU President, *My So-Called Rights*, *available at* http://www.speakout.com/Content/ICArticle/4298 (last visited June 29, 2000) (explaining that although school safety is an important priority, safety and civil liberties are not mutually exclusive). Strossen argues that students have basic constitutional rights to self-expression, privacy, and due process. *See id.* Additionally, a 1998 Department of Education study found that only thirty-four percent of expulsions were shortened to less than one year, based on reports submitted by forty-three states. *See* BETH SINCLAIR ET AL., U.S. DEP'T OF EDUC., REPORT ON STATE IMPLEMENTATION OF THE GUN-FREE SCHOOLS ACT—SCHOOL YEAR 1996-1997 4 (1998) (furnishing statistics in connection with expulsions in schools across the nation).

58. *See* ARIZ. REV. STAT. ANN. § 15-841(B) (West 1989 & Supp. 1999) (listing offenses in addition to weapon possession for which schools must expel students).

59. *See* COLO. REV. STAT. § 22-33-106 (2000) (noting that offenses other than weapons possession can be grounds for suspension, expulsion, and denial of readmission).

those envisioned by the Gun-Free Schools Act of 1994.[60] However, states can legally expand the provisions of the Gun-Free Schools Act of 1994 as the Act serves only as a minimum requirement for states, and they are free to add offenses to state laws regarding school discipline.[61] Thus, opponents of zero tolerance policies will find little success in challenging expansive state interpretations of the 1994 Act.

Despite the legality of expansive zero tolerance policies, in practice, these laws frequently punish children for minor violations that pose no danger to others.[62] Consider the suspension of nine-year old Karl Bauman for submitting a "threatening message" in a fortune cookie for a school project.[63] Karl, who enjoys martial arts movies, submitted the message, "you will die an honorable death," as his contribution to a class assignment.[64] The Hudson, Ohio Schools Director of Pupil Services upheld the suspension as an appropriate punishment for Karl's "threatening message," thereby causing Karl to miss valuable school instruction during his suspension.[65] This account demonstrates the real effect of expanding zero tolerance laws as school administrators formulate and promulgate zero tolerance policies for a range of misconduct much wider than the 1994 Act ever intended.[66] Thus, this Comment contends that despite the legality of expansive state policies under the Gun-Free Schools Act of 1994, the policies still present major concerns that warrant reevaluation, as will be addressed in Part II.

### *C. Case Law Regarding School Discipline*

Another approach to challenging zero tolerance policies would lie

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60. *See* 20 U.S.C. § 8921(b)(1). Section 8921(b)(1) states that:

> [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 a school under the jurisdiction of local educational agencies in that State.

61. *See generally* SINCLAIR ET AL., *supra* note 57 and accompanying text (describing how states can expand the terms and provisions of the federal statute).

62. *See* Cerrone, *supra* note 7, at 133 (noting that zero tolerance policies have the potential to impose harsh punishments on non-dangerous students, who are likely to suffer negative effects resulting from lost educational opportunities).

63. *See* ACLU, *Third-Grader Suspended Over Fortune Cookie Message*, *available at* http://www.aclu.org/news/1999/n061499d.html (last modified June 14, 1999).

64. *See id.* ("Bauman's suspension is one of the most extreme cases of student discipline reported to the ACLU since the school shootings in Littleton, Colorado.").

65. *See id.* (stating that Karl Bauman's family consulted with the ACLU following the Hudson Schools Director of Pupil Services' decision to uphold the suspension).

66. *See* Tebo, *supra* note 7, at 42 (noting that the only requirement of local school boards is to provide minimal due process, and emphasizing that the judiciary has been very reluctant to intervene in the actual disciplinary decisions of school boards).

in judicial involvement and resolution; however, the courts consistently have responded to school disciplinary matters by deferring to local school boards.[67] Nevertheless, several cases have held that although schools have a duty to maintain order,[68] some limits exist when administering disciplinary policies.[69]

As early as 1974, the Fifth Circuit tempered a school's disciplinary decision in *Lee v. Macon County Board of Education*.[70] In *Lee*, the Macon County Board of Education, following a principal's recommendation, permanently expelled two sisters, Lillie Mae, age seventeen, and Rose Ella, age fourteen, for allegedly fighting with other students and disobeying their teachers.[71] The Fifth Circuit remanded the expulsion case to the Board of Education because it recognized that permanently removing students from public school bars them from

67. *See* Boucher v. Sch. Bd., 134 F.3d 821, 827 (7th Cir. 1998) (quoting Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 507 (1969), which noted that the Supreme Court "has repeatedly emphasized the need for affirming the comprehensive authority of the States and of school officials . . . to prescribe and control conduct in the schools"); *accord* Wood v. Strickland, 420 U.S. 308, 326 (1975) (internal citations omitted) (noting that even if the Supreme Court believes the punishment to be too strict, it is not the Court's place to intervene); Fuller v. Decatur Pub. Sch. Bd. of Educ., 78 F. Supp. 2d 812, 821-22, 828 (C.D. Ill. 2000) (recognizing that federal courts have a very limited role in resolving school disciplinary issues and affirming the expulsion of six students); Hammock v. Keys, 93 F. Supp. 2d 1222, 1224 (S.D. Ala. 2000) (establishing in the introduction that "[i]t is not the role of the federal courts to set aside decisions of school administrators which the court may view as lacking a basis in wisdom or compassion"); South Gibson Sch. Bd. v. Sollman, 728 N.E.2d 909, 917-18 (Ind. Ct. App. 2000) (acknowledging judicial reluctance to intervene in school discipline and in particular, refusing to overturn a school board's decision to expel a student in accordance with a zero tolerance policy).

68. *See* Boykins v. Fairfield Bd. of Educ., 492 F.2d 697, 702 (5th Cir. 1974) (insisting that school boards and administrators have the authority to maintain discipline and order within the bounds of the Constitution, and thereby affirming the expulsion of eight children); *accord Tinker*, 393 U.S. at 507 (affirming that school officials have a duty to administer disciplinary policies necessary to sustain an orderly and safe learning environment).

69. *See* Lee v. Macon County Bd. of Educ., 490 F.2d 458, 461 (5th Cir. 1974) (remanding the expulsion of two children to the school board to reconsider the case, because the school board, without its own independent judgment, had automatically and therefore, wrongfully accepted the principal's recommendation of expulsion); *accord* Bd. of Trs. v. T.H., 681 So. 2d 110, 115 (Miss. 1996) (reinforcing the ability of school administrators to act with leniency in regard to disciplinary matters (citing Clinton Mun. Separate Sch. Dist. v. Byrd, 477 So. 2d 237, 241 (Miss. 1985)); Clinton Mun. Sch. Separate Dist. v. Byrd, 477 So. 2d 237, 238, 241 (Miss. 1985) (affirming the semester-long suspension of two students, but noting that mandatory rules do not ban school administrators from exercising leniency and flexibility); Lyons v. Penn Hills Sch. Dist., 723 A.2d 1073, 1076 (Pa. Commw. Ct. 1999) (finding that the school board exceeded its authority by administering a zero tolerance policy that did not allow for a discretionary review of the student's expulsion).

70. *See Lee*, 490 F.2d at 461 (recognizing the detrimental effects of barring a child from receiving a public school education).

71. *See id.* at 458-59 (noting hearing testimony claiming that the girls used foul language and resisted corporal punishment).

advancement in society, a very serious and detrimental consequence for acts committed before adulthood.[72] The Fifth Circuit concluded that "[i]n our increasingly technological society getting at least a high school education is almost necessary for survival,"[73] and urged citizens, lawmakers, and the media to encourage children to finish high school.[74]

In a 1985 case, *Clinton Municipal Separate School District v. Byrd*,[75] the Mississippi Supreme Court held that school boards have the power to lessen mandatory punishments.[76] Although the Supreme Court of Mississippi upheld the one semester suspension of two girls for defacing school property, in deference to the school board's findings,[77] it noted that the law did not require mandatory suspension and encouraged the school board to consider lesser, alternative punishments.[78] Rather than a lengthy suspension, the Supreme Court of Mississippi recommended the girls be required to clean the defaced property, to study extra course material, and to lose participation privileges in certain extracurricular activities.[79]

Lastly, in a 1999 school discipline case, *Lyons v. Penn Hills School District*,[80] the Pennsylvania Commonwealth Court overturned a school's decision to expel a seventh grader for filing his nails with a

72. *See id.* at 460 (concluding that "[s]tripping a child of access to educational opportunity is a life sentence to second-rate citizenship" because many children will have no other means to obtain an education).

73. *Id.*

74. *See id.* at 461 (recognizing that children who are expelled and suspended from high school often become "dropouts and burdens to society").

