

Restorative Justice Liability: School Discipline Reform and the Right to Safe Schools

BERNARD JAMES*

Part I: The Shifting Legal Environment

PART ONE OF A FIVE-PART SERIES

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I. THE COMMON WISDOM ON STUDENT SAFETY

Litigation challenging school discipline policies is on the upswing. Ordinarily, courts act to constrain judicial review of education decision-making in a distinctive dance that steps back in deference to educational interests with only an occasional forward step in support of student rights.¹ This deference is set off by the lyric that school

* Professor of Constitutional Law, Caruso School of Law, Pepperdine University.

1. See *Parents United for Better Schs., Inc. v. Sch. Dist. of Pa. Bd. of Educ.*, 148 F.3d 260, 274 (3d Cir. 1998) (“Judicial interference with discretionary exercise of a school board power is permissible where the action of the board was based on a misconception of law, ignorance through lack of inquiry into the facts necessary to form an intelligent judgment, or the result of arbitrary will or caprice.” ‘An abuse of discretion is not merely an error of judgment, but if in reaching a conclusion, the law

officials act for the public good, and when their actions are challenged, those asserting the contrary assume a heavy burden to overcome the presumption.²

The experiences of students attending public schools have been powerfully shaped by the character of this relationship between the courts and educators. Anyone wishing to examine its effect on student rights will be met at the outset with the assertion by the U.S. Supreme Court that “while children assuredly do not ‘shed their constitutional rights . . . at the schoolhouse gate,’ the nature of those rights is what is appropriate for children in school.”³ Several possible explanations for this deference are possible.⁴ In part, the deference can be accounted

is overridden or misapplied, or the judgment exercised is manifestly unreasonable, or the result of partiality, prejudice, bias or ill will, as shown by the evidence of record, discretion is abused.” (first quoting *Roberts v. Bd. of Dirs. of Sch. Dist. of Scranton*, 341 A.2d 475, 480 n.4 (Pa. 1975); and then quoting *Man O' War Racing Ass'n, v. State Horse Racing Comm'n*, 250 A.2d 172, 181 n.10 (Pa. 1969)); see also Bernard James & Joanne E. K. Larson, *The Doctrine of Deference: Shifting Constitutional Presumptions and the Supreme Court's Restatement of Student Rights After Board of Education v. Earls*, 56 S.C. L. REV. 1, 8 (2004) (“In this model, educator policies are presumed to represent a good faith attempt to maintain safety and discipline and are thus valid when certain factors are at work.”).

2. See *Epperson v. Ark.*, 393 U.S. 97, 104 (1968) (“Courts do not and cannot intervene in the resolution of conflicts which arise in the daily operation of school systems and which do not directly and sharply implicate basic constitutional values.”); see also *Wilson v. Phila. Sch. Dist.*, 195 A. 90, 98 (Pa. 1937) (“[T]he exercise of discretion by the school authorities will be interfered with only when there is a clear abuse of it, and the burden of showing such an abuse is a heavy one.”).

3. *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 655–56 (1995) (quoting *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969)); see also Noelia Rivera-Calderón, *Arrested at the Schoolhouse Gate: Criminal School Disturbance Laws and Children's Rights in Schools*, 76 NAT'L LAW. GUILD REV. 1, 4 (2019) (“*Vernonia* demonstrates the common tension in children's rights law between granting children the same substantive and procedural due process rights as adults (as in *Tinker*), and, on the other hand, finding that children are different from adults and thus have ‘special needs’ entitled to different protections, often corresponding with lesser rights.”).

4. See Patrick E. McDonough, *Where Good Intentions Go Bad: Redrafting the Massachusetts Cyberbullying Statute to Protect Student Speech*, 46 SUFFOLK U. L. REV. 627, 632 (2013) (“The Supreme Court's review of school officials' authority often begins by recognizing the high degree of deference afforded public-school officials' ‘comprehensive authority.’ Because these officials perform important and highly discretionary functions, federal courts tend to exercise restraint when

for by the longstanding view that school officials need “a certain degree of flexibility”⁵ in achieving the education mission.⁶ In other cases, a form of federalism influences deference in lieu of political accountability when stakeholders disagree with school policies.⁷ What is important here is that assertions of student rights confront a tangible constraint in the form of a presumption that second-guessing education policy sits uncomfortably outside the judicial role.⁸

considering issues within the purview of public-school officials.” (citing *Tinker*, 393 U.S. at 507)); see also Bernard James, *Tinker in the Era of Judicial Deference: The Search for Bad Faith*, 81 UMKC L. REV. 601, 602 (2013) (“There is a surprising level of judicial deference to school officials. When talking about this deference in regard to the education mission, courts frequently observe that, ‘[t]he broad authority [of school officials] to control the conduct of students . . . permits a good deal of latitude in determining which policies will best serve educational and disciplinary goals.’” (alteration in original) (quoting *Sypniewski v. Warren Hills Reg'l Bd. of Educ.*, 307 F.3d 243, 260 (3d Cir. 2002)); William Calve, Comment, *The Amplified Need for Supreme Court Guidance on Student Speech Rights in the Digital Age*, 48 ST. MARY'S L.J. 377, 381 (2016) (“The Court emphasized judicial deference to the decision-making of school administrators, officials tasked with imparting ‘the shared values of a civilized social order.’” (quoting *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675 (1986))).

5. *New Jersey v. T.L.O.*, 469 U.S. 325, 340 (1985).

6. See Amanda Harmon Cooley, *Controlling Students and Teachers: The Increasing Constriction of Constitutional Rights in Public Education*, 66 BAYLOR L. REV. 235, 254 (2014) (“[T]he Court is quite comfortable narrowing the scope of student speech rights if it fits within its preferences or within the policy agenda of school governing authorities.”); see also Kristi L. Bowman, *The Government Speech Doctrine and Speech in Schools*, 48 WAKE FOREST L. REV. 211, 245 (2013) (“[T]he Court strongly encourages deference to the state as educator, but the deference is not unqualified.”).

7. See *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 42 (1973) (“[T]his case also involves the most persistent and difficult questions of educational policy, another area in which this Court’s lack of specialized knowledge and experience counsels against premature interference with the informed judgments made at the state and local levels.”); *Bd. of Educ., Island Trees Union Free Sch. Dist. No. 26 v. Pico*, 457 U.S. 853, 891 (1982) (Burger, C.J., dissenting) (“[L]ocal control of education involves democracy in a microcosm. . . . A school board is not a giant bureaucracy far removed from accountability for its actions; it is truly ‘of the people and by the people.’ A school board reflects its constituency in a very real sense and thus could not long exercise unchecked discretion in its choice to acquire or remove books. If the parents disagree with the educational decisions of the school board, they can take steps to remove the board members from office.”).

8. See *Safford Unified Sch. Dist. v. Redding*, 557 U.S. 364, 371 n.1 (2009) (citing *T.L.O.*, 469 U.S. at 342 n.9) (“[S]tandards of conduct for schools are for school

Even so, under the current wave of school discipline reform, judicial review previously considered perfunctory is becoming more rigorous. Courts are finding educators liable in student injury cases, disregarding deference and traditional immunities.⁹ The cases come from more than a few states. They are premised on different facts and different local conditions, yet all focus on an issue with broad implications for the student-educator relationship: Are school officials liable for the failure to maintain a safe learning environment?

In Washington State, a jury determined that a school district should pay \$1.3 million for its negligence in failing to intervene to protect two high school girls from being stabbed. The jury found that the school's discipline policy was unreasonable in light of the circumstances of the known threat created by the student perpetrator.¹⁰ In Indiana, a state appellate panel held that a school district was not entitled to discretionary-function immunity for failing to intervene to prevent student victimization when a perpetrator's lengthy history of serious misbehavior placed educators on notice.¹¹ In Texas, a United States district court held that a school could be liable when educators turn a

administrators to determine without second-guessing by courts lacking the experience to appreciate what may be needed.”); *see also* Susan Stuart, *In Loco Parentis in the Public Schools: Abused, Confused, and in Need of Change*, 78 U. CIN. L. REV. 969, 1004 (2010) (“[C]ourts are wont to be persuaded that [education policy] problems are so intractable that they are outside their judicial capacity. Of course, there are courts who invite that persuasion because it appeals to their sense that management is always right. In doing so, these courts put their imprimatur on these outliers and the outermost boundaries of collective institutional behavior, not based on any coherent standards but on some loosely defined doctrine that allows courts to throw up their collective hands and say, ‘We don’t understand how to run schools so we won’t interfere, regardless of what we really think.’” (citing as an example *Bd. of Educ. of Indep. Sch. Dist. No. 92 of Pottawatomie Cty. v. Earls*, 536 U.S. 822, 838 (2002) (“In upholding the constitutionality of the Policy, we express no opinion as to its wisdom. Rather, we hold only that [the suspicionless drug-testing] Policy is a reasonable means of furthering the School District's important interest in preventing and deterring drug use among its schoolchildren.” (alteration in original))).

9. *See infra* notes 29–33 and accompanying text.

10. *Smith v. Snohomish Sch. Dist.* No. 201, No. 122222037, 2014 WL 1641050, at *2 (Wash. Super. Ct. Apr. 11, 2014); *see also* Eric Stevick & Scott North, *\$1.3 Million Jury Award in Snohomish High School Stabbing*, HERALDNET, (Apr. 15, 2014, 6:51 PM), <https://www.heraldnet.com/news/1-3-million-jury-award-in-snohomish-high-school-stabbing/>.

11. *M.S.D. of Martinsville v. Jackson*, 9 N.E.3d 230, 242 (Ind. Ct. App. 2014).

blind eye to maltreatment of vulnerable students: The court found that liability is appropriate when school officials have particular knowledge of a student's harassment but choose neither to report the harassment nor to intervene.¹²

II. ALTERATIONS IN THE UNDERLYING LAW ON STUDENT SAFETY

The assertion that judicial review is becoming more rigorous on the duty to protect students is a difficult, contentious endeavor. Courts have grappled tacitly with the educator's duty to protect students for nearly forty years in cases involving not the sense of duty but rather the "proposition that school officials should be accorded the widest authority in maintaining discipline and good order in their institutions."¹³ In none of these cases was it necessary to elucidate the link between the authority to discipline "children who have been committed to the temporary custody of the state as schoolmaster"¹⁴ and the duty to maintain a safe learning environment.¹⁵

One can argue that the case of *New Jersey v. T.L.O.* establishes such an obligation.¹⁶ Five justices, in concurring opinions, declare that educators have "the obligation to protect pupils from mistreatment by other children,"¹⁷ have "a heightened obligation to safeguard students whom it compels to attend school,"¹⁸ and "must not merely 'maintain an environment conducive to learning' among children who 'are inclined to test the outer boundaries of acceptable conduct,' but must also 'protect the very safety of students[.]'"¹⁹ But the precedential value of these statements has been tepid, a nearsightedness induced first by the

12. Prendergast *ex rel.* L.P. v. Wylie Indep. Sch. Dist., No. 18-cv-00020-ALM-KPJ, 2018 WL 6710034, at *9 (E.D. Tex. Dec. 4, 2018).

13. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 526 (1969) (Harlan, J., dissenting).

14. *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 654 (1995).

15. See Stuart, *supra* note 8, at 970 ("From its origins in U.S. public education law, the common law doctrine of *in loco parentis* was applied almost exclusively to student discipline. Rarely was it understood to also apply to parental-like responsibilities for the care of students. Consequently, *in loco parentis* was a misnomer for something other than the doctrine was intended . . .").

16. *New Jersey v. T.L.O.*, 469 U.S. 325 (1985).

17. *Id.* at 350 (Powell, J., concurring).

18. *Id.* at 353 (Blackmun, J., concurring).

19. *Id.* at 357 (Brennan, J., concurring in part and dissenting in part).

narrowness of the question presented for review in *T.L.O.*²⁰ and later through an obtuse statement on the duty of educators in a subsequent student search case.²¹ With the “rule of five” on the question

20. New Jersey’s petition for certiorari sought review of only one question: “[w]hether the Fourth Amendment’s exclusionary rule applies to searches made by public school officials and teachers in school.” Brief for Petitioner, *New Jersey v. T.L.O.*, 469 U.S. 325 (1985) (No. 83-712), 1984 WL 565537, at *i. Justice White opened the majority opinion with this comment: “We granted certiorari in this case to examine the appropriateness of the exclusionary rule as a remedy for searches carried out in violation of the Fourth Amendment by public school authorities.” *T.L.O.*, 469 U.S. at 327.

21. See *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 655 (1995) (“While we do not, of course, suggest that public schools as a general matter have such a degree of control over children as to give rise to a constitutional ‘duty to protect,’ we have acknowledged that for many purposes ‘school authorities act *in loco parentis*.’” (citations omitted)); Carl Rizzi, *A Duty to Protect: Why Gun-Free Zones Create a Special Relationship Between the Government and Victims of School Shootings*, 25 CORNELL J.L. & PUB. POL’Y 499, 515 (2015) (“[T]he issue in *Vernonia* was whether a school drug testing policy violated students’ Fourth Amendment rights—and not whether the state had a constitutional duty to protect students . . .”).

effectively ignored,²² *T.L.O.* is known only for authorizing student searches under reasonable suspicion rather than probable cause.²³

This pattern of avoidance on the duty to protect students is prominent in cases both before and after *T.L.O.* Student claims based upon the Due Process Clause are put off by the absence of a right to an education²⁴ or by the refusal of courts to identify a safe learning

22. The nearsightedness which Justice White's majority opinion induces has been both unfortunate and contagious. No scholar has made a meaningful attempt to divert attention in the *T.L.O.* case toward the five concurring justices on the "duty" question. The New Jersey Supreme Court cites only Justice Blackmun's *T.L.O.* concurrence in a curiously inefficient effort. See *Jerkins ex rel. Jerkins v. Anderson*, 922 A.2d 1279, 1291 (N.J. 2007) ("Justice Blackmun observed in *New Jersey v. T.L.O.* that educators have an obligation 'not just to maintain an environment conducive to learning, but to protect the very safety of students and school personnel.'" (quoting 469 U.S. 325, 353 (Blackmun, J., concurring))). For commentary on concurring opinions, see Linas E. Ledebur, *Plurality Rule: Concurring Opinions and A Divided Supreme Court*, 113 PENN ST. L. REV. 899, 900–01 (2009) ("Justices continue to write concurring opinions for a majority of cases, leading to a fragmented Court whose decisions lack clear precedential value and lead to confusion amongst lower courts."); Tristan C. Pelham-Webb, *Powelling for Precedent: "Binding" Concurrences*, 64 N.Y.U. ANN. SURV. AM. L. 693, 693–96 (2009) ("[S]ometimes [lower] courts that subsequently rely on [a] decision choose to find binding precedent in a concurring opinion—whether or not there are compelling reasons to do so. . . . All this leads to a question: how are lower courts supposed to treat such concurrences in the different contexts in which they arise? . . . There are two major rules of interpretation that lower courts have used when approaching arguably precedential concurring opinions. . . . [T]he two approaches each have their flaws.").

23. The Court in *T.L.O.* holds that "the accommodation of the privacy interests of schoolchildren with the substantial need of teachers and administrators for freedom to maintain order in the schools does not require strict adherence to the requirement that searches be based on probable cause to believe that the subject of the search has violated or is violating the law. Rather, the legality of a search of a student should depend simply on the reasonableness, under all the circumstances, of the search." *T.L.O.*, 469 U.S. at 341. In *Safford Unified School District v. Redding*, the Court refines the reasonable suspicion standard: "Perhaps the best that can be said generally about the required knowledge component of probable cause for a law enforcement officer's evidence search is that it raise a 'fair probability' or a 'substantial chance' of discovering evidence of criminal activity. The lesser standard for school searches could as readily be described as a moderate chance of finding evidence of wrongdoing." 557 U.S. 364, 371 (2009) (citations omitted).

24. See *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 35 (1973) ("Education, of course, is not among the rights afforded explicit protection under our Federal Constitution. Nor do we find any basis for saying it is implicitly so

environment as an interest that implicates life, liberty, or property.²⁵ So too, the path to a duty to protect based on principles of tort law has become grassy from lack of wear. Tort law recognizes a duty to protect, intervene, and prevent harm in circumstances where citizens cannot adequately protect themselves.²⁶ But numerous state and federal

protected.”); *Smith v. Guilford Bd. of Educ.*, 226 F. App’x 58, 62 (2d Cir. 2007) (dismissing student injury claim based on educator’s failure to respond to harassment and bullying) (“[T]he Fourteenth Amendment does not protect a public education as a substantive fundamental right.”).

25. See *DeShaney v. Winnebago Cty. Dept. of Soc. Servs.*, 489 U.S. 189, 202 (1989) (holding that government officials have no affirmative duty to protect citizens from injury inflicted by third-parties unless a special relationship exists by virtue of the state having custody over the citizen or state officials played an active role in placing a citizen in danger) (“[T]he Due Process Clause of the Fourteenth Amendment . . . as we have said many times, does not transform every tort committed by a state actor into a constitutional violation.”); *Johnson v. Dallas Indep. Sch. Dist.*, 38 F.3d 198, 203 (5th Cir. 1994) (holding that schools have neither an affirmative duty of care arising from the state’s compulsory attendance laws or a custodial special relationship). A narrow theory of recovery survives for injuries inflicted by school officials. See *Metzger v. Osbeck*, 841 F.2d 518 (3d Cir. 1988) (broken arm by acts of teacher); *Johnson v. Newburgh Enlarged Sch. Dist.*, 239 F.3d 246 (2d Cir. 2001) (pattern of assaults by angry gym teacher); *Dockery v. Barnett*, 167 F. Supp. 2d 597 (S.D.N.Y. 2001) (pattern of physical violence against special-education students); *P.B. v. Koch*, 96 F.3d 1298 (9th Cir. 1996) (principal’s hitting, grabbing, and pushing of several students); see also Amanda McGinn, *School Discipline Practices That Will Shock You, Literally: A Reevaluation of the Legal Standard for Excessive Force Against Students*, 54 AM. CRIM. L. REV. 627, 634–35 (2017) (“When evaluating these claims, the circuits make slightly varying assessments, but all generally consider the need for the force; the relationship between the need and the amount of force used; the extent of injury inflicted; and whether force was applied in a good-faith effort to maintain or restore discipline, as opposed to maliciously and sadistically for the purpose of causing harm.”).

26. A majority of states have adopted the approach in the Second Restatement of Torts, which mandates that “[o]ne who is required by law to take . . . custody of another under circumstances such as to deprive the other of his normal power of self-protection or to subject him to association with persons likely to harm him, is under a duty to exercise reasonable care so to control the conduct of third persons as to prevent them from intentionally harming the other or so conducting themselves as to create an unreasonable risk of harm to him, if the actor (a) knows or has reason to know that he has the ability to control the conduct of the third persons, and (b) knows or should know of the necessity and opportunity for exercising such control.” RESTATEMENT (SECOND) OF TORTS § 320 (AM. LAW INST. 1965). Comment (d) to section 320 also requires people with custody of others to give them effective protection should the need arise: “[A] schoolmaster who knows that a group of older boys are in the habit

exceptions, all of which are variations of the “no-duty” rule or immunity, frustrate student claims.²⁷ In other words, the jurisprudence has met the question only halfway: agreeing that the authority to control the school environment is relevant insofar as discipline is concerned but unwilling to confront the possibility that a rule that forecloses claims based upon the ill use of that authority focuses on the wrong question.²⁸

of bullying the younger pupils to an extent likely to do them actual harm, is not only required to interfere when he sees the bullying going on, but also to be reasonably vigilant in his supervision of his pupils so as to ascertain when such conduct is about to occur. This is true whether the actor is or is not under a duty to take custody of the other.” *Id.* at cmt. d.

27. See *id.* § 314 cmt. c (“The result of the rule has been a series of older decisions to the effect that one human being, seeing a fellow man in dire peril, is under no legal obligation to aid him, but may sit on the dock, smoke his cigar, and watch the other drown.”). As to state law, state government officials are immune from tort suits by individuals under the doctrine of sovereign immunity. Officials of units of local governments, municipalities, and political subdivisions of the state are immune from tort suits by virtue of governmental immunity, because a majority of states grant them immunity in some form. Sovereign immunity has been modified or abrogated in some states by legislative or judicial action. For example, Michigan law provides that a governmental agency is immune from tort liability if engaged in the exercise or discharge of a governmental function. A state employee will be immune from tort liability if: (1) acting or reasonably believes they are acting within the scope of employment; (2) the governmental agency is engaged in the exercise of a governmental function; or (3) does not involve gross negligence or an intentional act. See MICH. COMP. LAWS § 691.1407 (2013). For an extraordinary “no duty” case based on state constitutional law, see *Clousing v. San Francisco Unified Sch. Dist.*, 221 Cal. App. 3d 1224 (Cal. Ct. App. 1990) (finding that students’ state constitutional right to safe and peaceful campuses does not impose upon school districts an affirmative duty to provide safe schools). As to federal law, see Paul D. Coverdell Teacher Protection Act of 2001, 20 U.S.C. § 7946 which states: “[N]o teacher in a school shall be liable for harm caused by an act or omission of the teacher on behalf of the school if—(1) the teacher was acting within the scope of the teacher’s employment or responsibilities to a school or governmental entity” See also Perry A. Zirkel, *Coverdell Teacher Protection Act: Immunization or Illusion?*, 179 ED. L. REP. 547, 552 (2003) (“[R]ather than being limited to ‘maintain[ing] order, discipline, and appropriate educational environment,’ the necessary tools extend to an immunity from liability ‘for harm caused by an act or omission of the broadly defined ‘teacher’ on behalf of the school.’” (alteration in original) (citations omitted)).

28. See Perry A. Zirkel & Henry F. Reichner, *Is the In Loco Parentis Doctrine Dead?*, 15 J.L. & EDUC. 271, 281 (1986) (“[T]he courts have accepted with relative ease the notion that *in loco parentis* gives rise to duties as well as rights of educators.

Even so, recent decisions reflect a shift on the student safety question.²⁹ In Tennessee, the state appellate court ruled that school officials were jointly and severally liable for failing to intervene to prevent an attack on a student despite the complaints of the student's parents when officials knew that the perpetrator had threatened and bullied the other student before.³⁰ Again in Indiana, the state supreme court upheld the conviction of a school principal for failure to report child abuse, finding that his four hour delay did not satisfy his duty to immediately notify either the Department of Child Services (DCS) or a law enforcement agency.³¹ And in Texas, a federal court ruled that schools can be liable for failing to intervene in the face of a pattern of incidents that threaten the well-being of a child; accordingly, the judge held that when educators are aware of past abusive conduct by a student who victimizes another student, the control over the school environment gives rise to a duty to intervene, the failure to which results in liability through deliberate indifference.³² In a similar case in which school officials failed to intervene despite being aware of a student's mistreatment by students and staff, a federal court in Texas held that "[s]chools

. . . However, they have implemented this notion with notable difficulty . . . leaving negligence liability to remain or fall on other grounds."). *But see* Tyler Stoehr, Comment, *Letting the Legislature Decide: Why the Court's Use of In Loco Parentis Ought To Be Praised, Not Condemned*, 2011 BYU L. REV. 1695, 1730 (2001) ("In the case of *in loco parentis*, there appear to be good reasons why American courts accepted only the disciplinary side of the doctrine as traditionally understood, while rejecting the custodial side."). *See also* John E. Rumel, *Back to the Future: The In Loco Parentis Doctrine and Its Impact on Whether K-12 Schools and Teachers Owe a Fiduciary Duty to Students*, 46 IND. L. REV. 711 (2013) ("[The] less forceful principle embodied in the *in loco parentis* doctrine entails K-12 schools and school personnel discharging the parental duty of supervising or protecting students.").

29. *See* A.W. *ex rel.* C.B. v. Lancaster Cty. Sch. Dist. 0001, 784 N.W.2d 907 (2010) (involving an intruder's sexual assault of elementary school student). The court justifies its rigorous judicial review as a consequence of a shift in thinking on the duty to protect students: "[W]e conclude that our case law has, in the past, placed factual questions of foreseeability in the context of a legal duty when they are more appropriately decided by the finder of fact in the context of determining whether an alleged tort-feasor's duty to take reasonable care has been breached." *Id.* at 911.

30. *Moore v. Houston Cty. Bd. of Educ.*, 358 S.W.3d 612, 619 (Tenn. Ct. App. 2011).

31. *Smith v. State*, 8 N.E.3d 668, 679 (Ind. 2014).

32. *Alvarez ex rel. J. A. v. Corpus Christi Indep. Sch. Dist.*, No. 2:17-CV-182, 2018 WL 4469861, at *8 (S.D. Tex. Sept. 18, 2018).

cannot avoid liability by turning a blind eye to maltreatment of vulnerable students.”³³

If the judicial temperament is shifting, then it becomes important to know why. The task of this Article is to examine the common wisdom on the duty of educators to maintain a safe learning environment. It examines legal reforms outside of school law that confront the common wisdom and redirect educators toward a path with new obligations. This Article argues that educators are being judged by increasingly rigorous standards both because more is believed to be at stake in protecting children and, after Columbine,³⁴ Sandy Hook,³⁵ and Stoneman Douglas,³⁶ educators are conspicuous for having advantages in achieving the goals associated with child protection that other agencies lack.

Early reform discussions on the student safety issue depended largely on how policymakers thought about the authority of school officials *in loco parentis*. Its influence on the reasonableness assessment

33. Prendergast *ex rel.* L.P. v. Wylie Indep. Sch. Dist., No. 18-cv-00020-ALM-KPJ, 2018 WL 6710034, at *9 (E.D. Tex. Dec. 4, 2018).

34. On April 20, 1999, twelve students and one teacher were killed by two students who entered Columbine High School in Littleton, Colorado with weapons. See Tyler Pratt, Note, *The Fourth Amendment's Shortcomings for Police During School Shootings*, 44 VAL. U. L. REV. 1095, 1125–26 (2010) (“Within days after the Columbine shooting, law enforcement agencies across the country began scrutinizing and changing their rapid-response programs. These speedy changes were designed to prevent high casualties in school shootings and to avoid potential wrongful death lawsuits filed by victims’ families due to officer inaction.”).

35. On December 14, 2012, twenty children and six adults were killed by a local resident who entered the Sandy Hook Elementary School in Newtown, Connecticut with a semiautomatic rifle and two handguns. See Nicole Palermo, Note, *“The Fiend Whom I Had Let Loose Among Them”*: Should Parents be Liable for Their Children’s Atrocities?, 47 CONN. L. REV. 1491, 1493 (2015) (“Schools, which were once safe-havens for students, have quickly become modern-day battlegrounds where the student body itself comprises the greatest threat to student safety.”).

36. On February 14, 2018, fourteen students and three school officials were killed by a former student who entered the Marjory Stoneman Douglas High School in Parkland, Florida with weapons. See Vanessa Terrades & Shahabudeen K. Khan, *Will It Ever End? Preventing Mass Shootings in Florida & the U.S.*, 51 SUFFOLK U. L. REV. 505, 506–07 (2018) (“Students should not have to feel frightened in their learning environment. States need to put an end to mass shootings in schools, a place where students should feel safe and focus solely on their studies. The challenge is not acknowledging that change is needed; rather, it is determining what change to make.”).

of school policies, once pervasive, is diminishing in the light of scholarship that *in loco parentis* is “the wrong construct to define the nature of school power.”³⁷ The scholarship, together with the emerging science on proven models of child protection, are behind policy reforms in search of a coherent model of what the duty to protect students should be, how it might be defined with cultural and intellectual alertness, and how it should be joined with the education mission. The policymakers, by changing the underlying law with evidence-based expectations, have created a new model of school authority animated by evidence-based programs and interagency assessments.

III. SCHOOL DISCIPLINE REFORM: CONFLICTING RESPONSES TO MISCONDUCT

In this changing legal environment, educators unwittingly find themselves holding the sharp end of the stick as they take up the task of revising school discipline policies.³⁸ Current reform is organized around elements of restorative justice.³⁹ The school-based version of restorative justice is said to emphasize the elimination of

37. Anne Proffitt Dupre, *Should Students Have Constitutional Rights? Keeping Order in the Public Schools*, 65 GEO. WASH. L. REV. 49, 101 (1996).

38. See generally Kim Fries & Todd A. DeMitchell, *Zero Tolerance and the Paradox of Fairness: Viewpoints from the Classroom*, 36 J.L. & EDUC. 211 (2007); Devon L. DiSiena, Note, *Back Down to Bullying? The Detrimental Effects of Zero Tolerance Policies on Bullied Adolescents*, 22 CARDOZO J.L. & GENDER 337 (2016); NAT'L CTR. FOR EDUC. STATISTICS, VIOLENCE AND DISCIPLINE PROBLEMS IN U.S. PUBLIC SCHOOLS: 1996–97 18 (1998), <https://nces.ed.gov/pubs98/98030.pdf> (literature on school discipline reform); Russ Skiba & Reece Peterson, *Teaching the Social Curriculum: School Discipline as Instruction*, 42 PREVENTING SCH. FAILURE 66 (2003); Alicia C. Insley, Comment, *Suspending and Expelling Children from Educational Opportunity: Time to Reevaluate Zero Tolerance Policies*, 50 AMER. U. L. REV. 1039 (2001).

39. See Lydia Nussbaum, *Realizing Restorative Justice: Legal Rules and Standards for School Discipline Reform*, 69 HASTINGS L.J. 583, 604 (2018) (“A restorative school combines a conflict prevention and community-building pedagogy with specialized alternative dispute resolution processes to address conflicts when they arise.”).

predetermined punitive outcomes,⁴⁰ particularly expulsions and suspensions.⁴¹ These “zero tolerance” policies have fallen under suspicion in nearly all research on school discipline, especially in studies of discipline outcomes involving less serious offenses.⁴² The prevailing opinion is that zero tolerance policies produce harmful outcomes for children, contributing to recidivism, victimization, and increased drop-out rates.⁴³ Thus, the goal of school-based restorative justice is to eliminate predetermined punitive outcomes in place of more proportional responses to student misconduct.⁴⁴ Nationally, implementing restorative justice policies in schools has taken on a high priority in a quest to strike a balance between campus safety and the rights of all children to an education.⁴⁵

40. See, e.g., John Braithwaite, *Doing Justice Intelligently in Civil Society*, 62 J. SOC. ISSUES 393, 398 (2006) (“[A] restorative justice process that seeks to empower stakeholders to repair the harm of an injustice will produce outcomes that are more distributively satisfying to [individuals who have been affected by an offense] than a process that seeks to deliver equal punishments to equal wrongs. If we put the problem in the center of the circle, as opposed to putting the person in the center, we are more likely to come up with a solution to the problem that is perceived by the participants to deliver just distributive benefits.”).

41. See Fries & DeMitchell, *supra* note 38, at 214.

42. See *id.* (“[Z]ero tolerance policies were formulated with the best of intentions. . . . However . . . in a desire to be tough, no-nonsense, and scrupulously equal in punishment, schools have sacrificed measured and proportional responses for mechanical, non-discretionary decision-making. . . . [The] inflexible and unthinking zero tolerance approach to an exaggerated juvenile crime problem is derailing the educational process . . .”).

43. See sources cited *supra* note 38.

44. See William Haft, *More Than Zero: The Cost of Zero Tolerance and the Case for Restorative Justice in Schools*, 77 DENVER U. L. REV. 795, 809 (2000) (“[A] primary function of the [school-based restorative justice] process is to reintegrate the offender as a productive member of the school community, rather than further exiling the student and thereby increasing the potential for separation, resentment, and repeated offenses.”).

45. The U.S. Department of Justice and U.S. Department of Education jointly announced in 2014 guidelines for schools to revise zero-tolerance policies. See Press Release, U.S. Dep’t of Educ., Press Office, U.S. Departments of Education and Justice Release School Discipline Guidance Package to Enhance School Climate and Improve School Discipline Policies/Practices (Jan. 8, 2014), <https://www.ed.gov/news/press-releases/us-departments-education-and-justice-release-school-discipline-guidance-package-;> see also Patrick S. Metzge, *Plugging the School to Prison Pipeline by Addressing Cultural Racism in Public Education Discipline*, 16 U.C. DAVIS J. JUV. L. &

In theory, school-based restorative justice is recognizable to the parent theory in the criminal justice system that emphasizes victim/offender mediation, reconciliation, and rehabilitation through a process to help offenders understand the effect of their misconduct while giving victims a voice.⁴⁶ However, in practice, school discipline outcomes are often unrecognizable to any principle of restorative justice. Court decisions over the last decade reveal that school-based restorative justice policies take on variations of “excessive tolerance,” in which discipline outcomes function under the weight of an expectation to keep students in school, emphasizing forbearance and minimal sanctions. A review of the cases captures most of the variation in school policies. Suspensions and expulsions are inappropriate, except in an emergency or when there is good reason to believe that alternative forms of corrective action would fail if employed. Under this policy construct, expulsion is used only when there is an immediate danger to students and then only until the emergency subsides. A straight line connects this decision-making with the most important evidence of the changing judicial attitude: criminal and civil liability against educators who fail to protect students.⁴⁷

Discipline reform in public education cannot be understood apart from the liability cases currently working their way through the judicial system.⁴⁸ Within public education, assertions about the actual

POL’Y 203, 212–13 (2012) (“Some would argue that the current system of zero tolerance has evolved into the perfect balance of discipline and education effectively removing from the school environment all those that threaten its safety and effectiveness. . . . For those who see no problem here, let us not forget the byproduct of zero tolerance—the ever increasing failure of the public school system to educate all our children.”).

46. See John Braithwaite, *Evidence for Restorative Justice*, 40 VT. B.J. 18, 19 (2014) (“[T]here is encouraging enough evidence that restorative justice “works” cost-effectively in preventing a variety of injustice problems that include crime prevention.”).

47. Mary K. Kearney, *Breaking the Silence: Tort Liability for Failing to Protect Children from Abuse*, 42 BUFF. L. REV. 405, 407 (1994) (“If the breach of that duty is a cause in fact of the child’s injuries, then the adult should be liable to the child for damages under common-law negligence doctrine.”).

48. Bernard James, *Restorative Justice Liability: School Discipline Reform and the Right to Safe Schools* (pt. 4), 51 U. MEM. L. REV. 557, 656–74 (2021); see also Samuel Y. Song & Susan M. Swearer, *The Cart Before the Horse: The Challenge and Promise of Restorative Justice Consultation in Schools*, 26 J. EDUC. & PSYCHOL. CONSULTATION 313, 318 (2016) (“Despite the popularity of [restorative justice] in

or potential benefits of school-based restorative justice is extensively debated. The extent to which there is widespread internal criticism of the effects of school-based restorative justice is remarkable, and more and more of this criticism is being made public.⁴⁹ In schools with higher incidents of disruptions and violent misconduct, there is a perceived lack of legitimacy of the new disciplinary rules.⁵⁰ Some argue that restorative justice policies are instruments of deceptive metrics, creating the appearance of improvement in one area while exacerbating other campus problems.⁵¹ It is said that if the goal is to eliminate

school practice, it has been under-studied, especially in schools. This is concerning because practice appears to be far ahead of the research on effectiveness and successful implementation and sustainability . . .”).

49. See, e.g., Opinion, *Actions To Quell School Fights Welcomed*, THE STAR PRESS (Dec. 5, 2015), <https://www.thestarpress.com/story/opinion/editorials/2015/12/05/actions-quell-school-fights-welcomed/76792238/> (“The school board decided to change the student handbook at the request of administrators to make fighting ‘more consequential’ for students.”); Justin Murphy, *Bolgen Vargas, Adam Urbanski Clash on School Violence*, DEMOCRAT & CHRON. (Nov. 18, 2015), <https://www.democratandchronicle.com/story/news/2015/11/18/vargas-rta-rcsd-urbanski/75983254/> (“The teachers’ first concern is an increase in violence in schools. The union reports that assaults on teachers have risen precipitously, in part as a result of changes in discipline policies.”); *Green Bay Area School District Board of Education Meeting: June 5, 2017*, YOUTUBE (June 20, 2017), https://www.youtube.com/watch?reload=9&v=9fZNM1MMD_0&feature=youtu.be&t=1h35m21s (“Our work environment is so toxic, it is literally making [teachers] sick . . . [e]nforcing the following provisions of the school handbook for students with subsequent violent conduct would be another way to make a positive change for us . . . following through with the consequences. We need a no tolerance policy for this abusive behavior in our school”).

50. See Jill Barshay, Opinion, *The Promise of ‘Restorative Justice’ Starts to Falter Under Rigorous Research*, THE HECHINGER REP. (May 6, 2019), <https://hechingerreport.org/the-promise-of-restorative-justice-starts-to-falter-under-rigorous-research/> (“[I]t’s not correct to say that restorative justice ideas don’t work but that restorative justice programs aren’t particularly effective or necessary.” (emphasis omitted)).

51. See generally RAMSEY CTY. ATT’Y’S OFFICE, COMMUNITY TASK FORCE ON SAFE SCHOOLS FINAL REP. (2017), <https://www.ramseycounty.us/sites/default/files/County%20Attorney/RC%20Community%20Task%20Force%20Final%20Report.pdf> (finding that student-on-staff violence has doubled in just one year.); Clark Fouraker, *Arrests Down, Say Duval School Officials*, FIRST COAST NEWS (Apr. 26, 2016, 12:06 AM), <https://www.firstcoastnews.com/article/news/arrests-down-say-duval-school-officials/152974457> (noting concerns about “when the school district overextends the

student misconduct that compromises the learning environment, then policy interventions that focus on the reduction of suspensions and expulsions without other resources are futile.⁵² Another path leading to the same conclusion posits that educators' attempts to improve campus safety by keeping those who are known to be inclined toward violence on campus may be perverse rather than merely futile.⁵³ The American Psychological Association ("APA") Report on the climate of public school campuses that coincides with school disciplinary reforms recommends that schools prepare to replace teachers who leave the profession prematurely.⁵⁴ A review of the APA data finds that eighty

reach of the District's Code of Conduct" in a statement of State Attorney Angela Corey: "I saw some of them hit teachers and administrators. That's a felony and arrests should have been made."); Dave Roberts, *OPS Middle School Teachers Blame 'Lack of Support, Ineffective Consequences'*, KETV OMAHA (Nov. 7, 2016, 10:08 PM), <https://www.ketv.com/article/ops-middle-school-teachers-blame-lack-of-support-in-effective-consequences/8257178> (statement of Bridget Donovan, president of the Omaha Education Association) ("The fact is that the teachers in this district have serious concerns about students and their own safety. That is absolutely unacceptable.").

52. See Susan Edelman, *Teachers Say Hands-off Attitude at Queens HS Lets Teens Run Wild*, N.Y. POST (July 17, 2016, 1:01 AM), <https://ny-post.com/2016/07/17/hands-off-attitude-lets-teens-run-wild-at-queens-hs-sources/> (statement of teacher at John Adams High School) ("The principal has helped to create this environment of 'no discipline' by sweeping everything under the rug. . . . It's a completely unsafe environment."); see also OREGON EDUC. ASS'N, A CRISIS OF DISRUPTED LEARNING: CONDITIONS IN OUR SCHOOLS AND RECOMMENDED SOLUTIONS 9 (2019), http://opb-imgserved-production.s3-website-us-west-2.amazonaws.com/original/a_crisis_of_disrupted_learning_1549344834428.pdf ("Participants widely said that their schools did not effectively and holistically address disrupted learning. In fact, 91% of poll respondents reported that their school lacked adequate resources to provide safe, welcoming, and inclusive classrooms.").

53. See Selim Algar, *Teachers at Troubled Queens School No Fans of Embattled Principal*, N.Y. POST (Jan. 20, 2020, 7:29 PM), <https://ny-post.com/2020/01/20/teachers-at-troubled-queens-school-no-fans-of-embattled-principal/> ("Current and former teachers at MS 158 have told The Post that administrators do not suspend kids and that there is palpable decline at the top-rated school. 'What do people expect is going to happen?' said a veteran Marie Curie teacher. 'A kid was on videotape beating up another child, and that wasn't enough for an out of school suspension. You don't think other kids see that?"); see also Murphy, *supra* note 49.

54. See AM. PSYCHOL. ASS'N, A SILENT NATIONAL CRISIS: VIOLENCE AGAINST TEACHERS (2016), <https://www.apa.org/education/k12/teacher-victimization.pdf> (recommending schools prepare to replace teachers who leave the profession "prematurely") ("80% of teachers in a nationwide survey reported being victimized at least once within the current or past school year.).

percent of the nation's teachers have been victims of threats or physical violence. While the call for better implementation of restorative justice principles is also being heard in the adult criminal justice setting,⁵⁵ the unintended consequences of school-based restorative justice is reaching a crisis level.⁵⁶ The shift in judicial review is in direct response to the poor implementation of restorative justice policies in public schools in light of the changes in the underlying laws on child protection.

IV. THE THREE GREAT QUESTIONS ON LIABILITY

The court decisions raise three great questions relating to the liability of school officials. What duties to protect students exist when school officials act *in loco parentis*? At what tipping point should student injury claims succeed when based on the allegation that educators, through policy and custom, are deliberately indifferent to the risk of harm? How should courts assess the reasonableness of school policies when they conflict with external mandates that require more of school officials in protecting students on campus? The most important conclusion that emerges is that hard conflicts arise between school-based restorative justice and emerging laws on mandatory reporting, multi-disciplinary risk-factor and protective-factor assessments, and the traditional tort obligation to respond reasonably to conditions that place students at risk.

The trouble with school discipline reform, some say, is that it is disorganized.⁵⁷ In the case of school-based restorative justice reform,

55. See Braithwaite, *supra* note 46, at 19 (“[T]he really important evaluation questions around restorative justice are not at the level of meta-strategy, but at the level of the particular strategies that are chosen. . . . [I]t may now be time to redirect evaluation research attention onto how to improve the quality of strategy selection when we do restorative justice.”).

56. See OREGON EDUC. ASS’N, *supra* note 52, at 8 (“Educators and students are reporting that they feel unsafe. A third of poll respondents (32%) said they were scared for students’ safety at school because of this issue, and a quarter (25%) said they were concerned about their own safety. Anecdotally, educators, principals, superintendents, school board members and families have reported weekly and even daily room clears as becoming commonplace.”).

57. See Amy L. Wax, *Educating the Disadvantaged—Two Models*, 40 HARV. J. L. & PUB. POL’Y 687, 723 (2017) (“School districts all over the country have taken steps to reform and relax conventional sanctions for misbehavior. This has not always worked out well.”); Claudia Rowe, *Highline District Struggles with Fallout After*

such a diagnosis is extremely misleading. Of course, there are internal conflicts and adjustments to be made as administrators, faculty, and staff alter the procedures by which they respond to student misconduct.⁵⁸ And there may also be delays in letting go of the old regime such that the manner of implementing new disciplinary standards may fluctuate. But even this flux is organized. The new order is not by any means the diametrical opposite of its predecessor, but the era of the omniscient educator has passed.

The problem with school discipline reform is not lack of organization but failure of the internal school organization to mesh with the structure of the external demands surrounding it.⁵⁹ Some schools are institutionally more likely to resist mandates to collaborate with child protection and juvenile justice agencies. But this does not explain the loyalty of schools to their home-grown responses to recurring student victimizations that are in conflict with both the changes in the underlying law on child protection as well as reasonableness assessments of the courts in light of these reforms. As scholars Samuel Y. Song and Susan M. Swearer point out in their study of restorative justice, the primary reason appears to be an institutional disinterest in the science itself:

[T]here are divergent views on the importance of the level of specificity in [restorative justice] training. Some say that [restorative justice] is a way of being in the

Limiting Student Suspensions, SEATTLE TIMES (Sept. 10, 2016), <http://www.seattletimes.com/education-lab/highline-struggles-with-fallout-of-limiting-student-suspensions> (statement of Susan Enfield, superintendent of Highline schools) (“We were kind of flying blind at first. . . . I feel confident that we’re not giving suspensions for the wrong reasons anymore. Now we need to make sure what’s happening when they’re in the building is going right. We’re learning as we go.”).

58. Katherine Kersten, *Mayhem in the Classroom*, WASH. EXAMINER (Apr. 8, 2016), <http://www.weeklystandard.com/mayhem-in-the-classroom/article/2001892> (“A few brave teachers have taken their concerns to the St. Paul school board. But those who criticize publicly must be prepared to pay a price.”).

59. Josie Fohrenbach Brown, *Developmental Due Process: Waging A Constitutional Campaign to Align School Discipline with Developmental Knowledge*, 82 TEMP. L. REV. 929, 995 (2009) (“Making the effort to reconcile disciplinary practices with developmental knowledge should be understood as what both the educational best practice and constitutional principle demand, the fulfillment of schools’ educational responsibilities and their constitutional obligation to affirm the dignity of each student.”).

world, and therefore, there is no one way to practice it that can be captured adequately in a manual. From this perspective, [restorative justice] is best learned through experience and practice with a mentor who has undergone a similar apprenticeship model of training through experience. Certainly, this perspective highlights that [restorative justice] is an art rather than a science. The obvious critique of this approach is that the training of [restorative justice] practitioners is slow with vague standards for trainers and may not meet the current evidence-based demands that exist in schools.⁶⁰

With the possibilities so finely balanced between the potential for comprehensive child welfare reform and the danger of enhanced conflict with school policies, the first part of this series sets forth a snapshot of the complexities that define and confront students asserting a right to a safe learning environment. The remaining parts of this series narrate a comprehensive review of cases, scholarship, and research that connect school disciplinary policies characterized by (a) minimal sanction severity for serious offenses, (b) apathy to the probability of recurrence, and (c) disinterest for collaborative assessments, with a foreseeable risk of campus disorder and victimization for which educators are culpable.

60. Song & Swearer, *supra* note 48, at 26. For a description of the Illinois project to solve this problem, see Pamela A. Fenning & Miranda B. Johnson, *Developing Prevention-Oriented Discipline Codes of Conduct*, 36 CHILD. LEGAL RTS. J. 107, 112 (2016) (“[Illinois] developed a training program for school administrators, which focuses on implementation of the model code and compliance with the state legislation. The aim of the model code and the training program is to support districts in implementing appropriate and research-based alternatives to exclusionary school discipline policies.”).

Restorative Justice Liability: School Discipline Reform and the Right to Safe Schools

BERNARD JAMES*

Part II: *In Loco Parentis* and the Duty to Protect

PART TWO OF A FIVE-PART SERIES

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I. INTRODUCTION

Answering the great questions on the duty to protect students depends largely on how one thinks about the authority of school officials *in loco parentis*. Liability turns on whether school policies place students at an unreasonable risk—whether the outcomes are reasonable in light of known circumstances. In the litigation and public debate

* Professor of Constitutional Law, Caruso School of Law, Pepperdine University.

over student safety, many who have never heard the phrase “*in loco parentis*” have suddenly discovered the need to think about what it means and how it affects the reasonableness assessment.

Since the time of Blackstone,¹ the common wisdom has been that school officials are cloaked in a form of parental authority to their students and that this is particularly true in matters relating to conduct and discipline.² The common wisdom is accurate insofar as it marks the general terrain of educators to act as “guardian and tutor of children entrusted to [their] care.”³ Even so, as *in loco parentis* moves further away from the Blackstone model,⁴ its contours have become imprecise and capricious. Three recent cases illustrate this state of affairs.

II. THE DOCTRINE’S MUDDLED STATE: CASE LAW CONFOUNDS

First, in *Orr v. Ferebee*,⁵ a federal court was asked to resolve a dispute over the use of force by a teacher. The student claimed that the

1. See Stephen W. Glusman, *Corporal Punishment of Students—The State’s Authority and Constitutional Considerations*, 36 LA. L. REV. 984, 984 n.4 (quoting 1 WILLIAM BLACKSTONE, COMMENTARIES *453 (“[The father] may also delegate part of his parental authority, during his life, to the tutor or schoolmaster of his child; who is then *in loco parentis*, and has such a portion of the power of the parent committed to his charge, *viz.* that of restraint and correction, as may be necessary to answer the purposes for which he is employed.”)).

2. The notion of *in loco parentis* first appears in American jurisprudence in 1837. In the case of *State v. Pendergrass*, involving corporal punishment (an educator whipped a student with a switch), the court notes, “[o]ne of the most sacred duties of parents, is to train up and qualify their children, for becoming useful and virtuous members of society; this duty cannot be effectually performed without the ability to command obedience, to control stubbornness, to quicken diligence, and to reform bad habits. . . . The teacher is the substitute of the parent . . . and in the exercise of these delegated duties, is invested with his power.” 19 N.C. (2 & 4 Dev. & Bat.) 365, 365–66 (N.C. 1837).

3. *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 665 (1995).

4. See Todd A. DeMitchell, *The Duty to Protect: Blackstone’s Doctrine of In Loco Parentis: A Lens for Viewing the Sexual Abuse of Students*, 2002 BYU EDUC. & L. J. 17, 22 (2002) (“Today, the role of public schools in America is complex. Education is both a private benefit and a public good. Because the concept of a public school has morphed to meet this complexity, the school as an *in loco parentis* has also undergone a transformation since Blackstone articulated the concept.”).

5. No. 1:16-cv-02610-RLY-DML, 2017 WL 1509309, at *1 (S.D. Ind. Apr. 27, 2017).

teacher “choked him, hit his head against a wall, and dragged him down a hallway by the neck” in an effort to break up a fight with another student.⁶ The student argued that both the school policy (and training based on that policy) on the use of force and the Indiana Education Code’s authorization of the use of force were invalid.⁷ The court applied the plain meaning rule⁸ to uphold the provisions of the statute that authorizes educators to “take any disciplinary action necessary to promote student conduct that conforms with an orderly and effective educational system.”⁹ The court rejected the student’s challenge to the teacher’s use of force by echoing the statute, “[in] regarding matters of discipline and the conduct of students, public schools stand in the relation of parents and guardians.”¹⁰

6. *Id.*

7. *Id.*; IND. CODE ANN. § 20-33-8-8(b) (LexisNexis 2020) (“In all matters relating to the discipline and conduct of students, school corporation personnel: (1) stand in the relation of parents to the students of the school corporation; (2) have the right to take any disciplinary action necessary to promote student conduct that conforms with an orderly and effective educational system, subject to this chapter; and (3) have qualified immunity with respect to a disciplinary action taken to promote student conduct under subdivision (2) if the action is taken in good faith and is reasonable.”).

8. The process of interpreting a statute involves three primary steps. First, courts look to the plain meaning of the statutory language, then to its legislative history, and finally to the reasonableness of a proposed construction. *See* *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 756 (1975) (Powell, J., concurring) (“The starting point in every case involving construction of a statute is the language itself.”); *Caminetti v. United States*, 242 U.S. 470, 485 (1917) (“It is elementary that the meaning of a statute must, in the first instance, be sought in the language in which the act is framed, and if that is plain, and if the law is within the constitutional authority of the lawmaking body which passed it, the sole function of the courts is to enforce it according to its terms.”); Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 HARV. L. REV. 405, 457 (1989) (“The [plain meaning rule] warns [legislators] that courts will not guess about the meaning of statutes or supply remedies for language that leads to absurd results. The hope—probably a false one—is that the principle will lead [the legislature] to express itself clearly in the future. The principle also helps to discipline the judiciary by warning courts not to implement policies of their own choosing.”).

9. IND. CODE ANN. § 20-33-8-8(b)(2) (LexisNexis 2020).

10. *Orr*, 2017 WL 1509309, at *3 (quoting *Penn-Harris-Madison Sch. Corp. v. Joy*, 768 N.E.2d 940, 947 (Ind. Ct. App. 2002)). Some readers will know that the jurisprudence on corporal punishment, while beyond the scope of this article, is relevant to a full understanding of *Orr*. The use of force by educators is permitted unless

the motivation for its use is malicious or unrelated to any educational goal. The Supreme Court addressed the question in the corporal punishment case of *Ingraham vs. Wright*, 430 U.S. 651 (1977). There, the Court ruled that the Due Process Clause does not require notice and hearing before the imposition of corporal punishment. *Id.* at 682. The Justices also refused to apply the Eighth Amendment standard to corporal punishment in public schools, limiting its application to the criminal context. *Id.* at 683. The lower courts have fallen in line with this deference to educators. The majority of the courts apply the Fourth Amendment. Under this analysis, a teacher or administrator may take reasonable action to maintain order and discipline, which may include the seizure of student in response to provocative or disruptive behavior. The use of force is a violation of the Fourth Amendment only when it is unreasonable under the circumstances, which favors use of force by educators except in cases of extreme or arbitrary conduct. *See* *Graham v. Connor*, 490 U.S. 386, 393–95 (1989) (ruling that Fourteenth Amendment substantive due process protection against physical force applies only when another amendment does not provide relief). The language of the rationale of many Fourth Amendment cases is muddled—leaving hints of substantive due process in both prose and outcome. *See, e.g.*, *Muskrat v. Deer Creek Pub. Schs.*, 715 F.3d 775, 787 (10th Cir. 2013) (holding that slapping and physically restraining student with disabilities does not shock the conscience); *Johnson v. Newburgh Enlarged Sch. Dist.*, 239 F.3d 246, 249, 252 (2d Cir. 2001) (holding gym coach’s choking, dragging, and slamming student’s head to be conscience-shocking); *Gottlieb v. Laurel Highlands Sch. Dist.*, 272 F.3d 168, 175 (3d Cir. 2001) (holding an assistant principal’s pushing a student’s shoulder into a door is not conscience-shocking); *Doe v. Gooden*, 214 F.3d 952, 956 (8th Cir. 2000) (holding that an isolated incident where principal grabbed a student by the neck and shoulders and pushed him does not rise to level of a constitutional violation); *Neal v. Fulton Cnty. Bd. of Educ.*, 229 F.3d 1069, 1076 (11th Cir. 2000) (holding that striking a student in the eye with a metal weight shocks the conscience); *Lillard v. Shelby Cnty. Bd. of Educ.*, 76 F.3d 716, 725 (6th Cir. 1996) (holding that a single slap by principal does not shock the conscience); *Hall v. Tawney*, 621 F.2d 607, 614 (4th Cir. 1980) (holding that violent paddling and shoving of students may support a substantive due process claim). One federal circuit makes use of force liability turn on whether it is intended as a disciplinary measure. *See* *Washington v. Katy Indep. Sch. Dist.*, 390 F. Supp. 3d 822, 844 (S.D. Tex. 2019), *reconsideration denied*, 403 F.Supp.3d 610, 625 (S.D. Tex. Sept. 4, 2019); *Doe v. Taylor Indep. Sch. Dist.*, 15 F.3d 443, 459 (5th Cir. 1994) (holding that physical sexual abuse by a teacher violated student’s liberty interest in bodily integrity based in the Fourteenth Amendment because the abuse was not related to any educational goal). *See generally* Kathryn R. Urbonya, *Public School Officials’ Use of Physical Force as a Fourth Amendment Seizure: Protecting Students from the Constitutional Chasm Between the Fourth and Fourteenth Amendments*, 69 GEO. WASH. L. REV. 1, 42 (2000); Amanda McGinn, Note, *School Discipline Practices That Will Shock You, Literally: A Reevaluation of the Legal Standard for Excessive Force Against Students*, 54 AM. CRIM. L. REV. 627, 636 (2017). *But see* *Flores v. Sch. Bd. of DeSoto Par.*, 116 F. App’x 504, 509–11 (5th Cir. 2004) (holding that physically beating a student was both only a momentary seizure such that a Fourth Amendment

Second, in the *Lujan v. Carranza*, a state court was asked to adjudicate a claim by a parent that restrictions placed on his access to the school were unlawful.¹¹ The parent had been convicted for the rape of a juvenile with a deadly weapon in 1988. He was released from prison and discharged from parole supervision in 1998. In 2015, educators at his son's school placed restrictions on his access to the school based on his Level III sex offender status and the fact that his victim was a juvenile. The restrictions were not a complete prohibition from entering the school but prevented the parent from coming within 1,000 feet of school grounds without prior approval and supervision by school personnel. The parent argued that the "crime 'took place long ago' and there was no rational connection between the facts underlying his conviction and the restrictions."¹² The court dismissed the parent's challenge to the school policy declaring, "schools stand *in loco parentis* to their students and have a duty to protect them. The precautionary measures and restrictions here address the particular concerns [the father] presents and are rationally related to the school's *in loco parentis* duty."¹³

Third, in *Friedenberg v. School Board of Palm Beach County*,¹⁴ a federal appeals court affirmed the validity of drug testing as part of the screening process for substitute teachers. An applicant with a conditional offer to become a substitute teacher refused to submit to the testing, claiming that suspicionless drug testing for a teaching job was a violation of the Fourth Amendment. The lower court upheld the policy on the basis that urinalysis was not unduly intrusive and that it furthered the compelling interest of the school to protect "children under a substitute teacher's charge."¹⁵ The appellate court affirmed this ruling, first noting that ordinarily "[a] suspicionless search by the government is presumptively unconstitutional. So goes the basic hornbook law of the Fourth Amendment. The details are a bit more complex."¹⁶

analysis was not proper and not done maliciously such that the Substantive Due Process Clause did not apply).

11. 91 N.Y.S.3d 869, 874 (N.Y. Sup. Ct. 2019).

12. *Id.* at 872.

13. *Id.* at 876.

14. 911 F.3d 1084, 1109 (11th Cir. 2018).

15. *Friedenberg v. Sch. Bd. of Palm Beach Cnty.*, 257 F. Supp. 3d 1295, 1313 (S.D. Fla. 2017), *aff'd*, 911 F.3d 1084 (11th Cir. 2018).

16. *Friedenberg*, 911 F.3d at 1087.

The court then proceeded to rebut the presumption in a case-by-case summary of *in loco parentis* authority with the following conclusion:

The *in loco parentis* status of school administrators does not give rise to a constitutional “duty to protect,” but it has a protective element nonetheless, especially insofar as that protection relates to influences that are seen as immoral. . . . Whether we view it as a matter of physical protection or a matter of value-inculcation, we think that schools have a meaningful interest in keeping active drug users—including teachers—away from their students.¹⁷

What is important here is that *in loco parentis* has made a deep imprint on the reasonableness assessment of school policies. Under its influence, the concept of the authority of educators has shifted from referring simply to the power to tutor children and to compel school attendance.¹⁸ Instead, it has become a way of referring to a generalized power to make decisions affecting children that might conceivably have something to do with schooling.¹⁹ This fuzzy way of thinking

17. *Id.* at 1103 (citations omitted).

18. Those who are familiar with the history of juvenile law will recognize elements of *parens patriae* in this discussion. *Parens patriae* (“parent of the nation”) refers to the public policy that allows the state to step in and make decisions in the best interest of a child as would the parent. Several clinical presumptions trigger this authority. In its most intrusive form, government officials may usurp parental authority to preserve the well-being of a child who is in need of protection. *Parens patriae* is the doctrinal foundation for the juvenile court system. It provides the basis for protecting neglected children and rehabilitating delinquent children. See Jim Ryan & Don R. Sampen, *Suing on Behalf of the State: A Parens Patriae Primer*, 86 ILL. B. J. 684, 684 (1998) (“American courts have expanded it. Under the expanded view, a state does not step in only to represent the interests of persons who cannot represent themselves. Rather, the state sues on behalf of some or all of its citizens to prevent or repair harm to its ‘quasi-sovereign’ interests.”); see also Barbara Margaret Farrell, *Pennsylvania’s Treatment of Children Who Commit Murder: Criminal Punishment Has Not Replaced Parens Patriae*, 98 DICK. L. REV. 739, 753 (1994) (“The Juvenile Act vests the courts of common pleas with jurisdiction over all children coming within the provisions of the Act. Those courts have jurisdiction over both delinquent and dependent children. A delinquent child is a child ten years of age or older whom the court has found to have committed a delinquent act and is in need of treatment, supervision, or rehabilitation.”).

19. See Perry A. Zirkel & Henry F. Reichner, *Is the In Loco Parentis Doctrine Dead?*, 15 J. L. & EDUC. 271, 279 (1986) (“[T]he *in loco parentis* doctrine has had an

about *in loco parentis* leads educators to think and speak about their authority in ways that make it difficult for those outside of education to understand²⁰ and those inside to implement competently.²¹ This incoherence plays through the legal, political, and cultural debates over what it means for a child to be subject to the authority of educators, what this authority might be, and how educators might be made accountable for its ill use.

III. THE DOCTRINE'S MUDDLED STATE: SCHOLARSHIP DIVIDES/DIVIDED

To take this point any further, one needs to look at the commentary of scholars. A majority of scholars conclude that the jurisprudence on *in loco parentis* and student welfare is perplexing.²² The common

enduring and expansive role in supporting a wide variety of school rules, stopping only at the site of the home and fraying a bit in the 'hair' cases. Except for the [hair] cases, which are generally and severely split regardless of this doctrine, *in loco parentis* is alive and thriving as sustenance for school rules that are reasonably related to the general purposes of education.”).

20. See Deborah Ahrens, *Schools, Cyberbullies, and the Surveillance State*, 49 AM. CRIM. L. REV. 1669, 1683 (2012) (“While *in loco parentis* in theory would mean school officials would take on a broad variety of traditional parental responsibilities, that does not seem to be the position schools or courts are taking.”); Deborah M. Ahrens & Andrew M. Siegel, *Of Dress and Redress: Student Dress Restrictions in Constitutional Law and Culture*, 54 HARV. C.R.-C.L. L. REV. 49, 73 (2019) (“[M]any modern public schools have reconfigured the traditional doctrine of *in loco parentis* (the idea that schools are acting in the shoes of a parent), re-embracing the disciplinary powers implicit in the analogy while eschewing the nurturing and developmental responsibilities that traditionally accompanied those powers.”).

21. See Susan Stuart, *In Loco Parentis in the Public Schools: Abused, Confused, and in Need of Change*, 78 U. CIN. L. REV. 969, 983 (2010) (“[T]here is little literature that instructs teachers how to act *in loco parentis*.”).

22. See John E. Rumel, *Back to the Future: The In Loco Parentis Doctrine and Its Impact on Whether K-12 Schools and Teachers Owe a Fiduciary Duty to Students*, 46 IND. L. REV. 711, 711 (2013) (“The relationship between primary and secondary (‘K-12’) schools, school administrators, and teachers (‘school personnel’) and students—and the legal obligations arising from that relationship—have never been more complex or important.”); Tyler Stoehr, Comment, *Letting the Legislature Decide: Why the Court’s Use of In Loco Parentis Ought to be Praised, Not Condemned*, 2011 BYU L. REV. 1695, 1695 (“How has the concept of ‘authority’ in public schools been obscured to the point where an administrator actually thought that he had the authority to order a strip search of a student?”); Zirkel & Reichner, *supra* note 19, at 272 (“At

lament is that the uncertainty “enables school officials to remain ignorant of constitutional obligations and to violate students’ rights with impunity.”²³ The critiques range from declarations that *in loco parentis* no longer exists²⁴ to assertions that the “legal interpretation of the doctrine is wrong, or at least has been misapplied in public education

this abstract level, the death or decline of the doctrine would not be expected to cause great grieving among practitioners and parents.”).

23. Barry C. Feld, T.L.O. and Redding’s *Unanswered (Misanswered) Fourth Amendment Questions: Few Rights and Fewer Remedies*, 80 MISS. L.J. 847, 953 (2011); accord DeMitchell, *supra* note 4, at 38 (“The potential of authority without responsibility, at best, allows for mischief and, at worst, abuse of those situated with the least ability to protect themselves. It is a poor profession that does not owe a duty of responsibility or care to its clients. If the school assumes the duty of the parent then it can be argued that students must turn to the school for ‘reasonable security’ from sexual abuse while at school.”).

24. See MICHAEL IMBER & TYLL VAN GEEL, EDUCATION LAW 106 (2d ed. 2000) (“[T]he doctrine of *in loco parentis* has been largely abandoned.”); Anne Proffitt Dupre, *Should Students Have Constitutional Rights? Keeping Order in the Public Schools*, 65 GEO. WASH. L. REV. 49, 60 (1996) (“When the *Tinker* Court declared that constitutional rights followed students through the schoolhouse gate, the notion that school power was like that of a parent—the common law doctrine of *in loco parentis*—slipped out the back door.”); Kelly Frels, *Balancing Students’ Rights and Schools’ Responsibilities*, 37 HOUS. L. REV. 117, 120 (2000) (“Is *in loco parentis* dead?”); Timothy L. Jacobs, *School Violence: An Incurable Social Ill that Should Not Lead to the Unconstitutional Compromise of Students’ Rights*, 38 DUQ. L. REV. 617, 620 (2000) (stating an oblique view of the demise of *in loco parentis*: “The United States Supreme Court has discarded this doctrine, but recent school shootings may prompt a reemergence of the doctrine of *in loco parentis*.”); Katherine A. James, *Standard Operating Procedure: Take It All Off*, 44 WASHBURN L. J. 665, 677 (2005) (“Under *in loco parentis*, school officials in particular are granted the right to make decisions for a student that would otherwise be left to parents. The United States Supreme Court, however, has held that any relief parents have from complying with the Fourth Amendment *does not carry over to school officials*.” (emphasis added)); Richard Jenkins, *An Historical Approach to Search and Seizure in Public Education*, 30 W. ST. U. L. REV. 105, 175 (2003) (“After decades of jurisdictional differences and constant change in the law applicable to search and seizure in public education, the United States Supreme Court decided *New Jersey v. T.L.O.* As a result of that decision the current state of the law is: The Fourth Amendment’s prohibition against unreasonable searches and seizures applies to searches and seizures conducted by public school officials, in the public school setting. Further, the Fourth Amendment applies to school officials and *school officials are agents of the state and are not ‘in loco parentis,’ (substitute parents)*.” (emphasis added)).

law.”²⁵ While the convenience sample below is not a full representation of all of the scholarly concerns regarding *in loco parentis* in public education, it provides an outline of the most glaring problems with the concept as it pertains to student rights and school safety.

A. Scholarship on the Interment of In Loco Parentis

At the outset, one confronts scholars who conclude *in loco parentis* no longer exists. What is meant is that it is no longer relevant in understanding the legal relationship between students and educators. This is a contentious claim. As the cases above show, *in loco parentis* is a subplot in the rationale of many judicial decisions. Nevertheless, a surprising number of scholars tell the story in this way. In their education law casebook, Michael Imber and Tyll Van Geel alert their students that “the doctrine of *in loco parentis* has been largely abandoned.”²⁶ This is consistent with the conclusions of a post-*T.L.O.* review of student rights cases by Kelly Frels.²⁷ Frels starts with the observation that educators were put on notice in the decision of *Brown v. Board of Education*²⁸ that “the courts would become involved in the operation of schools when basic constitutional rights were implicated.”²⁹ He argues that unsafe schools should trigger more robust judicial review because “[s]chool officials must not conduct school in a threatening atmosphere and must restore and maintain the educational environment.”³⁰ Frels notes that *in loco parentis* did not survive the

25. Stuart, *supra* note 21, at 983; *see also* Feld, *supra* note 23, at 953 (“The absence of an exclusionary rule or other systemic remedy enables school officials to remain ignorant of constitutional obligations and to violate students’ rights with impunity. In short, students have few rights and even fewer remedies.”); DeMitchell, *supra* note 4, at 22 (“[I]n cases of students being sexually abused by an educator, the imputation of *in loco parentis* to educators does not arise within the need to discipline the child.”).

26. IMBER & GEEL, *supra* note 24, at 106.

27. Frels, *supra* note 24, at 117.

28. *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954). In *Brown*, the Court held that racial segregation was a violation of the Equal Protection Clause of the Fourteenth Amendment: “[I]n the field of public education the doctrine of ‘separate but equal’ has no place. Separate educational facilities are inherently unequal.” *Id.* at 495.

29. Frels, *supra* note 24, at 118.

30. *Id.* at 123.

decision in *T.L.O.* and that when examining post-*T.L.O.* decisions, one must conclude that “[t]hese cases did not restore *in loco parentis*.”³¹

Katherine James also finds the demise of *in loco parentis* within the *T.L.O.* decision.³² In a critical analysis of juvenile detention strip search policies,³³ James concludes that “juvenile detainees are subject to fewer privacy rights than other citizens and fewer rights than some foreign detainees.”³⁴ Critical to her analysis is the conclusion that *in loco parentis* does not survive *T.L.O.*³⁵ because, as she states:

[u]nder *in loco parentis*, school officials in particular are granted the right to make decisions for a student that would otherwise be left to parents. The United States Supreme Court, however, has held that any relief parents have from complying with the Fourth Amendment does not carry over to school officials.³⁶

Similarly, Anne Proffitt Dupre attributes the death of *in loco parentis* to *T.L.O.*³⁷ In an essay on two competing philosophies on educational authority,³⁸ Dupre argues that *T.L.O.* combines with other Supreme Court cases to make “it more difficult for the public schools to reclaim the order and discipline necessary to educate students.”³⁹ Dupre includes the *Tinker*⁴⁰ decision in the list because “[w]hen the *Tinker* Court declared that constitutional rights followed students through the schoolhouse gate, the notion that school power was like that of a parent—the common-law doctrine of *in loco parentis*—

31. *Id.* at 122.

32. James, *supra* note 24, at 677.

33. *See, e.g.*, *N.G. v. Connecticut*, 382 F.3d 225 (2d Cir. 2004).

34. James, *supra* note 24, at 665.

35. *New Jersey v. T.L.O.*, 469 U.S. 325, 362 (1985) (Brennan, J., concurring in part).

36. James, *supra* note 24.

37. Dupre, *supra* note 24, at 80.

38. Dupre’s essay is organized on the thesis that “[t]he amount of power we are willing to confer upon our institutions is a function of the confidence we have in those institutions to wield that power appropriately. The reconstruction and reproduction models present different views regarding the trust that should be afforded the public school. Indeed, the two models look upon the school as an institution from two sharply different perspectives.” *Id.* at 64–65.

39. *Id.* at 50.

40. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503 (1969).

slipped out the back door.”⁴¹ Dupre argues that after *T.L.O.*, the Court “failed to clarify what power was left to the school if *in loco parentis* power was no longer realistic.”⁴² In its place, Dupre offers a model of school authority “patterned after an attorneyship model that envisions the [educator] acting as an attorney to her constituents.”⁴³

Timothy Jacobs takes a different path leading to the same conclusion in his quantitative analysis of school violence in which he focuses on three decades of school shootings.⁴⁴ Jacobs’s assessment is that the failure of educators to implement effective solutions to school violence has a variety of causal factors—such as insufficient resources, unrealistic security measures, punitive school discipline, the imposition of harsh penalties, and infringement on student rights.⁴⁵ Jacobs argues that workable solutions to unsafe schools require a restatement of the authority of educators to reach not only students engaging in misconduct but “individuals who have no intent of committing criminal acts on school grounds.”⁴⁶ *In loco parentis* is well suited for this task if not for Jacobs’s view that “[t]he United States Supreme Court has discarded this doctrine.”⁴⁷ Nevertheless, he predicts that “the concept of *in loco parentis* may have to be rejuvenated in whole or modified form. [Although] [t]his would conflict with existing constitutional jurisprudence.”⁴⁸

Several levels of explanation for the interment of *in loco parentis* are possible. In part, it is attributable to the belief that the *T.L.O.* Court meant to declare a paradigm shift on the relationship between educators and students. On the contrary, the justices merely redirect the Fourth Amendment analysis of school authority toward the First

41. Dupre, *supra* note 24, at 60.

42. *Id.* at 62.

43. *Id.* at 102.

44. Jacobs, *supra* note 24, at 617.

45. Jacobs concludes that “it may be noted that the issue of school violence is of great importance, but the legislatures of the fifty states and our federal government will probably engage in a period of vacillation before attempting to combat school shootings.” *Id.* at 661.

46. *Id.* at 652.

47. *Id.* at 620.

48. *Id.* at 619.

Amendment⁴⁹ and Fourteenth Amendment⁵⁰ case decisions that were already applying constitutional principles to teacher/student disputes instead of common law rules.

49. See, e.g., *Morse v. Frederick*, 551 U.S. 393 (2007); *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260 (1988); *Bethel Sch. Dist. v. Fraser*, 478 U.S. 675 (1986); *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503 (1969) (after *T.L.O.*); *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943); Emily Gold Waldman, *No Jokes About Dope: Morse v. Frederick's Educational Rationale*, 81 UMKC L. REV. 685 (2013) (“[T]wo major rationales underlie the Supreme Court’s student speech framework for restricting student speech rights: protection and education. The protective rationale stems from the idea that student speech can sometimes pose a threat to other students or to the school environment itself, at which point school officials must step in to protect the school community from this potentially damaging speech. The educational rationale, meanwhile, holds that speech restrictions themselves can play a legitimate-indeed, important-role in teaching students about appropriate oral or written discourse.”).

50. See, e.g., *Parents Involved in Cmty. Schls. v. Seattle Sch. Dist.*, 551 U.S. 701 (2007); *Ingraham v. Wright*, 430 U.S. 651 (1977); *Goss v. Lopez*, 419 U.S. 565 (1975); *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973); *Wisconsin v. Yoder*, 406 U.S. 205 (1972); *Griffin v. County Sch. Bd.*, 377 U.S. 218 (1964); *Cooper v. Aaron*, 358 U.S. 1 (1958); *Brown v. Bd of Educ.*, 347 U.S. 483 (1954). On due process, see Kevin Brown, *Equal Protection Challenges to the Use of Racial Classifications to Promote Integrated Public Elementary and Secondary Student Enrollments*, 34 AKRON L. REV. 37, 58–59 (2000) (“[In] *Goss v. Lopez*, the Supreme Court first addressed the issue of the application of the Due Process Clause to public education. . . . The Court agreed with the students that they possessed a state-created property interest and a liberty interest to which the Due Process Clause applied. . . . The Court, however, stopped short of requiring that students be given the opportunity to secure counsel, to confront and cross-examine witness supporting the charges, or to call witnesses on their own behalf. The Court noted that to do so would not only be too costly, but would destroy suspensions as an effective part of the teaching process.”). On equal protection, see Kenji Yoshino, *The New Equal Protection*, 124 HARV. L. REV. 747, 755 (2011) (“Under the equal protection guarantees of the Fifth and Fourteenth Amendments, the Court has fashioned a framework of tiered scrutiny. That framework distinguishes between classifications that draw ‘heightened scrutiny’ and classifications that draw ‘rational basis review.’ Heightened scrutiny generally results in the invalidation of state action. . . . The Supreme Court has formally accorded heightened scrutiny to classifications based on five characteristics—race, national origin, alienage, sex, and nonmarital parentage.”).