75. *See* 477 So. 2d 237, 238 (Miss. 1985) (recognizing that the judiciary has vested a great deal of discretionary power in public school administrators, but also noting that this authority must be consistent with federal and state constitutions).

76. *See id.* at 241 (concluding that mandatory school rules do not prohibit school administrators from carrying out rules with leniency and flexibility, by considering facts and circumstances specific to an individual's case); *cf.* Lockett v. Ohio, 438 U.S. 586, 604 (1978) (advancing the consideration of all factors relevant to an individual situation in deciding punishment in a death penalty case as a key guarantee of the United States criminal justice system).

77. *See Clinton*, 477 So. 2d at 242 (upholding the suspension of two girls and noting that when courts disagree with the school board or administrator, it is generally meaningless because the judiciary generally gives deference to school officials in matters of school discipline).

78. *See id.* (suggesting the school employ more merciful means of punishment by teaching the students at school through "extra learning tasks," rather then excluding them from school).

79. *See id.* (suggesting as an alternative punishment that the girls memorize sections from the MERCHANT OF VENICE and teach them to school administrators, such as "the quality of mercy is not strain'd" and that "earthly power doth . . . show likest God's when mercy seasons justice," WILLIAM SHAKESPEARE, act 4, sc. 1).

80. 723 A.2d 1073, 1074 (Pa. Commw. Ct. 1999) (noting that the hearing examiner agreed that a one-year expulsion was a very strict punishment for a student using a small pen-knife to file his fingernails, but still recommended expulsion in compliance with the school district's zero tolerance policy).

small pen-knife because the school refused to allow discretionary review of their decision by the school board and superintendent.[81] The Pennsylvania Commonwealth Court found that the school exceeded its authority by adopting a zero tolerance policy that failed to include discretionary review.[82] This decision recognized that situations might arise that warrant an exception to the mandatory expulsion requirement of zero tolerance policies.[83] Despite these three cases spanning three decades, in the vast majority of cases throughout the 1970s, 1980s, and 1990s, courts routinely have deferred to school officials in matters of school discipline.[84]

Under current zero tolerance policies, the United States has experienced a dramatic increase in suspensions and expulsions for a myriad of infractions.[85] In 1997, zero tolerance approaches to discipline contributed to the suspensions of over 3.1 million students, mostly for non-violent behavior,[86] and to the expulsions of over 87,000 students nationwide in 1998.[87] For example, Maryland public schools suspended 64,103 students during the 1998-99 academic year;[88] almost eight percent of the entire kindergarten through

81. *See id.* at 1076 (ruling that discretionary review was essential to ensure that the expulsion was a valid and appropriate punishment).

82. *See id.* (noting that the zero tolerance policy prevented the superintendent, the school board, and the students from exercising discretion by automatically adopting the decision of the hearing officer).

83. *See id.* (expressing that "[i]mplicit in that grant of authority [to the School Board] is a grant of permission to the Board to consider an alternative to expulsion based upon the recommendation of the District's superintendent").

84. *See* Tebo, *supra* note 7, at 42 (emphasizing the judiciary's great hesitancy to overturn disciplinary decisions made by school boards, unless the student has a disability covered by the Americans with Disabilities Act); s*ee, e.g.*, O'Hayre v. Bd. of Educ. for Jefferson County Sch. Dist. R-1, 109 F. Supp. 2d 1284, 1296-97 (D. Colo. 2000) (upholding a student's expulsion in an Americans with Disabilities Act challenge and noting that no provision exists in Colorado allowing judicial review of supsensions and expulsions); Demers v. Leominster Sch. Dist., 96 F. Supp. 2d 55, 58 (D. Mass. 2000) (requiring an expelled "special needs" student to exhaust his administrative remedies, although the court noted that it seemed school officials failed to provide adequate due process); Doe v. Bd. of Educ. of Oak Park & River Forest High Sch. Dist. 200, 1995 U.S. Dist. WESTLAW 608534, at *5 (N.D. Ill. Oct. 12, 1995) (upholding the expulsion of a disabled student and noting that "the decision of whether or not to expel a student . . . is best left to the discretion of the school board").

85. *See* AP/CRP, *supra* note 6, at 3 (noting that although recorded data regarding expulsions and suspensions is limited, the numbers that are available indicate a very disturbing rise in such cases).

86. *See* Kim Brooks et al., *School House Hype: Two Years Later*, POLICY REP. (Justice Pol'y Inst., Washington, D.C. & Children's Law Cent., Inc., Covington, KY), Apr. 2000, at 4 ("The relatively good news concerning the declining juvenile crime rate has been met by an expansion of security policies across the country.").

87. *See* AP/CRP, *supra* note 6, at 3 (detailing the rise in the number of expulsions and suspensions throughout the United States due to zero tolerance policies).

88. *See* MARYLAND STATE DEP'T OF EDUC., SUSPENSIONS—MARYLAND PUBLIC SCHOOLS 1998–1999 2 (demonstrating in table two that 64,103 students were

twelfth grade student body.[89] Notably, Maryland issued approximately sixty percent of their suspensions for non-violent acts, such as tardiness, truancy, disrespect, classroom disruption, and portable communication devices.[90] Yet, despite alarming increases in suspensions and expulsions, most courts still defer to local school officials regarding disciplinary matters.[91] Thus, judicial resolution seems an inadequate remedy for opponents of zero tolerance policies.

### *D. Procedural and Substantive Due Process Challenges to Disciplinary Decisions*

Opponents of zero tolerance policies can also challenge zero tolerance policies on due process grounds under the Fifth and Fourteenth Amendments to the United States Constitution, which provide that neither the federal government, nor states, can deprive any person of life, liberty, or property without due process of law.[92] In *Goss v. Lopez*, the Supreme Court held that when the government deprives an individual of a property interest, such as depriving a student of their right to public education due to a suspension or an expulsion, minimum procedural due process requirements apply.[93] Under *Goss*, minimum due process includes notice and the opportunity to be heard prior to suspensions,[94] although, the opportunity to be heard need only be an informal conversation between the student and the vice-principal.[95] *Goss* only addressed suspensions for ten days or less, but the Court noted that longer

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suspended from Maryland public schools in the 1998-99 school year).

89. *See id.* at 1 (detailing, in table one, the percentage of students suspended from Maryland public schools as 7.8% in the 1998-99 academic year).

90. *See id.* at 4-7 (dividing the number of suspensions into the following eight categories: attendance, dangerous substance, weapons, attack/threats/fighting, arson/fire/explosives, sex offenses, disrespect/insubordination/disruption, and other).

91. *See* Tebo, *supra* note 7, at 42 (emphasizing the judiciary's deference to disciplinary decisions made by school boards in most cases).

92. *See* U.S. CONST. amends. V and XIV.

93. *See* Goss v. Lopez, 419 U.S. 565, 572-73, 581 (1975) (recognizing the property interest in public education under state law and therefore requiring due process protections before the right is revoked); *see also* Bd. of Regents v. Roth, 408 U.S. 564, 569-70 (1972) (noting that procedural due process requirements are triggered when the state deprives someone of liberty or property rights protected by the Fourteenth Amendment).

94. *See Goss*, 419 U.S. at 582 (outlining the general rule that "notice and [a] hearing should precede removal of the student from school").

95. *See id.* at 582-84 (recognizing that the hearing can be "an informal give-and-take between the student and disciplinarian"); *see also* C.B. v. Driscoll, 82 F.3d 383, 386 (11th Cir. 1996) ("[O]nce school administrators tell a student what they heard or saw, ask why they heard or saw it, and allow a brief response, a student has received all the process that the Fourteenth Amendment demands.").

suspensions or expulsions might entail more formal procedures.[96]

Procedural due process challenges to expulsions and suspensions under zero tolerance policies may be successful when a school fails to provide minimum procedures discussed above, a more likely occurrence in states that have no due process requirements.[97] For example, Arizona, Colorado, Georgia and Iowa have zero tolerance policies requiring one-year expulsions under the Gun-Free Schools Act of 1994; however, these states have no requirements regarding procedural due process.[98] Therefore, schools that fail to provide notice and an opportunity to be heard directly violate the minimum procedural due process requirements established in *Goss* and can be challenged on such grounds.[99] Yet, most schools provide notice and some kind of hearing to meet minimum due process requirements.[100] Therefore, procedural due process challenges generally will be futile because schools provide the basic due process requirements and summarily discharge students.

Substantive due process challenges to zero tolerance policies generally contest the mandatory nature of the policies as excessive and lacking a rational connection to legitimate educational goals.[101]

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96. *See Goss*, 419 U.S. at 584 (noting that in unusual situations involving only short suspensions, the court may not require anything "more than rudimentary procedures").

97. *See* Cerrone, *supra* note 7, at 178 (noting that the Gun-Free Schools Act of 1994 and state laws following the Act address school violence, but fail to provide procedural due process requirements).