Gerald Reamey, in his study of the *T.L.O.* decision,⁵¹ accurately explains the intent of the Court to unify the analysis of school authority under one construct:

In *T.L.O.*, the Supreme Court first noted that the Fourteenth Amendment had already been held to apply to public school officials and that the Fourth Amendment was applicable to the states through the Fourteenth. Logically, then, the Fourth Amendment would also appear to apply to public school officials. The State of New Jersey, however, had argued that the Fourth Amendment is applicable only to law enforcement officers, and since the Fourteenth Amendment governs school officials, the Fourth Amendment does not. The Court rejected such a restrictive view of the Fourth Amendment, noting that in the past it has often been applied to persons other than law enforcement agents. Moreover, the Court stated that the *in loco parentis doctrine* was “in tension with contemporary reality and the teachings of the Court.” Since school officials are state officers for purposes of the First Amendment and the Fourteenth Amendment, the *T.L.O.* Court saw no reason to reach a different result in search cases.⁵²

Another explanation for *in loco parentis* interment is the fixation by scholars with a statement by the *T.L.O.* Court that “[i]n carrying out searches and other disciplinary functions pursuant to such policies, school officials act as representatives of the State.”⁵³ In harmony with Reamey’s assessment above, this statement takes aim at the common law rule that educators *in loco parentis* possess “the parents’ immunity from the strictures of the Fourth Amendment.”⁵⁴ At common law, the conduct of school officials *in loco parentis* was not deemed to be “state

51. See generally Gerald S. Reamey, *New Jersey v. T.L.O.: The Supreme Court’s Lesson on School Searches*, 16 ST. MARY’S L. J. 933 (1985).

52. *Id.* at 937.

53. *New Jersey v. T.L.O.*, 469 U.S. 325, 336–37 (1985).

54. *Id.*

action”⁵⁵ for purposes of applying constitutional constraints.⁵⁶ The *T.L.O.* Court explains the need to remove this obstacle:

Notwithstanding the general applicability of the Fourth Amendment to the activities of civil authorities, a few courts have concluded that school officials are exempt from the dictates of the Fourth Amendment by virtue of the special nature of their authority over schoolchildren.

55. On the state action doctrine, see Louis Michael Seidman, *State Action and the Constitution's Middle Band*, 117 MICH. L. REV. 1, 2 (2018) (“When the government acts, constitutional limits take hold and the government action is invalid if those limits are exceeded. When the government fails to act, the state action doctrine leaves decisions to individuals, who are permitted to violate what would otherwise be constitutional constraints.”). See also Matthew M. Meacham, *The Perfect Storm: How Narrowing of the State Action Doctrine, Inconsistency in Fourth Amendment Caselaw, and Advancing Security Technologies Converge to Erode Our Privacy Rights*, 55 IDAHO L. REV. 309, 318–319 (2019) (“Generally, the Fourth Amendment only applies to actions of the states and the federal government, whereas, generally the actions of private individuals do not implicate the Fourth Amendment. This concept is known as the ‘state action’ doctrine. However, the actions of private individuals can become state action if the actions fall within one of the exceptions to the state action requirement.”); Emily Chiang, *No State Actor Left Behind: Rethinking Section 1983 Liability in the Context of Disciplinary Alternative Schools and Beyond*, 60 BUFF. L. REV. 615, 642–43 (2012) (“[T]he state action doctrine at its most essential holds that the Constitution constrains only government behavior, not private behavior. Thus, parents are not subject to the First Amendment when disciplining their children for speaking out of line, or to the Fourth Amendment when searching their bedrooms. The Fourteenth Amendment (which prohibits states from violating federal constitutional rights) applies only to state government entities. . . .”).

56. See the post-*T.L.O.* case of *Safford Unified Sch. Dist. No. 1 v. Redding*, 557 U.S. 364, 399 (2009) (“If the common-law view that parents delegate to teachers their authority to discipline and maintain order were to be applied in this case, the [strip] search of Redding would stand. There can be no doubt that a parent would have had the authority to conduct the search at issue in this case. Parents have ‘immunity from the strictures of the Fourth Amendment.’” (citations omitted)). Compare *Redding*, 557 US at 399, with pre-*T.L.O.* state court decisions from California and New York: *In re Thomas G.*, 90 Cal. Rptr. 361 (Cal. Ct. App. 1970), and *In re Donaldson*, 75 Cal. Rptr. 220 (Cal. Ct. App. 1969); *In re Christopher W.*, 105 Cal. Rptr. 775 (Cal. Ct. App. 1973), and compare *People v. Stewart*, 313 N.Y.S.2d 253 (N.Y. Crim. Ct. 1970), with *People v. Scott D.*, 315 N.E.2d 466 (N.Y. 1974). See also Donald B. Kaufman, Comment, *Strip Search in Pennsylvania Public Schools*, 90 DICK. L. REV. 803, 807–08 (1986) (“The early view held that school officials stand *in loco parentis* to students. A search performed without police involvement constitutes private rather than governmental action.”).

Teachers and school administrators, it is said, act *in loco parentis* in their dealings with students: their authority is that of the parent, not the State, and is therefore not subject to the limits of the Fourth Amendment.

Such reasoning is in tension with contemporary reality and the teachings of this Court. We have held school officials subject to the commands of the First Amendment and the Due Process Clause of the Fourteenth Amendment. If school authorities are state actors for purposes of the constitutional guarantees of freedom of expression and due process, it is difficult to understand why they should be deemed to be exercising parental rather than public authority when conducting searches of their students. More generally, the Court has recognized that ‘the concept of parental delegation’ as a source of school authority is not entirely ‘consonant with compulsory education laws.’ Today’s public school officials do not merely exercise authority voluntarily conferred on them by individual parents; rather, they act in furtherance of publicly mandated educational and disciplinary policies. In carrying out searches and other disciplinary functions pursuant to such policies, school officials act as representatives of the State, not merely as surrogates for the parents, and they cannot claim the parents’ immunity from the strictures of the Fourth Amendment.⁵⁷

Richard Jenkins succinctly clarifies both aspects of the *T.L.O.* decision in his analysis of search and seizure policies in public education.⁵⁸ Jenkins begins by noting that “[t]o understand the history of search and seizure in public education we must first look at the development of the juvenile justice system.”⁵⁹ He explains that “[o]ne of the difficulties that blocked the progression of students’ rights was the proposition that proceedings in juvenile courts were not criminal cases, and . . . [i]f juvenile cases were not criminal in nature, how then could the courts recognize constitutional protections for juveniles?”⁶⁰ This

57. *T.L.O.*, 469 U.S. at 336–37 (citations omitted).

58. Jenkins, *supra* note 24, at 124.

59. *Id.* at 105.

60. *Id.* at 124.

was the primary challenge confronting the early twentieth century architects of the juvenile court under the prevailing influence of common law *in loco parentis*.⁶¹ Jenkins concludes that “[a]fter decades of jurisdictional differences and constant change in the law applicable to search and seizure in public education, the United States Supreme Court decided *New Jersey v. T.L.O.* As a result of that decision . . . school officials are agents of the state and are not ‘*in loco parentis*,’ (substitute parents).”⁶² What is important here is that the *T.L.O.* court formalized a constitutional model of *in loco parentis*,⁶³ placing the Fourth Amendment analysis of school policies into the traditional state action rubric.⁶⁴ The Court stands fast on this commitment, save for those cases that rest on independent state grounds.⁶⁵

61. See David S. Tanenhaus, *First Things First: Juvenile Justice Reform in Historical Context*, 46 TEX. TECH L. REV. 281, 284 (2013) (“Though we keep on prating *parens patriae*, we might as well burn incense. Historical idiosyncrasies gave us a doubtful assumption of power over children. . . . Being somewhat facetious about it, the juvenile court is thus the product of paternal error and maternal generosity, which is a not unusual genesis of illegitimacy.”).

62. Jenkins, *supra* note 24, at 175.

63. *Id.*

64. See Bill O. Heder, *The Development of Search and Seizure Law in Public Schools*, 1999 BYU EDUC. & L. J. 71, 79 (1999) (“[I]t should be noted for the sake of perspective, if nothing else, that some of the pressure applied in *T.L.O.* was to persuade the Supreme Court to view the searches differently in light of the school setting. This pressure came from the idea that a school administrator acts in the place of parents, arguably changing that critical relational element of the search analysis.”).

65. States may, when applying the law of their constitutions, have the power to ignore federal law on individual rights by simply according their citizens a greater level of protection than that provided under the U.S. Constitution. See *Michigan v. Long*, 463 U.S. 1032, 1040 (1983) (“Respect for the independence of state courts, as well as avoidance of rendering advisory opinions, have been the cornerstones of this Court’s refusal to decide cases where there is an adequate and independent state ground.”). For an excellent summary, see Irma S. Raker, *Fourth Amendment and Independent State Grounds*, 77 MISS. L.J. 401, 401 (2007) (“Other courts have diverged from the federal interpretation and, recognizing that states may provide greater individual protection to a defendant, not less, have looked to the state constitution as an independent source of individual rights.”). For school cases, see *Theodore v. Delaware Valley Sch. Dist.*, 836 A.2d 76, 88 (Pa. 2003) (“We have little doubt that, if this case presented a Fourth Amendment challenge, the intervening decision in [*Board of Education v. Earls*] would require us to reverse the Commonwealth Court. . . . The Article I, Section 8 question, however, is more difficult. The cases decided under Article I, [Section] 8, have recognized a “strong notion of privacy, which is greater

B. Scholarship on a Surviving but Flawed In Loco Parentis

The second group of scholars do acknowledge *in loco parentis*, offering explanations for its flaws and recommendations for its reformation. The most instructive of this scholarship is the longitudinal study of school authority by Perry A. Zirkel and Henry F. Reichner.⁶⁶ They assert that *in loco parentis* “is not dead . . . it has changed along with schools and society.”⁶⁷ The initial change was “a shift in status from factual parental delegation to legal institutional imposition.”⁶⁸ Zirkel and Reichner argue that the rise of *in loco parentis* in public education corresponds to that of *parens patriae* in the fields of child welfare and juvenile justice.⁶⁹

Together, these notions empower the late nineteenth century public policy that the State could become the vanguard for child

than that of the Fourth Amendment.”). *See also* State *ex rel.* Juvenile Dep’t of Clackamas Cnty. v. M.A.D., 233 P.3d 437, 441 (Or. 2010) (“Although a Fourth Amendment search occurs when government conduct infringes an individual’s reasonable expectation of privacy, ‘the privacy protected by Article I, section 9, is not the privacy that one reasonably *expects* but the privacy to which one has a right’ . . . Having determined that the school officials conducted a search of youth, the next question is whether that search was valid under Article I, section 9.”) (citations omitted); State v. Meneese, 282 P.3d 83, 87 (Wash. 2012) (“[W]e note that our case law has consistently demonstrated ‘that article I, section 7 provides greater protection to an individual’s right of privacy than . . . the Fourth Amendment.’ This is true even in the context of school searches.” (quoting State v. Parker, 987 P.2d 73, 78 (1999))).

66. Zirkel & Reichner, *supra* note 19, at 281.

67. *Id.* at 276.

68. *Id.*

69. *Parens patriae* describes the sovereign power of guardianship over persons in need. American jurisprudence conveys this authority to the state, represented by juvenile institutions, to stand *in loco parentis* to protect and control minors and guard their interests. *See* discussion *supra* note 18; Julian W. Mack, *The Juvenile Court*, 23 HARV. L. REV. 104, 109 (1909) (“To get away from the notion that the child is to be dealt with as a criminal; to save it from the brand of criminality, the brand that sticks to it for life; to take it in hand and instead of first stigmatizing and then reforming it, to protect it from the stigma,—this is the work which is now being accomplished by dealing even with most of the delinquent children through the court that represents the *parens patriae* power of the state.”). More recently, see Elchanan G. Stern, *Parens Patriae and Parental Rights: When Should the State Override Parental Medical Decisions?*, 33 J.L. & HEALTH 79, 91 (2019) (“This doctrine makes the child’s welfare the court’s paramount concern. It requires the court to step in and enforce parental responsibilities for the welfare and wellbeing of their child.”).

welfare as well as a superintendent directing the education of children.⁷⁰ History records the immediate judicial recognition of one aspect of this power—the authority of educators to discipline students. *In loco parentis* was “readily imported from England as a protection for public school teachers who saw the need to corporally punish students in their charge.”⁷¹ A state court decision in 1890 explains it this way:

When the teacher keeps within the circumscribed sphere of his authority, the degree of correction must be left to his discretion, as it is to that of the parent, under like circumstances. Within this limit, he has the authority to determine the gravity or heinousness of the offense, and to mete out to the offender the punishment which he thinks his conduct justly merits.⁷²

70. Readers who know this history will quickly point out the cases in which the United States Supreme Court places limits on this institutional authority in order to preserve “the liberty of parents and guardians to direct the upbringing and education of children.” *Pierce v. Soc’y of the Sisters of the Holy Names of Jesus and Mary*, 268 U.S. 510, 534 (1925) (striking down a statute that required all children to attend public school); see also *Meyer v. Nebraska*, 262 U.S. 390, 403 (1923) (striking down a law restricting foreign-language education); *Wisconsin v. Yoder*, 406 U.S. 205, 234–35 (1972) (striking down a compulsory school attendance law when applied to Amish parents). The lower court decisions of the same period concur. See *Hobbs v. Germany*, 49 So. 515, 517–18 (Miss. 1909) (striking down evening study requirement requiring students to remain at home and study from 7:00 p.m. to 9:00 p.m.); *Hailey v. Brooks*, 191 S.W. 781, 783 (Tex. App. 1916) (striking down requirement that students purchase all foods and supplies from the school cafeteria and supply house); *Westley v. Rossi*, 305 F. Supp. 706, 713–14 (D. Minn. 1969) (striking down school rule on hair length that prevented male student from attending public high school). For an excellent analysis, see Barbara Bennett Woodhouse, “*Who Owns the Child?*”: *Meyer and Pierce and the Child as Property*, 33 WM. & MARY L. REV. 995, 1052 (1992) (“The concept of children’s rights, however, provided a key tool for use by adults in protecting individual children and in advancing programs of child welfare. The language of the children’s rights movement was a natural offshoot of a prior movement, self-described as ‘child-saving,’ which dated back to at least the 1850s.”).

71. Zirkel & Reichner, *supra* note 19, at 273. Zirkel and Reichner also note that “[t]he core context for the *in loco parentis* doctrine, as is apparent in Blackstone’s seminal statement above, is ‘restraint and correction,’ i.e., student discipline.” *Id.*

72. *Boyd v. State*, 7 So. 268, 269 (Ala. 1890).

According to Zirkel and Reichner, the second change should have been to pair this authority with a correlative duty to protect. But their findings conclude that the duty to protect did not take root alongside the authority to discipline and remains oddly estranged. Their research identifies the competing philosophies on the duty to protect students in the late nineteenth century when students began filing injury claims asserting that “along with the delegated discretion for the broad purposes of education school authorities are clothed with corresponding duties.”⁷³ Both judicial philosophies begin with the assumption that *in loco parentis* requires educators to act reasonably to conditions that place students at risk but diverge on the tipping point at which educators are liable for student injuries.

1. *In Loco Parentis* and the *Mano Animo* Approach

The more lenient approach was the first to appear. It can be seen in the judicial decisions that place a constraint on findings of liability unless the educator “acted with malice or if s/he inflicted permanent and reasonably foreseeable injury in attempting to enforce discipline.”⁷⁴ For example, in *Boyd v. State*,⁷⁵ the Alabama Supreme Court upheld the conviction of a teacher for assault because “[t]here was evidence in this case from which the inference of malice could have been deduced as influencing the conduct of the defendant in his chastisement of [the] young [student], both as to his outbursts of temper, and in the use of improper instruments of correction.”⁷⁶ The relevant evidence showed that after chastising the student in the school room, the teacher followed the student into the school yard, struck him with a stick, struck him in the face with his fist, and hit him over the head with the butt end of the stick.⁷⁷ The court reasoned:

73. Zirkel & Reichner, *supra* note 19, at 279.

74. *Id.*; see also, e.g., *Dean v. State*, 8 So. 38 (Ala. 1890); *Roberson v. State*, 116 So. 317 (Ala. Ct. App. 1928); *Danenhoffer v. State*, 69 Ind. 295 (1879); *State v. Koonse*, 101 S.W. 139 (Mo. Ct. App. 1907); *State v. Thornton*, 48 S.E. 602 (N.C. 1904); *Heritage v. Dodge*, 9 A. 722 (N.H. 1887); *Ely v. State*, 152 S.W. 631 (Tex. Crim. App. 1912); *Stephens v. State*, 68 S.W. 281 (Tex. Crim. App. 1902); *State ex rel. Burpee v. Burton*, 45 Wis. 150 (1878).

75. 7 So. at 271.

76. *Id.*

77. *Id.*

While, on the one hand, we should recognize that every child has rights which ought to be protected against the brutality of a cruel teacher or barbarous parent, on the other, it is equally important not to paralyze that power of correction and discipline by the rod given, as Blackstone asserts, “for the benefit of education,” which has for ages been deemed necessary alike, on the part of parents, to prevent their children from becoming “the victims of bad habits, and thereby proving a nuisance to the community,” and on the part of teachers, to preserve that discipline of the schools without which all efforts to promote the education of the present and future generations will prove a lamentable failure. . . . This right of discipline with the rod, administered without malice or immoderation, has been well characterized as a part of the common law of the schoolroom. The more thoroughly the right is established, as experience in all discipline shows, the less frequent will be the necessity of resorting to its exercise to enforce obedience to the lawful mandates of the parent or the schoolmaster.⁷⁸

A significant contributing factor giving rise to *mano animo* reasonableness was the influence, albeit short-lived, of the parent-parity element of common law *in loco parentis*.⁷⁹ Zirkel and Reichner found that when the “correlative duty of due care [was taking] shape . . . defendant-educators counterargued that they should have the same degree of immunity that is enjoyed by parents.”⁸⁰ A 1931 California appellate court decision summarizes the parental-parity defense and foretells its eventual demise:

[W]hen we come to the question of the *quantum* of punishment, or rather of the determination of the

78. *Id.* at 270.

79. *See supra* note 74.

80. Zirkel & Reichner, *supra* note 19, at 280; *see* State v. Jones, 95 N.C. 588, 591 (1886) (“Within the sphere of his authority, the master is the judge when correction is required, and of the degree of correction necessary; and, like all others [e]ntrusted with discretion, he cannot be made penally responsible for errors of judgment, but only for wickedness of purpose. His judgment must be *presumed* correct, because he is the *judge*.”).

reasonableness of the punishment inflicted, we find two distinct lines of authority. One group makes the teacher the arbiter, and declares *all* punishment to be reasonable which does not result in disfigurement of or permanent injury to the child, and which is not inflicted maliciously The second group of cases . . . expresses the more enlightened view . . . refuses to make the teacher the sole arbiter. The courts deciding these cases hold that both the reasonableness of, and the necessity for, the punishment is to be determined by a jury, under the circumstances of each case.⁸¹

Nevertheless, even with the demise of the parent-parity element, *mano animo* reasonableness became a deeply rooted feature in liability cases, this in spite of the difficulty experienced by jurors in their attempts to apply it.⁸² In *Drum v. Miller*,⁸³ the Supreme Court of North Carolina reversed a finding of liability arising out of the injury to a student when a teacher hit him in the eye with a pencil, “for the purpose of attracting his attention.”⁸⁴ According to the appellate court, the trial jury was given the wrong instruction on the applicable legal standard:

[B]efore they could return a verdict for the plaintiff, [they] were required to find that the defendant was, at the time, able to foresee, by the exercise of ordinary care, not only that injury would result, but that the particular injury

81. *People v. Curtiss*, 116 Cal. App. Supp. 771, 775–777 (Cal. App. Dep’t Super Ct. 1931). The first case to recognize the doctrine of parental immunity was *Hewellette v. George*, 9 So. 885, 887 (Miss. 1891) (reasoning that “[t]he peace of society, and of the families composing society . . . forbid to the minor child a right to appear in court in the assertion of a claim to civil redress for personal injuries suffered at the hands of the parent”), *overruled in part by Denton ex rel. Glaskox v. Glaskox*, 614 So.2d 906, 912 (Miss. 1992). For other cases abolishing the doctrine of parental immunity, see *Gibson v. Gibson*, 479 P.2d 648, 653–54 (Cal. 1971). See also *Flynn ex rel. Turner v. Turner*, 304 N.W.2d 786, 788 (Iowa 1981).

82. In student injury cases asserting negligence, questions regarding foreseeability, proximate cause, and negligence are questions of fact for the jury to decide. See, e.g., *Roberson v. Duval Cnty. Sch. Bd.*, 618 So. 2d 360, 362–63.

83. 47 S.E. 421, 425 (N.C. 1904).

84. *Id.* at 422.

which was received by the plaintiff would be the natural and probable consequence of his act.⁸⁵

The appellate court upheld the teacher's request for a new trial with a more restrictive jury instruction on the standard of liability:

[T]he jury should have been further instructed that, however severe the pain inflicted, and however, in their judgment, it might seem disproportionate to the alleged negligence or offense of so young and tender a child, yet, if it did not produce nor threaten lasting mischief, it was their duty to acquit the defendant, unless the facts testified induced a conviction in their minds that the defendant did not act honestly in the performance of duty, according to her sense of right, but, under the pretext of duty, was gratifying malice.⁸⁶

The *mano animo* standard of reasonableness, which imposes liability on educators only for the malicious misuse of authority under the pretense of administering policy, is recognizable today in court decisions and positive law in various forms of the mantra that “any act done in the exercise of this authority, and not prompted by malice, is not actionable, though it may cause permanent injury, unless a person of ordinary prudence could reasonably foresee that a permanent injury of some kind would naturally or probably result from the act.”⁸⁷

85. *Id.* at 425.

86. *Id.* at 426.

87. *Id.* at 422; see *Dean v. State*, 8 So. 38 (Ala. 1890); *Roberson v. State*, 116 So. 317 (Ala. Ct. App. 1928); *Danenhoffer v. State*, 69 Ind. 295 (1879); *State v. Koonse*, 101 S.W. 139 (Mo. Ct. App. 1907); *State v. Thornton*, 48 S.E. 602 (N.C. 1904); *State v. Jones*, 95 N.C. 588 (1886); *Heritage v. Dodge*, 9 A. 722 (N.H. 1887); *Ely v. State*, 152 S.W. 631 (Tex. Crim. App. 1912); *Stephens v. State*, 68 S.W. 281 (Tex. Crim. App. 1902); *State ex rel. Burpee v. Burton*, 45 Wis. 150 (1878). More recently, see *Montag v. Board of Education*, 446 N.E.2d 299, 303 (Ill. App. Ct. 1983), where a court applied a statute establishing *in loco parentis* immunity to affirm the finding that gymnastics coach was not liable for injuries to a student practicing for an interschool competition. See also *Guyton v. Roundy*, 477 N.E.2d 1266, 1269 (Ill. App. Ct. 1985) (applying same statute to affirm a finding of no liability for the decision of a teacher to order a nine-year-old student to carry a desk from one classroom to another who was injured while doing so). But most recently, see *Huddleston v. Illinois State Board of Education*, No. 1-18-1907, 2019 Ill. App. Unpub. LEXIS 2009 (Ill. App. Ct. Oct. 29, 2019), which affirmed the decision to dismiss a tenured teacher

2. *In Loco Parentis* and the Negligence Approach

A second, more rigorous standard of reasonableness emerged during this period as well. Courts simply inserted existing common law tort obligation to take precautions to prevent foreseeable injuries into *in loco parentis*.⁸⁸ These courts abandoned the *mano animo* standard of reasonableness out of necessity, with full awareness that its lenient outcomes could not contain the growing number of student claims based on inadequate supervision and deliberate indifference. The rationale of two cases from the first spate of decisions capture the judicial attitude in rejecting the *mano animo* standard of reasonableness.

In *Gaincott v. Davis*,⁸⁹ a case involving injuries to a student cut on broken glass during a class activity, the Supreme Court of Michigan opines:

At least in a limited sense the relation of a teacher to a pupil is that of one *in loco parentis*. We are not here concerned with the law applicable to punishment of a pupil by a teacher; but rather with the law applicable to the duties of a teacher in the care and custody of a pupil. In the faithful discharge of such duties the teacher is bound to use reasonable care, tested in the light of the existing relationship. If, through negligence, the teacher is guilty of a breach of such duty and in consequence thereof a pupil suffers injury, liability results. It is not essential to such liability that the teacher's negligence should be so extreme as to be wanton or willful.⁹⁰

for striking a ten-year-old student in the face. The court ruled that the use of force far exceeded the scope of any reasonable force necessary to maintain safety and discipline inside the school. The court was applying the state statute governing dismissals for malicious conduct. See 105 ILL. COMP. STAT. 5/34-85(a) (West 2016)).

88. Zirkel & Reichner, *supra* note 19, at 280 (“These jurisdictions could in effect afford to abandon the [*mano animo*] *in loco parentis* rationale for negligence because this form of liability had become firmly entrenched on its own.”); see also RESTATEMENT (SECOND) OF TORTS § 320 (2000) (“One who is required by law to take . . . custody of another under circumstances such as to deprive the other of his normal power of self-protection or to subject him to association with persons likely to harm him, is under a duty to exercise reasonable care.”).

89. 275 N.W. 229, 230 (1937).

90. *Id.* at 231.

Similarly, in *Brooks v. Jacobs*⁹¹ the Supreme Judicial Court of Maine highlights the more rigorous reasonableness standard in its rationale in a student injury case occurring in a vocational skills class when the construction scaffolding collapsed:

[T]he duty is based on the teacher–pupil relationship of “in loco parentis,” and that because the teacher has the care and custody of his pupils with right to govern and control them in their school work, he must so act as not negligently to injure them, whether the act is one of misfeasance or nonfeasance. . . . We think liability in such a situation is dependent upon the establishment of the duty to the third party and breach thereof as the proximate cause. Furthermore, we believe that when one accepts responsibility of due care towards those under his direction and control he must exercise that care not only as to what he himself actually does in its observance but as to what he fails to do, which in the exercise of due care he should have done.⁹²

The backbone of the negligence standard is the obligation “to exercise ordinary care to supervise . . . children,”⁹³ “with reference to the age and inexperience of the students, their maturity, and the dangers to which they may be exposed.”⁹⁴ Even so, the negligence standard came with limitations to distinguish it from strict liability that occasionally produced outcomes resembling that of the *mano animo*

91. 31 A.2d 414, 415 (Me. 1943).

92. *Id.* at 417–18.

93. *Clark v. Furch*, 567 S.W.2d 457, 458 (Mo. Ct. App. 1978) (holding that educators were not liable for injuries sustained during a physical education period when a student tied a jump rope to a jungle gym and began swinging down); *see also* *Segerman v. Jones*, 259 A.2d 794, 801 (Md. 1969) (“[W]hile the teacher may stand *in loco parentis* as regards the enforcement of authority, a teacher does not stand *in loco parentis* with regard to negligent acts . . .”).

94. *King v. Kartanson*, 720 S.W.2d 65, 68 (Tenn. Ct. App. 1986) (finding educators were not liable for injuries sustained by students injured while crossing the street by applying the standard first set forth in *Townsley v. Yellow Cab Company*, 237 S.W. 58 (Tenn. 1922)).

standard.⁹⁵ First, the duty did not require constant supervision.⁹⁶ Second, there emerged a bright-line exception for injuries arising out of spontaneous acts by students that would not have been preventable even with proper supervision.⁹⁷ Third, any evidence tending to establish the negligence of a school official was made to give way to an independent intervening cause.⁹⁸ As one court puts it, “even if we assume without conceding that the teacher was negligent in leaving the room for any purpose, for any length of time, it does not follow that the board is liable for the consequences of an unforeseen act of a third party.”⁹⁹ These judicial efforts to diminish the likelihood of perverse

95. See Joan L. Neisser, *School Officials: Parents or Protectors? The Contribution of a Feminist Perspective*, 39 WAYNE L. REV. 1507, 1530 (1993) (“In summary, the *in loco parentis* doctrine continues to provide school officials with a privilege to physically discipline students within reason. In addition, the doctrine’s transposition of the role of the parent to that of the educator has sometimes led courts to immunize school officials from liability in the area of negligent supervision. Finally, even when school officials are not protected by immunity, courts have tended to substantially limit liability.”).

96. *Estate of Narcisse v. Cont’l Ins. Co.*, 419 So. 2d 13, 15–16 (La. Ct. App. 1982) (holding educators were not liable when student was injured when a classmate shut a heavy metal door on the child’s thumb while the teacher was in the bathroom) (“Constant supervision of all pupils is not required. Indeed such a requirement would be virtually impossible in view of class sizes and children’s mobility, absent a ball and chain.”); see also *Butler v. District of Columbia*, 417 F.2d 1150, 1153 (D.C. Cir. 1969); *Ballard v. Polly*, 387 F. Supp. 895, 899 (D.D.C. 1975); *Morris v. Ortiz*, 437 P.2d 652, 655 (Ariz. 1968); *Furch*, 567 S.W.2d at 458; *Simonetti v. Sch. Dist. of Phila.*, 454 A.2d 1038, 1040 (Pa. Super. Ct. 1982).

97. *Thompson v. Bd. of Educ.*, 19 N.E.2d 796, 797 (N.Y. 1939) (holding educators not liable for the injuries to a student when another student, running down the stairway, collided with her and caused her to fall).

98. See *Ewing v. Roslyn High Sch.*, No. 05-CV-1276(JS)(ARL), 2007 WL 9719283, at *5 (E.D.N.Y. Sept. 30, 2007) (“Schools are liable for ‘foreseeable injuries proximately related to the absence of adequate supervision.’ However, schools are not expected to continuously supervise and control all their students’ movements. Liability only attaches if a school ‘had sufficiently specific knowledge or notice of the dangerous conduct which caused injury . . . or they could have reasonably anticipated’ it.’ If a student’s ‘impulsive, unanticipated’ conduct caused the injury, then liability for negligent supervision does not lie unless ‘proof of prior conduct . . . would have put a reasonable person on notice to protect against the injury-causing act.’” (citations omitted)).

99. *Ohman v. Bd. of Educ.*, 90 N.E.2d 474, 475 (N.Y. 1949) (finding that a teacher’s absence from the classroom was not proximate cause of plaintiff’s injury

results arising from the negligence standard caused one judge to opine that “the scope of an individual instructor’s duty to avoid injury to any particular student by controlling the conduct of the others is very narrow.”¹⁰⁰

For example, in *K.A. v. City of New York*,¹⁰¹ the spontaneous acts exception to the negligence standard of reasonableness controlled. The court held that a school did not breach its duty owed to a student who was struck by an automobile while crossing the street leaving school.¹⁰² The court ruled that the school could not be liable when an accident occurs so quickly that even the most intense supervision could not have prevented it.¹⁰³ The crossing guard told the student not to cross the street at the unsafe location and pointed the student to the nearest crosswalk.¹⁰⁴ But the student crossed the street in the middle of a block where there was no intersection or crosswalk and no traffic device affording her right-of-way.¹⁰⁵ The court opined, “Where an accident occurs so quickly that even the most intense supervision could not have prevented it, any lack of supervision is not a proximate cause of the injury.”¹⁰⁶

Similarly, in *Stopford v. Milton Town School District*,¹⁰⁷ the unforeseeable events exception produced a similar result. The Vermont Supreme Court ruled that educators were not liable for the death by suicide of a student committed as a result of being assaulted by his teammates on the school football team.¹⁰⁸ The court held that schools owe students a duty of ordinary care and could not be held liable for injuries that a reasonable person could not have foreseen or anticipated.¹⁰⁹ The school’s complete ignorance of a pattern of hazing by team members was determinative:

resulting from being struck in the eye by a pencil thrown in classroom by another pupil to a third pupil, who stepped aside).

100. *Kersey v. Harbin*, 531 S.W.2d 76, 82 (Mo. Ct. App. 1975).

101. 169 A.D.3d 655, 656 (N.Y. App. Div. 2019).

102. *Id.* at 657.

103. *Id.* at 656.

104. *Id.*

105. *Id.*

106. *Id.*

107. 202 A.3d 973, 980 (Vt. 2018).

108. *Id.* at 982.

109. *Id.*

The undisputed facts support the conclusion that [educators] did not breach the duty of ordinary care because the school was not required to protect Jordan against an unforeseeable assault by his teammates. Neither the common law nor [state law] allows the school to be held liable in negligence for injury that a reasonable person could not have foreseen or anticipated under the circumstances.¹¹⁰

Despite these criticisms, the rigor of the negligence standard of reasonableness was met with approval by many courts and took deep root.¹¹¹ In the 1918 case of *Bruenn v. North Yakima School District No. 7*, the Supreme Court of Washington upheld a jury finding of negligence against school officials for injuries sustained by a student playing on a teeter board on the school grounds that had been removed from its original position and was being put to use dangerously by students as a swing.¹¹² The court applied the negligence standard of reasonableness with the following comment:

If, as accepted by the jury, the accident occurred in the manner and at the time testified to by the little boy, and at the time, as contended by appellant, a teacher was present, then the jury might have found that the supervision was inadequate or negligent, in permitting the boys to take the teeter board from its own upright and use it in connection with the swing. If the teacher knew it, it was negligence to permit it; and, if she did not know it, it was negligence not to have observed it. For these reasons this claim of error must be rejected.¹¹³

110. *Id.* at 980.

111. See Allan E. Korpela, Annotation, *Tort Liability of Public Schools and Institutions of Higher Learning for Injuries Resulting from Lack or Insufficiency of Supervision*, 38 A.L.R.3d 830 §2(a) (1971) (“Courts which recognize, at least for purposes of the decision, the general tort liability of public school agencies, in cases in which the lack, insufficiency, or ineffectiveness of supervision or supervisory conduct is in issue, generally discuss two distinct problems, namely, whether under the facts of the case, any duty of supervision was owed the injured person, and whether such duty, if owed, was reasonably satisfied by the conduct of the supervisory personnel.”).

112. 172 P. 569, 571 (Wash. 1918).

113. *Id.* at 571.

In *Rice v. School District No. 302 of Pierce County*,¹¹⁴ the same court found school officials liable for the injuries of a student who was electrocuted by a live wire on school grounds. The facts established that “[t]he school had a rule [that] . . . on each school day some one of the teachers was supposed to be on the ground after half past 8 o’clock to look after the pupils. . . . and there was proof that the covering or insulation on the electric wires had worn off[.]”¹¹⁵ The court reasoned that “[s]omebody, at the risk of the school district, must look after the safety of young children on the school grounds against unusual dangers; hence the rule in practice or schedule of supervision in this particular case in addition to the general obligation of teachers.”¹¹⁶ In *Les-sin v. Board of Education of City of New York*, the Court of Appeals of New York upheld a jury verdict of negligence against school officials for failing to repair the hatch to a sidewalk commercial, injuring a student who fell while running.¹¹⁷ The court held that the educators had the duty of maintaining school grounds in a safe condition:

[a]t that time the employees of the board of education had notice that, until the elevator was repaired, it constituted a danger to any person, using the sidewalk, who might step upon it. It was their duty to exercise reasonable care to remove the danger, and reasonable care should be commensurate with the danger that threatens. Here the jury might find that the care exercised did not measure up to this standard.¹¹⁸

In *Eastman v. Williams*,¹¹⁹ the Supreme Court of Vermont reversed a lower court ruling in favor of school officials after a student was injured while riding a merry-go-round on school grounds. The educators argued successfully at trial for the application of the *mano animo* standard of reasonableness.¹²⁰ The appellate court reversed, noting that “[i]nvolved here is the question of the standard of care owed

114. 248 P. 388, 390 (Wash. 1926).

115. *Id.* at 389.

116. *Id.* at 390.

117. 161 N.E. 160, 164 (N.Y. 1928).

118. *Id.* at 162.

119. 207 A.2d 146, 151 (Vt. 1965).

120. *Id.* at 147.

by teachers in a public school to pupils under their care and supervision [A]nd the question not having been previously presented to this Court, it is one of first impression here.”¹²¹ Applying instead the negligence standard of reasonableness, the court offered the following rationale:

[T]he teacher stands in the parent’s place in his relationship to a pupil under his care and charge, and has such a portion of the powers of the parent over the pupil as is necessary to carry out his employment. In such relationship, he owes his pupils the duty of supervision, and if a failure to use due care in such supervision results in injury to the pupil in his charge, makes him liable to such pupil. Common sense and fairness must call for the exercise of reasonable care in such duty of supervision, not only in the commission of acts that will not injure the pupil, but in a neglect or failure to act, when from such failure to act, injury results.¹²²

In light of this history, Zirkel and Reichner conclude that “the courts have accepted with relative ease the notion that *in loco parentis* gives rise to duties as well as rights of educators. However, they have implemented this notion with notable difficulty and some circularity as to whether these duties and rights are parallel, or matching.”¹²³ The Missouri case of *Kersey v. Harbin*¹²⁴ highlights their conclusion. In *Kersey*, parents of a student who died due to a head injury sustained when he was thrown to the floor in physical education class brought suit against school officials for wrongful death.¹²⁵ The initial difficulty in maintaining the lawsuit was a procedural defect in the pleading that failed to properly state a claim on which relief could be granted.¹²⁶ In addition to alerting the court of this defect, educators also asserted the *mano animo* defense. The appellate court granted the parents leave to

121. *Id.*

122. *Id.* at 148–49.

123. Zirkel & Reichner, *supra* note 19, at 281.

124. 531 S.W.2d 76 (Mo. Ct. App. 1975).

125. *Id.* at 77–78.

126. *Id.* at 81.

amend their pleading.¹²⁷ In doing so, the judges gave notice of their intention to apply the negligence standard of reasonableness to the parent's claim:

[the educator's] assertion that they stood *in loco parentis* to the [student] and are therefore immune from suit has only superficial ingenuity to commend it. The notion that a teacher stands in place of a parent is a legal fiction intended to describe and limit the teacher's privilege to discipline the child. If the *loco parentis* doctrine still stands . . . it has never been thought to excuse the teacher for his negligence.¹²⁸

After remand, the appellate court affirmed the decision of the trial court to reject the *mano animo* defense in place of the negligence standard of reasonableness,¹²⁹ as well as to reject the educator's motion for summary judgment.¹³⁰ In doing so, the appellate court notes that under the more rigorous standard, "the supervisory duty is very narrow. Defendants' obligation was to exercise ordinary care to supervise the children, or . . . to exercise ordinary care to see that they were supervised."¹³¹ The court held that this assessment was a question of fact precluding summary judgment.¹³²

More recently, in the case of *Metropolitan School District of Martinsville v. Jackson*,¹³³ the distinctiveness of the negligence standard of reasonableness as opposed to the *mano animo* standard is on full display. There, an eighth-grader shot and injured two fellow classmates on the school's campus.¹³⁴ At the time of the shooting, the

127. *Id.* at 82.

128. *Id.*

129. *Kersey v. Harbin*, 591 S.W.2d 745, 749–50 (Mo. Ct. App. 1979) ("We will reiterate that we have found no rule of law, no line of authority, which clothes any of the defendants with immunity from liability for his negligent acts.").

130. *Id.* at 751 ("[W]e do not find the defendants to be immune, and we cannot say that in the absence of admissible evidence showing the circumstances or the manner in which Daniel was injured, defendants have shown by 'unassailable proof' that they are entitled to judgment as a matter of law.").

131. *Id.* at 749.

132. *Id.* at 751.

133. 9 N.E.3d 230 (Ind. Ct. App. 2014).

134. *Id.* at 234.

shooter was prohibited from entering school property because he had been withdrawn by his mother following a series of suspensions.¹³⁵ Although the school had a safety plan in place, which included security cameras and employees at each entrance, the shooter entered the campus undetected by school officials.¹³⁶ None of the employees who manned the entrances were either told to look out for the former student or were informed that he was a threat.¹³⁷ The court refused to overturn the denial of the school's motion to dismiss because the school could not make a valid argument that there was no dispute as to whether the school could be found liable for the victims' injuries.¹³⁸ The court ruled that if it found that the school could have taken precautions to avoid certain injuries sustained by students as a result of another student's actions, a court may then determine that the school was negligent:

this court has held that a plaintiff has established that a school had a duty to protect its student from criminal attack and breached that duty where the attacker had a propensity towards violence; the school system or school personnel was aware of this propensity; and school personnel's failure to provide adequate supervision allowed the attacker the opportunity to assault the student, proximately causing his injuries.¹³⁹

Other scholars concur with Zirkel and Reichner that the courts have met the *in loco parentis* question only half-way. In his comparative research on *in loco parentis* and fiduciary obligations,¹⁴⁰ John Rumel comments on the disjunction between the authority of school officials to discipline students and the duty to provide a safe learning environment:

The duty to protect students, however, has traditionally been cabined by, at most, negligence principles. Rather than impose upon school supervisory personnel a heightened duty of care concerning their responsibility toward

135. *Id.* at 232–33.

136. *Id.* at 233–34.

137. *Id.* at 234.

138. *Id.* 248–49.

139. *Id.* at 243.

140. Rumel, *supra* note 22, at 711.

students, courts have made clear that the duty stemming from the *in loco parentis* doctrine to supervise and/or protect requires schools, administrators, and teachers to act reasonably under the circumstances. In this regard, several courts, paying homage to the genesis of the *in loco parentis* doctrine, have defined that duty as how a reasonable parent of the student would have acted under the circumstances giving rise to the alleged harm to the student. A minority of courts, based on the *in loco parentis* doctrine, have required even less from schools and teachers: those courts have held that schools and teachers are only liable when the school personnel's willful and wanton conduct causes the student's injury.¹⁴¹

In a qualitative study of student victimization in schools,¹⁴² Todd DeMitchell finds that the failure to sort out the duty question is the single biggest reason why court decisions “fail to fashion effective remedies.”¹⁴³ DeMitchell argues that the question of whether students have a right to a safe learning environment should not be difficult to resolve because “[i]t takes no intuitive leap or well-reasoned analysis to conclude that children should be able to attend school and be free from sexual abuse[.]”¹⁴⁴ One of DeMitchell's most important findings with respect to student injuries inflicted by educators is that “[d]espite the expansion of liability for law enforcement and health care [officials], sexual assaults perpetrated by school employees on students have been consistently found to be outside of the scope of employment, thus shielding the school district from respondeat superior liability.”¹⁴⁵ DeMitchell concludes that “current theories of responsibility [on the

141. *Id.* at 716–17.

142. DeMitchell, *supra* note 4, at 17.

143. *Id.*

144. *Id.* at 51.

145. *Id.* at 33. Oddly, DeMitchell's proposal for a workable theory on the duty to protect students requires a recommitment to common law *in loco parentis* because “Blackstone's *in loco parentis* theory of responsibility may provide a more appropriate vehicle for the protection of children in school. If educators act in the place of parents, should they be held to a similar duty to protect the children entrusted to their care?” *Id.* at 20.

duty to protect students with consequences for breach of that duty] . . . are inadequate.”¹⁴⁶

Respondent superior has consistently failed to hold schools liable in state courts. Likewise, no constitutional duty to protect students has been imposed. Turning to the federal government for a redress of harms suffered at the hands of a state employed educator has resulted in the Title IX bar being set so high that for most children it is out of reach. . . . If there is any place where a child can go and be free from the fear of sexual abuse and sexual harassment, it should be the public schools. Instead, public schools are an environment where the students are too often harassed by their peers and even molested and assaulted by school personnel.¹⁴⁷

Susan Stuart’s study of *in loco parentis*¹⁴⁸ explains how it is that courts “remain focused on the school districts’ right to discipline and not on the concomitant duty to protect.”¹⁴⁹

When courts first started using *in loco parentis* as a justification defense for schools, they used it as a descriptive word of convenience because they never really adopted the entirety of the doctrine. From its origins in U.S. public education law, the common law doctrine of *in loco parentis* was applied almost exclusively to student discipline. Rarely was it understood to also apply to parental-like responsibilities for the care of students.¹⁵⁰

Stuart finds that an additional explanation for the confusion surrounding *in loco parentis* is the changing status of public education over time. Stuart argues that:

[i]n *loco parentis* assumes a voluntary delegation of parental authority and was envisioned during a time of

146. *Id.* at 20.

147. *Id.* at 51–52.

148. Stuart, *supra* note 21, at 969.

149. *Id.* at 981.

150. *Id.* at 970.

either home-schooling tutors or small residential, private schools. The doctrine is now anachronistic in an era of involuntary delegation occasioned by compulsory attendance laws and of large public schools with responsibilities that often go beyond educational function.”¹⁵¹

In Stuart’s view, to repair the damage to the concept, “courts must move past Victorian (and even colonial) ideas of school organization and leadership and recognize school districts are entities that can follow, and would probably welcome, better legal guidance[.]”¹⁵²

IV. THE DEBATE ON *IN LOCO PARENTIS* INFORMS DUTY ANALYSIS AFTER LEGISLATIVE REFORMS

Taken together, the scholarship on both sides of the question yields particularly strong proof on why fixing the student protection issue matters. Before the rise of the scholarship, policymakers pondered the issue of unsafe schools in constant awareness of two facts: first, although the muddle over the authority of educators *in loco parentis* presented many barriers to solving the duty question, it was not a sufficient explanation for the schools’ failure to maintain a safe learning environment. Second, policymakers knew only a few interesting facts about school safety¹⁵³ but not enough to explain the rise in

151. *Id.* at 971.

152. *Id.* at 1000.

153. See Gabriel P. Kuperminc et al., *School Social Climate and Individual Differences in Vulnerability to Psychopathology Among Middle School Students*, 39 J. SCH. PSYCHOL. 141, 141–59 (2001) (“Positive perceptions of school climate moderated the negative effects of self-criticism on both internalizing and externalizing problems. . . . [C]areful attention needs to be given to the social–emotional environment of middle schools, particularly for young adolescents preoccupied with issues of self-definition.”); Dorian Wilson, *The Interface of School Climate and School Connectedness and Relationships with Aggression and Victimization*, 74 J. SCH. HEALTH 293, 299 (2004) (“[A] positive school climate does not always reduce the likelihood of perpetration of aggression and victimization . . . [but] the amount of connectedness experienced by the average student appears to consistently contribute to predicting his likelihood of aggression and victimization.”); see also Kathryn A. Brookmeyer, Kostas A. Fanti & Christopher C. Henrich, *Schools, Parents, and Youth Violence: A Multilevel, Ecological Analysis*, 35 J. CLINICAL CHILD & ADOLESCENT PSYCHOL. 4,

victimizations or know what to do about it beyond deploying police officers, which many schools endeavored to do through federal funding programs.¹⁵⁴ While creating serious issues for students, the fuzzy way of thinking about *in loco parentis* has brought to the scholarship analyzing school safety a sizable group of experts—some trained in social anthropology, some in child welfare, others in political science, and more still with backgrounds in civil rights.¹⁵⁵

One of the central claims of this Article is that the scholarship together with the science on proven models of child protection, discussed below, have been enough to explain the problem of unsafe schools to policymakers and point toward solutions to the school authority issue.¹⁵⁶ The message conveyed by all of the scholars, save one¹⁵⁷ is that *in loco parentis* is “the wrong construct to define the

504–514 (2006) (“[S]chool climate serves as a protective factor for student violent behavior.”).

154. See Paul J. Hirschfield, *Preparing for Prison? The Criminalization of School Discipline in the USA*, 12 THEORETICAL CRIMINOLOGY 79 (2008); Arrick Jackson, *Police-School Resource Officers’ and Students’ Perception of the Police and Offending* 25 POLICING: INT’L J. POLICE STRAT. & MGMT. 631 (2002); Udi Ofer, *Criminalizing the Classroom: The Rise of Aggressive Policing and Zero Tolerance Discipline in New York City Public Schools*, 56 N.Y.L. SCH. L. REV. 1373, 1378 n.20 (2012) (“In the late 1990s, the federal government began awarding hundreds of millions of dollars to local law enforcement agencies to hire police officers to be stationed in schools. For example, in 2000 alone, the U.S. Justice Department awarded \$68 million in grants to hire 599 new police officers to work in schools in 289 cities and towns.”) (citations omitted); Matthew T. Theriot, *School Resource Officers and the Criminalization of Student Behavior*, 37 J. CRIM. JUST. 280, 281 (2009).

155. There is a ponderous, interdisciplinary body of recent scholarship on *in loco parentis*. See, e.g., Lizbet Simmons, *THE PRISON SCHOOL: EDUCATIONAL INEQUALITY AND SCHOOL DISCIPLINE IN THE AGE OF MASS INCARCERATION* (2017); Ferris Roger Byxbe & Martin Guevara Urbina, *In Loco Parentis: The Contours of the Fourth Amendment in American Public Schools*, 2 INT’L J. ARTS & COM. 11 (2013); J. Herbie DiFonzo, *Dilemmas of Shared Parenting in the 21st Century: How Law and Culture Shape Child Custody*, 43 HOFSTRA L. REV. 1003 (2015); Mark Fidanza, *Aging out of In Loco Parentis: Towards Reclaiming Constitutional Rights for Adult Students in Public Schools*, 67 RUTGERS U. L. REV. 805 (2015); David Adam Friedman, *Public Health Regulation and the Limits of Paternalism*, 46 CONN. L. REV. 1687 (2014).

156. See *infra* notes 159–63 and accompanying text.

157. For an opposing view, see Stoehr, *supra* note 22, at 1730 (“[I]n the case of *in loco parentis*, there appear to be good reasons why American courts accepted only the disciplinary side of the doctrine as traditionally understood, while rejecting the custodial side. For one, the fact that the doctrine was initially invoked only in cases

nature of school power.”¹⁵⁸ The scholars are also loud in their insistence that the failure to settle the student protection question threatens to collapse the notion of *in loco parentis* into a morass such that “the death or decline of the doctrine would not be expected to cause great grieving among practitioners and parents.”¹⁵⁹

Even so, as the dissenting scholar foretold,¹⁶⁰ legislators have stepped forward, replacing the fuzzy way of thinking about *in loco parentis* with a model of obligations that implement the emerging science on student behavior and campus management. Patrick Metzke succinctly frames the reasoning of policymakers in his study of cultural biases in school disciplinary outcomes¹⁶¹ by stating, “[t]hose in the schools that are victimized at the hands of others should not have to experience further trauma by unnecessary and thoughtless continued exposure to their perpetrator.”¹⁶² What is important here is that these reforms influence the reasonableness assessment by the courts of school policies that are unrelated or weakly related to the evidence-based reforms by lawmakers.¹⁶³

where discipline was concerned indicates that courts felt the need to justify a teacher’s power to impose discipline and order in the classroom but were reluctant to give the teacher enough control so as to give rise to a constitutional duty to protect.”).

158. Dupre, *supra* note 24, at 101.

159. Zirkel & Reichner, *supra* note 19, at 272.

160. See Stoehr, *supra* note 22, at 1739–40 (“[I]f reforms like the ones proposed by [the scholars] are, in fact, desired by parents, teachers, school administrators, and school boards, the legislature should theoretically be more responsive and motivated to make a detailed inquiry into such proposals.”).

161. See generally Patrick S. Metzke, *Plugging the School to Prison Pipeline by Addressing Cultural Racism in Public Education Discipline*, 16 U.C. DAVIS J. JUV. L. & POL’Y 203 (2012).

162. *Id.* at 213.

163. For a definition of “evidence-based,” see Robert H. Horner et al., *Examining the Evidence Base for School-Wide Positive Behavior Support*, 42 FOCUS ON EXCEPTIONAL CHILD. 1, 3 (2010) (“[F]or a practice to be defined as having a strong or promising evidence base, it will need to be assessed within multiple experimental studies . . . that allow both documentation of a valued effect and demonstration of experimental control.”).

Restorative Justice Liability: School Discipline Reform and the Right to Safe Schools

BERNARD JAMES*

Part III: External Reforms and the Duty to Protect

PART THREE OF A FIVE-PART SERIES

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I. INTRODUCTION

Two branches of reform outside of educational law help explain the shift in the expectations on educators to maintain a safe learning environment. The reforms combine the carrot and the stick,¹ consisting

* Professor of Constitutional Law, Caruso School of Law, Pepperdine University.

1. The carrot and stick philosophy is credited to Jeremy Bentham's description of the "coercive" and "alluring" influence of legal reform implementation. *See* JEREMY BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION 240 (Hafner Pub. Co. 1948) (1907); *see also* H. L. A. Hart, *Bentham on Legal Powers*, 81 YALE L.J. 799, 805 (1972) ("[I]t is a power to procure persons to act [sic] in conformity with a command or prohibition by providing motives influencing

not so much in usurping school discipline outcomes but in dictating what must be done to prove those results. Its duties are integrated into the education mission with profound consequences for educators apart from their implications for student safety. Courts are bound to acknowledge and apply the changes to the underlying laws on child welfare and campus safety. A straight line connects the reforms with the most important evidence of the shift in judicial review of school policies: criminal and civil liability against educators whose policies are inconsistent with the new obligations.²

II. CHILD WELFARE LAW AND THE IMPLICATIONS OF CAPTA

The first branch is the reform taking place in child welfare law. The most widely accepted aspect of this reform is the mandate for community-level collaboration between schools and other agencies.³ It alters the autonomy one traditionally associates with school authority with a procedure in which the outcomes for children emerge from evidence-based multidisciplinary assessments.⁴ Emerging from the

their will, and it does so in either of two main ways: by threatening punishment if the act is not done or by offering reward if it is done.”); James Allan, *Democracy, Liberalism, and Brexit*, 39 CARDOZO L. REV. 879, 902 (2018) (“Bentham saw democracy as yet another system of sticks and carrots to motivate those with power to look out for the happiness or the welfare—in Bentham’s eighteenth century terminology, the pleasure—of as many other people in the society as possible.”).

2. See *infra* Part A.

3. See *infra* Part B.

4. For purposes of this Article, *in loco parentis* is given its traditional legal definition: the authority of a school official to make decisions in the best interest of the child during the school day as would a parent. See Susan Stuart, *In Loco Parentis in the Public Schools: Abused, Confused, and in Need of Change*, 78 U. CIN. L. REV. 969, 969 (2010) (“As originally conceived, the doctrine was used primarily to justify and defend student disciplinary actions: the school stood in the shoes of the parent and had authority to discipline, almost at will.”); see also *Orr v. Ferebee*, No. 1:16-cv-02610-RLY-DML, 2017 WL 1509309, at *2 (S.D. Ind. Apr. 27, 2017) (upholding the following statute that codifies its common law origin: “In all matters relating to the discipline and conduct of students, school corporation personnel: (1) stand in the relation of parents to the students of the school corporation; (2) have the right to take any disciplinary action necessary to promote student conduct that conforms with an orderly and effective education system, subject to this chapter; and (3) have qualified immunity with respect to a disciplinary action taken to promote student conduct under subdivision (2) if the action is taken in good faith and is reasonable.”).

science is the fact that youth violence and victimization are preventable if systems are in place to identify concerning behaviors, gather information to assess the risk factors,⁵ and utilize multiple resources to mitigate the risk.⁶ Although there are many examples of the system,⁷ its

5. A risk factor is a characteristic of a person, situation, area, or community that can be used to help predict an occurrence. The concept of a risk factor is statistical. It serves as the basic tool of prediction in many areas of public policy assessments, including allocation of police resources, insurance valuations, and child welfare. See Lawrence W. Sherman et al., *Hot Spots of Predatory Crime: Routine Activities and the Criminology of Place*, 27 CRIMINOLOGY 27 (1989) (discussing the criminogenic nature of places); Richard Berk et al., *Forecasting Murder Within a Population of Probationers and Parolees: A High Stakes Application of Statistical Learning*, 172 J. OF THE ROYAL STAT. SOC'Y 191 (2009) (using a statistical learning approach to forecast murderous conduct by individuals on probation or parole).

6. See generally Jeremy D. Finn & Donald A. Rock, *Academic Success Among Students at Risk for School Failure*, 82 J. OF APPLIED PSYCHOL. 221 (1997); Richard F. Catalano et al., *Raising Healthy Children Through Enhancing Social Development in Elementary School: Results after 1.5 years*, 41 J. OF SCH. PSYCHOL. 143–64 (2003); Mark W. Lipsey & James H. Derzon, *Predictors of Violent or Serious Delinquency in Adolescence and Early Adulthood: A Synthesis of Longitudinal Research*, SERIOUS & VIOLENT JUVENILE OFFENDERS: RISK FACTORS AND SUCCESSFUL INTERVENTIONS 86 (1998); Mark W. Lipsey, *The Primary Factors that Characterize Effective Interventions with Juvenile Offenders: A Meta-Analytic Overview*, 4 VICTIMS & OFFENDERS 124 (2009).

7. See Astra Outley, *Overcoming Barriers to Permanency: Recommendations for Juvenile and Family Courts*, 44 FAM. CT. REV. 244, 250 (2006) (“[D]espite their shared responsibility for children, courts and agencies often do not communicate and collaborate well. . . . Jurisdictions in which courts and agencies have been able to make this shift have yielded better results for children.”); see also Robert N. Jacobs & Christine Riehl, *Doing More for Children with Less: Multidisciplinary Representation of Poor Children in Family Court and Probate Court*, 50 LOY. L.A. L. REV. 1, 5, 16 (2017) (“Multidisciplinary representation can be the missing link between children and justice in family court and probate court. . . . [S]ome kids in family and probate court need help to investigate their cases and to develop and enforce effective case plans. ‘Multidisciplinary representation’ means bringing together people from different professions and sectors of the community”); Rudy Estrada & Jody Marksamer, *Lesbian, Gay, Bisexual, and Transgender Young People in State Custody: Making the Child Welfare and Juvenile Justice Systems Safe for all Youth Through Litigation, Advocacy, and Education*, 79 TEMP. L. REV. 415, 435 (2006) (“Legal and child welfare organizations are now working in partnership to develop nonadversarial, multidisciplinary approaches for improving the care and outcomes of LGBT youth in the child welfare and juvenile justice systems.”).

most conspicuous feature is the reporting mandate.⁸ This feature is familiar to educators as the ignition to a collaborative process by means of a duty⁹ to immediately report known or suspected child victimizations in the home setting and in schools.¹⁰ Karena T. Valkyrie, D. Andrew Creamer, and Leila Vaughn in their review of the role of schools in child wellness found that educators were “in a perfect position to address child abuse and maltreatment early in a child’s life”¹¹ in light of the data that “educators generated 32% of all child maltreatment reports.”¹²

The rise of the child welfare branch and the science which continues to promote its extension into schools is well documented. Its seed was planted in the early 1900s with the creation of the Children’s

8. See Jon M. Hogelin, *To Prevent and to Protect: The Reporting of Child Abuse by Educators*, 2013 BYU EDUC. & L.J. 225, 234–35 (2013) (“Even though there is some variance between each state, generally there is a requirement for a report upon suspicion or a reason to suspect that a child has been abused or neglected.”); Thomas L. Hafemeister, *Castles Made of Sand? Rediscovering Child Abuse and Society’s Response*, 36 OHIO N.U. L. REV. 819, 851–66 (2010).

9. See Mary Kate Kearney, *Breaking the Silence: Tort Liability for Failing to Protect Children from Abuse*, 42 BUFF. L. REV. 405, 428 (1994) (“The recognition of an affirmative duty comports with long-standing policies that underlie a general duty of care. . . . The obligation to assist abused children arises out of the ‘natural responsibilities of social living and human relations.’” (quoting *Wytupeck v. Camden*, 136 A.2d 887, 893 (N.J. 1957))).

10. See Jane Rosien et al., *Intent v. Practice: Incentives and Disincentives for Child Abuse Reporting by School Personnel*, 1993 BYU EDUC. & L.J. 102, 102 (1993) (“The reporting laws, however, were originally intended to facilitate identification by school personnel of the broader problem of abuse and neglect arising in home settings.”); Marjorie R. Freiman, Note, *Unequal and Inadequate Protection Under the Law: State Child Abuse Statutes*, 50 GEO. WASH. L. REV. 243, 247 (1982) (“The objective of any child abuse program is to identify and protect the children who are or may be at risk within their homes.”).

11. Karena T. Valkyrie et al., *Mandatory Reporting and School Counselors: Reporting Laws, Obstacles, and Solutions*, 34 ALA. COUNSELING ASS’N J. 18, 27 (2008), <https://files.eric.ed.gov/fulltext/EJ875391.pdf>.

12. *Id.* at 18.

Bureau in 1912,¹³ the Maternal and Infancy Act of 1921,¹⁴ and the Child Welfare Services Program in 1935.¹⁵ Each law was a response to the “movement in the late nineteenth century focused on protecting children from physical cruelty inflicted by adults.”¹⁶ Marjorie R. Freiman’s study of child abuse legislation

notes:

The American public did not become aware of child abuse as a problem requiring immediate attention until 1874. During that year, the famous case of Mary Ellen sparked a massive crusade for child protection. A New

13. See Children’s Bureau Act of 1912, ch. 73, 37 Stat. 79 (1912) (the first federal grant program designed to encourage state childcare programs); see also DeLeith Duke Gossett, *The Client: How States Are Profiting from the Child’s Right to Protection*, 48 U. MEM. L. REV. 753, 762 (2018) (“Congress created the federal Children’s Bureau to ‘investigate and report . . . upon all matters pertaining to the welfare of children and child life among all classes of our people.’” (citing § 2, 37 Stat. at 79)).

14. See Maternity and Infancy (Sheppard-Towner) Act of 1921, Pub. L. No. 67-97, 42 Stat. 224. The Sheppard-Towner Act was originally sponsored by Republican congresswoman Jeannette Rankin of Montana in 1918 and after her departure by Morris Sheppard, a Democratic senator from Texas, and Horace Towner, a Republican congressman from Iowa; it provided federal funding for maternity and childcare to help curb the high rates of infant mortality. See *The Sheppard-Towner Maternity and Infancy Act*, HISTORY, ART & ARCHIVES U.S. HOUSE OF REPS., <https://history.house.gov/Historical-Highlights/1901-1950/The-Sheppard%E2%80%93Towner-Maternity-and-Infancy-Act/> (last visited Feb. 24, 2021); see also Libby S. Adler, *Federalism and Family*, 8 COLUM. J. GENDER & L. 197, 226 (1999) (“The Sheppard-Towner Act, also known as the ‘Federal Act for the Promotion of the Welfare and Hygiene of Maternity and Infancy,’ provided funds for the federal Children’s Bureau to administer through cooperating states . . .”).

15. The Child Welfare Services Program was the result of a comprehensive body of legislation in the Social Security Act of 1935 that included funding to the states for child protective services, foster care services, and the Aid to Families with Dependent Children Program, which targeted children living in poverty. See Howard Davidson, *Federal Law and State Intervention When Parents Fail: Has National Guidance of our Child Welfare System Been Successful?*, 42 FAM. L.Q. 481, 482 (2008) (“In the Social Security Act of 1935, there was an important provision intended to enable the U.S. Children’s Bureau (then in the Department of Labor) to better support state and local government child welfare services, or as the Act put it, ‘for the protection and care of homeless, dependent, and neglected children, and children in danger of becoming delinquent.’”).

16. Freiman, *supra* note 10, at 244.

York charity worker had unsuccessfully sought legal recourse to remove and protect Mary Ellen, age nine, from her abusive stepparents. Accounts of the child's maltreatment, reprinted in New York newspapers, however, activated members of the American Society for the Prevention of Cruelty to Animals (A.S.P.C.A.). In the late nineteenth century, authorities had no legal basis for interfering in cases of battered children. Therefore, based on the premise that a person is a member of the animal kingdom, the A.S.P.C.A. obtained a writ of habeas corpus to remove Mary Ellen from her home. In December of 1874, concerned citizens organized the New York Society for the Prevention of Cruelty to Children. The movement in the late nineteenth century focused on protecting children from physical cruelty inflicted by adults. By 1905, there were 400 more organizations working to prevent cruelty to children or to intervene upon discovering cruelty than there were in 1875.¹⁷

During this formative period researchers, usually with federal funding, began to develop, test, and report on themes that became deeply rooted in twentieth century public policy—the most well-known of which is the Child Abuse Prevention and Treatment Act (“CAPTA”), which provided federal funding for state and local programs for the prevention, identification, and treatment of child abuse and neglect.¹⁸ This Act formalized the child protection research with technical assistance programs for training state and local jurisdictions to implement proven protocols.¹⁹

Congress, armed with empirical data to support its position, advocated careful consideration of prevention science factors that were

17. *Id.* at 243–44.

18. *See* Child Abuse Prevention and Treatment Act, Pub. L. No. 93-247, 88 Stat. 4 (1974).

19. *Id.* The least well-known program is the Comprehensive Drug Abuse Prevention and Control Act of 1970. *See* Comprehensive Drug Abuse Prevention and Control Act of 1970, Pub. L. No. 91-513, 84 Stat. 1236. Title 21 of the Act is known as the Controlled Substances Act, which makes it a federal crime to sell drugs in or near a public or private elementary, secondary, vocational, or post-secondary school. *See* 21 U.S.C. § 860.

closely interwoven with child welfare.²⁰ It concluded that improvement of child welfare requires a comprehensive approach that:

(A) integrates the work of social service, legal, health, mental health, education, and substance abuse agencies and organizations; (B) strengthens coordination among all levels of government, and with private agencies, civic, religious, and professional organizations, and individual volunteers; (C) emphasizes the need for abuse and neglect prevention, investigation, and treatment at the neighborhood level; (D) ensures properly trained and support staff with specialized knowledge, to carry out their child protection duties; and (E) is sensitive to ethnic and cultural diversity.²¹

Under CAPTA, states were required to investigate reports of child abuse or neglect in order to substantiate the claims; upon any confirmation of abuse or neglect, the State was required to take steps to protect the health and welfare of the child.²² CAPTA also created a National Center on Child Abuse to encourage research, evaluation, technical assistance, and data collection on methods and procedures for protecting children. The criteria in its grant program stated:

Grants or contracts under this subsection may be—
(1) for the development and establishment of training programs for professional and paraprofessional personnel in the fields of medicine, law, education, social work, and other relevant fields who are engaged in, or intend to work in, the field of the prevention, identification, and treatment of child abuse and neglect; and training

20. See Child Abuse Prevention and Treatment Act § 2(b).

21. Child Abuse, Domestic Violence, Adoption and Family Services Act of 1992, Pub. L. No. 102-295, § 2(3), 106 Stat. 187.

22. See Tony L. *ex rel.* Simpson v. Childers, 71 F.3d 1182, 1188 (6th Cir. 1995) (“CAPTA allows grants of federal money ‘for purposes of assisting the States in developing, strengthening, and carrying out child abuse and neglect prevention and treatment programs.’ . . . ‘In order for a State to qualify for a grant . . . such State shall— (2) provide that upon receipt of a report of known or suspected instances of child abuse or neglect an investigation shall be initiated promptly to substantiate the accuracy of the report, and, upon a finding of abuse or neglect, immediate steps shall be taken’” (citing 42 U.S.C. § 5106a(b)(2) (1988) (current version at 42 U.S.C. § 5106a(7)).

programs for children, and for persons responsible for the welfare of children, in methods of protecting children from child abuse and neglect; (2) for the establishment and maintenance of centers, serving defined geographic areas, staffed by multidisciplinary teams of personnel trained in the prevention, identification, and treatment of child abuse and neglect cases, to provide a broad range of services related to child abuse and neglect, including direct support and supervision of satellite centers and attention homes, as well as providing advice and consultation to individuals, agencies, and organizations which request such services; (3) for furnishing services of teams of professional and paraprofessional personnel who are trained in the prevention, identification, and treatment of child abuse and neglect cases, on a consulting basis to small communities where such services are not available; and (4) for such other innovative programs and projects, including programs and projects for parent self-help, and for prevention and treatment of drug-related child abuse and neglect, that show promise of successfully preventing or treating cases of child abuse and neglect as the Secretary may approve.²³

Congress enacted CAPTA with full awareness that “[a] fundamental problem with child abuse and neglect legislation in this country is the lack of a cohesive policy.”²⁴ Before CAPTA, one scholar noted that “‘there are 51 sets of policies . . . , each of which take their character from the practical way that a large range of discretion is exercised by the police, the prosecutors, the juvenile court workers, and private and public social welfare workers.’ Ineffective directional guidance in the

23. Child Abuse Prevention and Treatment Act § 4(a).

24. Freiman, *supra* note 10, at 267; *see also* Roger J. R. Levesque, *Child Abuse Prevention and Treatment Act*, in *ENCYCLOPEDIA OF ADOLESCENCE* 384 (Roger J. R. Levesque ed., 2011) (“The federal legislation recognizes and encourages states to adopt a comprehensive approach to dealing with child maltreatment. That expansive approach seeks to integrate the work of social service, legal health, mental health, education, and substance abuse agencies and organizations. It also seeks to strengthen coordination among all levels of government, and with private agencies, civic, religious, and professional organizations, and individual volunteers.”).

federal and state legislatures has caused confusion regarding the appropriate response to child maltreatment.”²⁵

Despite the appearance of usurpation of state authority²⁶ and the absence of a private right of action as a means of enforcement,²⁷ the primary and enduring achievement of CAPTA was to create a common language for policymakers—defining child endangerment, abuse, and neglect—to energize state and local officials’ efforts to effectively implement protection programs.²⁸

Since its enactment, the success of CAPTA is reflected in its frequent amendment and expansion.²⁹ Public policies on child

25. Freiman, *supra* note 10, at 267–68 (1982) (citing CHARLES P. SMITH ET AL., A PRELIMINARY NATIONAL ASSESSMENT OF CHILD ABUSE AND NEGLECT AND THE JUVENILE JUSTICE SYSTEM: THE SHADOWS OF DISTRESS 19 (1980)).

26. See Vivek S. Sankaran, *Innovation Held Hostage: Has Federal Intervention Stifled Efforts to Reform the Child Welfare System?*, 41 U. MICH. J.L. REFORM 281, 287 (2007) (“[C]hild welfare policy in particular, which today is driven by federal law, represents a notable exception to this pattern of state control on family law matters. . . . States looking to receive federal funding are given financial incentives to implement a one-size-fits-all model which places poor children in foster care, terminates parental rights expeditiously and locates adoptive homes immediately. Any State wishing to deviate from federal mandates risks losing millions of dollars.”).

27. See *Childers*, 71 F.3d at 1191 (“[W]e do not think that Congress intended to create a private right of action under the CAPTA provisions.”); *Suter v. Artist M.*, 503 U.S. 347, 356 (1992) (holding that Congress must confer enforceable rights, privileges, or immunities unambiguously when it intends to impose conditions on grant of federal money).

28. See Gerard F. Glynn, *The Child's Representation Under CAPTA: It Is Time for Enforcement*, 6 NEV. L.J. 1250, 1253 (2006); Foster Care Independence Act of 1999, Pub. L. No. 106-169, 113 Stat. 1860 (to amend the Social Security Act to provide states with more funding and greater flexibility in carrying out programs designed to help children make the transition from foster care to self-sufficiency).

29. See Levesque, *supra* note 24, at 384 (“These are incredibly challenging goals, and they have resulted in a truly massive child welfare system.”). CAPTA has become the template for protection policies on areas outside of child welfare. The footprint of CAPTA can be seen in the Older American Act Technical Amendments of 1993, Pub. L. No. 103-171, 107 Stat. 1988 (codified as amended in scattered sections of 42 U.S.C.), at which extended abuse and neglect prevention funding to programs reaching senior citizens, as well as the Human Services Amendments of 1994, Pub. L. No. 103-252, 107 Stat. 1988 (codified as amended in scattered sections of 42 U.S.C.), which created a funding branch for comprehensive “Head Start” preschool programs targeting preschool children of low-income families. See *The Head*

protection expanded exponentially within a decade of its enactment through appropriations of funding for states and local government in the Community-Based Child Abuse and Neglect Prevention Grants in 1985.³⁰ The provisions of CAPTA were amended in the Child Abuse Prevention, Adoption, and Family Services Act of 1988.³¹ In 1989, the provisions of CAPTA were transferred and codified in the Child Abuse Prevention Challenge Grants Reauthorization Act and expanded in the Drug Free School Amendments.³² Additional authorizations for the expansion of federal funding to encourage efforts to protect transient children and homeless children were added in the Stewart B. McKinney Homeless Assistance Act Amendments of 1990.³³

In 1992, CAPTA was reauthorized in the Child Abuse, Domestic Violence, Adoption, and Family Services Act.³⁴ The same year, CAPTA combined its focus on child protection with program efforts in the juvenile justice system in the Juvenile Justice and Delinquency Prevention Act Amendments of 1992.³⁵ CAPTA was further amended by the Child Abuse Prevention and Treatment Act Amendments of 1996,³⁶ which expanded its funding authority to include a Community-Based Family Resource Centers Program. The Adoption and Safe Families Act (“ASFA”) was placed alongside CAPTA in 1997³⁷ to promote accountability of service delivery systems in achieving positive outcomes for children related to three national goals: safety, permanency, and

Start Model, NAT’L HEAD START ASS’N: <https://www.nhsa.org/why-head-start/head-start-model> (last visited Feb. 24, 2021).

30. Continuing Appropriations for Fiscal Year 1985, Pub. L. No. 98-473, 98 Stat. 1837.

31. See Child Abuse Prevention, Adoption, and Family Services Act of 1988, Pub. L. No. 100-294, 102 Stat. 102.

32. See Drug-Free Schools and Communities Act Amendments of 1989, Pub. L. No. 101-226, 103 Stat. 1928.

33. Stewart B. McKinney Homeless Assistance Act of 1990, Pub. L. No. 101-645, 104 Stat. 4673.

34. See Child Abuse, Domestic Violence, Adoption and Family Services Act of 1992, Pub. L. No. 102-295, 106 Stat. 187.

35. See Juvenile Justice and Delinquency Prevention Appropriations Authorization, Pub. L. No. 102-586, 106 Stat. 4982 (1992).

36. See Child Abuse Prevention and Treatment Act Amendments of 1996, Pub. L. No. 104-235, 110 Stat. 3063 (codified at 42 U.S.C. §§ 5101–5119c).