98. Arizona, Colorado, Georgia, and Iowa's statutes generally follow the federal Gun-Free Schools Act of 1994, 20 U.S.C. §§ 8921-8923, which also fails to include procedural due process requirements. *See* ARIZ. REV. STAT. ANN. § 15-841(B-G) (West 1991 & West Supp. 1999); COLO. REV. STAT. § 22-33-106 (2000); GA. CODE ANN. §§ 20-2-751.1, 20-2-756 (1996 & Supp. 2000); IOWA CODE ANN. § 280.21B (West 1996).

99. *See Goss*, 419 U.S. at 582-84 (requiring notice and an opportunity to be heard, and possibly more formal procedures in cases of suspensions and expulsions over ten days).

100. *See* Fuller v. Decatur Pub. Sch. Bd. of Educ., 78 F. Supp. 2d 812, 815 (C.D. Ill. 2000) (noting that the expelled students received sufficient notice of a hearing before an independent hearing officer and the school board, including the opportunity to address the board and present witnesses, thereby satisfying the students' procedural due process rights); *see also* James v. Unified Sch. Dist., 899 F. Supp. 530, 535-36 (D. Kan. 1995) (holding that the expelled student and his father received sufficient notice because they knew to attend the hearing and were afforded the opportunity to present evidence at the hearing, thus satisfying procedural due process requirements); D.B. v. Clarke County Bd. of Educ., 469 S.E.2d 438, 441 (Ga. Ct. App. 1996) (holding that an expelled student received adequate due process because the school's rules were published and distributed to students, thus providing notice to all students of the rules and punishments).

101. *See, e.g.*, Mitchell v. Bd. of Trustees, 625 F.2d 660, 662 (5th Cir. 1980) (stating the legal issue in the case as whether students are entitled to discretion by school officials issuing mandatory punishments under substantive due process, and finding that mandatory punishments do not violate substantive due process); Caldwell v. Cannady, 340 F. Supp. 835, 838 (N.D. Tex. 1972) (upholding a mandatory expulsion rule as valid and therefore not a violation of substantive due process).

However, most cases have held that zero tolerance polices mandating specific punishments for certain behaviors do not violate substantive due process.[102] To successfully challenge a zero tolerance policy or disciplinary decision on substantive due process grounds, one must show an "extraordinary departure from established norms" that is "wholly arbitrary."[103] Thus, if the government provides some reasonable justification for its policy or decision, it will likely withstand judicial scrutiny.[104] Moreover, courts generally defer to local school systems concerning disciplinary decisions;[105] thus, substantive due process challenges have had little success.[106]

In conclusion, both procedural and substantive due process challenges are likely to be successful only in cases of blatant omissions of minimum procedures or extreme policies that present no rational connection. Schools generally provide basic procedures and rational policies that courts are reluctant to overturn, effectively blocking due process challenges to zero tolerance policies in all but the most egregious cases. Therefore, due process challenges will not prove useful in undermining zero tolerance policies.

## II. KEY PROBLEMS REGARDING ZERO TOLERANCE POLICIES

Although the noted legal challenges to zero tolerance policies will likely prove ineffective, zero tolerance policies still pose serious

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102. *See Fuller*, 78 F. Supp. 2d at 826 (holding that the Decatur Public School System's zero tolerance policy regarding violence did not violate substantive due process); *see also Caldwell*, 340 F. Supp. at 838 (holding that a mandatory expulsion policy did not violate substantive due process rights); Adams v. Dothan Bd. of Educ., 485 So. 2d 757, 760 (Ala. Civ. App. 1986) (holding that a school board's expulsion of a student did not violate his substantive due process rights because the school's policy clearly stated the rules and punishments and the school board considered the merits of the student's case prior to expelling him); Clinton Mun. Separate Sch. Dist. v. Byrd, 477 So. 2d 237, 240-42 (Miss. 1985) (holding that mandatory school disciplinary policies are not unconstitutional if they further legitimate school interests and noting the reluctance of courts to intervene in matters of school discipline).

103. *See* Dunn v. Fairfield Cmty. High Sch., 158 F.3d 962, 966 (7th Cir. 1998) (noting that "education itself is not a fundamental right").

104. *See id.* at 965 (noting that the challengers must show that the "exercise of governmental power [was] without any reasonable justification").

105. *See* Lee v. Macon County Bd. of Educ., 490 F.2d 458, 460 (5th Cir. 1974) (remanding the case back to the local board of education); *see also* Tebo, *supra* note 7, at 42 (noting that school systems need only provide minimal due process, and emphasizing that courts are reluctant to intervene in disciplinary decisions made by local school officials).

106. *See Mitchell*, 625 F.2d at 662-63 (holding that mandatory punishments do not violate substantive due process unless there is no rational connection between the violation and the punishment and finding that the policy at issue in this case mandating expulsion for weapon possession was rationally related to providing a safe learning environment).

problems warranting reconsideration and reform. When federal and state governments create law, the most basic goal should be the improvement of society through rational and reasonable measures. As noted, legal challenges may not be the answer, thus, this Comment now turns to the sociological and societal problems surrounding zero tolerance policies to illustrate the irrationality and unreasonableness of such policies. Only by examining these key problems will legislators and school administrators be convinced that zero tolerance policies must be reconsidered, and take action to re-evaluate this current approach to school discipline.

### *A. Effect of the Media on School Safety Issues*

According to the Center for Media and Public Affairs ("CMPA"),[107] the three major television stations, NBC, ABC and CBS, devoted 378 news stories,[108] consuming approximately ten hours of news coverage, to eight public school shootings that occurred between October 1997 and May 1999,[109] in the week following the shootings.[110] For example, in the week after the Columbine High School shooting in Littleton, Colorado, the three major networks aired approximately twelve hours of news coverage of the incident.[111]

Due in part to increasing coverage of school violence, "crime" rose from the third most highly covered news topic in 1998 to the second most highly covered in 1999 on the CMPA's top-ten list of television

107. The Center for Media and Public Affairs (CMPA) is a nonpartisan, nonprofit research organization in Washington, D.C., which scientifically studies how the media handles social and political issues. *See* CMPA website home page, http://www.cmpa.com/ (last visited Sept. 17, 2000).

108. *See Violence Goes to School*, 13-3 MEDIA MONITOR 1 (1999) (breaking down the number of stories as follows: 151 stories about the shooting in Littleton, Colorado; sixty-six stories about the shooting in Jonesboro, Arkansas; fifty-one stories about the shooting in Springfield, Oregon; forty-three stories about the shooting in Conyers, Georgia; twenty-eight stories about the shooting in Paducah, Kentucky; sixteen stories about the shooting in Edinboro, Pennsylvania; fourteen stories about the shooting in Richmond, Virginia; and nine stories about the shooting in Pearl, Mississippi).

109. *See id.* at 2 (referring to school shootings in Pearl, Mississippi; Paducah, Kentucky; Jonesboro, Arkansas; Edinboro, Pennsylvania; Springfield, Oregon; Richmond, Virginia, Littleton, Colorado; and Conyers, Georgia).

110. *See id.* at 1-2 (noting that NBC aired three hours, forty minutes, CBS aired three hours, twenty-one minutes, and ABC aired three hours, seventeen minutes of school violence coverage); *see also* Strossen, *supra* note 57 (referring to the CMPA findings to demonstrate that media hype, at least in part, has driven zero tolerance policies due to an unreasonable fear that "[school violence] could happen anywhere . . . .").

111. *See Violence Goes to School*, *supra* note 108, at 1-2 (demonstrating that the Columbine High School shootings generated the most media attention (forty percent of all school shooting coverage) as compared to the seven other shootings that occurred in the eighteen-month period examined by CMPA).

news topics.[112] In fact, the ethnic war and NATO's involvement in Kosovo "barely edged out crime at home as the leading news topic in 1999"[113] by a mere two stories.[114] Contributing to the rise in crime coverage, the three major networks aired 319 stories about the Columbine High School shooting, constituting fifty-four percent of all stories about murder in 1999.[115]

In contrast to Columbine, other murder stories in 1999 received far less media coverage. Only forty-eight stories covered the trial of two men for the racially motivated murder of James Byrd in Texas,[116] forty-five stories covered the shooting of nine people in a Georgia day trading office,[117] and forty-eight stories covered the nationwide manhunt for Rafael Resendez-Ramirez, a suspected serial killer.[118] Combined, these stories totaled only half the number of stories aired about Columbine.[119]

A comparison to other news topics further illustrates the exorbitant amount of time devoted to coverage of the Columbine shooting. For example, 138 stories aired about the crash of Egypt Air flight 990,[120]

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112. *See 1999 Year in Review*, 14-1 MEDIA MONITOR 1, 2 (2000) (noting in the section on crime news that, "[f]or TV news, 1999 was the year of the mass shooting.").

113. *Id.* at 1 (stating that the Columbine shooting on April 22, 1999, caused a decrease in coverage of Kosovo, thereby lowering the number of stories about Kosovo to 1,615, which barely kept it as the top television news topic in 1999).

114. *See id.* at 1-2 (displaying a graph showing the top ten total news stories for 1999 as follows: 1,615 news stories about Kosovo, 1,613 news stories about crime, 1,543 about business and economy, 895 about health issues, 793 about disasters and weather, 655 about accidents, 425 about impeachment, 368 about sports, 270 about Campaign 2000, and 208 about Russia).

115. *See id.* at 2 (stating news stories about the Columbine High School shooting accounted for five times the stories about any other school violence incident).

116. *See id.* at 2 (noting the state of Texas charged three men with the murder of James Byrd); *see also* Rick Lyman, *Man Guilty of Murder in Texas Dragging Death*, N.Y. TIMES, Feb. 24, 1999, at A1 (detailing the charges against John William King, Lawrence Russell Brewer, and Shawn Berry for the dragging-death of James Byrd, and the jury's finding that John William King was guilty of capital murder).

117. *See 1999 Year in Review*, *supra* note 112, at 2 (comparing other high profile shootings to Columbine, including the shooting of nine people in an Atlanta office); *see also* J.R. Moehringer, *Atlanta Stock Trader Kills 12*, L.A. TIMES, July 30, 1999, at A1 (reporting that a day-trader, upset by financial losses, opened fire in an Atlanta office, killing nine people and wounding twelve others before killing himself).

118. *See 1999 Year in Review*, *supra* note 112, at 2 (comparing news coverage of other criminal matters, such as the nationwide law enforcement search for Rafael Resendez-Ramirez); *see also* Roberto Suro, *Hunt Intensifies For Rail-Riding Serial Killer*, WASH. POST, June 25, 1999, at A2 (noting that Rafael Resendez-Ramirez had been jailed several times over the last twenty years for aggravated assault, burglary, and other felonies, but nothing indicating murder).

119. *See supra* notes 115-118 and accompanying text (reporting the number of stories aired on Columbine versus the number of news stories concerning three other high-profile murders). In total, 141 news stories covered the above-mentioned shootings, while the Columbine shooting was the subject of 319 stories. *See id.*

120. *See 1999 Year in Review*, *supra* note 112, at 4 (noting that accidents such as

twenty-four stories covered the Justice Department's antitrust lawsuit against Microsoft,[121] and twenty-one stories covered AIDS and treatments for the disease.[122] The total number of reports on these three topics combined does not equal the number of news stories aired about the Columbine tragedy.[123]

This excessive amount of media coverage surrounding school violence has created the public misconception that such violence pervades our schools.[124] The media's failure to adequately or accurately report statistics indicating the recent decline in school violence only perpetuates this erroneous belief.[125] In a 1999 *New York Times* article,[126] one journalist observed that "[a]nyone watching the news would find it almost impossible to believe that school violence has *decreased*."[127]

Journalists' word choice in reporting the shooting at Columbine High School as a "massacre," only fosters the public's misconceptions

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plane crashes ranked sixth among the top ten news topics of 1999); *see also* Guy Gugliotta & Lynne Duke, *Jet Crashes Into Sea With 217 Aboard; Cairo-Bound Flight Dropped Suddenly Off Massachusetts; No Sign of Foul Play*, WASH. POST, Nov. 1, 1999, at A1 (reporting that an Egypt Air jetliner flying from New York to Cairo crashed on October 31, 1999, killing all passengers, including dozens of American tourists).

121. *See 1999 Year in Review*, *supra* note 112, at 2 (ranking business and economy issues, such as the Justice Department's lawsuit against Microsoft, as third in the top ten list of 1999 news topics); *see also* Rajiv Chandrasekaran & David Streitfeld, *Microsoft: The Empire Strikes Out?; In Courtroom and Beyond, Software King Is At Risk*, WASH. POST, Nov. 7, 1999, at A1 (discussing Microsoft's vulnerability due to a Justice Department antitrust lawsuit, alleging that Microsoft wielded monopoly power over its competitors).

122. *See 1999 Year in Review*, *supra* note 112, at 3 (listing health issues, including the AIDS disease, as fourth among the top ten list of 1999 news topics); *see also* David Brown, *HIV Respite Is Brief; Subjects Relapse After Halting Treatment*, WASH. POST, May 9, 1999, at A1 (reporting on the failure of experimental treatments to cure the AIDS virus, which affects millions of people worldwide).

123. *See supra* notes 120-122 and accompanying text (reporting the number of stories concerning several major news events in 1999). Only 183 news stories aired on these events, while 319 stories reported on the Columbine murders. *See id.*

124. *See* Strossen, *supra* note 57 ("The media's sensationalized coverage of school violence has helped whip up exaggerated fears, which in turn spur officials to overreact, treating all students like potential perpetrators or victims of mass murder."); *see also* ABC News Survey, Public Agenda Online, *available at* http://www.publicagenda.com/issues. . .ype=crime&concern_graphic=pcc5.gif (last visited Sept. 16, 2000) (finding seventy-six percent of respondents answered that they based their perceptions of violence on the news).

125. *See* Schwartz, *supra* note 16, at 4 (acknowledging that sensationalized media coverage of a shooting at a Jewish Center in California was contrary to findings by the Center for Disease Control indicating a considerable decline in high school violence throughout the 1990s) (citing Barry Glassner, *School Violence: The Fears, the Facts*, N.Y. TIMES, Aug. 13, 1999, at A21).

126. Barry Glassner, *School Violence: The Fears, the Facts*, N.Y. TIMES, Aug. 13, 1999, at A21 (asserting that ceaseless media accounts of youth violence distort the reality that high school violence substantially declined in the 1990s).

127. *Id.* (admitting that the media's coverage of school violence has led to public misconceptions about the actual state of school safety) (emphasis added).

about school violence.[128] Consider how the following headlines contribute to increasing public fear: "Horror Comes to Life in Columbine Videos,"[129] "Springfield Slaughterhouse: The Boy Who Loved Bombs,"[130] and "He Turned the Guns Straight At Us and Shot."[131] Arguably, due to such sensationalized headlines and excessive media coverage, seventy-one percent of adults now believe that a school shooting is likely to occur in their community.[132] In addition, although ninety-six percent of all juvenile homicide arrests occur in suburbs and cities, parents in rural areas expressed more fear than suburban and urban parents regarding school safety.[133] Although the American public believes that gun violence in schools has increased dramatically,[134] statistical data on school safety contradicts this belief.[135]

### *B. Questions Regarding the Effectiveness of Zero Tolerance Policies*

There is little, if any data showing that zero tolerance policies increase school safety or reduce school violence.[136] In fact, a 1998

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128. *See, e.g.*, Barbara Kantrowitz, *The New Age of Anxiety*, NEWSWEEK, Aug. 23, 1999, at 39 (describing the Columbine shooting as a "massacre" and noting that Columbine "sounded the alarm for parents across the country."). *See generally 2nd Anniversary of Columbine Massacre Marked with Quiet Memorials*, L.A. TIMES, Apr. 21, 2001, at A22; Matt Bai et al., *Anatomy of a Massacre*, NEWSWEEK, May 3, 1999, at 24; Connie Langland, *Being Scared . . . Is Not the Way to Go Through School; College Admiissions Essays Offer a Vivid Look at How the Columbine Massacre Seared a Generation*, WASH. POST, Apr. 15, 2001, at A10.

129. Julie Cart, *Horror Comes to Life in Columbine Videos*, L.A. TIMES, Dec. 14, 1999, at A15 (detailing "chilling home movies" in which two students planned to shoot classmates and school officials at Columbine High School).

130. Margot Hornblower, *Springfield Slaughterhouse: The Boy Who Loved Bombs*, TIME, June 1, 1998, at 42 (describing the school shooting at Thurston High School in Springfield, Oregon, which left two students dead and eighteen others wounded).

131. *He Turned the Guns Straight At Us and Shot*, ASSOC. PRESS, Apr. 24, 1999, at A9 (reporting accounts of students and teachers in the school during the Columbine shooting).

132. *See* Brooks et al., *supra* note 86, at 6 (referring to a phone poll of 1,004 adults performed by Hart and Teeter Research, which revealed that approximately 712 of those polled believed that a shooting was likely to happen in their community).

133. *See id.* at 7 (referring to a Gallup Poll conducted in September 1999 that demonstrated the false perceptions of many parents regarding school violence, and noting that urban and suburban parents expressed less fear than rural parents about school safety even though crime is more likely to occur in their communities).