37. See Adoption and Safe Families Act of 1997, Pub. L. No. 105-89, 111 Stat. 2115 (codified at 42 U.S.C. § 671).

child and family well-being.³⁸ CAPTA was amended in 2003 in the Keeping Children and Families Safe Act of 2003,³⁹ which created grants to support program efforts for the prevention of child abuse and neglect. CAPTA was reauthorized in 2011 in the Child Abuse Prevention and Treatment Act of 2011⁴⁰ and in 2016 in the Comprehensive Addiction and Recovery Act of 2016.⁴¹

State reforms on child welfare reflect a similar pattern. The eligibility requirements for CAPTA's three major funding programs have shown tremendous power to influence local decision making.⁴² CAPTA creates strong incentives for states to establish multidisciplinary teams for the investigation of reported cases of child abuse in schools based on studies that showed that at least five students would be victimized or be reported as possible victims of abuse in a typical teachers' classroom per year.⁴³ Most state laws mimic CAPTA with

38. See JILL GOLDMAN ET AL., *A COORDINATED RESPONSE TO CHILD ABUSE AND NEGLECT: THE FOUNDATION FOR PRACTICE* (2003), <https://www.childwelfare.gov/pubPDFs/foundation.pdf#page=58&view=Chapter%208.%20Which%20Laws%20And%20Policies%20Guide%20Public%20Intervention%20In%20Child%20Maltreatment?> (last visited Nov. 1, 2020); see also DOROTHY ROBERTS, *SHATTERED BONDS: THE COLOR OF CHILD WELFARE* 108–10 (2002) (“ASFA supporters placed children’s right to be safe in opposition to parents’ right to custody of their children. . . . It generally narrows the requirement by directing state authorities to make the health and safety of children in foster care their ‘paramount concern.’ It also exempts states from using reasonable efforts to return children who are abandoned, tortured, or repeatedly or severely abused. . . . ASFA also offers financial incentives to states to get more children adopted. The federal government pays states a bonus for foster child adoptions.”).

39. See Keeping Children and Families Safe Act of 2003, Pub. L. No. 108-36, 117 Stat. 800.

40. See CAPTA Reauthorization Act of 2010, Pub. L. No. 111-320, 124 Stat. 3459.

41. See Comprehensive Addiction and Recovery Act of 2016, Pub. L. No. 114-198, 130 Stat. 695.

42. See Howard Davidson, *Legal Issues Related to Abuse and Neglect of Children with Disabilities*, 18 MENTAL & PHYSICAL DISABILITY L. REP. 707, 707 (1994) (listing requirements for these programs: “basic child abuse grants, community abuse prevention grants (which, among other things, support child abuse prevention education programs in the schools), and the police- and prosecutor-focused children’s justice grants”).

43. See Valkyrie, *supra* note 11, at 18.

slight variation,⁴⁴ with some jurisdictions extending child protection rules “considerably beyond the federal mandate.”⁴⁵ Lucy S. McGough, in a study of forensic interviews of child victims, noted, “By 1991, thirty-three states required joint Child Protective Services and law enforcement investigations of reported child maltreatment.”⁴⁶ In his study discussing in part “the obstacles confronting investigators and prosecutors”⁴⁷ in multidisciplinary child abuse investigations, Victor I. Vieth describes the multidisciplinary process:

First, identify the agencies who have a role in the handling of child abuse cases. At a minimum, this means law enforcement, social services, and the prosecuting attorney. It may also involve hospitals, crisis center advocates, mental health professionals, and others directly involved in treating child abuse victims. Second, identify the goals of the various agencies. . . . Third, the various agencies must identify the duties they perform in reaching their goals and note how these duties overlap with the work of other agencies. . . . Finally, the respective agencies must form a working group and reach a consensus as to the how the agencies can work together to avoid duplication of efforts and build stronger cases.⁴⁸

44. See Emily Bazelon, *Public Access to Juvenile and Family Court: Should the Courtroom Doors Be Open or Closed?*, 18 *YALE L. & POL’Y REV.* 155, 158 n.19 (1999); Susan S. Greenebaum, *Conditional Access to Juvenile Court Proceedings: A Prior Restraint or a Viable Solution?*, 44 *WASH. U. J. URB. & CONTEMP. L.* 135, 138 n.15 (1993).

45. See Christina Anderson, Comment, *Double Jeopardy: The Modern Dilemma for Juvenile Justice*, 152 *U. PA. L. REV.* 1181, 1185 (noting that “educational institutions have extended zero-tolerance efforts considerably beyond the federal mandate”).

46. See Lucy S. McGough, *Good Enough for Government Work: The Constitutional Duty to Preserve Forensic Interviews of Child Victims*, *LAW & CONTEMP. PROBS.* 179, 183 n.18 (2002).

47. See Victor I. Vieth, *In My Neighbor’s House: A Proposal to Address Child Abuse in Rural America*, 22 *HAMLIN L. REV.* 143, 144 (1998).

48. *Id.* at 159.

The team that emerges from the child welfare branch—social workers, police, schools, licensed medical and mental health practitioners, prosecutors, and community stakeholder experts in the assessment and treatment of juvenile needs—represents “a new standard of best practice.”⁴⁹ It integrates programs on campus safety and child welfare⁵⁰ through laws that mandate threat assessment teams,⁵¹ school threat protocols,⁵² behavioral intervention assessments,⁵³ and peer

49. Catherine Dixon, *Best Practices in the Response to Child Abuse*, 25 MISS. C. L. REV. 73, 80 (2005) (“The formation of multidisciplinary teams and the collaboration with Children’s Advocacy Centers mirrors a national trend, which represents a new standard of best practice and a more effective response to the problem of child abuse.”).

50. See, e.g., ALASKA ADMIN. CODE tit. 4, §§ 06.200(a), 06.210(b)(1)(A)–(B) (2012) (establishing guidelines for determining what is a safe school and permitting parents to transfer students out of schools that are “persistently dangerous”); COLO. REV. STAT. §22-32-109 (2011) (requiring Colorado school district boards of education to adopt and implement a safe school plan, or review and revise, if necessary, any existing plans or policies already in effect); CONN. GEN. STAT. § 10-220(a) (2011) (providing that each board of education “shall provide an appropriate learning environment for all its students which includes . . . a safe school setting”); D.C. CODE § 38-174(c)(9) (2012) (obligating the District of Columbia Public Schools chancellor to “[m]aintain clean and safe school facilities”); 24 PA. CONS. STAT. § 13-1310-A (2020) (establishing safe schools advocates for certain Pennsylvania school districts and describing the advocates’ duties).

51. See Miles T. Bradshaw, *Texas Safe Schools 2020: School Security in a Modern Era*, 56 HOUS. LAW. 20, 21 (2019) (“[T]he School and Firearm Safety Action Plan includes encouraging local school districts to develop threat assessment programs with goals and strategies for identifying students at risk for mental health issues. A pilot program was started through Texas Tech University Health Sciences Center in which Lubbock ISD participated by allowing threat assessment screenings to be conducted in limited circumstances.”).

52. See Andrija Lopez, *School Threats: A San Diego County Approach to Protocol and Threat Assessment*, 52 PROSECUTOR 53, 54 (2018) (explaining that the School Threat Assessment Team (“STAT”) “is a multi-disciplinary group comprised of deputy district attorneys, district attorney investigators, law enforcement officers, representatives from the San Diego County Office of Education, and mental health professionals. STAT convenes monthly to discuss cases where legal challenges prevent the filing of formal charges, but the individual presents a heightened risk to public safety and requires intervention”).

53. See Ellen A. Callegary, *The IDEA’s Promise Unfulfilled: A Second Look at Special Education & Related Services for Children with Mental Health Needs after Garret F.*, 5 J. HEALTH CARE L. & POL’Y 164, 202 (2002) (“For children with complex mental health needs, this cooperation is especially critical. I have represented many

mediation interventions.⁵⁴ For good practical reasons, schools are deemed an essential member not only because they “typically have frequent contact with children”⁵⁵ but also because educators are conspicuous for having advantages in achieving the goals associated with child protection that other agencies lack. Cynthia Crosson-Tower’s study on the role of schools in child protection explains the shift in thinking about the duty of schools:

Children and adolescents spend a large portion of their time in school, which gives educators more access to students than most other professionals. . . . Each individual who is involved with children has the obligation of knowing the basics of how to protect children from harm. The protection of children is not only an individual issue, but a community concern as well. Educators are an integral part of the community and, as such, can lead and be involved in community efforts to combat child maltreatment.⁵⁶

In their comprehensive study of the lessons that emerge from litigation challenging multidisciplinary assessments, Cynthia A.

children who have multiple agency involvement including social services, juvenile justice, mental health and developmental disabilities agencies.”).

54. See Raija Churchill, *Today’s Children, Tomorrow’s Protectors: Purpose and Process for Peer Mediation in K-12 Education*, 13 PEPP. DISP. RESOL. L.J. 363, 378 (2013) (describing the success of the New York City Resolving Conflict Creatively Program and the New Mexico Center on the Dispute Resolution Mediation in Schools program: these programs “fit directly into the existing framework for educators, law enforcement, and courts to collaborate on student safety”).

55. See CHILD WELFARE INFORMATION GATEWAY, DEP’T OF HEALTH AND HUM. SERVS., MANDATORY REPORTERS OF CHILD ABUSE AND NEGLECT: SUMMARY OF STATE LAWS (2019), http://www.childwelfare.gov/systemwide/laws_policies/statutes/manda.pdf (“[T]hree States—Indiana, New Jersey, and Wyoming—require all persons to report without specifying any professions. vIn all other States, territories, and the District of Columbia, any person is permitted to report. These voluntary reporters of maltreatment are often referred to as ‘permissive reporters.’”).

56. See CYNTHIA CROSSON-TOWER, THE ROLE OF EDUCATORS IN PREVENTING AND RESPONDING TO CHILD ABUSE AND NEGLECT 8 (2003), <http://www.childwelfare.gov/pubs/usermanuals/educator/educator.pdf>.

Dieterich, Nicole D. Snyder, and Christine J. Villani confirm that educators are being judged by increasingly rigorous standards:

[R]ecent cases and commentary reveal that FBAs and BIPs address a wide range of behaviors—from aggressive and externalizing behaviors to internalizing, isolating, or school- and task-avoidance behaviors. Addressing a broad spectrum of behaviors rather than exclusively evaluating students with violent or illegal activity affords school leaders the opportunity to meet the needs of all children with behavior problems. In addition, implementing FBAs and BIPs across a wider range of behavior problems than was originally intended by the law aligns with the intent of FBA and BIP practices within social sciences—that is, to systematically identify the underlying cause of problematic behaviors and to create positive behavioral interventions to develop socially appropriate responses.⁵⁷

III. EDUCATION REFORM IN THE JUVENILE JUSTICE SYSTEM

The second branch is the reform taking place in the juvenile justice system. Public policy in juvenile justice at the end of the twentieth century was dominated by the ever-increasing use of penal control,

57. Cynthia A. Dieterich et al., *Functional Assessments and Behavior Intervention Plans: Review of the Law and Recent Cases*, 2017 BYU EDUC. & L.J. 195, 197 (2017).

especially in the form of adult certification⁵⁸ and youth detention.⁵⁹ When the juvenile crime rate began rising sharply in the 1980s and early 1990s,⁶⁰ public school campuses were not immune from the violence.⁶¹ During this period, policymakers began processing the information on evidence-based solutions. The initial view was that victimization was the result of human factors such as attitudes, peer connections, family or school problems, and the like.⁶² And as to school crime, there was the additional concern that the misconduct of

58. For juveniles to be charged in the adult criminal justice system, they must first be certified by the juvenile court. The court waives its jurisdiction and transfers a juvenile to an adult district court to face the adult criminal justice process. This is what is called certifying a juvenile as an adult. For a comprehensive study of 330 judicial waiver decisions, see Marcy R. Podkopacz & Barry C. Feld, *The End of the Line: An Empirical Study of Judicial Waiver*, 86 J. CRIM. L. & CRIMINOLOGY 449 (1996). See also Christopher Slobogin, *Treating Kids Right: Deconstructing and Reconstructing the Amenability to Treatment Concept*, 10 J. CONTEMP. LEGAL ISSUES 299, 299 (1999) (“[T]he central inquiry in a juvenile delinquency proceeding should be whether the child found delinquent is amenable to treatment. Disposition should depend upon the rehabilitative potential and needs of the juvenile, and only if no treatment is available in the juvenile system should transfer to adult court be considered.”).

59. For a comprehensive empirical assessment of youth detention in this era, see DALE G. PARENT ET AL., *CONDITIONS OF CONFINEMENT: JUVENILE DETENTION AND CORRECTIONS FACILITIES* (1994), <https://files.eric.ed.gov/fulltext/ED367928.pdf>. See also Stacey Gurian-Sherman, *Back to the Future: Returning Treatment to Juvenile Justice*, 15 CRIM. JUST. 30, 31 (2000) (“Between 1986 and 1995, detention increased 31 percent, with just over 133,500 children detained in 1995 on property offenses—a 7 percent increase in this category over 10 years. During this same period, the number of drug offenses involving detention increased 110 percent, and the number of ‘public order’ cases involving detention increased 22 percent.”).

60. JEFFREY BUTTS & JEREMY TRAVIS, *THE RISE AND FALL OF AMERICAN YOUTH VIOLENCE: 1980 TO 2000* 2 (2002) (“[T]he United States experienced sharply growing rates of juvenile violence during the 1980s and early 1990s. If these trends had continued, it would have caused a national crisis. . . . By the early 1990s, violent juvenile crime had captured the attention of the nation’s policymakers and news media, as well as the public. Nearly every State in the country had launched new juvenile justice reform initiatives, often involving reduced judicial discretion and a greater use of adult court for juvenile offenders.”).

61. See *Challenge of School Violence*, CONST. RTS. FOUND., <https://www.crf-usa.org/school-violence/challenge-of-school-violence.html> (last visited Feb. 25, 2021) (“[I]n the early- and mid-1980s, reports revealed that school violence was on the rise once more, reaching a new peak in the early 1990s.”).

62. See James Q. Wilson, *Crime and American Culture*, 70 THE PUB. INT. 22, 33 (1983).

juveniles seemed to reflect a view that they had been liberated from traditional behavioral restraints.⁶³ Title 21 of the Comprehensive Drug Abuse Prevention and Control Act of 1970, a pre-CAPTA policy, made it a federal crime to sell drugs in or near a public or private elementary, secondary, vocational, or post-secondary school.⁶⁴ Using a Presidential Directive in 1984, President Reagan, created the National School Safety Center to authorize the Department of Justice and its partner institution Pepperdine University to “inform teachers and other officials of their legal rights and to provide a computerized national clearinghouse for school safety resources” as well as to announce that “the Department of Justice [wa]s studying possible amendments of Federal law that would help principals and others reestablish good order in our schools.”⁶⁵

The Safe and Drug-Free Schools and Communities Act was established in 1986 by the Anti-Drug Abuse Act.⁶⁶ It provided grants to the states on substance abuse education and violence prevention activities.⁶⁷ With the support of over \$5.1 billion in federal aid from the Safe and Drug-Free Schools and Communities Act, school districts in all states now had the resources to promote school safety, violence reduction, and environmental designs conducive to safety.⁶⁸ The Gun-

63. *See id.*

64. *See supra* note 19 and sources cited therein.

65. *See* President Ronald Reagan, *Remarks at the Annual Convention of the National Association of Secondary School Principals in Las Vegas, Nevada* (Feb. 7, 1984) (transcript available online via the American Presidency Project), <https://www.presidency.ucsb.edu/documents/remarks-the-annual-convention-the-national-association-secondary-school-principals-las>.

66. *See* Drug-Free Schools and Communities Act of 1986, Pub. L. No. 101-226.

67. *Id.* Programs funded by the Act include: (1) drug education and prevention that emphasize individual responsibility; (2) education about the consequences of disruptive and violent behavior; (3) instruction on prejudice and tolerance; (4) violence prevention programs focusing on individual responsibility; (5) model programs for training of school personnel, parents, and members of the community; (6) Drug Abuse Resistance Education (“DARE”) programs; and (7) direct services to school districts with particularly severe drug and violence problems. *Id.*

68. *See* Shamus P. O’Meara, *School Security Design: Planning to Mitigate Risk and Avoid Liability*, 34 CONSTRUCTION LAW. 11, 12 (2014) (“Federal agencies responsible for safety, such as the Department of Homeland Security, strive ‘to provide the design community and school administrators with the basic principles and

Free Schools Act of 1994⁶⁹ required schools to implement zero tolerance measures for weapons violations⁷⁰ and referral into the juvenile justice system.⁷¹

Now, an evidence-based process is responsible for a shift away from the “get tough on crime” approach toward an emphasis on rehabilitation,⁷² multidisciplinary assessments,⁷³ and child trauma from the

techniques to make a school safe from terrorist attacks and school shootings and at the same time ensure it is functional and aesthetically pleasing.”).

69. See Improving America’s Schools Act of 1994, Pub. L. No. 103–382, 108 Stat. 3518. It is not to be confused with Gun-Free Schools Act of 1990, which was held to be an unconstitutional use of Congressional authority under the Commerce Clause in *United States v. Lopez*, 514 U.S. 549, 567 (1995).

70. See 20 U.S.C. § 7151(b)(1).

71. See 20 U.S.C. § 7151(h)(1). For a thorough history of the policy impact of the Gun-Free Schools Act of 1994 on state law, see Anderson, *supra* note 45, at 1185–86 (“After the passage of the Gun-Free Schools Act of 1994, all fifty states introduced zero-tolerance legislation.”).

72. See Brandon L. Garrett & John Monahan, *Judging Risk*, 108 CAL. L. REV. 439 (2020) (“The largely retributive approach has changed in the past decade and a half—policy-makers turned back towards rehabilitation—and more quantitative research on recidivism began to inform policy.”); Karl A. Racine & Elizabeth Wilkins, *Toward a Just System for Juveniles*, 22 U. D.C. L. REV. 1, 5 (2019) (“A “working” system would meet the twin goals of rehabilitation and public safety by focusing all its efforts on reducing that failure rate. That means decreasing recidivism and increasing children’s resilience—their ability to recover from and deal with trauma and stress. In order to do this effectively, all the actors in the juvenile justice system have to understand the root causes of delinquency in order to direct young people into effective services to treat those underlying causes and prevent future harm.”).

73. See Paul J. Hirschfield, *Effective and Promising Practices in Transitional Planning and School Reentry*, 65 J. OF CORRECTIONAL EDUC. 84, 89 (2014) (recommending that schools begin multidisciplinary assessments while a juvenile is in custody to facilitate a smooth transition when the juvenile is released); 1 ROBERT W. MASON, FLORIDA JUVENILE LAW AND PRACTICE, § 8.1 (2018) (Florida law requires the Department of Juvenile Justice to “develop and implement an appropriate continuum of care that provides individualized, multidisciplinary assessments, objective evaluations of relative risks, and the matching of needs with placements for all children under its care.” (quoting FLA. STAT. § 985.601(2))). ; Morgan Molinoff, Note, *The Age of (Guilt or) Innocence: Using ADR to Reform New York’s Juvenile Justice System in the Wake of Miller v. Alabama*, 15 CARDOZO J. CONFLICT RESOL. 297, 328 (2013) (“[T]he program would be treatment and rehabilitation, rather than punishment and confinement (unless in-patient mental health services were required), and the program would be based on a multidisciplinary approach to adjudication. After opting into participation, each juvenile would be assigned a team of professionals that would

perspective of the offending juvenile.⁷⁴ The laws of every state seek to reduce confinement,⁷⁵ strengthen community supervision,⁷⁶ and focus finite resources on practices proven to attack recidivism.⁷⁷ Again, for

devise an individual treatment plan tailored to his specific needs and circumstances and then closely monitor his compliance with the team's recommendations.”).

74. See Samantha Buckingham, *Trauma Informed Juvenile Justice*, 53 AM. CRIM. L. REV. 641, 670 (2016) (“The trauma-specific therapy provided must be evidence-based, meaning the therapist must remain faithful to the design that was created using statistically and clinically meaningful studies to measure the effectiveness of various practices. These effective practices take place in school, in the community, and at home.”); Erin Komada, *Recognizing the Role of Trauma and Creating Trauma-Informed Systems in Pennsylvania Juvenile Courts*, 28 WIDENER COMMONWEALTH L. REV. 85, 94 (2019) (“Courts may also want to establish partnerships with organizations that play vital roles in the lives of youth and work together to address the challenges youth face as a result of trauma exposure and being involved with the juvenile court system. Collaborating with educational institutions can have significant benefits for children and can minimize stress children face when in the court system.”).

75. The “get tough on crime” approach led to increases in youth detention. The immediate result of the reform shift was a twenty-four to sixty percent decline in detention without an increase in the rate of juvenile crime. See Mark R. Fondacaro et al., *The Rebirth of Rehabilitation in Juvenile Justice and Criminal Justice: New Wine in New Bottles*, 41 OHIO N.U. L. REV. 697, 700–02 (2015); Charlyn Bohland, *No Longer a Child: Juvenile Incarceration in America*, 39 CAP. U. L. REV. 193, 206 n.125 (2011); *Youth Incarceration in the United States*, THE ANNIE E. CASEY FOUND. 1, <http://www.aecf.org/m/resourcedoc/aecf-YouthIncarcerationInfographic-2013.pdf> (last visited Feb. 25, 2021).

76. See Hon. Suchada P. Bazzelle, *The Changing Landscape of Juvenile Justice*, 33 UTAH B.J. 16, 20–21 (2020) (“A major selling point of the reform was saving huge sums of money that could be reinvested in the front-end services that would allow youths to remain in their homes and receive the necessary supervision and treatment in the community, rather than in state custody.”); Cynthia Conward, *The Juvenile Justice System: Not Necessarily in the Best Interests of Children*, 33 NEW ENG. L. REV. 39, 73 (1998) (“Community supervision is another form of graduated sanction. In Washington state, community supervision is mandated by the court via an order of disposition or an order granting a deferred disposition to an adjudicated youth that has not been committed to a correctional facility. An order of community supervision can last up to two years for a sex offense, and up to one year for other offenses.”).

77. See Mark W. Lipsey, *Can Rehabilitative Programs Reduce the Recidivism of Juvenile Offenders? An Inquiry into the Effectiveness of Practical Programs*, 6 VA. J. SOC. POL’Y & L. 611, 628–29 (1999) (conducting a meta-analysis of research studies on the effects of programs and concluding that “the following types of services showed statistically significant effects that were also large enough to represent worthwhile reductions in delinquent behavior . . . [s]chool-sponsored programs that used approaches other than special classes, tutoring, and counseling; examples of these ‘other’

good practical reasons, educators are deemed an essential component of this reform. The primary risk factors associated with child delinquency are all in play during the years when children fall under the authority of school officials.⁷⁸ The emerging school programs combine with the mental and behavioral services received elsewhere to address issues of self-esteem, anti-social feelings, anger management, and the development of academic skills.⁷⁹ The rise in expectations followed by reason of “[f]indings from decades of research conducted in schools suggest that contingency management systems (i.e., systematic use of reinforcement and predictable use of appropriate punishment) are effective in producing changes in children's classroom behaviors—for example, increasing prosocial behaviors and decreasing off-task, disruptive behaviors.”⁸⁰

IV. EXTERNAL REFORMS AND THE NEW ORDER: SCIENCE-BASED REASONABLENESS

On one hand, these reforms come as welcome news for schools. Previously, educators found themselves estranged from the child

programs include a law-related education program, an athletic and recreational program, a school-wide organizational and environmental change with targeted programs for high risk youth, and a school reorganization aimed at improved social relationships and reduced problem behavior”); Christopher Slobogin, *Treating Juveniles Like Juveniles: Getting Rid of Transfer and Expanded Adult Court Jurisdiction*, 46 TEX. TECH L. REV. 103, 110 (2013) (“The best way to reduce juvenile recidivism is through community-based programs that are an awkward fit in a system based on retributive punishment.”).

78. See David M. Altschuler, *Issues and Challenges in the Community Supervision of Juvenile Offenders*, 23 S. ILL. U. L.J. 469, 478–79 (1999).

79. See Jade Gary, *Education Connection: A Prison to School Pipeline: Preparing Incarcerated Youth for Reentry into Society and Public School*, 34 CHILD. LEGAL RTS. J. 241, 243 (2014) (recommending that schools be the hub for coordinating with other reentry-related agencies a support network as juveniles transition back into public education); SMART ON JUVENILE JUSTICE: STRATEGIES FOR COMPREHENSIVE STATEWIDE JUVENILE JUSTICE REFORM, U.S. DEP'T OF JUSTICE OFFICE OF JUVENILE JUSTICE & DELINQUENCY PREVENTION 6 (2016), <https://ojjdp.ojp.gov/sites/g/files/xyckuh176/files/media/document/OJJDP-2014-3901.PDF>.

80. Naomi E.S. Goldstein et al., “*You’re on the Right Track!*” *Using Graduated Response Systems to Address Immaturity of Judgment and Enhance Youths’ Capacities to Successfully Complete Probation*, 88 TEMP. L. REV. 803, 821 (2016).

welfare and juvenile justice systems as, for example, even the identities of children purposefully placed into classrooms as a condition of probation, diversion, or with special risk factors were routinely concealed from school officials, causing one researcher to lament that “when agencies fail to coordinate, cases are often compromised and children can be further harmed by the very system that exists to protect them.”⁸¹

On the other hand, this improved vision comes at the cost of the autonomy educators previously exercised over both process and outcomes of campus-based incidents. The mandates of the evidence-based models⁸² heavily rely on maximizing outcomes for children through collaborative decision-making.⁸³

In the same way, more outside agencies are integrated as stakeholders into school administration. Of the forty-seven states that have revised their education codes to target bullying, all contain language that requires schools to adopt policies prohibiting harassment, intimidation, or bullying that must also include law enforcement authorities and social workers, when necessary.⁸⁴ This trend is confirmed by the

81. Catherine Dixon, *Best Practices in the Response to Child Abuse*, 25 MISS. C. L. REV. 73, 82 (2005).

82. The term “evidence-based” describes programs to which “their effectiveness has been demonstrated by causal evidence obtained through high quality outcome evaluations and that have been replicated and evaluated in at least three sites.” *Glossary*, NAT. INSTITUTE OF JUSTICE, <https://www.crimesolutions.gov/Glossary.aspx#E> (last visited Feb. 25, 2021).

83. See “*We Need to Do Something: Iowa City Schools Grapple with Potential for Shootings, Other Dangers*,” IOWA CITY PRESS-CITIZEN (Jun. 20, 2019), <https://www.press-citizen.com/story/news/2019/06/20/iowa-city-schools-grapple-potential-shootings-other-dangers/1502345001/> (explaining that the Iowa City School Safety Advisory Committee is looking to implement threat-assessment teams at schools made up of mental health professionals, school administrators, and law enforcement to address incidents like school shootings, violence and threats of violence, and professional development training for school officials).

84. See, e.g., OR. REV. STAT. § 339.356 (2020); WYO. STAT. ANN. § 21-4-314 (2020); S.C. CODE ANN. § 59-63-140 (2020); N.J. REV. STAT. § 18A:37-15 (2020); TENN. CODE ANN. § 49-6-4503 (2021); see also Phillip Lee, *Expanding the Schoolhouse Gate: Public Schools (K-12) and the Regulation of Cyberbullying*, 2016 UTAH L. REV. 831, 864 (2016) (“[S]chools are in a better position to identify and remediate incidents of cyberbullying than courts. If cyberbullying is criminalized in a state, then courts would have a role in its regulation. However, most states put the main onus on schools to come up with and implement anti-bullying policies, which include disciplinary procedures and centralized reporting requirements. This legislative choice to

many state laws that relax the confidentiality of student education records.⁸⁵ The law of one state meets the obstacle of records privacy with a remarkable call for transparency, requiring the disclosure of “confidential information contained in the student’s educational records if the student has been: (1) taken into custody under [another section]; or (2) referred to a juvenile court for allegedly engaging in delinquent conduct or conduct indicating a need for supervision” even “regardless of whether other state law makes that information confidential.”⁸⁶

The most important single conclusion that emerges from a survey of the external reforms is that they have become a significant factor in the assessment of school discipline policies.⁸⁷ Simple comparisons

delegate enforcement to schools is motivated by the fact that, unlike courts, schools know who their students are, have contact with students' parents, and therefore have a basis for understanding the social contexts in which they are operating. These community connections are manifested in parent-teacher meetings, Parent Teacher Associations (PTAs), parent volunteer opportunities, and other forms of shared educational process between teachers, staff, students, and parents.”).

85. The knowledgeable reader will immediately recognize that the relaxation of state education record privacy laws only occurs through an authorization found in the Family Educational Rights and Privacy Act. Even so, thirty-seven states have taken advantage of the discretion to do so based on the Improving America’s School Act of 1994 (“IASA”). IASA was signed into law on October 20, 1994, as Public Law 103-382. It allows states to authorize the interagency release of education records without prior parental consent. See U.S. DEP’T. OF JUSTICE, SHARING INFORMATION: A GUIDE TO THE FAMILY EDUCATIONAL RIGHTS AND PRIVACY ACT AND PARTICIPATION IN JUVENILE JUSTICE PROGRAMS 9 (1997), <https://www.ncjrs.gov/pdffiles/163705.pdf> (“The Secretary of Education believes that each school, working in conjunction with State and local authorities, can best determine whether a release of personally identifiable information from an education record ‘concerns the juvenile justice system’s ability to effectively serve a student prior to adjudication.’”).

86. TEX. FAM. CODE § 58.0051 (2019); see also Sonia Pace, *From Correctional Education to School Reentry: How Formerly Incarcerated Youth Can Achieve Better Educational Outcomes*, 23 TEX. J. ON CIV. LIBERTIES & CIV. RIGHTS 127, 135 (2018) (“As a result of the collaboration, [one city] established a ‘streamlined’ record transferal process, created a dual-credit program with a local community college, accelerated high schools for older youth, and evening programs for students with day-time jobs. By 2008, thirty-one percent of the youth released from placement received a high school diploma, GED, or both.”).

87. See SYLVIE HALE ET AL., EVIDENCE-BASED IMPROVEMENT: A GUIDE FOR STATES TO STRENGTHEN THEIR FRAMEWORKS AND SUPPORTS ALIGNED TO THE EVIDENCE REQUIREMENTS OF ESSA (2007), <https://www.wested.org/wp->

of outcomes across the child welfare and juvenile justice systems have tremendous power to sway the reasonableness assessment of school discipline policies.⁸⁸ In particular, the science behind the external reforms are clear about which programs effectively address the problems juveniles face.⁸⁹ In contrast, school discipline policies that are loosely structured around the goal of handling incidents with constructive

content/uploads/2016/12/Evidence-Based-Improvement-Guide-FINAL-122116.pdf (“One of the broad intents of the Elementary and Secondary Education Act (ESEA) as amended by the Every Student Succeeds Act (ESSA) is to encourage evidence-based decision-making as a way of doing business. Nonregulatory guidance issued in September 2016 by the U.S. Department of Education (ED) clarifies and expands on both the nature of evidence-based improvement and the levels of evidence that are specified in the law.”); Barbara Fedders & Jason Langberg, *School Discipline Reform: Incorporating the Supreme Court’s “Age Matters” Jurisprudence*, 46 *LOY. L.A. L. REV.* 933, 968 (2013) (“School administrators and educational policymakers can incorporate the concepts and principles derived from social science and neuroscience that formed the basis of the “age matters” cases into improved educational policies and practices.”); NAT’L INST. OF CHILD HEALTH & HUM. DEV. U.S. DEP’T OF HEALTH AND HUM. SEVS. & NAT’L COUNCIL FOR ACCREDITATION OF TEACHER EDUC., CHILD AND ADOLESCENT DEVELOPMENT RESEARCH AND TEACHER EDUCATION: EVIDENCE-BASED PEDAGOGY, POLICY, AND PRACTICE 33 (2006), https://www.nichd.nih.gov/sites/default/files/publications/pubs/documents/child_adol_dev_teacher_ed.pdf (“Often, a cognitive ‘piece’ of the developmental puzzle will help a teacher interpret a child’s social conduct. A large body of literature is available on the social bases of this type of cognitive development and should inform the development of classroom activities that help students to master skills and become independent. Teaching from a developmental perspective inevitably transforms teachers into problem solvers who adapt and modify instructional approaches based on knowledge of factors that promote optimal development.”).

88. See generally Bernard James, *Restorative Justice Liability: School Discipline Reform and the Right to Safe Schools* (pt. 2), 51 *U. MEM. L. REV.* 557, 611–12 (2021).

89. See, e.g., Matthew R. Sanders et al., *The Triple P-Positive Parenting Program: A Comparison of Enhanced, Standard, and Self-Directed Behavioral Family Intervention for Parents of Children with Early Onset Conduct Problems*, 68 *J. OF CONSULTING & CLINICAL PSYCHOL.* 624, 636–40 (2000); Arnold Binder & Gilbert Geis, *Ad Populum Argumentation in Criminology: Juvenile Diversion as Rhetoric*, 30 *CRIME & DELINQUENCY* 309, 326–33 (1984); Rachel Boisjoli et al., *Impact and Clinical Significance of a Preventive Intervention for Disruptive Boys*, 191 *BRITISH J. OF PSYCHIATRY* 415, 417–19 (2007) (“The results suggest that early preventive intervention for those at early preventive intervention for those at high risk of antisocial behaviour is likely to high risk of antisocial behavior is likely to benefit both the individuals concerned and society.”).

rather than punitive measures may be unrelated or weakly related to evidence-based principles.⁹⁰

Josie Foehrenbach Brown, in her review of proven effective child welfare programs notes that “groups such as the National Institute of Child Health and Human Development, the National Association for the Accreditation of Teacher Education, and the American Psychological Association have joined the chorus of criticism, urging that school disciplinary practices be aligned with the current knowledge about child and adolescent development” and argues that “institutional departures from relevant professional and scientific norms should be treated as prima facie evidence that the demands of due process are not satisfied.”⁹¹ In their study on the victimology of children and effective models of protection, Kathleen Barrett, Susan Lester, and Judith Durham reflect on the science behind this attitude:

A substantial body of research supports the conclusion that the impact of maltreatment on the developing child can be profound, affecting both school-specific and broader life contexts, and may extend long after childhood has passed Given the prevalence of childhood maltreatment and the gravity of associated consequences, schools are called to view maltreated children as a population in need of advocacy, and develop systems to enable more effective recognition, prevention, and response⁹²

In a study on the importance of school success in the development of children, Roger P. Weissberg, Marlene Caplan, and Robin L.

90. See Samuel Y. Song & Susan M. Swearer, *The Cart Before the Horse: The Challenge and Promise of Restorative Justice Consultation in Schools*, 26 J. OF EDUC. AND PSYCHOL. CONSULTATION 313, 318 (2016) (“Despite the popularity of [restorative justice] in school practice, it has been under-studied, especially in schools. This is concerning because practice appears to be far ahead of the research on effectiveness and successful implementation and sustainability, when in fact, research should be facilitating data-based decision making using [restorative justice].”).

91. Josie Foehrenbach Brown, *Developmental Due Process: Waging a Constitutional Campaign to Align School Discipline with Developmental Knowledge*, 82 TEMP. L. REV. 929, 932 (2009).

92. Katherine Marie Barrett et al., *Child Maltreatment and the Advocacy Role of Professional School Counselors*, 3 J. FOR SOC. ACTION IN COUNSELING & PSYCHOL. 86 (2011).

Harwood conclude that school involvement represents “an innovative mental health strategy that affects many risk and protective factors for diverse problem behaviors.”⁹³ Elena Govorova, Isabel Benítez, and José Muñiz, in their research on the well-being components that affect student academic performance, concur.⁹⁴ They note:

[I]t could be argued that the “results” of a school in terms of non-academic achievement should also be considered as educational objectives given that students with low levels of well-being are more likely to have a negative experience of school, as well as to suffer from depression and be involved in substance abuse or delinquency. As a result of the shared concerns of educational communities and families around the world, the latest trends aim to extend the focus of school effectiveness research beyond simple cognitive performance and also examine aspects such as well-being in the academic context.⁹⁵

School disciplinary policies and the science on juvenile welfare are two of the most important developmental contexts for public school students. It is hard to overstate the importance of the studies that suggests that the science of child and adolescent development and school disciplinary practices are important correlates of school success. Of course, this does not mean that there are no disagreements, either within the legislature or in the schools, as to which reforms or mandates provide the best fit to campus problems. Such is the nature of systemic reform. What is important is that in the era of school discipline reform, educators who typically control internal changes find themselves confronting serious questions over their role as a contributor to or an impediment in the development of children and adolescents.

93. See Roger P. Weissberg et al., *Promoting Competent Young People in Competence-Enhancing Environments: A Systems-Based Perspective on Primary Prevention*, in ANNUAL PROGRESS IN CHILD PSYCHIATRY AND CHILD DEVELOPMENT 267 (Margaret E. Hertzog & Ellen A. Farber, eds., 1992).

94. See Elena Govorova et al., *How Schools Affect Student Well-Being: A Cross-Cultural Approach in 35 OECD Countries*, FRONTIERS IN PSYCHOL. (2020), <https://doi.org/10.3389/fpsyg.2020.00431>.

95. See *id.* (citations omitted).

Restorative Justice Liability: School Discipline Reform and the Right to Safe Schools

BERNARD JAMES*

Part IV: Judicial Review and the Duty to Protect

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* Professor of Constitutional Law, Caruso School of Law, Pepperdine University.