134. *See, e.g.*, Kantrowitz, *supra* note 128, at 39 (reporting on a Newsweek poll that found that eighty-one percent of those surveyed thought that the country had experienced an increase in gun-related school violence).

135. *See* Schwartz, *supra* note 16, at 4 (emphasizing that despite intense media coverage of school violence, the arrest rate for violent crimes committed by American minors has decreased, as has the likelihood of youths being victims of violent crime).

136. *See* Adams, *supra* note 15, at 148 (noting that there is minimal statistical data demonstrating that zero tolerance policies improve school safety or diminish school violence) (citing Russ Skiba, *The Dark Side of Zero Tolerance: Can Punishment Lead to*

Department of Education study found students between the ages of twelve and eighteen were more likely to be victims of serious violent crime outside of school than inside school.[137] The study also revealed that less than one percent of all homicides involving school-aged children (five to nineteen years old) occur in or around school grounds or on the way to and from school.[138]

In addition to data regarding homicides, four doctors in the field of adolescent health and violence prevention recently issued a report on nonfatal behavior such as physical fights and weapon possession on school property.[139] The report revealed that between 1991 and 1997 the percentage of students who engaged in physical fights decreased by fourteen percent and the percentage of students who carried a weapon on school property decreased by twenty-eight percent.[140]

Although school officials may credit this decrease in school violence to enforcement of zero tolerance policies, the reduction is more likely the result of the overall decline in juvenile delinquency that began before the emergence of zero tolerance policies.[141] The Federal Bureau of Investigation's Uniform Crime Reports show a decline of approximately twenty-three percent in juvenile homicide arrests between 1989 and 1998.[142] In addition, a 1999 report by the U.S. Department of Justice's Office of Juvenile Justice and

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*Safe Schools?*, 80(5) PHI DELTA KAPPAN 372, 376 (1999)).

137. *See* Kaufman et al., *supra* note 6, at vi (reporting that in 1996, 671,000 students were victims of serious violent crime outside of school, whereas 225,000 minors aged twelve to eighteen were victims of serious violent crime at school).

138. *See* Centers for Disease Control and Prevention ("CDC"), *Facts About Violence Among Youth and Violence in Schools*, *available at* http://www.cdc.gov/od/oc/media/pressrel/r990421.htm (last modified Apr. 21, 1999) (identifying common features of school-related violent deaths).

139. *See* Nancy D. Brenner et al., *Recent Trends in Violence-Related Behaviors Among High School Students in the United States*, 282 JAMA 440, 442-46 (1999)(measuring nonfatal adolescent behaviors between 1991 and 1997, concluding that a decline in fights and weapon possession must be examined further to determine effective methods for prevention). The four authors are Nancy D. Brenner, PhD, and Thomas R. Simon, PhD, Division of Adolescent and School Health, National Center for Chronic Disease Preventions and Health Promotion; Etienne G. Krug, MD, Division of Violence Prevention, National Center for Injury Prevention and Control, Violence and Injury Prevention Unit, Social Change and Mental Health, World Health Organization; Richard Lowery, MD, MS, Division of Violence Prevention, National Center for Injury Prevention and Control.

140. *See id.* at 444.

141. *See* Brooks et al., *supra* note 86, at 18 (noting that most referrals to law enforcement officials are made for behaviors that are not a threat to school-wide safety).

142. *See* U.S. DEP'T OF JUST. AND FED. BUREAU OF INVESTIGATION, CRIME IN THE UNITED STATES: UNIFORM CRIME REPORTS, 1998, at 214 tbl. 32 (indicating a decline in murder arrests from 1,759 in 1989 to 1,354 in 1998 as well as an 8.9% overall decline in juvenile crimes).

Delinquency Prevention reported that violence by juveniles dropped thirty-three percent between 1993 and 1997.[143] Notably, this overall decline began before the Gun-Free Schools Act of 1994 and zero tolerance policies were subsequently enacted by the states.[144] Thus, the decline in violence among youth is more likely the result of a general decline in violence, rather than the enactment and enforcement of zero tolerance policies. The Justice Department data undermines the notion that school violence is a growing "epidemic," and perhaps indicates a diminished need for harsh zero tolerance policies.[145]

Furthermore, studies also suggest that zero tolerance policies have serious flaws and produce severe detrimental effects.[146] In fact, schools that point to fewer expulsions as a positive result of zero tolerance policies ignore the fact that expelled children often attend alternative schools or drop out of school altogether.[147] More importantly, automatic exclusion from school fails to address the underlying problems facing children, particularly those children classified as "at-risk."[148] In recent school shootings, severely disturbed children resorted to violence on school grounds while caring little for the consequences of their actions, particularly expulsion or suspension.[149] Almost all of these children demonstrated early warning signs of mental illness, such as violent fantasies, which could have been addressed by counseling if promptly detected.[150]

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143. *See* HOWARD N. SNYDER & MELISSA SICKMUND, U.S. DEP'T OF JUST., JUVENILE OFFENDERS & VICTIMS: 1999 NATIONAL REPORT 62 ("The drop in serious violence was led by reductions in victimizations by juveniles."). The report also indicates that violence by adults dropped twenty-five percent. *Id.* at 62-63.

144. *See supra* note 46 (listing the relevant statutes in all fifty states).

145. *See* Schwartz, *supra* note 16, at 6 (noting that declines in serious violence committed by youth both inside and outside of school contradict public perceptions and current disciplinary policies).

146. *See* Adams, *supra* note 15, at 147. Adams asserts that zero tolerance disciplinary approaches are harmful for the following six reasons. First, expelled children are usually low-income, at-risk youth who need education. Second, zero tolerance policies often volate children's due process rights. Third, zero tolerance policies allows schools to disregard their responsibilty to provide a caring, mentoring environment. Fourth, zero tolerance policies disproportionately punish minority students. Fifth, zero tolerance policies punish children for minor offenses due to broad interpretations of such laws by school administrators. Sixth, there is no data to prove that zero tolerance policies are effective measures to prevent violence or misbehavior. *See id.*

147. *See* AP/CRP, *supra* note 6, at 15 (asserting that "claims of success from schools must be viewed critically").

148. *See* Tebo, *supra* note 7, at 44 (advancing the argument that removing guns and drugs from schools does not necessarily protect children unless schools also address the underlying problems affecting violence-prone children).

149. *See id.* (indicating that zero tolerance policies did not deter the shooters in Littleton, Colorado; Paducah, Kentucky; or Springfield, Oregon).

150. *See id.* (noting that shooters received little evaluation or therapy despite

Most children who contemplate murdering others are likely to be suffering from severe psychological problems, and thus are unlikely to be deterred by zero tolerance policies.[151] Removing these children from school may even increase the danger to their families, schools, and communities, as they are likely to receive little, if any, supervision outside of school.[152] School officials must begin to concentrate on addressing these students' underlying problems, rather than administering blanket zero tolerance policies that not only serve to punish children, but may even foster hazardous situations in the future.[153]

### *C. How Zero Tolerance Policies Undermine Education*

"Policymakers, educators and parents should be very concerned with the long-term implications of denying educational opportunities to millions of children particularly when the effectiveness of these policies in ensuring school safety is highly suspect."[154] One educational implication of suspension and expulsion is that students typically fall behind in their schoolwork which, when combined with the natural feelings of alienation, increases the likelihood that they will drop out of school.[155] One study published in the *Teachers College*

noticeable warning signs of violent tendencies).

151. *See* IRVING B. WEINER, JUVENILE DELINQUENCY IN PRIMARY PEDIATRIC CARE 819 (1st ed. 1987) (cited in Cerrone, *supra* note 7, at 182 n.292) (noting "[t]he illegal behavior of characterological delinquents . . . manifest many features of what is commonly termed psychopathy.").

152. *See* Cerrone, *supra* note 7, at 183 (emphasizing that children may not be supervised at home, and without school supervision may act out on the streets).

153. *See* Cerrone, *supra* note 7, at 183-84 (describing a case in which a student was suspended from school for possession of a gun, questioned by police but not a psychologist, and later committed murder during his suspension). Recommending alternative strategies to deal with school disciplinary issues is beyond the scope of this Comment. However, for information regarding alternatives, *see* AP/CRP, *supra* note 6, at 26-32, 42-44 (detailing case studies of several schools that do not employ zero tolerance policies and recommending alternative strategies employed by these institutions); *see also* Adams, *supra* note 15, at 153-54 (detailing several recommendations including the development of clear disciplinary rules and procedures separate from academic matters, award structures for positive behavior, training programs for students and teachers on conflict resolution, and mandatory parental involvement); Brooks et al., *supra* note 86, at 30-34 (recommending adding more context to media reports, adopting alternative approaches to create safer schools, and regulating the gun trade through legislation); Schwartz, *supra* note 16, at 15-19 (suggesting an increase in after-school programs, mentoring programs, parental involvement, community involvement and partnerships, and social services and faith-based organization involvement and partnerships); Tebo, *supra* note 7, at 113 (discussing recommendations such as high-quality alternative education programs, extracurricular activities after school hours, and peer juries for disciplinary matters).

154. AP/CRP, *supra* note 6, at 1 (recognizing school safety as a very important issue, but also emphasizing the great importance of education).

155. *See id.* at 11 (noting that suspended children often fail to receive assignments

*Record* of Columbia University reported that suspended sophomores drop out of school at three times the rate of other students their age.[156] Ten percent of the students questioned in the Columbia study cited expulsion or suspension as their primary reason for dropping out of school.[157] In today's society, young adults without a high school diploma find it difficult to obtain an entry-level job or to continue education or training.[158] Consequently, removing children from school adds to the growing number of citizens lacking the basic educational skills essential to supporting themselves.[159] In addition to disadvantaging the individual, dropping out of school adversely affects society. On average, a high school dropout costs society between $243,000 and $388,000 over his or her lifetime due to both a lack of productivity and dependence on government subsidies.[160]

To illustrate the immediate educational effects of suspension and expulsion under zero tolerance policies, consider the story of eighteen-year-old Dana Heitner, a "straight-A" student and leading candidate for valedictorian of his high school class.[161] During the fall of his senior year, Dana made posters for his girlfriend's student council campaign intended to parody the movie "Speed."[162] In the movie, a bomb was set to explode if a bus slowed below fifty miles per hour and could only be deactivated by a ransom delivery.[163] Heitner hung the following poster in the boys' restroom:

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and receive little or no credit during suspensions); *see also* Brooks et al., *supra* note 86, at 4 ("Children face greater risks of dropping out permanently and becoming entangled in the courts when they are excluded from school.").

156. *See* Ruth B. Ekstrom et al., *Who Drops Out of High School and Why? Findings from a National Study*, 87 TEACHERS COLL. RECORD, 356, 364 (1986) (noting that one-third of students who drop out do so due to poor achievement and feelings of alienation, often resulting from disciplinary problems, suspension, or expulsion).

157. *Id.* The study also indicates that among males, the rate rose to thirteen percent claiming suspension or expulsion as their main reason for dropping out. *Id.*

158. *See* SNYDER & SICKMUND, *supra* note 143, at 12 (recognizing that dropping out of high school impedes one's ability to attain productive employment or education); *see also* Tebo, *supra* note 7, at 41 (recognizing the employment and economic challenges facing those students expelled from public school).

159. *See* Roni R. Reed, *Education and State Constitutions: Alternatives for Suspended and Expelled Students*, 81 CORNELL L. REV. 582, 605 (1996) (arguing that eliminating students' educational advancement leads to lesser overall advancement in society).

160. *See* SNYDER & SICKMUND, *supra* note 143, at 82-83 (noting that lack of education imposes even higher costs on society when high school dropouts become involved in crime or drug use, in which case the societal cost rises to between $1.7 and $2.3 million dollars over a lifetime).

161. *See* Tebo, *supra* note 7, at 42 (using the story of Dana Heitner to argue that zero tolerance policies often harm innocent, promising students).

162. *See id.* (recognizing that Heitner created posters based on a fictional movie and did not intend to make a bomb threat).

163. *See* Sara J. Bennett, *Schools' Zero Tolerance Debated*, CINCINNATI ENQUIRER, Dec. 2, 1999, at B1 (noting that Dana Heitner's idea behind making the sign was a joke based on a movie, not a real threat).

> There is a bomb in this receptacle. If the weight on the seat goes over 50 pounds, the bomb will be activated . . . The only way to get off the seat safely is to scream as loud as you can that you will vote for Robin Cox in the coming election.[164]

When the school learned of the posters, Dana received a ten-day suspension under Ohio's zero tolerance policy for making a "terrorist threat."[165]

Dana received no credit for schoolwork assigned during the suspension period and as a result his grades dropped significantly.[166] Dana had previously been at the top of his class in calculus, but he received a "D" on an exam given during his suspension.[167] Some college applications require disclosure of suspensions and expulsions; thus this grade affected Dana's college applications as well as his candidacy for valedictorian.[168] School officials even admitted that Dana's poster was never considered to be a true threat to school safety,[169] thereby effectively acknowledging the unreasonable result of applying their zero tolerance policy.[170] Cases like Dana Heitner's illustrate that zero tolerance policies may severely limit a student's educational advancement, as well as other opportunities for success. For these reasons, zero tolerance policies must be critically re-evaluated.

### *D. The Guarantee of Alternative Education*

The U.S. Constitution does not recognize the right to education as a fundamental right.[171] Therefore, no federal mandate requires

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164. Tebo, *supra* note 7, at 42 (noting the direct reference on the sign to Robin Cox's election campaign).

165. *See id.* (noting that Ohio state law requires every school district to employ a zero tolerance policy without any exceptions); *see also* OHIO REV. CODE ANN. § 3313.66 (Anderson 1999) (following the federal Gun-Free Schools Act, but expanding the language to include other threatening acts).

166. *See* Tebo, *supra* note 7, at 42 (recognizing the detrimental academic effects of suspending a student from school).

167. *See id.* (emphasizing that calculus was one of Dana Heitner's strongest subjects, but his grades dropped significantly due to the missed exam).

168. *See id.* (relating Heitner's and his parents' frustration that one unthreatening incident impeded his academic achievement).

169. *See id.* (observing that even the superintendent, Michele Hummel, acknowledged that the school did not believe the sign to be an actual threat when they learned that Heitner made the poster).

170. *See id.* at 44 (questioning the purpose of zero tolerance policies that punish innocent, promising children such as Heitner).

171. *See* San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 33-35 (1973) (stating that public education is not a fundamental right explicitly or implicitly protected by the U.S. Constitution). The plaintiffs asserted that the financing of Texas' public education system denied poor students equal protection because these students lived in areas with low property taxes. *See id.* at 5. The plaintiffs argued that the United States should consider education to be a fundamental right because it is

schools to provide alternative education for suspended or expelled children.[172] Only a limited number of states guarantee the right to public education;[173] thus, alternative educational opportunities for suspended and expelled students are inadequate in the United States.[174]

Some states, including Connecticut,[175] Hawaii[176] and Kentucky,[177] recognize the importance of continuous instruction, and provide alternative education for suspended and expelled students. In *Cathe A. v. Doddridge Board of Education*, the West Virginia Supreme Court of Appeals, the state's highest court, held an expelled student's right to

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inherent in the First Amendment right to free speech. *See id.* at 35-36. The Court held that while education is of great importance to the United States, "the importance of a service performed by the State does not determine whether it must be regarded as fundamental for purposes of examination under the Equal Protection Clause." *Id.* at 30. The Court concluded that education is a property right conferred by each state, with the responsibility of guaranteeing "each child . . . an opportunity to acquire the basic minimal skills necessary for the enjoyment of the rights of speech and of full participation in the political process." *Id.* at 37.

172. *See id.* at 33-35 (concluding that the U.S. Constitution does not protect education as a fundamental right, explicitly or implicitly). However, the Gun-Free Schools Act of 1994 explicitly notes that nothing in the Act prevents states from providing alternative education for expelled students. *See* 20 U.S.C. § 8921(b)(2).

173. *See* Goss v. Lopez, 419 U.S. 565, 567, 573 (1975) (finding the right to education to be a fundamental right in Ohio); *accord* State *ex rel.* G.S., 749 A.2d 902, 907-08 (N.J. Super. Ct. Ch. Div. 2000) (holding the right to education is a fundamental right in the state of New Jersey and requiring schools to provide alternative education to expelled students); Cathe A. v. Doddridge Bd. of Educ., 490 S.E.2d 340, 349, 351 (W. Va. 1997) (requiring school districts in West Virginia to provide free alternative education to student expelled for one year). *But see* Fuller v. Decatur Pub. Sch. Bd. of Educ., 78 F. Supp. 2d 812, 819 (C.D. Ill. 2000) (noting that expelled students were only able to attend alternative education programs due to the intervention of Governor George Ryan and the Rainbow/PUSH Coalition); *see also* Walter v. Sch. Bd. of Indian River County, 518 So. 2d 1331, 1335-36 (Fla. Dist. Ct. App. 1987) (holding that there was no statutory requirement in Florida to furnish expelled students with alternative educational instruction); Brooks et al., *supra* note 86, at 20 (noting that Massachusetts public schools are not required to provide alternative education, and finding that in the 1997-98 academic year, thirty-seven percent of expelled children received no alternative education because in seventy-five percent of those cases, the school district chose not to do so).