I. INTRODUCTION

The Court's insertion of external mandates into the school environment suggests, but does not prove, that judicial review is shifting on the duty to protect students. What is at issue is the second great question relating to the liability of school officials: How should courts assess the reasonableness of school policies when they conflict with external mandates that require more of school officials in protecting students on campus?¹ There is every reason to suppose that courts, in response to the changes in the underlying laws in child welfare and juvenile justice, will be less averse to second-guessing education decision-making. One court characterizes the reporting mandate as one which creates "a statutory and moral duty" of compliance.² Indeed, in a review of the complex factors surrounding efforts to eliminate cyberbullying, Carolyn McNamara is correct to argue that the cooccurrence of legal reform and school liability has at least some causal connection with rigorous judicial review.³ Even so, to prove this argument requires taking into account the characteristics of judicial review in public education in light of the reforms, a task that until recently was difficult to do.⁴

1. See Bernard James, *Restorative Justice Liability: School Discipline Reform and Right to Safe Schools* (pt. 1), 51 U. MEM. L. REV. 557, 573 (2021).

2. See *Heotis v. Colo. State Bd. of Educ.*, 457 P.3d 691, 698 (Colo. App. 2020) (upholding a teacher's license revocation because the teacher failed to report sexual abuse), *cert. denied*, No. 19SC297, 2020 WL 624230, at *1 (Colo. Feb. 10, 2020).

3. See Carolyn McNamara, Note, *Cyberbullying Beyond the School-Gate: Does Every Student Deserve a National Standard of Protection?*, 45 HOFSTRA L. REV. 1343, 1376 (2017) ("In the case where there is no statute authorizing schools to discipline students for off-campus cyberbullying, school administrations are often hesitant to act out of fear of being held in violation of the Constitution and regulating with authority that is too broad. However, where there is a newly enacted cyberbullying statute allowing the schools to intervene in off-campus speech, the impact on school administrations is not to be ignored because implementing a mandatory policy for schools will render school administrations liable in the case where they have knowledge of any cyberbullying and fail to intervene accordingly.").

4. See Louis Fischer, *When Courts Play School Board: Judicial Activism in Education*, 51 EDUC. L. REP. 693, 708 (1989) ("Without a doubt, judicial policy making in education has reached a high water mark . . . [m]uch of it, however, was based on the phenomenal growth of legislation and other sources of regulation related to schooling. There is no reason to conclude that the level of court involvement will

II. UNDERSTANDING THE EVOLUTION OF JUDICIAL REVIEW OF EDUCATION POLICY

From the founding of free taxpayer supported public education,⁵ judicial review of education policies has been for the most part an explicitly anti-student movement.⁶ Students were often the subjects of a separate regime with no court of appeal.⁷ Therefore, many view the

subside . . .”); Kathleen Conn, *Allegations of School District Liability for Bullying, Cyberbullying, and Teen Suicides After Sexting: Are New Legal Standards Emerging in the Courts?*, 37 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 227, 228 (2011) (“[N]ew legal standards appear to be emerging in the courts.”); Matthew Fenn, *A Web of Liability: Does New Cyberbullying Legislation Put Public Schools in a Sticky Situation?*, 81 FORDHAM L. REV. 2729, 2734 (2013) (“In crafting or amending their bullying and cyberbullying laws, many states have potentially imposed new duties on schools, administrators, and teachers to monitor and police cyberbullying. . . . This leaves educators in a confusing and precarious situation when it comes to making increasingly common disciplinary decisions.”).

5. In 1635, Boston, Massachusetts became the birthplace of the United States’ first public school. See Samar A. Katnani, *Pics, Grutter, and Elite Public Secondary Education: Using Race as a Means in Selective Admissions*, 87 WASH. U.L. REV. 625, 634 (2010) (“Boston Latin, founded by the citizens of Boston in 1635, is a public six-year college preparatory school whose alumni include five signees of the Declaration of Independence.”).

6. See cases cited *infra* note 7.

7. In Pennsylvania, a school rule in the Northern Lebanon School District requires that students smile while walking the hallways between classes or “see a guidance counselor to discuss their problems” or receive a detention punishment. See Merriell Moyer, *School Requires Smiling in Between Classes, Teen Says—or Students Get Sent to Office*, USA TODAY (May 15, 2018, 2:01 PM), <https://www.usatoday.com/story/news/nation-now/2018/05/15/school-smiling-hallway-hallways-northern-lebanon-school-district/611706002/>. In several states, school rules prohibit physical contact such as hugging, holding hands, or high fiving. See Mike Celizic, *Schools Jumping on the Hug Ban-Wagon*, TODAY (Oct. 2, 2007, 9:02 AM), <https://www.today.com/news/schools-jumping-hug-ban-wagon-wbna21097673>. Over the years, many state courts have refused to strike down strict school rules. See, e.g., *Kissick v. Garland Indep. Sch. Dist.*, 330 S.W.2d 708, 709, 712 (Tex. Civ. App. 1959) (upholding a school rule that “married students or previously married students be restricted wholly to classroom work, that they be barred from participating in athletics or other exhibitions, and that they not be permitted to hold class offices or other positions of honor”); *Casey Cnty. Bd. of Educ. v. Luster*, 282 S.W.2d 333, 335 (Ky. Ct. App. 1955) (upholding a school rule that prohibited students from entering or purchasing goods in a cafe adjacent to the school grounds during school hours); *McLean Indep. Sch. Dist. v. Andrews*, 333 S.W.2d 886, 887 (Tex. Civ. App. 1960) (upholding a school

judicial review of education policies with deep distrust,⁸ not least because of the puzzling discourse that accompanies its application.⁹ The best recent example can be found in *Safford Unified School District No. 1 v. Redding*, where the U.S. Supreme Court applies the Fourth

rule that required students to park in the school “parking lot when they arrive at school and not move [from the] same until 3:45 P.M. unless by special permission”); *Bishop v. Houston Indep. Sch. Dist.*, 29 S.W.2d 312, 312 (Tex. 1930) (upholding a school rule that “prohibited [a student] from taking lunch during the noon recess except from the school cafeteria or that which was brought from her home”).

8. See Larry J. Obhof, *Rethinking Judicial Activism and Restraint in State School Finance Litigation*, 27 HARV. J.L. & PUB. POL’Y 569, 606 (2004) (“Many of these decisions suffer from critical constitutional and practical defects. Courts that decline to offer judicial review abandon their responsibility. Courts that take an activist approach often exceed their authority and impinge on the rightful duties of the other branches of government.”); Susan Stuart, *In Loco Parentis in the Public Schools: Abused, Confused and in Need of Change*, 78 U. CIN. L. REV. 969, 984 (2010) (“*In loco parentis* lingers because it takes the burden off courts from questioning the discretion of school board decisions.”); Hon. David S. Tatel, *Judicial Methodology, Southern School Desegregation, and the Rule of Law*, 79 N.Y.U. L. REV. 1071, 1133 (2004) (“By failing to anchor [school desegregation cases] in principles of judicial methodology, I fear the Court may have contributed to the ‘popular misconception that this institution is little different from the two political branches of the Government.’”); Alan Brownstein, *The Nonforum as a First Amendment Category: Bringing Order Out of the Chaos of Free Speech Cases Involving School-Sponsored Activities*, 42 U.C. DAVIS L. REV. 717, 720–21 (2009) (“The problems with existing doctrine and case analysis in this area are conceptual and practical. . . . Confronted with holdings that lack justification or doctrinal continuity, courts do not know what these rules mean or how they are to be applied.”); Bernard James, *Tinker in the Era of Judicial Deference: The Search for Bad Faith*, 81 UMKC L. REV. 601, 606 (2013) (“The task of sifting the facts of a dispute for a legitimate educational interest or evidence of bad faith has given way to the education mission as a justification in itself. The principle of deference has merged with the notion of ‘reasonableness’ to produce a judicial code that resolves doubts in favor of educators—in light of what can be understood by judges to be the education mission.”).

9. See Stuart, *supra* note 8, at 1004 (“[C]ourts are wont to be persuaded that [education policy] problems are so intractable that they are outside their judicial capacity. Of course, there are courts who invite that persuasion because it appeals to their sense that management is always right. In doing so, these courts put their imprimatur on these outliers and the outermost boundaries of collective institutional behavior, not based on any coherent standards but on some loosely defined doctrine that allows courts to throw up their collective hands and say, ‘We don’t understand how to run schools so we won’t interfere, regardless of what we really think.’”).

Amendment to a school strip search policy.¹⁰ The *Safford* Court combines the invalidation of the policy—an expected result—with an unanticipated expression of contrition:

In so holding, we mean to cast no ill reflection on the assistant principal, for the record raises no doubt that his motive throughout was to eliminate drugs from his school and protect students from what [one student] had gone through. Parents are known to overreact to protect their children from danger, and a school official with responsibility for safety may tend to do the same. The difference is that the Fourth Amendment places limits on the official, even with the high degree of deference that courts must pay to the educator’s professional judgment.¹¹

A historically grounded understanding of judicial review of education policies is that at the heart of this thinking lays the sense that “the judiciary is well advised to refrain from imposing on the States inflexible constitutional restraints that could circumscribe or handicap the continued research and experimentation so vital to finding even partial solutions to educational problems and to keeping abreast of ever-changing conditions.”¹² As a result, part of the ambiguity known to all judges regarding their role in education law is the task of deciding which challenges to a school policy must be politely declined and which challenges should be taken up and by what standard of review.¹³

10. 557 U.S. 364, 377 (2009).

11. *Id.*

12. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 43 (1973).

13. *See Pyle ex rel. Pyle v. S. Hadley Sch. Comm.*, 861 F. Supp. 157, 159, 170 (D. Mass. 1994) (holding that school officials could restrict vulgar expression by students regardless of whether there was any risk of substantial disruption but dress code provision prohibiting apparel which “harasses” violated students’ First Amendment rights) (“Plaintiffs argue that, even if school administrators have the hypothetical power to limit ‘vulgar’ speech, this court must itself weigh the slogans on its own scale of offensiveness and conclude that these particular T-shirts simply were not vulgar. The question then becomes, who decides what is ‘vulgar’? The answer in most cases is easy: assuming general reasonableness, the citizens of the community, through their elected representatives on the school board and the school administrators appointed by them, make the decision. On questions of coarseness or ribaldry in school, federal courts do not decide how far is too far.”).

Scholars in search of principles or “theories that might tie these cases together”¹⁴ conclude that an institutional presumption exists that courts will “defer to education officials, with the caveat that policies that intrude upon [student] rights without furthering an academic goal will not be tolerated.”¹⁵

A. Tradition of Judicial Deference

There is quite a lot to be said about judicial deference in all its forms¹⁶ and its relationship to policymaking in education. This author

14. James E. Ryan, *The Supreme Court and Public Schools*, 86 VA. L. REV. 1335, 1337 (2000) (comprehensive review of education jurisprudence).

15. *Id.* at 1417. Professor Ryan concludes that “the cases seem to rest on a pragmatic and necessarily rough distinction between two functions of education: academic and social.” *Id.* at 1340; see also Anne Proffitt Dupre, *Should Students Have Constitutional Rights? Keeping Order in the Public Schools*, 65 GEO. WASH. L. REV. 49, 64 (1996) (“On one side were the Justices who essentially viewed the institution as the adversary of the child, whom the Court must protect as the child attempts to rebut the values that the school attempts to inculcate. On the other side were the Justices who viewed the institution and its students as sharing in a common enterprise that consisted, at least in part, of teaching children how to be responsible citizens.”).

16. For more on the post-*Lochner* deference to social and economic legislation, see *United States v. Carolene Prods.*, 304 U.S. 144, 152 (1938), which confirms “the assumption that [social and economic legislation] rests upon some rational basis within the knowledge and experience of the legislators,” and *Williamson v. Lee Optical of Oklahoma*, 348 U.S. 483, 488 (1955), which holds that social and economic legislation is subject to only rational basis review and that the Court need not contemplate all possible reasons for legislation. See also Guy Miller Struve, *The Less-Restrictive-Alternative Principle and Economic Due Process*, 80 HARV. L. REV. 1463, 1463 (1967) (“The Supreme Court has been too thoroughgoing in its abandonment of economic due process.”). For deference in administrative law, see *Chevron, Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). See also Theodore W. Wern, *Judicial Deference to EEOC Interpretations of the Civil Rights Act, the ADA, and the ADEA: Is the EEOC A Second Class Agency?*, 60 OHIO ST. L.J. 1533, 1585 (1999) (“Courts offer less deference to agency guidelines that have not been cleansed by APA procedures, even if such guidelines are legitimately exempted from the requirements of the APA.”). For separation of powers deference that results when “a question . . . is not justiciable in federal court because of the separation of powers provided by the Constitution,” *Powell v. McCormack*, 395 U.S. 486, 517 (1969), see *Coleman v. Miller*, 307 U.S. 433, 456 (1939), which rules that the question of timeliness of the ratification of an amendment to the Constitution is a political and non-justiciable one that is up to the Congress.

has written about the subject at length elsewhere¹⁷ and for present purposes need only to draw out three short but vital points to explain how it is that educators unwittingly find themselves holding the sharp end of the stick as they take up the task of revising school discipline policies in the midst of the external constraints on their authority.

First, courts have indeed marked out in their decisions a broad landscape of deference to school officials.¹⁸ Even so, courts climactically and decisively¹⁹ invoke more rigorous levels of judicial scrutiny to invalidate policies that go “beyond the legitimacy of the education mission, take impermissible advantage of the temporary custody of

17. See, e.g., James, *supra* note 8, at 602 (“[T]he judicial appetite for reviewing school board decisions is at an ominous low, in part due to abstinence brought about by habitually applying objective presumptions of validity to school policies . . . particularly after the Columbine shooting.”); Bernard James & Joanne E. K. Larson, *The Doctrine of Deference: Shifting Constitutional Presumptions and the Supreme Court’s Restatement of Student Rights After Board of Education v. Earls*, 56 S.C. L. REV. 1, 89–90 (2004) (“It is not clear, at first glance, nor under sustained observation, why this judicial reluctance to interfere with legitimate educational needs should generate such a broad departure from constitutional norms. It is, in fact, the breadth of the model that is its most significant feature, begging the level of deference.”).

18. See, e.g., *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968) (“By and large, public education in our Nation is committed to the control of state and local authorities. Courts do not and cannot intervene in the resolution of conflicts which arise in the daily operation of school systems and which do not directly and sharply implicate basic constitutional values.”); *Goss v. Lopez*, 419 U.S. 565, 577 (1975) (“Judicial interposition in the operation of the public school system of the Nation raises problems requiring care and restraint . . .” (quoting *Epperson*, 393 U.S. at 104)); *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 683 (1986) (“The determination of what manner of speech in the classroom or in school assembly is inappropriate properly rests with the school board.”); *New Jersey v. T.L.O.*, 469 U.S. 325, 326 (1985) (“[S]triking the balance between schoolchildren’s legitimate expectations of privacy and the school’s equally legitimate need to maintain an environment in which learning can take place requires some easing of the restrictions . . .”); *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 266 (1988) (“A school need not tolerate student speech that is inconsistent with its ‘basic educational mission.’”); *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 654 (1995) (“Teachers . . . stand *in loco parentis* over the children entrusted to them.”); *Safford Unified Sch. Dist. No. 1 v. Redding*, 557 U.S. 364, 371, n.1 (2009) (“[S]tandards of conduct for schools are for school administrators to determine without second-guessing by courts.”).

19. Kristi L. Bowman, *The Government Speech Doctrine and Speech in Schools*, 48 WAKE FOREST L. REV. 211, 246 (2013) (“[T]he Court strongly encourages deference to the state as educator, but the deference is not unqualified.”).

children, and deny due process by discriminating . . . in a manner that undermines academic interests.”²⁰ The lessons taught by the landmark student rights cases, arising out of the Due Process,²¹ Equal Protection,²² and Free Speech Clauses,²³ are of great importance in understanding the limits of judicial deference to school policies in the era of school discipline reform.²⁴

20. James & Larson, *supra* note 17, at 72.

21. The Due Process Clause of the Fourteenth Amendment and Fifth Amendment constrain governments from depriving “any person of life, liberty, or property, without due process of law.” U.S. CONST. amends. V, XIV. The Fifth Amendment is applicable to the federal government only. U.S. CONST. amend. V. The Fourteenth Amendment, adopted by the 39th Congress, applies due process constraints to state law. See Edward B. Foley, *Due Process, Fair Play, and Excessive Partisanship: A New Principle for Judicial Review of Election Laws*, 84 U. CHI. L. REV. 655, 709 (2017) (“[D]ue process embodies the idea of fair play.”).

22. The Equal Protection Clause of the Fourteenth Amendment prevents governments from denying “to any person within its jurisdiction the equal protection of the laws.” U.S. CONST. amend. XIV, § 1. It defines a legitimate governmental policy as one whose objective does not distinguish between persons based on irrelevant and/or immutable characteristics. See Kenneth W. Simons, *Equal Protection: A Closer Look at Closer Scrutiny*, 76 MICH. L. REV. 771, 773 (1978) (“Equal protection proscribes both ‘hostile’ and ‘unfair’ discriminations.”).

23. The Free Speech Clause of the First Amendment prevents governments from punishing expression without a substantial justification. The range of speech that is protected includes spoken, written, or symbolic expressions conveyed in a manner that is truthful and which does not interfere with neutral time, place, and manner restrictions. See Cass R. Sunstein, *Free Speech Now*, 59 U. CHI. L. REV. 255, 310 (1992) (“Government may not regulate speech of any kind if the reason is that it disapproves of the message or disagrees with the idea that the speech expresses.”).

24. See *Brown v. Bd. of Educ.*, 347 U.S. 483, 494–495 (1954) (“Segregation of white and colored children in public schools has a detrimental effect upon the colored children. The impact is greater when it has the sanction of the law We conclude that in the field of public education the doctrine of ‘separate but equal’ has no place.”); *United States v. Virginia*, 518 U.S. 515, 555 (1996) (“The Fourth Circuit plainly erred in exposing Virginia’s VWIL plan to a deferential analysis Virginia’s remedy affords no cure at all for the opportunities and advantages withheld from women.”); *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 511 (1969) (“[S]tudents may not be regarded as closed-circuit recipients of only that which the State chooses to communicate. They may not be confined to the expression of those sentiments that are officially approved.”); see also Leon Letwin, *After Goss v. Lopez: Student Status as Suspect Classification?*, 29 STAN. L. REV. 627, 661 (1977) (“[W]hether one adopts a ‘flexible’ intermediate standard or an ‘inflexible’ strict standard is not nearly as important as whether the analysis begins with an appreciation

Second, the links in the chain of judicial deference in education are forged around the dirge that the disputes lack “the tools with which a court can work.”²⁵ It is recognizable as far back as the case of *Epperson v. Arkansas*, where the Court invalidates an education policy that forbids the teaching of evolution in public schools.²⁶ The application of strict judicial scrutiny is necessary in light of the constraints imposed on government officials by the Establishment Clause.²⁷ This is because, as the Court declares, “the First Amendment does not permit the State to require that teaching and learning must be tailored to the principles or prohibitions of any religious sect or dogma.”²⁸ Before it concludes, the *Epperson* Court settles expectations that strict judicial scrutiny is the exception to the rule of educational deference, noting that “public education in our Nation is committed to the control of state and local authorities. Courts do not and cannot intervene in the resolution of conflicts which arise in the daily operation of school systems

of the defects in the traditional view of students and of the importance of extending to them the constitutional protections of our society.”).

25. Conn. Coal. for Justice in Educ. Funding, Inc. v. Rell, 990 A.2d 206, 218 (2010).

26. 393 U.S. 97, 109 (1968).

27. For example, see *Meyer v. Nebraska*, where the Court invalidates a school policy that prevented a private religious school from teaching a foreign language. 262 U.S. 390, 399–400 (1923) (“The established doctrine is that this liberty may not be interfered with, under the guise of protecting the public interest, by legislative action which is arbitrary or without reasonable relation to some purpose within the competency of the state to effect. Determination by the Legislature of what constitutes proper exercise of police power is not final or conclusive but is subject to supervision by the courts.”). Also see *West Virginia State Board of Education v. Barnette*, where the Court invalidates a school policy mandating flag salute by a student with a religious objection. 319 U.S. 624, 642 (1943) (“If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.”). In *Wisconsin v. Yoder*, the Court invalidated a school policy compelling school attendance until age sixteen brought by Amish parents whose beliefs limited attendance until age thirteen. 406 U.S. 205, 214 (1972) (“Long before there was general acknowledgment of the need for universal formal education, the Religion Clauses had specifically and firmly fixed the right to free exercise of religious beliefs, and buttressing this fundamental right was an equally firm, even if less explicit, prohibition against the establishment of any religion by government.”).

28. *Epperson*, 393 U.S. at 106.

and which do not directly and sharply implicate basic constitutional values.”²⁹

The refrain appears again in *Goss v. Lopez*,³⁰ where the Court refuses to defer after identifying tools in the Due Process Clause to resolve a challenge to a state law authorizing student suspensions without a hearing.³¹ The *Goss* Court rules that suspensions of up to ten days must include notice of the school rule violated, an explanation of evidence, and an opportunity to reply.³² As in *Epperson*, the *Goss* Court settles expectations about educational deference, noting that while it was “mindful of our own admonition”³³ to defer, deference was not appropriate because “[t]here are certain bench marks to guide [the Court].”³⁴

In *San Antonio Independent School District v. Rodriguez*, the dirge is the rationale as the Court reiterates its “lack of specialized knowledge and experience counsels against premature interference with the informed judgments made at the state and local levels.”³⁵ Confronted with claims that the Texas school-financing system was discriminatory to students residing in low-property-tax-based school districts, the justices explained how the lack of suitable tools prevent a judicial solution:

29. *Id.* at 104.

30. 419 U.S. 565, 584 (1975).

31. “No State shall make or enforce any law which shall . . . deprive any person of life, liberty, or property, without due process of law.” U.S. CONST., amend. XIV.

32. The Court did acknowledge that when a disciplinary incident did not allow for pre-suspension due process that school officials could immediately remove the student, with due process to be accorded “as soon as practicable.” *Goss*, 419 U.S. at 582–83; see also David M. Pedersen, *A Homemade Switchblade Knife and a Bent Fork: Judicial Place Setting and Student Discipline*, 31 CREIGHTON L. REV. 1053, 1092 (1998) (“Courts have also allowed *Goss* type hearings in these circumstances to take place over the phone.”).

33. 419 U.S. at 578.

34. *Id.* The Court also notes that its judicial deference was part of the Fourth Amendment balancing test. See *New Jersey v. T.L.O.*, 469 U.S. 325, 326 (1985) (“[S]triking the balance between schoolchildren’s legitimate expectations of privacy and the school’s equally legitimate need to maintain an environment in which learning can take place requires some easing of the restrictions.”).

35. 411 U.S. 1, 42 (1973).

[T]his case also involves the most persistent and difficult questions of educational policy, another area in which this Court's lack of specialized knowledge and experience counsels against premature interference with the informed judgments made at the state and local levels. . . . On even the most basic questions in this area the scholars and educational experts are divided. . . . The ultimate wisdom as to these and related problems of education is not likely to be divined for all time even by the scholars who now so earnestly debate the issues. In such circumstances, the judiciary is well advised to refrain³⁶

Third, with the rise in studies about likely causes and potential remedies to unsafe schools, policymakers now have reliable evidence about (1) which policies are effective;³⁷ (2) whether there are any

36. *Id.* at 42–43. One should not leave *Rodriguez* without acknowledging the federalism issue of avoiding the usurpation of matters reserved for state legislative processes. It reveals an underlying reverence to sub-constitutional federalism brought into the open by Chief Justice Burger in a prior decision: “[L]ocal control of education involves democracy in a microcosm. . . . A school board is not a giant bureaucracy far removed from accountability for its actions; it is truly ‘of the people and by the people.’ A school board reflects its constituency in a very real sense and thus could not long exercise unchecked discretion in its choice to acquire or remove books. If the parents disagree with the educational decisions of the school board, they can take steps to remove the board members from office.” *Bd. of Educ. v. Pico*, 457 U.S. 853, 891–92 (1982) (Burger, J., dissenting); see also Richard H. Fallon, Jr., *The “Conservative” Paths of the Rehnquist Court’s Federalism Decisions*, 69 U. CHI. L. REV. 429, 490 (2002) (“Beyond the principal paths of the Court’s federalism revival lies a thickening underbrush of subconstitutional doctrines comprising clear statement rules, equitable doctrines restricting federal judicial power, statutory interpretations that shield local governments from liability, and official immunity doctrines. This underbrush is substantively inelegant and methodologically undisciplined.”).

37. See, e.g., Mary Faye Nelson, *A Qualitative Study of Effective School Discipline Practices: Perceptions of Administrators, Tenured Teachers, and Parents in Twenty Schools*, (Dec. 2002) (Ed.D. dissertation, East Tennessee State University) (available at <https://dc.etsu.edu/etd/718>) (“Effective discipline requires the enforcement of simple classroom and school rules that facilitate learning and minimize disruptions.”); Sheri S. Williams, *The School Discipline Plan: Does It Have All the Right Components?*, 82 NASSP BULL. 40–43 (1998) (providing elements effective school discipline plans have in common); COMMITTEE ON SOCIAL SCIENCE RESEARCH EVIDENCE ON RACIAL DIVERSITY IN SCHOOLS, NAT’L ACAD. OF EDUC., RACE-CONSCIOUS POLICIES FOR ASSIGNING STUDENTS TO SCHOOLS: SOCIAL SCIENCE

programs that prevent students from becoming disruptive in the first place;³⁸ (3) whether programs that claim to maintain safe campuses really work;³⁹ and (4) what kinds of crisis programs reset campuses after a disruption.⁴⁰ This Article does not offer a thorough evaluation of the research nor insist on any specific policy.⁴¹

RESEARCH AND THE SUPREME COURT CASES 23–24 (Robert L. Linn & Kevin G. Welner eds., 2007) (race-neutral policies are not as effective as race-conscious policies); Shuvo Robi Sircar, *Students Helping Students: An Alternative to Current Disciplinary Mechanisms in Schools*, 14 RUTGERS J.L. & PUB. POL'Y 347, 375–76 (2017) (“When intervention programs ‘improve[d] connections between homes, schools, and communities,’ students were far less likely to both misbehave in school and were less likely to ultimately drop out.”).

38. See, e.g., David Hawkins et al., *Reducing Early Childhood Aggression: Results of a Primary Prevention Program*, 30 J. AM. ACAD. CHILD & ADOLESCENT PSYCHIATRY 208 (1991); Ellen S. Amatea et al., *Becoming Partners: A School-Based Group Intervention for Families of Young Children Who Are Disruptive*, 8 J. SCH. COUNSELING 3 (2010); Denise C. Gottfredson & Gary D. Gottfredson, *Quality of School-Based Prevention Programs: Results from a National Survey*, 39 J. RES. IN CRIME & DELINQ. 3 (2002); John R. Weisz et al., *Promoting and Protecting Youth Mental Health Through Evidence-Based Prevention and Treatment*, 60 AM. PSYCH. 628 (2005).

39. See, e.g., Rhonda Nese & Kent McIntosh, *DO School-wide Positive Behavioral Interventions and Supports, NOT Exclusionary Discipline Practices*, in ADVANCES IN LEARNING AND BEHAVIORAL DISABILITIES 175 (2016); James C. Collins & Joseph B. Ryan, *Extension of Positive Behavioral Interventions and Supports from the School to the Bus: A Case Study*, 19 J. AT-RISK ISSUES 29 (2016); Jamie T. Goldin & Sara C. McDaniel, *Reducing Discipline and Safety Issues: A District-Wide Bus-PBIS Initiative*, 27 BEYOND BEHAV. 99, 106 (2018).

40. See Dusty Columbia Embury et al., *Keeping Our Students Safe During School Crises*, 38 PHYSICAL DISABILITIES: EDU. & RELATED SERVS. 1, 4–9 (2019); SARITA CHUNG ET AL., U.S. DEPT. OF HEALTH AND HUM. SERVICES: AGENCY FOR HEALTHCARE RES. AND QUALITY, SCHOOL-BASED EMERGENCY PREPAREDNESS: A NATIONAL ANALYSIS AND RECOMMENDED PROTOCOL (2008), <https://archive.ahrq.gov/prep/schoolprep/>; U.S. DEP'T OF EDUC. ET AL., GUIDE FOR DEVELOPING HIGH-QUALITY SCHOOL EMERGENCY OPERATIONS PLANS 1 (2013); Glen I. Earthman, *Schools in a Crisis: Where to Put the Students?*, 21 EDUC. PLAN. 39, 42–49 (2013).

41. For a perspective from a reader who desires comprehensive descriptive and normative assessments of the science of school safety, see STEVE FLEISCHMAN, ET AL., BETTER EVIDENCE, BETTER CHOICES, BETTER SCHOOLS: STATE SUPPORTS FOR EVIDENCE-BASED SCHOOL IMPROVEMENT AND THE EVERY STUDENT SUCCEEDS ACT (2016), which presents a series on implementation of the Every Student Succeeds Act from the Center for American Progress. See also Charles Milligan, *School Centered*

What is important is that the research is influencing positive laws that provide tools with which the courts can work. Policymakers are altering the underlying law through substantive and procedural mandates,⁴² private rights of action,⁴³ and exceptions to sovereign immunity.⁴⁴ Courts in recent history have held that “schools cannot avoid liability by turning a blind eye to maltreatment of vulnerable students,”⁴⁵ educators “have a duty to protect others from the foreseeable intentional acts of third persons,”⁴⁶ or student injury claims will not be dismissed when evidence shows that school policies are inadequate.⁴⁷

Evidence Based Accountability, 3 UNIVERSAL J. EDUC. RES., 460, 460–62 (2015); Joseph M. McKenna & Kathy E. Martinez-Prather, *Moving Toward a Research-Based Framework for School Policing*, TRANSLATIONAL CRIMINOLOGY, Spring 2017, at 12; Kent McIntosh, et al., *Effects of School-wide Positive Behavior Support on Internalizing Problems: Current Evidence and Future Directions*, 16 J. POSITIVE BEHAV. INTERVENTIONS, 209, 211–218 (2014); SYLVIE HALE ET AL., EVIDENCE-BASED IMPROVEMENT: A GUIDE FOR STATES TO STRENGTHEN THEIR FRAMEWORKS AND SUPPORTS ALIGNED TO THE EVIDENCE REQUIREMENTS OF ESSA (2017), <https://www.wested.org/wp-content/uploads/2016/12/Evidence-Based-Improvement-Guide-FINAL-122116.pdf>.

42. See Bernard James, *Restorative Justice Liability: School Discipline Reform and Right to Safe Schools* (pt. 5), 51 U. MEM. L. REV. 557, 694–731 (2021).

43. See Colo. S.B. 15-213; COLO. REV. STAT. § 24-10-106.3 (2020). The Claire Davis School Safety Act permits victims to sue districts for liability if they fail to ensure the safety of students and staff on school property or at district-sponsored events.

44. *Id.* The Claire Davis School Safety Act creates a limited waiver of school immunity for injuries arising from the failure of a school to exercise reasonable care to protect all students, faculty and staff from reasonably foreseeable acts of violence. The Governmental Immunity Act of Utah waives governmental immunity “as to any injury proximately caused by a negligent act or omission of an employee committed within the scope of employment.” UTAH CODE ANN. § 63G-7-301(2)(i) (LexisNexis 2020). But it exempts from this waiver injuries that originate from, among other things, “battery.” See UTAH CODE ANN. § 63G-7-301(4)(b); see also Peter J. Maher et al., *Governmental and Official Immunity for School Districts and Their Employees: Alive and Well?*, 19 KAN. J.L. & PUB. POL’Y 234, 242–44 (2010) (“[T]he fifty states are approximately evenly split as to whether their general rule is immunity or liability . . . [and] the most common exception is for discretionary functions.”).

45. Prendergast *ex rel.* L.P. v. Wylie Indep. Sch. Dist., No. 4:18-cv-00020-ALM-KPJ, 2018 U.S. Dist. LEXIS 215109, at *27 (E.D. Tex. Dec. 4, 2018).

46. Moore v. Houston Cnty. Bd. of Educ., 358 S.W.3d 612, 622 (Tenn. Ct. App. 2011).

47. J.A. v. Corpus Christi Indep. Sch. Dist., No. 2:17-CV-182, 2018 WL 4469861, at *6 (S.D. Tex. Sept. 18, 2018).

In these decisions, courts depart from the longstanding institutional posture of “affirming the comprehensive authority of the States and of school officials, consistent with fundamental constitutional safeguards, to prescribe and control conduct in the schools.”⁴⁸ This point, obvious by itself, takes on added significance when one considers the benchmarks necessary to induce more rigorous judicial review and how they combine to reflect a modern pattern reflected in the emerging student injury cases.

B. Benchmark Cases Inducing More Rigorous Review

As to benchmarks, the landmark student rights cases decided by the Supreme Court exert a normative influence on the thinking of judges as to when deference to educators is no longer appropriate. This is most clearly evident in the case of *Brown v. Board of Education*, where the Court heralds a narrowing of the margins of deference in constitutional challenges to school policies.⁴⁹ The *Brown* Court pivots away from deferring to deeply rooted local traditions in favor of a complementary assessment of the interests of educators and the impact of the school policy on students. In its application, the *Brown* Court fashions the Equal Protection Clause into a tool that “consider[s] public education in the light of its full development and its present place in American life throughout the Nation . . . [to] determin[e] if segregation in public schools deprives these plaintiffs of the equal protection of the laws.”⁵⁰ Student rights cases after *Brown I* devise a vocabulary around this approach, aided greatly by the declaration of the *Brown II* Court that “[s]chool authorities have the primary responsibility for elucidating, assessing, and solving these problems; courts will have to consider whether the action of school authorities constitutes good faith implementation of the governing constitutional principles.”⁵¹

By the time of the ruling of the Court in *Tinker v. Des Moines School District*,⁵² the arm-band-wearing students successfully elicited more rigorous judicial review of their suspensions, in full command of the script from *Brown I* and *Brown II* that courts must act to prevent

48. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 507 (1969).

49. *Brown v. Bd. of Educ. (Brown I)*, 347 U.S. 483, 493–96 (1954).

50. *Id.* at 492–93.

51. *Brown v. Bd. of Educ. (Brown II)*, 349 U.S. 294, 299 (1955).

52. 393 U.S. at 514.

even bad faith implementation of legitimate school interests.⁵³ The *Tinker* Court used the Free Speech Clause to invalidate the school policy,⁵⁴ holding that “this case does not concern speech or action that intrudes upon the work of the schools or the rights of other students.”⁵⁵ It concludes that deference is inappropriate lest educators use their authority to suppress “expressions of feelings with which they do not wish to contend.”⁵⁶ The greater significance of the *Tinker* decision, beyond the defeat of the school policy, is its confirmation of the shift in expectations on the role of courts in constitutional litigation over school policies.⁵⁷

After *Brown* and *Tinker*, judicial review of constitutional challenges to school policies take on an aggressive tone, considering “both the asserted interest and the relationship between the interest and the

53. See Brief for Petitioners at 19–20, *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503 (1969) (No. 21) (“[T]he [trial court] expressly refused to apply the standard enunciated in *Burnside v. Byars* and upheld the prohibition by applying a standard of review which this Court has consistently held to be impermissible in determining the constitutionality of limitations on the exercise of First Amendment rights. By applying a standard of ‘reasonableness,’ the District Court ignored decisions by this Court holding that the First Amendment does not permit the suppression of freedom of speech ‘on the basis of . . . notions of mere ‘reasonableness.’”); see also *id.* at 24 (“Unless this Court announces a constitutional standard which reinforces the rights of students to peacefully express their views in the schools, school officials presumably will continue to assume, as they did in this case, that they may suppress free speech by public school students as they see fit . . .”).

54. The school policy in *Tinker* was that “any student wearing an armband to school would be asked to remove it, and if he refused he would be suspended until he returned without the armband.” 393 U.S. at 504; see also Mark Soler, *An Introduction to Children’s Rights*, 74-DEC A.B.A. J. 52, 54 (1988) (“[T]he Supreme Court held that public school students could not be suspended for wearing black armbands to protest the Vietnam War, despite the existence of a school policy prohibiting the wearing of armbands to school, since their protest was expressive activity and did not ‘materially and substantially disrupt the work and discipline of the school.’”).

55. *Tinker*, 393 U.S. at 508.

56. *Id.* at 511.

57. See James, *supra* note 8, at 602 (2013); see also *Tinker*, 393 U.S. at 507 (“[T]he Court has repeatedly emphasized the need for affirming the comprehensive authority of the States and of school officials, consistent with fundamental constitutional safeguards, to prescribe and control conduct in the schools. Our problem lies in the area where students in the exercise of First Amendment rights collide with the rules of the school authorities.” (citations omitted)).

methods used by the State.”⁵⁸ The gender discrimination cases in education present the full range of its application, as the Court repeatedly explains that “[t]he heightened review standard our precedent establishes does not make sex a proscribed classification . . . [b]ut such classifications may not be used, as they once were, to create or perpetuate the legal, social, and economic inferiority of women.”⁵⁹ In an area of education law that is frequently misunderstood, cases highlight the workings of the complementary assessment that consistently invalidates school policies that “caus[e] the girls to suffer a burden the boys do not, simply because they are female,”⁶⁰ while deferring when there is “little difference in the way the single-sex and coeducational classes [a]re conducted, and no disparity [is] found in the content taught.”⁶¹

This principle is also at work in the spate of decisions that assert the religion clauses,⁶² most notably in the case of *Edwards v. Aguillard*,

58. *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 731 (1982).