174. *See* AP/CRP, *supra* note 6, at III-1 to III-6 (noting that the discretionary or mandatory nature of alternative education varies from state to state). Approximately half of U.S. states require mandatory alternative education programs. *See id.*

175. *See* CONN. GEN. STAT. § 10-233(d) (1996 & Supp. 2000) (mandating alternative schooling for students under sixteen, and providing alternative schooling for students between sixteen and nineteen on an optional basis).

176. *See* HAW. REV. STAT. § 302A-1134.5(a) (1996 & Supp. 1998) ("If a child is excluded from attending school, the superintendent or the superintendent's designee shall ensure that substitute educational activities or other appropriate assistance are provided, such as referral for appropriate intervention and treatment services.").

177. *See* KY. REV. STAT. ANN. § 158.150(2) (Banks-Baldwin 1995 & Supp. 1999) ("A board that has expelled a student from the student's regular school setting shall provide or assure that educational services are provided to the student in an appropriate alternative program or setting.").

an education is a fundamental right in West Virginia.[178] The court concluded "[f]orced ignorance, by failing for 12 months to provide a student with a publicly funded education, is not a rational or appropriate remedy for student misconduct regardless of the severity of such conduct."[179] Thus, the court required the state to provide free, alternative education for the expelled student.[180]

In *State* ex rel. *G.S.*,[181] a 2000 New Jersey case, the Superior Court of New Jersey also ordered a school to provide alternative education for a student expelled under the school's zero tolerance policy.[182] The court recognized the importance of educating suspended and expelled children as a crucial part of the rehabilitative process, which aims to "restore a delinquent youth to a position of responsible citizenship."[183] Therefore, the court ordered New Jersey to provide alternative education for "G.S.," an expelled student, until he reached age nineteen or received his high school diploma.[184]

Despite these two cases, schools in most states are not required to provide alternative education for expelled and suspended students.[185] In a time of increased suspensions and expulsions due to zero tolerance policies, alternative education provides many students with their only opportunity to receive guidance and instruction.[186] In

178. *See Cathe A.*, 490 S.E.2d at 344 (recognizing education as a fundamental right in West Virginia).

179. *Id.* at 345.

180. *Id.* at 349 (holding that the school system must provide free educational services because the child had a fundamental right to an education, regardless of the child or parent's ability to pay).

181. 749 A.2d 902, 903 (N.J. Super. Ct. Ch. Div. 2000) (stating the fundamental issue as whether expelled students have the constitutional right to receive a public education).

182. *See id.* at 907-08 (holding that an expelled student is entitled to free alternative education).

183. *Id.* (stressing education as an important aspect of rehabilitation and reformation) (quoting State *ex rel.* F.M., 400 A.2d at 579).

184. *See id.* at 908 (directing the state of New Jersey, through the New Jersey Department of Education or another appropriate agency, to provide an in-school program, in-home program, or other alternative educational program for expelled student, "G.S.").

185. *See* ALA. CODE § 16-1-24.3 (1995 & Supp. 1999) (stating "[s]tudents who are expelled from schools for firearm possession *may* be permitted to attend alternative schools designed to provide education services.") (emphasis added); ARIZ. REV. STAT. § 15-841(E) (West 1991 & Supp. 1999) (providing that "a school district *may* reassign any pupil to an alternative education program if good cause exists for expulsion or for a long-term suspension.") (emphasis added); *see also* Fuller v. Decatur Pub. Sch. Bd. of Educ., 78 F. Supp. 2d 812, 819 (C.D. Ill. 2000) (noting that Illinois has no requirement that schools provide alternative education programs for expelled students); Walter v. Sch. Bd. of Indian River County, 518 So. 2d 1331, 1335-36 (Fla. Dist. Ct. App. 1987) (stating that Florida schools have no affirmative duty to provide alternative education for suspended or expelled students).

186. *See* AP/CRP, *supra* note 6, at 12 (recognizing the necessity of providing at-risk youth with high quality alternative education).

states without mandatory alternative public education, expelled students, many of whom come from low-income families, will not have the means to attend private schools or schools in other districts.[187] This consequence of zero tolerance policies is contrary to statements made by former Secretary of Education Richard W. Riley such as, "I urge schools to do everything possible to make sure that expelled students are sent to alternative schools . . . . These young people need to get their lives turned around."[188] The lack of alternative education in every state is cause for reconsideration of zero tolerance policies that diminish students' educational opportunities.

### *E. The Psychological Effects on Children*

Leading psychologists, including James Comer and Alvin Poussaint, regard zero tolerance policies as inconsistent with healthy childhood development because they punish severely but offer little, if any positive opportunities for instruction or rehabilitation.[189] Furthermore, as former Secretary of Education Richard W. Riley noted, schools need strict policies, but "some children can just get disconnected and lose their way."[190] Many students who are expelled or suspended from school are low-income, at-risk youth; thus exclusion from school particularly harms these children because they greatly benefit from education that assists them in facing many unique challenges.[191]

Additionally, zero tolerance policies alienate children and exacerbate misbehavior, particularly affecting at-risk children who are already on the verge of school failure and need additional support and guidance.[192] Feelings of alienation and failure often lead

187. *See* Adams, *supra* note 15, at 147 (recognizing that "students who are kicked out of school are typically the students who need education the most," as many of these children come from families facing socio-economic challenges).

188. PRESS RELEASE, U.S. DEP'T OF EDUC., MORE THAN 600 STUDENTS NATIONWIDE EXPELLED FOR BRINGING A FIREARM TO SCHOOL (May 8, 1998), *available at* http://www.ed.gov/PressReleases/05-1998/gfsint.html (last visited Dec. 24, 2000).

189. *See* AP/CRP, *supra* note 6, at 8 (citing the opinions of leading psychologists who acknowledge a conflict between harsh zero tolerance punishments and the developmental needs of youth, including development of trusting relationships with adults and positive opinions of fairness).

190. PRESS RELEASE, U.S. DEP'T OF EDUC., U.S. DEP'T OF EDUC. RELEASES FIRST IN SERIES OF SCHOOL SAFETY REPORTS, (Mar. 19, 1998), *available at* http://www.ed.gov/PressReleases/03-1998/school~1.html (reminding the public that not all children, even those who misbehave, are violent threats to school safety).

191. *See* Adams, *supra* note 15, at 147 (asserting that students expelled and suspended from school are likely to be the students who most need the educational environment to avoid delinquent behaviors).

192. *See* AP/CRP, *supra* note 6, at 9 (asserting that alienating students worsens the

excluded students to unemployment, gangs, and crime.[193] Studies suggest that when children are out of school, they are more likely to engage in physical fights, to possess a weapon, and to use alcohol, tobacco, and drugs.[194] In fact, harsher punishments often intensify a student's adversarial feelings toward adults and destroy a student's motivation to learn.[195] When students fear zero tolerance punishments, they may hesitate to confide in teachers, school counselors, or other adults at school because they believe adults will punish them before helping them.[196] As exclusionary punishments frequently intensify this conflict with adults, students who have been suspended or expelled from school often turn to deviant behaviors with their peers.[197] Because zero tolerance policies have demonstrated negative psychological effects on the children being punished, legislators must re-evaluate the need for these policies in light of the harm they may cause.

### *F. The Criminalization of Youth*

The Justice Policy Institute and the Children's Law Center agree that the real threat to youth comes not from school violence, but from the recent policies that are turning schools into "funnels for the juvenile justice system."[198] These two groups recognize that one of the most harmful effects of zero tolerance policies is the criminalization of minors for behavior that was once handled by school

behavior the punishment sought to correct).

193. *See* Tebo, *supra* note 7, at 41 (referring to children expelled and suspended from school as the "kids of whom the system washes its hands," who often join gangs and commit crimes).

194. *See* Centers for Disease Control and Prevention, *Health Risk Behaviors Among Adolescents Who Do and Do Not Attend School: United States 1992*, MORTALITY WKLY. REPT. 43:(08), Mar. 4, 1994, at 129, 130-32, *available at* http://www.cdc.gov/mmwr/preview/mmwrhtml/0025174.html (concluding that children are more likely to engage in behavior carrying potentially dangerous health risks with greater frequency when schools remove children from the educational environment).

195. *See* JONES, *supra* note 31, at 268-70 (recognizing that an adversarial relationship between a teacher or administrator and a student, caused by enforcement of expulsion and suspension policies, causes "a war of attrition . . . between punitive adult authority and [a] revengeful child" and "a desire for revenge that will guarantee the recurrence of the problem").

196. *See* Tebo, *supra* note 7, at 44 (recounting a situation in which Virginia school officials suspended a middle-school student who took a knife from a suicidal classmate and kept it in his locker until he could talk to his mother, because he wanted his classmate to get counseling, not punishment).

197. *See* AP/CRP, *supra* note 6, at 9-11 (noting that zero tolerance policies conflict with the adolescent need to develop strong bonds with adults).

198. *See* Brooks et al., *supra* note 86, at 4 (noting that automatic reporting of misbehavior to law enforcement officials is destroying confidentiality laws once considered "the hallmark of the juvenile court's rehabilitative model").

administrators.[199]

In the wake of highly-publicized school shootings, many educational institutions began to require that even minor offenses be referred to law enforcement officials.[200] Moreover, although the Gun-Free Schools Act of 1994 requires students found in possession of a gun or weapon to be referred to law enforcement officials,[201] most referrals are made for minor incidents of fighting that pose no real threat to school-wide safety, at least not in the way portrayed by the media.[202]

For example, in a recent Virginia case, two fifth-grade boys faced felony charges for putting soap in their teacher's water glass, an act most would consider a childish prank.[203] This case illustrates the expanded application of the Gun-Free Schools Act of 1994, which requires students found in possession of a weapon or firearm to be referred to the criminal justice system rather than the juvenile justice system.[204] Now, children who commit minor infractions such as the childish soap prank, can find themselves charged with a crime.[205] Six years after the passage of the Gun-Free Schools Act of 1994, many school districts now turn students over to local law enforcement officials for a wide range of misbehavior.[206] For example, in South Carolina, school officials can refer students to the criminal justice system based on mere allegations of disturbing the school environment.[207] As a result of these referrals, many children are now

199. *See* AP/CRP, *supra* note 6, at 13 (contending that what once was a schoolyard skirmish is now grounds for criminal charges).

200. *See* Strossen, *supra* note 57 (noting that the ACLU has received complaints from parents of children suspended or expelled for dying their hair, wearing certain jewelery, or tatooing their bodies).

201. *See* 20 U.S.C. § 8922(a) ("No funds shall be made available under this chapter to any local educational agency unless such agency has a policy requiring referral to the criminal justice or juvenile delinquency system of any student who brings a firearm or weapon to school served by such agency.").

202. *See* Brooks et al., *supra* note 86, at 18 (noting that weapons offenses constitute a small number of referrals, thus inferring that the decline in youth violence must result from a general decline in violence rather than recent disciplinary policies).

203. *See* Patricia Davis, *Fifth-Graders Charged Over Soapy Drink*; *Boys Going to Arlington Court For Spiking Teacher's Water*, WASH. POST, Nov. 16, 1999, at B1 (noting that felony charges carrying a twenty-year maximum penalty were filed against the two young boys for putting soap in their teacher's drinking glass).

204. *See* 20 U.S.C. § 8922(a) (conditioning Federal funding on state laws mandating policies that require referral to the criminal justice or juvenile delinquency system of any student who brings a firearm or weapon to a school).

205. *See* Davis, *supra* note 203, at B1 (recognizing that a childish joke resulted in two young boys facing felony criminal charges).

206. *See* AP/CRP, *supra* note 6, at 13 (noting a case in which a child who made a bet with another child at school was simply referred to law enforcement officials without a school investigation, as well as similar actions for children who threw peanuts, possesed a paging device, or put soap in a teacher's water glass).

207. *See id.* at 13-14 (discussing the additional concern that statements made by

part of the juvenile justice system or the adult criminal justice system and are not attending school because school administrators have abandoned the goal of rehabilitation in favor of incarceration.[208]

Historically, the United States juvenile justice system has recognized children as persons with "less than fully developed moral and cognitive capacities," and has therefore treated juvenile offenders differently than adult offenders.[209] Throughout the 19th and early 20th century, the juvenile justice system focused on offenders, not offenses, and on rehabilitation rather than punishment, seeking to re-establish delinquents as productive citizens through intensive therapy and education.[210] However, in the 1980s and 1990s the United States began treating more juvenile offenders as adult criminals, thus forcing youth into the criminal justice system where rehabilitation is not a primary goal.[211] As the juvenile justice system continues to emphasize rehabilitation as the most effective way to help troubled youth become productive citizens,[212] it seems counterproductive for courts and schools to abandon programs geared toward rehabilitation in favor of harsher penalties often resulting from zero tolerance policy referrals to the adult criminal justice system.

Although teachers and school administrators may be aiming to prevent violence, their hasty involvement of law enforcement officials and procedures raises questions regarding the appropriate role of schools and educators in disciplining students.[213] When school officials are quick to report students to law enforcement officials,

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accused students to school officials may later be used against them in criminal or juvenile delinquency cases).

208. *See id.* (stating that in an excessive number of disciplinary matters many schools erroneously interpret the law to include referral to law enforcement officials).

209. *See* SNYDER & SICKMUND, *supra* note 143, at 86 (noting that in 1899, Cook County, Illinois established the first American juvenile court regime that concentrated on the state's power and responsibility to provide guidance to children).

210. *See id.* (distinguishing the juvenile justice system from the criminal justice system, which handled cases based solely on legal factors, while the juvenile justice system considered "extra-legal" factors in its discretionary choice of cases).

211. *See id.* at 89, 94-96 (comparing the criminal justice system and the juvenile justice system in a chart showing multiple differences in the operating assumptions, prevention goals, law enforcement involvement, prosecutorial role, detention purposes, and adjudication proceedings of the two systems).

212. *See id.* at 94 (recognizing the main operating assumptions of the juvenile justice system as the malleability of youthful behavior, the viability of rehabilitation, and the dependence of youths on adults).

213. *See* Brooks et al., *supra* note 86, at 26 (noting that involvement by school personnel often facilitates prosecution of students).

students often feel there is a preconceived bias against them.[214] This perception should trouble adults as well as youth, and prompt reconsideration of zero tolerance policies, because there is "no support for the proposition that this treatment of children positively affects their behavior or their futures."[215]

## CONCLUSION

In the wake of highly publicized school shootings such as the Columbine tragedy, school administrators and state policymakers continue to implement zero tolerance policies for a myriad of infractions.[216] As noted, legal attacks on federal and state laws, including due process challenges, have proven ineffective, yet these policies continue to pose serious questions that warrant reconsideration and reform.[217]

In addition to concerns regarding the ineffectiveness of zero tolerance policies,[218] such harsh punishments lead to a series of negative repercussions that ultimately hinder children in achieving success.[219] Children who are suspended or expelled under zero tolerance policies lose valuable educational opportunities,[220] suffer significant psychological harm,[221] and often find themselves forced

214. *See id.* (commenting that students might interpret the coordination between school officials and law enforcement as an "alliance" against them).

215. AP/CRP, *supra* note 6, at 14 (urging reconsideration of automatic law enforcement referral in instances in which it causes more harmful effects than any possible benefits).

216. *See* AP/CRP, *supra* note 6, at iv (noting that principals and school administrators fail to exercise the discretionary authority included in most states' zero tolerance policies, opting instead to suspend and expel many children for relatively minor, non-violent behavior).

217. *See supra* Part II (detailing the questions surrounding zero tolerance policies including several negative effects on children).

218. *See supra* Part II.B (explaining that statistical data fails to show that zero tolerance policies enhance school safety and noting that such policies actually overlook the underlying causes of misbehavior, which may increase the risks of future misconduct and even violent behavior).

219. *See* AP/CRP, *supra* note 6, at 41 (noting that zero tolerance policies negatively affect families, and pushing schools to change these policies as well as their approaches to school discipline).

220. *See supra* Part II.C (discussing the negative educational effects of suspension and expulsion on students, such as falling behind in class work, receiving lower grades for missed exams or assignments, and dropping out of school, making it very difficult for those without a high school diploma to obtain meaningful employment or further education); *see also supra* Part II.D (explaining that most states fail to provide alternative education, thereby suggesting that many students expelled or suspended from school have no other means to attain further education).

221. *See supra* Part II.E (explaining that suspending and expelling students from school often causes feelings of alienation, exacerbating misbehavior, and often increasing the chances they will use drugs and alcohol, engage in fights, join a gang, and commit crimes).

into the adult criminal justice system for minor infractions that occurred at school.[222]

To achieve the goal of creating rational policies to address school violence, legislators and school officials must carefully examine not only the legality, but also the sociological issues surrounding zero tolerance policies. A review of the evidence will reveal that disciplining children through these questionably effective policies lacks the logic and the reasonableness that should be the basis for initiatives addressing school discipline. Therefore, this Comment recommends state policymakers and school officials re-evaluate and reform zero tolerance policies that exceed the scope of the Gun-Free Schools Act of 1994, and explore alternative approaches to maintaining safe schools.[223]

222. *See supra* Part II.F (focusing on automatic referrals to law enforcement officials for those students punished under zero tolerance policies and acknowledging that many juveniles face charges in the adult criminal justice system under these policies).

223. This Comment encourages school administrators to work toward the development and implementation of more realistic alternatives to zero tolerance policies. However, these necessary alternatives are beyond the scope of this Comment.