59. *United States v. Virginia*, 518 U.S. 515, 533–534 (1996).

60. *Peltier v. Charter Day Sch.*, 384 F. Supp. 3d 579, 597 (E.D.N.C. 2019) (holding that a uniform policy that required female students to wear skirts, skorts, or jumpers and male students to wear shorts or pants violated the Fourteenth Amendment’s Equal Protection Clause).

61. *A.N.A. ex rel. S.F.A. v. Breckinridge Cnty. Bd. of Educ.*, 833 F. Supp. 2d 673, 680, 683 (W.D. Ky. 2011) (holding that school policy of offering students option to participate in single-sex classes did not violate the Fourteenth Amendment’s Equal Protection Clause); see also Nancy Chi Cantalupo, *Comparing Single-Sex and Reformed Coeducation: A Constitutional Analysis*, 49 SAN DIEGO L. REV. 725, 749 (2012) (“[O]nce the intermediate scrutiny test is triggered, it operates in such a fashion as to create results similar to those generated by strict scrutiny: overwhelming invalidation of sex classifications as violating the Equal Protection Clause. Specifically, because the government bears the burden of proof, it must produce and show that it has a genuine, important objective and must show that the sex classification closely fits the achievement of that objective. In its demonstration of fit, moreover, the government must demonstrate that the classification does not constitute a sex stereotype, regardless of whether that stereotype can be supported by empirical proof showing that most women or most men act in accordance with the stereotype. The government must also show that the sex classification is more effective than existing sex-neutral alternatives in advancing the government’s objective.”).

62. See U.S. CONST. amend. I (“Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. . . .”); *Zorach v. Clauson*, 343 U.S. 306, 315 (1952) (upholding policy allowing students to leave school for part of the day to receive religious instruction); *Agostini v. Felton*, 521 U.S. 203, 234–35 (1997) (upholding a state education policy authorizing public school teachers to teach secular subjects at religious schools); *Mitchell v. Helms*, 530 U.S. 793, 808

where the Court held that a policy that forbade the teaching of the theory of evolution unless accompanied by instruction in the theory of creation science violated the Establishment Clause.⁶³ On the deference question, the Court said that “[w]hile the Court is normally deferential to a State’s articulation of a secular purpose, it is required that the statement of such purpose be sincere and not a sham.”⁶⁴

A similar application of strict judicial scrutiny is at work in *Santa Fe Independent School District v. Doe*.⁶⁵ In *Doe*, the Court invalidates a school policy that allowed the student body to implement a prayer by which a designated student would deliver a prayer over the public address system before each school-sponsored football game.⁶⁶ The Court had little trouble applying the constraints of the Establishment Clause to declare that deference was inappropriate:

When a governmental entity professes a secular purpose for an arguably religious policy, the government’s characterization is, of course, entitled to some deference. But it is nonetheless the duty of the courts to “distinguish a sham secular purpose from a sincere one.”⁶⁷

Thus, these cases make clear that courts have been increasingly willing to shirk the tradition of deference when it comes to constitutional challenges to school policy. Further, these cases serve as a guidepost for judges deciding cases as part of their legacy and

(2000) (upholding Chapter 2 of the Education Consolidation and Improvement Act of 1981 that authorized loans to be made to religious schools); *Lamb’s Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 393–95 (1993) (invalidating school district policy that refused to allow churches access to school buildings for non-school sponsored activities on the same basis as permitted to secular organizations); *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 316–17 (2000) (invalidating a policy that allowed student-led, student-initiated prayer at school-sponsored events); *Zelman v. Simmons-Harris*, 536 U.S. 639, 644 (2002) (upholding state policy school voucher program that allowed parents to use vouchers for private, religious schools.).

63. 482 U.S. 578, 596–97 (1987).

64. *Id.* at 586–87.

65. 530 U.S. at 317 (2000) (holding that a school policy of permitting student-led, student-initiated prayer before football games violated the Establishment Clause).

66. *Id.*

67. *Id.* at 308 (quoting *Wallace v. Jaffree*, 472 U.S. 38, 75 (1985) (O’Connor, J., concurring)).

foundation for a deferential shift in student claims, whether grounded in the Constitution or not.

C. *An Emerging Pattern in Modern Judicial Review*

The generation of judges brought up under this shifting judicial review construct are not neutral, objective, or deferential in school cases involving constitutional claims brought by students. Indeed, the unanticipated success of the school officials in the affirmative action case of *Grutter v. Bollinger*,⁶⁸ where strict scrutiny is neither “strict in theory” nor “fatal in fact,”⁶⁹ is not suggestive of a doctrinal shift on racial classifications in higher education nor a misapplication of the compelling governmental interest test.⁷⁰ Rather, *Grutter* illustrates how deference will reassert its influence on judicial review in school

68. 539 U.S. 306, 326 (2003).

69. See *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 237 (1995); see also Gerald Gunther, *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972) (“At the beginning of the 1960’s, judicial intervention under the banner of equal protection was virtually unknown outside racial discrimination cases. The emergence of the ‘new’ equal protection during the Warren Court’s last decade brought a dramatic change. Strict scrutiny of selected types of legislation proliferated. . . . Some situations evoked the aggressive ‘new’ equal protection, with scrutiny that was ‘strict’ in theory and fatal in fact; in other contexts, the deferential ‘old’ equal protection reigned, with minimal scrutiny in theory and virtually none in fact.”); Richard Fallon, Jr., *The Supreme Court, 1996 Term—Foreword: Implementing the Constitution*, 111 HARV. L. REV. 56, 79 (1997) (noting that “‘strict in theory’ will routinely prove ‘fatal in fact’”); Adam Winkler, *Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts*, 59 VAND. L. REV. 793, 795 (2006) (“The myth teaches that strict scrutiny is an ‘inflexible’ rule that invalidates every (or nearly every) law to which it applies.”).

70. On race and affirmative action, *Grutter* follows the decision in *Regents of the University of California v. Bakke*, where a plurality finds that in higher education the stated objective of achieving student body diversity was a compelling interest. 438 U.S. 265, 314–15 (1978); see also Nancy L. Zisk, *The Future of Race-Conscious Admissions Programs and Why the Law Should Continue to Protect Them*, 12 NE. U.L. REV. 56, 62 (2020) (“[E]ven though the Court has twice upheld the constitutionality of race-conscious programs, the matter of a university’s reliance on race to make admissions decisions is anything but settled.”).

litigation after a finding of good faith by educators in light of the impact of the policies on the interests of students.⁷¹

The Law School's educational judgment that such diversity is essential to its educational mission is one to which we defer. The Law School's assessment that diversity will, in fact, yield educational benefits is substantiated by respondents and their amici. Our scrutiny of the interest asserted by the Law School is no less strict for taking into account complex educational judgments in an area that lies primarily within the expertise of the university.⁷²

As for the emerging pattern of judicial review in student injury cases that assert non-constitutional claims, the courts have come quickly to extend this rigorous review, which the landmark student

71. In this way, *Grutter* is easily distinguishable from the outcome in the K–12 affirmative case of *Parents Involved in County School v. Seattle School District*, 551 U.S. 701 (2007). The good faith assessment and the impact analysis goes against educators. The implementation of the student assignment policy could not have been less congenial to the education mission when its effects upon families and students were measured. The Court concludes, “Before *Brown*, schoolchildren were told where they could and could not go to school based on the color of their skin. The school districts in these cases have not carried the heavy burden of demonstrating that we should allow this once again—even for very different reasons. For schools that never segregated on the basis of race, such as Seattle, or that have removed the vestiges of past segregation, such as Jefferson County, the way to ‘achieve a system of determining admission to the public schools on a nonracial basis,’ is to stop assigning students on a racial basis. The way to stop discrimination on the basis of race is to stop discriminating on the basis of race.” *Id.* at 747–48.

72. *Grutter*, 539 U.S. at 328. After *Grutter*, the remaining avenue of criticism surrounding judicial deference should be directed at the good faith element in light of the record of legal doctrines that rely upon a good faith component. See Matthew Tokson, *The Normative Fourth Amendment*, 104 MINN. L. REV. 741 (2019) (“While police officers can simply follow established law in most cases, they are unlikely to be able to resolve difficult Fourth Amendment questions of first impression under any viable test, normative or otherwise. . . . Qualified immunity limits officers’ liability to those cases where officers violate clearly established law, and the good faith doctrine prevents the exclusion of evidence where officers rely on law that is later overturned. . . . [T]ests that are simple enough to permit police officers to reliably answer novel Fourth Amendment questions may be profoundly deficient in other respects, such as drastically under-protecting privacy or protecting it in an extremely arbitrary manner.”).

rights cases had inspired in the first place.⁷³ The cases reflect a rigor shaped by the clarity of the obligations and constraints in the relevant statutes. The rise of this shift indicates that judges think themselves capable of identifying disoriented policymaking using the new assessment tools. Future research will need to focus on any gap between intentions and practice,⁷⁴ but the underlying shift is clear.

The best, most succinct statement of the philosophy is found in the case of *Parents United for Better Schools v. School District of Philadelphia Board of Education*, where the Third Circuit Court of Appeals upholds a health services policy that included condom distribution in high schools.⁷⁵ In rejecting the claims of parents who argued that the policy violated their fundamental right to remain free from unnecessary governmental interference with bringing up their children, the appellate panel settles expectations for judicial deference around a new construct:

Judicial interference with discretionary exercise of a school board power is permissible where the action of the board was based on a misconception of law, ignorance through lack of inquiry into the facts necessary to form an intelligent judgment, or the result of arbitrary will or caprice.⁷⁶

As explained below, strong evidence of rigorous judicial review is presented in two categories of cases: the “failure to collaborate” and “failure to intervene” cases.

73. See Fischer, *supra* note 4, at 708 (“Some of this was based on the application of constitutional principles to areas heretofore untouched by courts and reserved for school boards. Much of it, however, was based on the phenomenal growth of legislation and other sources of regulation related to schooling.”).

74. *Id.* at 696 (“Historical and legal analysis can help us distinguish rhetoric from reality.”).

75. 148 F.3d 260, 274 (3d Cir. 1998).

76. *Id.* (quoting *Roberts v. Bd. of Dir. of Sch. Dist. of Scranton*, 462 Pa. 464, 341 A.2d 475, 480 n.4 (1975)).

1. The Failure to Collaborate Cases: Refusing to Defer Based on Statutory Interpretation

In the failure to collaborate cases, courts routinely give educators a lengthy exposition on statutory interpretation in support of their refusal to defer.⁷⁷ One court simply declared that in criminal prosecutions “the crime is complete (and the statute is violated just once) when, upon receiving information that would cause the mandatory reporter to know or suspect child abuse, he fails to ‘immediately’ report it.”⁷⁸ Another court stated that in civil actions, “the child victim’s delayed or partial disclosure will not be countenanced, in law or equity, to victimize the child a second time.”⁷⁹

In *Doe v. Hartford Board of Education*, the Superior Court of Connecticut refused to dismiss the claim of an abused student against a school social worker who failed to report alleged child abuse communicated to her by the victimized student.⁸⁰ The school requested deference to its policies, arguing that a school social worker has discretion to withhold in good faith information received from those to whom she counsels. The court disagreed, noting that the reporting statute did “establish a duty of care owed to the [student]”⁸¹ such that “once reasonable cause exists to suspect or believe abuse has occurred [the]

77. When courts render decisions on the meaning of provisions in positive laws, they apply a dynamic set of rules of statutory interpretation organized in five categories: ordinary meaning, statutory context, canons of construction, legislative history, and evidence of the way a statute is implemented. See William N. Eskridge, Jr. & Philip P. Frickey, *Statutory Interpretation as Practical Reasoning*, 42 STAN. L. REV. 321, 383 (1990) (“[S]tatutory interpretation is neither mechanical foundationalism nor unbounded, unpredictable, and unprincipled decisionmaking. It is, therefore, fundamentally similar to judicial lawmaking in the areas of constitutional law and common law.”); Mark Tushnet, *Theory and Practice in Statutory Interpretation*, 43 TEX. TECH L. REV. 1185 (2011) (“[S]tatutory interpretation [issues] arise only when the text is to some degree uncertain.”).

78. *Gonzales v. Cnty. Ct. of Arapahoe*, 477 P.3d 752, 755, 758 (holding that failure of a middle school administrator to report was not a continuing offense for purposes of the statute of limitations).

79. *N.G. v. A.C.*, 281 So. 3d 727, 733, 735 (La. Ct. App. 2019) (allowing a damages claim against school officials for the school’s failure for more than two years to inform the father or child services of child abuse).

80. No. CV146049842S, 2016 WL 5798794, at *7 (Conn. Super. Ct. Aug. 31, 2016).

81. *Id.* at *5.

obligation to report becomes ministerial as indicated by the word ‘shall’ in the statute.”⁸² Indeed, “[a]bsent an indication to the contrary, the [drafter’s] choice of the mandatory term ‘shall’ rather than the permissive term ‘may’ indicates that the . . . directive is mandatory.”⁸³

In *Christopher Smith v. State*, the Indiana Supreme Court affirmed a high-school principal’s conviction under a law that “imposes criminal liability—a Class B misdemeanor—for anyone who has reason to believe that a child may be a victim of abuse or neglect but fails to immediately report it to DCS or to police.”⁸⁴ Under the new construct, the court declared that “[w]e observe a high level of deference with respect to the General Assembly’s decision-making,”⁸⁵ despite the belief by the judges that the state law “err[s] on the side of *over* reporting.”⁸⁶

Instead, the court declared that it had “no right to substitute our convictions as to the desirability or wisdom of legislation for those of our elected representatives.”⁸⁷ The court found that although the principal “took the allegation seriously,”⁸⁸ a “four-hour delay that included . . . conducting a personal interrogation of the alleged rapist [and] ordering the search of the involved students’ lockers for evidence”⁸⁹ did not constitute good-faith compliance “when considered within the context of Indiana’s reporting statutes.”⁹⁰ The court noted that “it would hardly serve the purpose of the reporting statutes to permit—under every circumstance—school administrators to effectively sit on a report of potential (or even confirmed) child abuse.”⁹¹

In *Yates v. Mansfield Board of Education*, the Supreme Court of Ohio reversed the summary judgment dismissal of a case brought by a

82. *Id.* at *3.

83. *Id.* (alterations in original).

84. *Doe v. Ind. Dep’t of Child Servs.*, 81 N.E.3d 199, 2014 (Ind. 2017); *Christopher Smith v. State*, 8 N.E.3d 668, 683 (Ind. 2014); IND. CODE ANN. § 31–33–22–1(a) (West 2017).

85. *C.S.*, 8 N.E.3d at 676.

86. *Id.* at 683.

87. *Id.* at 676.

88. *Id.* at 684.

89. *Id.* at 679.

90. *Id.* at 677.

91. *Id.* at 678.

student who was sexually abused by a teacher.⁹² The student informed educators, including the principal, a coach, and a teacher. The principal conducted an internal investigation and concluded that she was lying, and the allegation was never reported to the police or to a children services agency.⁹³ After the teacher admitted to unlawful sexual conduct with another student, the parents of the initial victim argued that their daughter was injured as a proximate result of the failure of educators to report the sexual abuse as required under state law.⁹⁴ The school argued that the duty to report and the liability that comes from failure to report only applies to one student; that its failure to report the suspected abuse of one student could not be used as the basis of liability for the harm caused to a different student.⁹⁵

The court completely disagreed and ruled that a board of education may in fact “be held liable when its failure to report the sexual abuse of a minor student by a teacher in violation of [state law] proximately results in the sexual abuse of another minor student by the same teacher.”⁹⁶ The court held that school teachers, officials, and authorities have a special duty to protect all children enrolled in their schools because a special relationship is created.⁹⁷ School officials and authorities have direct control of educational environments and in turn are entrusted with ensuring student safety, especially regarding teachers.⁹⁸ When administrators are informed that one student was abused by a teacher, they must understand that this puts all of the students in danger.

In *Struble v. Blytheville School District*, the Court of Appeals of Arkansas upheld the dismissal of a school principal who, rather than report suspected child abuse, conducted an internal investigation of the

92. 808 N.E.2d 861, 871 (2004).

93. *Id.* at 862.

94. See OHIO REV. CODE ANN. § 2151.421 (stating that no school teacher, employee, or authority “who is acting in an official or professional capacity and knows, or . . . suspect[s] . . . that a child under eighteen years of age . . . has suffered or faces a threat of suffering any physical or mental wound, injury, disability, or condition of a nature that reasonably indicates abuse or neglect of the child shall fail to immediately report that knowledge or [suspicion]. . . to the public children services agency or a peace officer in the county in which the child resides or in which the abuse or neglect is occurring or has occurred”).

95. *Yates*, 808 N.E. 2d at 865.

96. *Id.* at 871

97. See *id.* at 870.

98. See *id.*

matter.⁹⁹ The court ruled that the school policy, “which allows a school official to make a ‘limited inquiry to assist in the formation of a belief that child abuse, maltreatment or neglect has occurred, or to rule out such a belief,’”¹⁰⁰ did not relieve the principal of the statutory mandate, because:

The duty to report suspected child abuse or maltreatment is a direct and personal duty, and cannot be assigned or delegated to another person. There is no duty to investigate, confirm or substantiate statements a student may have made which form the basis of the reasonable cause to believe that the student may have been abused or subjected to maltreatment by another person.¹⁰¹

In *Heotis v. Colorado State Board of Education*, the Colorado Court of Appeals upheld the decision of the state board to deny the license renewal application of a teacher who failed to report that her then-husband had sexually abused their daughter over a period of years.¹⁰² The court found the educator’s failure culpable under both a reporting statute¹⁰³ and the education code’s unethical behavior clause¹⁰⁴ because the failure to report caused her child to “‘remain[] in danger of continued abuse’ by the husband . . . [and] ‘placed other children at risk’ because the husband continued to teach private music lessons. . . .”¹⁰⁵ The court further explained:

Simply put, section 19-3-304 mandates that public school teachers report any known or suspected child abuse or neglect. The statute does not limit this reporting duty to child abuse and neglect that public school teachers learn of or suspect while working in their professional capacity. For these reasons, the statute reflects a moral standard in the community for teachers.¹⁰⁶

99. 516 S.W.3d 269, 271 (Ark. Ct. App. 2017).

100. *Id.* at 274.

101. *Id.* at 272.

102. 457 P.3d 691, 692–693 (Colo. App. 2019).

103. *Id.* at 692; *see also* COLO. REV. STAT. § 19-3-304(2)(1) (2020).

104. 457 P.3d at 693; *see also* COLO. CODE REGS. § 301-37:10.00(1)(1) (2020).

105. 457 P.3d at 699.

106. *Id.* at 698.

In *Bellflower Unified School District v. Commission on Professional Competence*, the state court of appeal and the California Commission on Professional Competence accepted the apology of an administrator facing dismissal for failing to call the police or report to anyone an incident involving the sale of marijuana on campus.¹⁰⁷ The reinstatement was based on the administrator's promise that she would not repeat her mistake in the future.¹⁰⁸ The school official was the program administrator of the district alternative school.¹⁰⁹ When a school staff member approached her with information that a drug deal was taking place between two students, the administrator decided to let the drug deal go unreported to the police.¹¹⁰ However, later in the day, she began to regret her decision and reported what happened to her supervisor.¹¹¹ She was placed on administrative leave and was informed that she was going to be fired.¹¹²

The educator then requested a hearing before the Commission on Professional Competence.¹¹³ At the hearing, she accepted responsibility for her actions, apologized, and explained that she was only trying to solve the school's persistent drug problem.¹¹⁴ The Commission decided that, although statutory grounds existed justifying her dismissal, the educator would be reinstated.¹¹⁵ The School District appealed the Commission's decision.¹¹⁶ The court held that it was within the Commission's power to decide whether to fire the educator after weighing the factors for themselves.¹¹⁷

Research indicates that "many school principals have a preference of resolving child abuse quietly within the school community, while others personally investigate cases of suspected abuse brought to them by staff before making a report. Both of these actions are not in

107. No. B262523, 2016 WL 1706727, at *1 (Cal. Ct. App. Apr. 26, 2016).

108. *Id.*

109. *Id.*

110. *Id.*

111. *Id.* at *3.

112. *Id.*

113. *Id.*

114. *Id.* at *4.

115. *Id.*

116. *Id.*

117. *Id.* at *8.

compliance with most state child abuse reporting laws.”¹¹⁸ Professor Ruth Siegel’s review of the early spate of court decisions and research on school failures to collaborate argues that “analysis of these cases and other recent Section 1983 cases suggests that in the not too distant future Section 1983 liability could be imposed on a school district that fails to meet certain standards relating to legal requirements for reporting child abuse.”¹¹⁹ Her research notes that the rigor of court review is consistent with the clarity with which the law dictates the duty.¹²⁰

More importantly, Professor Siegel sees the failure of courts to defer to schools as a formalization of judicial suspicions of bad faith on the part of school officials, justifying judicial interference (in the words of the *Parents United For Better Schools* mantra) because of “ignorance through lack of inquiry into the facts necessary to form an intelligent judgment”¹²¹ and in more recent cases “the result of arbitrary will or caprice.”¹²² The *Parents United* court makes Professor Siegel’s connection with Section 1983, explaining:

118. Allison N. Sinanan, *Bridging the Gap of Teacher Education About Child Abuse*, 25 EDUC. FOUND. 59, 60 (2011) (citing Beverly D. Payne & David A. Payne, *The Ability of Teachers to Identify Academically At-Risk Elementary Students*, J. RESEARCH IN CHILDHOOD EDUC., 52, 116 (1991)); see also Zachary Hansen, *District: Principal Suspended for Not Reporting Alleged Abuse of Special Needs Students*, ATLANTA J.-CONST. (Jan. 24, 2020), <https://www.ajc.com/news/crime—law/district-principal-suspended-for-not-reporting-alleged-abuse-special-needs-students/5bY-HqUjF06W6RseSkgXdWI/> (“[Investigators are also working to determine if [the principal] committed a mandated reporter violation, which could lead to misdemeanor charges. . . . Georgia law [GA. CODE ANN. § 19-7-5 (2020)] requires that mandated reporters, which includes all school district personnel, to report cases of child abuse within 24 hours.”).

119. Ruth V. Siegel, *Failure to Report Suspected Child Abuse: Potential Civil Rights Liability for School Districts*, 4 EDUC. L. REP. 345, 345 (1986).

120. Siegel, *supra* note 107, at 349–50 (“From these complex rulings regarding Section 1983, several standards and requirements for school districts regarding the reporting of child abuse can be inferred. The statutory reporting requirements appear to create the kind of special relationship between schools and abused children that establishes a legal duty to the child. School districts must then act in a way that prevents treating this duty with deliberate indifference.”).

121. *Parents United for Better Sch., Inc. v. Bd. of Educ.*, 148 F.3d 260, 274 (3d Cir. 1998).

122. *Id.*

As knowledge regarding child abuse has grown and application of Section 1983 has expanded, the implications of failure to meet reporting requirements are changing. The law is not entirely settled in this area, however. The ease with which school districts can meet their obligations, and the benefit to abused children from doing so, should be strong incentives for changes in district practices.¹²³

2. The Failure to Intervene Cases: Strict Review of the Immunity Doctrines

The failure to intervene in cases has come to represent the low hanging fruit of the shifting judicial temperament.¹²⁴ These claims

123. *Id.* at 352. The unsettled state of the law in the area of reporting and collaboration is due in large part to the pushback efforts of school officials to eliminate the requirement to share certain incident information or to narrow the list only to information involving exigent or felonious circumstances. *See* 2020 Va. Adv. Legis. Serv. 173 (LexisNexis) (codified at VA. CODE ANN. § 22.1-279.3:1). The law amends sections 22.1-279.3:1 of the Virginia Code to eliminate the requirement that school principals report to law enforcement certain enumerated acts that may constitute a misdemeanor offense. *See* VA. CODE ANN. § 22.1-279.3:1; *see also* Brent Solomon, *Virginia Education Advocates Praise Measures to Get Rid of ‘School to Prison Pipeline’*, WHSV NEWS (Feb. 24, 2020), <https://www.whsv.com/content/news/Virginia-education-advocates-praise-measures-to-get-rid-of-School-to-Prison-Pipeline-568145621.html> (“[It] will get rid of the option schools currently have to insist students are charged with disorderly conduct if they act up in school, which is a misdemeanor. . . . [It] will give school leaders more power to decide whether a student’s behavior really constitutes a need to get the police involved.”).

124. This conclusion is plainly evident after controlling for cases where educators are deliberately indifferent or ineffective in their attempts at intervention. For purposes of this Article, the deliberate indifference cases are not distinguishable in any meaningful way from the cases that impose liability on educators for the intentional misuse of authority under the pretense of administering policy. Therefore, in forecasting the future for litigation of student claims in light of school discipline reform, intentional tort liability and liability arising from nonfeasance are lumped together. What is important is that judicial deference is improbable in both cases. *See* Siegel, *supra* note 107, at 347 (“Although an intentional failure to perform a duty, thereby causing an individual harm, can be considered a violation of someone’s rights, proof of such intention is often difficult. So, too, is establishing deliberate indifference. In general, a pattern of actions or practices that supports or encourages a failure

were once well above the reach of plaintiffs because of the doctrine of sovereign immunity. Reforms to the doctrine of sovereign immunity are bringing student assertions of negligence within reach of judicial review with every indication that the pattern will continue.¹²⁵ The landscape of the tort law is also shifting, evident in the implicit¹²⁶ and explicit¹²⁷ removal of foreseeability from the duty framework and an

to perform the duty provides the necessary evidence of deliberate indifference.”); *see also* Davis *ex rel.* LaShonda D. v. Monroe Cnty. Bd. of Educ., 526 U.S. 629, 643 (1999) (holding “deliberate indifference to known acts of harassment—amounts to an intentional violation of Title IX,” where a private damages action may lie against a school board under Title IX in cases of student-on-student harassment, but only where the funding recipient acts with deliberate indifference and the harassment is so severe that it effectively bars the victim’s access to an educational opportunity or benefit).

125. *See* S. 15-213, 70th Gen. Assemb., Reg. Sess. (Colo. 2015) and COLO. REV. STAT. § 24-10-106.3 (2015). The Claire Davis School Safety Act creates a limited waiver of school immunity for injuries arising from the failure of a school to exercise reasonable care to protect all students, faculty, and staff from reasonably foreseeable acts of violence. *See* 2015 Colo. Sess. Laws 213 (enacted at COLO. REV. STAT. 24-10-106.3). This Act imposes a limited waiver of sovereign immunity for schools if a school fails to exercise “reasonable care” to protect all students, faculty and staff from “reasonably foreseeable” acts of violence that occurs at school or a school-sponsored activity. *Id.* *See also* the Oklahoma Governmental Tort Claims Act (“GTCA”), OKLA. STAT. ANN. tit. 51, § 151 (West 2020), which contains a broad waiver of sovereign immunity, providing that a political subdivision, such as the School District, “shall be liable for loss resulting from its torts or the torts of its employees acting within the scope of their employment . . . where the political subdivision, if a private . . . entity, would be liable for money damages under the laws of this state.” J.M. v. Hilldale Indep. Sch. Dist. No. I-29, No. CIV 07-367-JHP, 2008 WL 2944997 (July 25, 2008), at *10 (citing GTCA § 153).

126. *See* Munn v. Hotchkiss Sch., 24 F. Supp. 3d 155 (D. Conn. 2014), *aff’d*, 724 F. App’x 25 (2d Cir. 2018) (affirming a jury verdict against a school for failure to protect students from known threats to their health and safety during sponsored trip). The school argued that it bore no legal duty because it could not have foreseen the risk of students contracting insect-borne diseases. 24 F. Supp. 3d at 170. The court held that “[a]s a matter of law, Hotchkiss undoubtedly owed Munn, a minor child in its care, a duty to protect her from known threats to her health and safety[.]” At a minimum Hotchkiss had a legal duty “to use care . . . [in] circumstances under which a reasonable person [in the defendant’s position], knowing what he knew or should have known, would anticipate that harm of the general nature of that suffered was likely to result from his act or failure to act.” *Id.* (alternations in original).

127. *See* Dinsmoor v. City of Phoenix, 468 P.3d 745 (Ariz. Ct. App. 2020) (refusing to dismiss a gross negligence case arising out of an off-campus shooting in which two students were killed). Applying an Arizona law that removed foreseeability

increased emphasis on special relationships¹²⁸ and public policy.¹²⁹ Together, the dilution of sovereign immunity defenses and the underlying legal reforms that require school officials to respond reasonably to conditions that place students at risk present new terrain for judicial review of school-discipline decision making.¹³⁰

In *El Paso Independent School Dist. v. Apodaca*, the Court of Appeals of Texas ruled against the school district in an injury case involving a student who fell from the wheelchair ramp as an employee removed her from the school bus.¹³¹ The school officials' defense of immunity was denied because the student's negligence claim fell

from the duty framework, the court held that "a school unquestionably has a duty to address situations of which school officials become aware in dealing with students." *Id.* at 751. The court held that in the context of the shooter's known history of violence a jury could conclude that educators should have taken some action to protect the threatened student. *Id.*

128. See *supra* note 97 and accompanying text; quoted material *supra* note 120. One notable alteration in the underlying law of school safety is the special relationship between schools and students that imposes a duty on educators to prevent injury to a student from another student while the student is a passenger on a school bus. See, e.g., *Lockett v. Bd. of Educ.*, 555 N.E.2d 1055 (Ill. App. Ct. 1990); *Cooper v. Millwood Indep. Sch. Dist. No. 37*, 887 P.2d 1370 (Okla. Civ. App. 1994); *Kansas State Bank & Tr. Co. v. Specialized Transp. Servs., Inc.*, 819 P.2d 587 (Kan. 1991); *J.M. v. Hilldale Indep. Sch. Dist. No. I-29*, No. CIV 07-367-JHP, 2008 WL 2944997 at * 12 (July 25, 2008).

129. See Marc Edelman, *Addressing the High School Hazing Problem: Why Lawmakers Need to Impose a Duty to Act on School Personnel*, 25 PACE L. REV. 15, 46 (2004) ("[S]overeign immunity" is not an appropriate defense because society seeks to discourage individuals incapable of preventing hazing from becoming school personnel. Even though sovereign immunity generally serves the important purpose of protecting state employees from liability, here superior public policy is to discourage individuals that cannot maintain children's safety from entering the field of education.").

130. See RESTATEMENT (SECOND) OF TORTS § 320 cmt. d (AM. L. INST. 1965). Comment (d) to section 320 also requires people with custody of others to give them effective protection should the need arise. *Id.* Comment (d) states: "A schoolmaster who knows that a group of older boys are in the habit of bullying the younger pupils to an extent likely to do them actual harm, is not only required to interfere when he sees the bullying going on, but also to be reasonably vigilant in his supervision of his pupils so as to ascertain when such conduct is about to occur. This is true whether the actor is or is not under a duty to take custody of the other."

131. 346 S.W.3d 593 (Tex. App. 2009) (denying school discretionary immunity from suit for failing to report suspected child abuse as required by law).

within the limited waiver of governmental immunity provided in the amended Texas Tort Claims Act (“TTCA”).¹³² Passed in 1969, the Act gives school districts a broad grant of immunity but grants permission to sue in certain specific limited circumstances.¹³³ The appellate court concluded that “in this case, we are presented with allegations of negligence involving district employees engaged in an affirmative action, utilizing a part of the vehicle. . . . [such that the student] has alleged a claim within the TTCA’s waiver.”¹³⁴

In *King v. Northeast Security, Inc.*, the Indiana Supreme Court held that a school district was not immune from an injured student’s claim that educators failed to take reasonable steps to protect him.¹³⁵ The student’s injuries were the result of an assault inflicted by other students on campus at the end of the school day.¹³⁶ Ordinarily, school policy required the presence of special deputies who received payment from the school under a contract to provide security services with the assistance of an administrator.¹³⁷ On the day of the assault, neither the deputy nor the administrator was at the assigned post.¹³⁸ The student “suffered two fractures to his jaw as well as several lacerations and bruises to his head and body.”¹³⁹ At trial, the school successfully asserted common law immunity.¹⁴⁰ In reversing the dismissal of the case, the Indiana Supreme Court relied on statutory abrogation, holding that “the proper forum for any debate over governmental immunity was the

132. *Id.* at 597.

133. TEX. CIV. PRAC. & REM. CODE ANN. § 101.051 (“Except as to motor vehicles, this chapter does not apply to a school district”); TEX. CIV. PRAC. & REM. CODE ANN. § 101.021(1)(A) (stating that a governmental unit is liable for “property damage, personal injury, or death [arising] from the operation or use of a motor-driven vehicle or motor-driven equipment . . .”).

134. *Apodaca*, 346 S.W.3d at 597; *see also* Patrick Luff & Jay Harvey, *Understanding the Texas Tort Claims Act*, 51 TEX. TECH L. REV. 693, 708 (2019) (“The Texas Tort Claims Act originally functioned as a shield, protecting public funds and exercises of public policymaking discretion. The Act has evolved into a sword, hacking away remedies that victims of negligence once held, even to the point of violating the Texas Constitution.”).

135. 790 N.E.2d 474, 483–84 (Ind. 2003).

136. *Id.* at 477.

137. *Id.*

138. *Id.*

139. *Id.*

140. *Id.*

legislature.”¹⁴¹ Relying entirely on the precedent of cases applying the statute to schools, the court held that on the duty question “the school district has a duty to take reasonable steps for the protection of its students.”¹⁴²

In *Linhart v. Lawson*, the Virginia Supreme Court ruled that “the General Assembly created an exception to the common law principle [of immunity] . . . and imposed liability on a school board for simple negligence.”¹⁴³ The dispute in *Linhart* involved injuries to a citizen whose vehicle was struck by a school bus.¹⁴⁴ At trial, educators successfully asserted the defense of sovereign immunity.¹⁴⁵ The appellate court agreed that “[a]s a general matter, school boards are immune governmental entities,”¹⁴⁶ [but] “this statute abrogates the immunity of a school board for acts of simple negligence ‘to a limited degree’ and when the conditions of the statute are met, the defense of sovereign immunity will ‘not bar an action . . . for recovery of damages in an amount up to the limits of the insurance policy.’”¹⁴⁷

In this environment, even the discretionary function immunity is under attack. At its core, discretionary function immunity acts as a defense when school officials “are sued for acting in areas where they are vested with discretion and empowered to exercise judgment in matters before them.”¹⁴⁸ In its seminal form, its breadth was astonishing:

It is a well-established principle that a public official who fails to perform purely ministerial duties required by law is subject to an action for damages by one who is injured by his omission. However, it is equally well established that “where an officer is invested with discretion and is empowered to exercise his judgment in matters brought before him, he is sometimes called a quasi-judicial officer, and when so acting he is usually given immunity

141. *Id.* at 478.

142. *Id.* at 479.

143. 540 S.E.2d 875, 877 (Va. 2001).

144. *Id.* at 876.

145. *Id.*

146. *Id.* at 878.

147. *Id.* at 876.

148. *Holloway v. Dougherty Cty. Sch. Sys.*, 277 S.E.2d 251, 253 (Ga. Ct. App. 1981).

from liability to persons who may be injured as a result of an erroneous decision; provided the acts complained of are done within the scope of the officer's authority, and without wilfulness [sic], malice, or corruption." "These discretionary acts' . . . lie midway between judicial and ministerial ones. The name of the public officer or officers is immaterial, and the question depends on the character of the act. If the act done for which recovery is sought is judicial or quasi-judicial in its nature, the officer acting is exempt from liability."¹⁴⁹

Even so, considerable revisions to discretionary function immunity are taking place. State statutory reform now focuses on whether the exercise of discretion arises in the context of a "policy judgment in choosing among alternate courses of policy judgment in choosing among alternate courses of action."¹⁵⁰ In particular, the narrower definition does not apply to decisions that involve routine everyday matters not requiring evaluation of broad policy factors.¹⁵¹

Courts applying the narrower definition typically remove from immunity basic functions that are part of the routine, everyday operation of the school such as the implementation of a bullying prevention policy to which one court notes, "[t]he duty of the [t]eachers to report

149. *Id.*; see also RESTATEMENT (SECOND) OF TORTS, § 895D cmt. b (AM. L. INST. 1979) ("The basis of the immunity has been not so much a desire to protect an erring officer as it has been a recognition of the need of preserving independence of action without deterrence or intimidation by the fear of personal liability and vexatious suits. This, together with the manifest unfairness of placing any person in a position in which he is required to exercise his judgment . . . has led to a general rule that tort liability should not be imposed for conduct of a type for which the imposition of liability would substantially impair the effective performance of a discretionary function.").

150. *Brantley v. Dep't of Hum. Res.*, 523 S.E.2d 571, 574 (Ga. 1999) (citing GA. CODE ANN. § 50-21-22(2) (2020)).

151. See *Williams v. Ky. Dep't of Educ.*, 113 S.W.3d 145, 150 (Ky. 2003) ("Promulgation of rules is a discretionary function; enforcement of those rules is a ministerial function."); *Doe v. Indep. Sch. Dist.* 31, No. 20-CV-226, 2020 WL 4735503, at *28 (D. Minn. Aug. 14, 2020) (quoting *Unzen v. City of Duluth*, 683 N.W.2d 875, 882 (Minn. Ct. App. 2004)) ("Planning-level functions 'require evaluating such factors as the financial, political, economic, and social effects of a given plan. Operational-level decisions, in contrast, are those actions involving the ordinary, day-to-day operations of the government.'").

bullying was ministerial and so they lack the protection of qualified immunity.”¹⁵² More significantly, discretionary function immunity does not apply to a legal duty such that “[w]hen a negligent act occurs in contravention of an established policy, that act is operational in nature and is not entitled to immunity.”¹⁵³

The result is a narrower, more restrictive definition. In *Nation v. Piedmont Independent School District No. 22*, the United States District Court comments on the current state of discretionary function immunity in a case in which it denies discretionary function immunity to assertions by parents that school officials turned a blind eye to abuse inflicted upon special needs students by a teacher.¹⁵⁴ The *Piedmont* court held that “[t]he decision not to investigate or take any action following complaints of inappropriate behavior . . . ‘did not involve a balancing of policy considerations.’ Once [the] District was notified of Plaintiffs’ allegations, it was required ‘to do the work with reasonable care and in a non-negligent manner.’”¹⁵⁵ The court went on to note:

[T]he discretionary function exemption from governmental tort liability is extremely limited. This is so because a broad interpretation would completely eradicate the government’s general waiver of immunity. Almost all acts of government employees involve some element of choice and judgment and would thus result in immunity if the discretionary exemption is not narrowly construed. Just as the waiver is not a blue sky of limitless

152. *Hargrove ex rel. R.S. v. Kelly*, No. 2019-CA-000859-MR, 2020 WL 4507356, at *4 (Ky. Ct. App. July 2, 2020) (“ACMS policy provided a list of specific conduct considered to be bullying and required the reporting of any listed act. No discretion or judgment was required to determine if specific conduct qualified as bullying.”); *J.M. v. Hilldale Indep. Sch. Dist. No. I-29*, No. CIV 07-367-JHP, 2008 WL 2944997, at *12 (E.D. Okla. July 25, 2008) (“Given the Reporting Act’s mandatory language, the School District was divested of the exercise of discretion and the determination of policy based on the failure to report. Therefore, the Court finds the School District is not immunized under § 155(5) for Plaintiff’s claim based on its failure to report.”).

153. *Giggers v. Memphis Hous. Auth.*, 363 S.W.3d 500, 508 (Tenn. 2012).

154. No. CIV-18-1090-R, 2019 WL 4452953, at *5 (W.D. Okla. Sept. 17, 2019).

155. *Id.*

liability, the discretionary exemption is not a black hole enveloping the waiver.¹⁵⁶

In *Moore v. Houston County Board of Education*, an appellate court applied the narrower rule on discretionary function immunity to affirm the culpability of school officials who failed to intervene on behalf of a victimized student.¹⁵⁷ The Tennessee Governmental Tort Liability Act waives immunity for a negligent act or omission, “except if the injury arises out of . . . [t]he exercise or performance or the failure to exercise or perform a discretionary function.”¹⁵⁸ To define a discretionary function, the Tennessee courts adopted the planning-operational test.¹⁵⁹

Under this analysis, “decisions that rise to the level of planning or policy-making are considered discretionary acts which do not give rise to tort liability, while decisions that are merely operational are not considered discretionary acts and, therefore, do not give rise to immunity.”¹⁶⁰

More recently, the Tennessee Supreme Court succinctly stated that “[o]perational decisions . . . implement ‘preexisting laws, regulations, policies, or standards’ An operational decision requires that the decision-maker act reasonably when implementing preexisting policy. Unlike a planning or policy-making decision, an operational decision does not involve the formulation of new policy.”¹⁶¹

This exception arose in *Moore v. Board of Education*.¹⁶² At issue was a school discipline policy mandated by state law, which “required each school district to adopt a policy prohibiting harassment, intimidation, or bullying.”¹⁶³ The school enacted rules in compliance with the state mandate that included an intervention procedure:

When it has been determined by the principal that a student has been guilty of a violation of the provisions of this policy, the principal shall impose appropriate

156. *Id.* at *2 (quoting *Nguyen v. State*, 788 P.2d 962, 964 (Okla. 1990)).

157. 358 S.W.3d 612, 622 (Tenn. Ct. App. 2011).

158. TENN. CODE ANN. § 29-20-205(1) (2021).

159. *Bowers v. City of Chattanooga*, 826 S.W.2d 427, 430 (Tenn. 1992).

160. *Id.* at 430.

161. *Giggers v. Memphis Hous. Auth.*, 363 S.W.3d 500, 507–08 (Tenn. 2012).

162. *Moore*, 358 S.W.3d at 616.

163. *Id.* at 617 (citing TENN. CODE ANN. § 49-6-1016).

disciplinary measures. It is the intention of the Board of Education that this policy be viewed as cumulative so that repeat or persistent violations of the policy should result in enhanced punishment.¹⁶⁴

When assessing the culpability of the school in failing to protect the victimized student, the court ruled that the role of school officials was ministerial and not immune:

The role of the HCMS administrators was to implement the policies established by the Board. . . . [T]he administrators at HCMS were charged with implementing existing policy and were not engaged in policy-making. Thus, the HCMS administrators' decisions were operational in nature, not discretionary, and immunity was removed.¹⁶⁵

In *Marson v. Thomason*, the Kentucky Supreme Court ruled that school administrators qualified for discretionary function immunity but not teachers in a negligence action brought by a student who was injured in a fall from the gym bleachers.¹⁶⁶ The court noted that for administrators, the responsibility to look out for the safety of students was a general rather than a specific duty that required them "to act in a discretionary manner by devising school procedures, assigning specific tasks to other employees, and providing general supervision of those employees."¹⁶⁷ For teachers, however, "there must be at least a common-sense understanding of what a particular person's job requires."¹⁶⁸ The court ruled that because there was "a set, specific routine for coordinating the children and looking out for their safety that [the teacher] was specifically assigned to follow,"¹⁶⁹ the discretionary function immunity did not apply:

[The] duty to supervise students is ministerial, as it requires enforcement of known rules. . . . Even though this ministerial act might permit some decision-making

164. *Id.* at 617.

165. *Id.* at 618.

166. 438 S.W.3d 292, 302 (Ky. 2014).

167. *Id.* at 299.

168. *Id.* at 300.

169. *Id.* at 301.

during the process, it was not his decision to set up and perform bus duty. It was required of him, and at that point in time was the mandatory governmental act. Consequently, he does not have qualified immunity, and can be sued individually. Whether his actions on that morning amount to a tort or not depends on whether he negligently failed to perform his mandatory acts, or negligently performed them, which is a question for a jury, assuming of course there is evidence that he acted unreasonably, that is, negligently.¹⁷⁰

In this environment, the rigor of modern judicial review in the reasonableness assessment of school policies is plainly evident, as explained below.

III. BYGONE TRADITION: DEFERENCE REPLACED WITH RIGOROUS REVIEW

Modern judicial review in the school context is primarily a story about a greater propensity to find unreasonableness in school decision-making that cannot be explained in the light of known conditions that placed students at risk. For example, in *Metropolitan School District of Martinsville v. Jackson*, Michael Phelps, an eighth-grader at Martinsville West Middle School (“MWMS”), shot and injured two fellow classmates on the school’s campus.¹⁷¹ At the time of the shooting, Phelps was prohibited from entering school property because he had

170. *Id.*; see also Jessica M. Stemple, *Anti-Bullying Laws and Teacher Liability in Kentucky: Giving Teachers Greater Discretion to Prevent Unwarranted Punishment*, 47 J.L. & EDUC. 411, 414 (2018) (“Kentucky law describes the basic difference between discretionary and ministerial acts as declaring what the rules are as a discretionary function whereas enforcement of the rules is a ministerial function.”); *Hurt v. Parker*, 462 S.W.3d 403, 407 (Ky. Ct. App. 2015) (finding the school principal was entitled to qualified official immunity from a lawsuit filed by a fan after she tripped and fell in the school parking lot after watching a football game, reasoning that the principal’s responsibility to maintain the school parking lot was discretionary and thus principal was entitled to qualified official immunity); *id.* at 406 (“Devising procedures, assigning duties, and reasonable determination that those procedures are being performed are discretionary acts.”).

171. 9 N.E.3d 230, 232 (Ind. Ct. App. 2014).

been withdrawn by his mother following a series of suspensions.¹⁷² Although the school had a safety plan in place, which included security cameras and employees at each entrance, Phelps entered the campus undetected by school officials.¹⁷³ None of the employees who manned the entrances were notified to look out for Phelps or were informed that Phelps was a threat on the day of the incident.¹⁷⁴

During his time at MWMS, Phelps received fifty disciplinary referrals, seven of which were for harassing, threatening, and physically assaulting other students.¹⁷⁵ In the weeks leading up to the shooting, Phelps had threatened one of the victims, C.J., multiple times.¹⁷⁶ However, the school was only made aware of one of these incidents when C.J.'s girlfriend informed two teachers.¹⁷⁷ Before the shooting, C.J. even texted his mother that Phelps wanted to fight him, and she instructed him to go to the office, to which he did not listen.¹⁷⁸

The mothers of both victims brought separate suits, which were later consolidated, against the Martinsville Metropolitan School District.¹⁷⁹ The basis of their claim was that the school district was negligent in its failure to protect its students and prevent Phelps from entering the property.¹⁸⁰ The school district moved for summary judgment, claiming immunity under the Indiana Tort Claims Act and, arguing in the alternative, that the school did not breach its duty to the students and that C.J. was contributorily negligent; however, the motion was unsuccessful.¹⁸¹

The school district argued that the safety plan (cameras and manned entrances/exits), created by the school principal and implemented on school property, was a policy decision which resulted from weighing risks and benefits and was therefore entitled to immunity.¹⁸² However, the court ruled that the discretionary function exception only

172. *Id.* at 233.

173. *Id.* at 233–34.

174. *Id.*

175. *Id.* at 232–33.

176. *Id.* at 233.

177. *Id.*

178. *Id.* at 234.

179. *Id.*

180. *Id.*

181. *Id.* at 234–35.

182. *Id.* at 237.

applies to decisions and actions which constitute “the exercise of political power.”¹⁸³ Although the principal might have balanced risks and benefits in creating the safety plan, the court decided that the action did not “rise[] to the level of protected policy-making.”¹⁸⁴ Therefore, the school district was not entitled to immunity under the discretionary function exception of the Indiana Tort Claims Act.

More importantly, the appellate court rejected the argument of educators that because the injuries to the victims could not have been foreseen, the school could not be found to be negligent.¹⁸⁵ In determining foreseeability, the court focused on “whether the injured person[s] . . . [were foreseeable victims] and whether the type of harm actually inflicted was reasonably foreseeable.”¹⁸⁶ Phelps had a history of misbehavior in the school, including making threats to blow up the school and to one of the victims directly, all of which MWMS teachers were aware.¹⁸⁷ However, prior to the shooting, Phelps had never been involved in a physical altercation with either of the victims at school.¹⁸⁸

Thus, it is possible for schools to be found liable when evidence might prove that the event could have reasonably been prevented. Here, the school district’s motion for summary judgment was denied because the school could not make a valid argument that there was no dispute as to whether the school could be found liable for the victims’ injuries.¹⁸⁹ The level of liability applied in this case was negligence, and the focus was on the extent of a school’s duty to its students.¹⁹⁰ Courts have established that the extent of the duty may be determined by the specific circumstances of each case. A court may determine that the school was negligent if there exists evidence that the school could have taken precautions to avoid certain injuries sustained by students as a result of another student’s actions.

For example, in *Prendergast ex rel. L.P. v. Wylie Independent School District*, the court focused on the bullying and harassment of a high school student, L.P., who was diagnosed with Pervasive

183. *Id.*

184. *Id.*

185. *Id.* at 243.

186. *Id.* at 244.

187. *Id.* at 245.

188. *Id.*

189. *Id.*

190. *Id.*

Developmental Disorder (a learning disability on the Autism spectrum).¹⁹¹ Prior to enrolling L.P. at Wylie High School in August 2016, his parents shared their concerns with school officials that L.P. would possibly be bullied and harassed.¹⁹² Ultimately, L.P. became the victim of multiple incidents of harassment. Students would “taunt him, poke him with things . . . and call him [derogatory] names” many times in front of teachers.¹⁹³ L.P.’s parents reported the treatment to the school and complained that no teachers “ever stepped in to prevent [the bullying] from happening or disciplined any student who engaged in [the] behavior.”¹⁹⁴

This was supported by the fact that L.P.’s Spanish teacher sent him to the nurse after a student stabbed him with a fork but failed to punish the student.¹⁹⁵ In fact, even some of L.P.’s teachers joined in on the harassment: his Spanish teacher told him that he was going to fail, his math teacher made multiple insulting comments regarding his haircut, and another teacher told him he “d[id not] look old enough to be in high school.”¹⁹⁶ When the plaintiffs informed school officials of what the Spanish teacher had said, they responded simply by telling the plaintiffs the teacher should not have said that without reprimanding or punishing the teacher.¹⁹⁷

Soon thereafter, L.P. was attacked by five African American males who filmed the assault and posted it on social media.¹⁹⁸ The students started a rumor that they attacked L.P. after he tried to kiss them, despite having “over 60 fights posted on social media,” all of which seemed to have taken place on school grounds.¹⁹⁹ L.P. “exhibited signs of post-traumatic stress disorder,” and his parents refused to send him back to Wylie High School.²⁰⁰ L.P.’s parents filed a

191. Prendergast *ex rel.* L.P. v. Wylie Indep. Sch. Dist., No. 4:18-cv-00020-ALM-KPJ, 2018 WL 6710034 (E.D. Tex. Dec. 4, 2018), *report and recommendation adopted*, No. 4:18-CV-20, 2018 WL 6705536 (E.D. Tex. Dec. 20, 2018).

192. *Id.* at *1.

193. *Id.* at *1.

194. *Id.* at *2.

195. *Id.*

196. *Id.* at *1–2.

197. *Id.* at *2.

198. *Id.*

199. *Id.*

200. *Id.*

complaint against the school district, alleging that their failure to investigate the allegations of L.P.'s harassment constituted a violation of Title IX of the Education Amendments of 1972.²⁰¹

The court ruled that the school's response to L.P.'s treatment was deliberately indifferent as to deem it liable.²⁰² First, the court held that L.P.'s treatment did in fact constitute sexual harassment under Title IX.²⁰³ Then the court reasoned that a school district's liability is based on whether the school's actions were "clearly unreasonable in light of the known circumstances."²⁰⁴ The reasonableness assessment worked against the school officials because the parents alerted school officials to the potential of harassment before L.P. was enrolled, told them of multiple instances of actual harassment while L.P. was

201. *Id.* at *3. Title IX of the Education Amendments of 1972 provides in part, "[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance . . ." 20 U.S.C. §1681(a). Harassment on the basis of sex or gender identity is not limited to those incidents in which a bully uses the word "gay." *See Riccio v. New Haven Bd. of Educ.*, 467 F. Supp. 2d 219, 225 (D. Conn. 2006) (noting that terms including "b—h" were "sex-specific, derogatory language" which could form the basis for an actionable Title IX claim). Regarding school liability for student-on-student harassment, the Supreme Court in *Davis v. Monroe County Board of Education* recognized a private right of action under Title IX for gender-based harassment. *See* 526 U.S. 629 (1999). The Fifth Circuit has interpreted the language of Title IX to require that a plaintiff alleging school board liability for student harassment by another student must demonstrate: (1) the harassment was known to school officials; (2) the harassment took place during school hours or in a setting where the officials could exercise control over the students; (3) the officials acted with "deliberate indifference" in the response to the known harassment; (4) the harassment was so severe, pervasive, and objectively offensive that it deprived the victim of educational benefits or opportunities; and (5) the harassment was based on the victim's sex. *See Sanches v. Carrollton-Farmers Branch Indep. Sch. Dist.*, 647 F.3d 156, 165 (5th Cir. 2011). In *Davis*, the Supreme Court established that a school district is only liable under these claims where the school itself "is deliberately indifferent to known acts of student-on-student sexual harassment." 526 U.S. at 647. To demonstrate deliberate indifference, the plaintiff must show the school's response to the harassment was "clearly unreasonable in light of the known circumstances." *Id.* at 648.

202. *Prendergast ex rel. L.P. v. Wylie Indep. Sch. Dist.*, No. 4:18-cv-00020-ALM-KPJ, 2018 WL 6710034 at *9 (E.D. Tex. Dec. 4, 2018), *report and recommendation adopted*, No. 4:18-CV-20, 2018 WL 6705536 (E.D. Tex. Dec. 20, 2018).

203. *Id.*

204. *Davis*, 526 U.S. at 648.

enrolled, *and* teachers and faculty were oftentimes present in the room or hallway when the harassment occurred.²⁰⁵ The district court determined that the school's failure to react to, or even report a single bullying incident was clearly unreasonable and therefore showed that Wylie High School was deliberately indifferent to the harassment of L.P.²⁰⁶ What is important here is that schools are liable when they are aware of daily harassment, rather than just an isolated incident, and fail to take any action.

In *Moore v. Houston County Board of Education*,²⁰⁷ Trevor, the victimized student, was a Houston County Middle School ("HCMS") student who was constantly threatened and harassed by one of his classmates throughout the 2006–2007 school year.²⁰⁸ The harassment occurred on school campus, at sports functions, on the school bus and at the school dance.²⁰⁹ The harassment became so bad that Trevor feared for his safety and decided to express his fear to multiple school administrators.²¹⁰ Trevor specifically spoke with the HCMS principal, the assistant principal, and the director of schools.²¹¹ Trevor's father also spoke directly to his teachers.²¹² The assistant principal addressed the ongoing issue only once by calling Trevor and one of the bullies into her office for a conversation after an incident on the bus; however, the bullying continued.²¹³

Tragically, Trevor was severely beaten by another classmate, who was paid by a student to attack Trevor.²¹⁴ Trevor suffered a broken nose and jaw and required surgery that resulted in his mouth being wired shut.²¹⁵ Trevor faced a plethora of residual effects as a result of

205. *Prendergast*, 2018 WL 6710034, at *2.

206. *Id.* at *8.

207. 358 S.W.3d 612 (Tenn. Ct. App. 2011).

208. *Id.* at 614.

209. *Id.*

210. *Id.*

211. *Id.*

212. *Id.*

213. *Id.*

214. *Id.*

215. *Id.*

the attack.²¹⁶ Trevor and his parents filed suit against the school board and his assailants.²¹⁷

First, the *Moore* court held that the school could not claim immunity under the Tennessee Governmental Liability Act for a discretionary function²¹⁸ because the Tennessee Education Code required each school district to adopt a policy prohibiting harassment, intimidation, or bullying.²¹⁹ The educators' decision to disregard the provisions of its "Bully/Intimidation" policy was operational and did not qualify for the discretionary function exception.²²⁰

The more significant holding of the *Moore* court was that school officials were given enough notice of the plight of the student that the injury was reasonably foreseeable.²²¹ The court held that although a different student than the one Trevor feared inflicted the injury, the foreseeability requirement does not require that the exact mechanism of the injury be foreseeable.²²² Rather, the general manner in which the injury occurred was or should have been foreseeable.²²³ Because school administrators were on notice that one student intended to harm Trevor and threatened to have others beat up Trevor, the attack by another student "was consistent with [the] threats."²²⁴ Thus, Trevor's injury was foreseeable and the Board was determined to be negligent.²²⁵ What is important in the *Moore* case is that the level of liability comes from how much notice school administrators have of the bullying and how they choose to respond in order to prevent it.

In *Alvarez ex rel J.A. v. Corpus Christi Independent School District* ("CCISD"), a student with ADHD, Fetal Alcohol Syndrome, and cognitive defects was enrolled in CCISD's South Park Middle

216. *Id.* at 615.

217. *Id.* at 614.

218. *Id.* at 618; TENN. CODE ANN. § 29-20-205(1) (2020).

219. *Moore*, 358 S.W.3d at 617; TENN. CODE ANN. § 49-6-1016 (2011) (current version at TENN. CODE ANN. § 49-6-4503(a) (2020)).

220. *Moore*, 358 S.W.3d at 618; *see also* *Limbaugh v. Coffee Med. Ctr.*, 59 S.W.3d 73, 85 (Tenn. 2001).

221. *Moore*, 358 S.W.3d at 618.

222. *Id.* at 619

223. *Id.*

224. *Id.* at 620.

225. *Id.* at 621.

School.²²⁶ Because J.A.'s diagnoses caused him to function at a first or second grade level as a teenager, he received special education services through CCISD.²²⁷ Sometime during the year, a fellow student, R., sexually assaulted J.A. in the school restroom when a teacher left the two unattended.²²⁸ After the incident was reported to J.A.'s parent, the assistant principal assured J.A. that steps would be taken to ensure his safety at school; however, no formal investigation was conducted.²²⁹

J.A. then advanced to CCISD's Mary Carroll High School.²³⁰ The high school was not made aware of any incidents between R. and J.A.²³¹ Early on in the school year, J.A. informed his aunt that he was being bullied at school.²³² One week later, J.A. was sexually assaulted by R. again after R. pushed him into a restroom stall.²³³ Again, the incident was reported to the school as soon as J.A.'s parent became aware of it.²³⁴ The vice principal informed both J.A. and his parent that, after viewing cameras, he concluded that the "contact was mutual."²³⁵

In order to protect J.A., his parent had him transferred to CCISD's Richard King High School.²³⁶ Despite being transferred, however, J.A. suffered emotionally and psychologically from the attacks, exhibiting fear of school and avoidance of bathrooms.²³⁷ One year later, J.A. received a letter informing him that an investigation had been conducted pursuant to CCISD policy.²³⁸ Neither J.A. nor his parents were aware that any investigation had taken place, nor were either

226. *Alvarez ex rel J.A. v. Corpus Christi Indep. Sch. Dist.*, No. 2:17-CV-182, 2018 WL 4469861, at *2 (S.D. Tex. Sept. 18, 2018).

227. *Id.*

228. *Id.*

229. *Id.*

230. *Id.*

231. *Id.*

232. *Id.*

233. *Id.*

234. *Id.*

235. *Id.*

236. *Id.* at *4–5.

237. *Id.* at *5.

238. *Id.*

of them interviewed.²³⁹ J.A. and his parents decided to file suit pursuant to Section 504 and the Americans with Disabilities Act (“ADA”),²⁴⁰ because contrary to CCISD policy, the incident was not timely reported to any Title IX or Section 504 coordinators, and no corrective action was taken.²⁴¹

The court held that an entity’s failure to comply with Section 504 and ADA requirements to make reasonable accommodations for the needs of disabled persons qualifies as “intentional discrimination on account of disability.”²⁴² CCISD was aware of two incidents with R. and was therefore placed on alert that R. posed a threat to J.A.’s safety.²⁴³ Nonetheless, CCISD failed to communicate the need to protect J.A. to faculty at the high school when he moved.²⁴⁴ Furthermore, when another incident of sexual assault occurred at the high school, CCISD blamed it on J.A. and concluded that “[his] participation in the sexual encounter was mutual,”²⁴⁵ despite knowing that J.A. mentally functioned at the level of a young child. The court found that CCISD likely came to this conclusion in order to “justify [their] taking no action to remedy a reported problem.”²⁴⁶

What is important here is that the changes in the underlying laws on child protection require that schools give some form of acknowledgement to instances of sexual harassment. Where a school fails to react in any way to known acts of peer sexual harassment, they may be found liable for their deliberate indifference. Claims of deliberate indifference are valid only where a school or school officials made an

239. *Id.*

240. *Corpus Christi Indep. Sch. Dist.*, 2018 WL 4469861, at *6. Under federal law, “[n]o otherwise qualified individual with a disability . . . shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.” 29 U.S.C. § 794(a). Additionally, the ADA states that no such individuals may “be subjected to discrimination by any [public entity].” Americans with Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat. 327 (codified as amended at 42 USC § 12132).

241. *Corpus Christi Indep. Sch. Dist.*, 2018 WL 4469861, at *5.

242. *Id.* at *6 (citing *Melton v. Dallas Area Rapid Transit*, 391 F.3d 669, 672 (5th Cir. 2004)).

243. *Id.* at *9.

244. *Id.*

245. *Id.* at *7.

246. *Id.*

“official decision not to remedy it.”²⁴⁷ The deliberate indifference in the J.A. case stems from CCISD’s failure to consider the abusive past with R. when both students moved to the high school, which was compounded when the high school vice principal blamed J.A. for the abuse he faced and chose not to investigate or file any sort of report.²⁴⁸

In *Doe ex rel. M.W. v. DeKalb County School District* (“DCSD”), a custodian at Lithonia Middle School, Rodney Winston, was reported twice for “act[ing] inappropriately towards students.”²⁴⁹ The first allegation came in 2011, when a student complained that Winston “thr[ew] candy at her buttocks, ask[ed] her ‘weird questions’ . . . and repeatedly star[ed] at her in a manner that made her feel uncomfortable.”²⁵⁰ This allegation was reported to the principal, who conducted an investigation, notified the social worker, and submitted an employee misconduct packet to the regional superintendent, all according to DeKalb County School District’s protocol.²⁵¹ The principal recommended that Winston receive “several days of staff time out.”²⁵² The regional superintendent reported the misconduct to the DCSC’s Office of Legal Affairs, which is the only office with the authority to terminate employees.²⁵³ The Office of Legal Affairs required Winston’s shift be changed to avoid student contact and that he received a letter of reprimand which informed him that “further [inappropriate communication with students] will result in termination of [his] employment.”²⁵⁴

In 2013, another student complained that Winston “referred to her as his ‘queen’”; commented on the fact that she did not call or text him; hugged her; and said to her, “[D]—n girl, I spotted you from down the hall.”²⁵⁵ The student informed faculty that Winston’s behavior made her “emotionally stressed.”²⁵⁶ Again, the principal followed

247. *Id.* at *8.

248. *Id.* at *7, 9.

249. *Doe ex rel. M.W. v. DeKalb Cty. Sch. Dist.*, No. 1:15-CV-03276-RWS, 2018 WL 6171431, at *2 (N.D. Ga. Nov. 26, 2018).

250. *Id.* at *1.

251. *Id.*

252. *Id.* at *3.

253. *Id.* at *2.

254. *Id.*

255. *Id.*

256. *Id.*

DCSC protocol by “conducting an investigation, notifying the social worker, and ultimately submitting an employee misconduct packet to the regional superintendent.”²⁵⁷ The principal pointed out that this was the second time and recommended an internal transfer out of Lithonia Middle School.²⁵⁸ This time, the regional superintendent did not report the incident to the Office of Legal Affairs and it remained unaware of this second allegation.²⁵⁹ However, if the office had been informed of the incident, “Winston would have been terminated.”²⁶⁰ Instead, Winston’s schedule was changed again, and McGhee told him not to have contact with the student.²⁶¹

In the summer of 2014, Winston sexually assaulted M.W., who was not yet a student at Lithonia Middle School.²⁶² The assault occurred off campus.²⁶³ When M.W. started sixth grade at Lithonia Middle school in the fall 2014, she saw Winston every day at school.²⁶⁴ Every time she encountered Winston, M.W. felt uncomfortable and made her “fear for her safety while at school.”²⁶⁵ In October 2014, the mothers of both girls learned of the incidents and reported them to the school.²⁶⁶ Again, McGhee followed protocol and submitted another misconduct packet to the regional superintendent.²⁶⁷ This time, the incident was reported to the Office of Legal Affairs, and Winston “was allowed to resign in lieu of termination on October 21, 2014.”²⁶⁸ M.W.’s mother filed a Title IX claim against DCSD, alleging DCSD was liable for the damages that resulted from the sexual harassment because it failed to prevent such harassment.²⁶⁹ She also filed a Section

257. *Id.* at *2.

258. *Id.*

259. *Id.*

260. *Id.*

261. *Id.*

262. *Id.*

263. *Id.*

264. *Id.* at *3.

265. *Id.*

266. *Id.*

267. *Id.*

268. *Id.*

269. *Id.* Under Title IX, “[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial

1983 claim against both DCSD and Winston.²⁷⁰ DCSD moved for summary judgment.²⁷¹

The court rejected the motion for summary judgment, holding that even though the principal followed protocol and the allegations were reported each time, the school district could be held liable for the damages resulting from the sexual harassment under Title IX.²⁷² The court reasoned that “a school cannot shield itself from Title IX liability simply by taking some action to investigate sexual harassment allegations.”²⁷³ In order to avoid liability, schools must not respond in a manner that is “clearly unreasonable in light of the known circumstances.”²⁷⁴ Considering the past allegations, the court held that the failure of the Principal to recommend termination after the second allegation and the Regional Superintendent’s failure to transfer Winston or report the second incident to the Office of Legal Affairs could be

assistance.” 20 U.S.C. § 1681(a). The Supreme Court has held that a teacher’s sexual harassment of a student constitutes actionable discrimination under Title IX. *See Franklin v. Gwinnett Cnty. Pub. Sch.*, 503 U.S. 60, 75–76 (1992). For a school district to be held liable for damages resulting from teacher-student sexual harassment “an official of the school district who at a minimum has authority to institute corrective measures on the district’s behalf has [to have] actual notice of, and [act] deliberately indifferent to, the teacher’s misconduct.” *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 277 (1998). Deliberate indifference is defined as “an official decision . . . not to remedy the violation.” *Id.* at 290.

270. Under 42 U.S.C. § 1983, liability is established when a violation of a specific constitutional right is committed by a person acting under color of state law. *Doe v. Sch. Bd. of Broward Cnty.*, 604 F.3d 1248, 1265 (11th Cir.) (citing *Williams v. Bd. of Regents of the Univ. Sys. of Ga.*, 477 F.3d 1282, 1299 (11th Cir. 2007)). The theory of respondeat superior prevents municipal entities from being held liable for the acts of its employees under Section 1983. *Monell v. Dep’t of Soc. Servs.*, 436 U.S. 658, 691 (1978). A court can only hold a municipality liable under Section 1983 if its custom or policy caused the municipal “employees to violate a citizen’s constitutional rights.” *Gold v. City of Miami*, 151 F.3d 1346, 1350 (11th Cir. 1998). One way that a plaintiff can establish municipal liability is by “identify[ing] an unofficial custom or practice that is ‘so permanent and well settled as to constitute a custom and usage with the force of law’” which caused the constitutional violation. *Doe ex rel M.W. v. DeKalb Cnty. Sch. Dist.*, No. 1:15-CV-03276-RWS, 2018 WL 6171431, at *6 (N.D. Ga. Nov. 26, 2018) (citing *Cuesta v. Sch. Bd. of Miami-Dade Cnty.*, 285 F.3d 962, 966, 968 (11th Cir. 2002)).

271. *DeKalb Cnty. Sch. Dist.*, 2018 WL 6171431, at *3.

272. *Id.* at *6.

273. *Id.*

274. *Sch. Bd. of Broward Cnty.*, 604 F.3d at 1259.

determined as “clearly unreasonable in light of the known circumstances.”²⁷⁵

What is important in the *DeKalb County School District* case is that while schools are not required to make the best decisions, they are required to make reasonable decisions. When dealing with claims of sexual harassment, or any form of student harassment, schools have a duty to act reasonable in light of the known circumstances. This protects students from facing an educational environment which, through its failure to take meaningful precautions, shelters abusers of its students.

In *T.E. v. Pine Bush Central School District*,²⁷⁶ the plaintiffs were five Jewish students who attended three separate schools within Pine Bush Central School District, and each experienced anti-Semitic harassment over the course of five years.²⁷⁷ Each student complained of harassment by other kids, indifference from both teachers and bus drivers, and the prevalence of drawn swastikas all over the campuses.²⁷⁸ One victimized student, D.C., was “physically and verbally threatened” and told that he “was going to be burned in an oven.”²⁷⁹ D.C. was constantly harassed in front of the bus driver and numerous teachers.²⁸⁰ When D.C. and his father would complain to the principal, he was very dismissive and made D.C. feel as though he “didn’t really care . . . about the harassment.”²⁸¹ D.C. felt unsafe going to school every day and was driven to contemplate suicide.²⁸²

Another victimized student, T.E., felt extremely uncomfortable going to school because there were swastikas everywhere: in the bathrooms, on the desks, on the playground, and even in the textbooks.²⁸³ When T.E.’s mother reported one instance where other students showed T.E. swastikas they drew in their planners, the principal responded: “[w]hat’s the big deal, they didn’t aim [the swastikas]

275. *DeKalb Cty. Sch. Dist.*, 2018 WL 6171431, at *6.

276. 58 F. Supp. 3d 332 (S.D.N.Y. 2014).

277. *Id.* at 338.

278. *Id.* at 340–50.

279. *Id.* at 340.

280. *Id.* at 340–42.

281. *Id.* at 342.

282. *Id.* at 342.

283. *Id.* at 342–45.

towards [T.E.]?”²⁸⁴ When T.E.’s mother informed the school that her daughter was “afraid to go to school” and that the problem of the swastikas was being ignored, the principal responded by saying that “anti-Semitism is prevalent in the community . . . and that it’s rather hard to stop.”²⁸⁵ When T.E. would try to inform the principal of different swastika graffiti, he told her that she was just looking for trouble.²⁸⁶ Ultimately, T.E. was pushed to leave the school and be home schooled, instead.²⁸⁷

O.C., a victimized classmate of T.E. and the sister of D.C., also experienced harassment and administrative indifference.²⁸⁸ Students made ethnic slurs and threw pennies at her, and two students “held [her] hands behind her back at recess and ‘tried to shove a quarter down [her] throat.’”²⁸⁹ Similarly to the other students, her complaints fell on deaf ears.²⁹⁰ O.C. and T.E. went to see the principal so often that “he told them to ‘stop coming as often as [they] did.’”²⁹¹

All of the students and their parents reported these incidents to the school authorities on multiple occasions.²⁹² Of the plethora of complaints submitted by the children and their parents, the administration only investigated a very small percentage, and even when they did investigate disciplinary action rarely resulted.²⁹³ While the school district took the effort to put on anti-bullying rallies, they remained completely silent regarding the individual harassment these three children were facing.²⁹⁴

Plaintiffs brought multiple claims against the school district and administrators, alleging violations of Title VI of the Civil Rights Act²⁹⁵

284. *Id.* at 342.

285. *Id.* at 344.

286. *Id.* at 345.

287. *Id.* at 347.

288. *Id.* at 347–50.

289. *Id.* at 348 (alterations in original).

290. *Id.* at 348–50.

291. *Id.* at 348–49 (alteration in original).

292. *Id.* at 340–51.

293. *Id.*

294. *Id.* at 363–64.

295. *Id.* at 338. Under Title VI, a recipient of federal funding is prohibited from discriminating on the basis of race, color, or national origin. *See* 42 U.S.C. § 2000d. The statute further prevents a recipient of federal funds to “[r]estric an individual in

and of their right to equal protection under the U.S. Constitution.²⁹⁶ The school district moved for summary judgment with respect to the claims brought by three of the students.²⁹⁷

The court held that the school district could be held liable under Title VI.²⁹⁸ Anti-Semitic harassment and discrimination amounts to racial discrimination under Title VI,²⁹⁹ “when the harassment is based on the group’s actual or perceived shared ancestry or ethnic characteristics, rather than solely on its religious practices.”³⁰⁰ Because the harassment faced by the plaintiffs was based on their “Jewish ancestry” rather than their religious beliefs, it was “rooted in Plaintiffs’ actual or perceived national origin or race” and warranted a Title VI claim.³⁰¹

What is important in the *T.E.* case is that the court established that school districts “exercise[] substantial control over the circumstances of the harassment when it occurs ‘during school hours and on school grounds.’”³⁰² Furthermore, it was clear that the school had actual knowledge and that the harassment was severe, to the point that it caused one student to contemplate suicide and another student to leave the school. Here, the court held that the administrations’ failure to take steps calculated to intervene against the harassment could be judged by a jury as unreasonable.

any way in the enjoyment of any advantage or privilege enjoyed by others receiving any . . . benefit under the program” on the grounds of race, color, religion. *See* 34 C.F.R. § 100.3(b)(1)(iv). A school district can be held civilly liable under Title VI for student-on-student harassment when the school exhibits (1) substantial control, (2) actual knowledge, (3) deliberate indifference, and (4) the harassment is severe and discriminatory. *See* *Zeno v. Pine Plains Cent. Sch. Dist.*, 702 F.3d 655, 665 (2d Cir. 2012).

296. Similarly to a Title VI claim, under 42 U.S.C. § 1983, a school district can be found liable for violating a student’s 14th Amendment right to equal protection rights where there is (1) harassment based on membership in a protected group, (2) actual knowledge of the race-based harassment, and (3) deliberate indifference. *See* *DiStiso v. Cook*, 691 F.3d 226, 241 (2d Cir. 2012).

297. *T.E.*, 58 F. Supp. 3d at 338.

298. *Id.* at 368.

299. *See* *Shaare Tefila Congregation v. Cobb*, 481 U.S. 615, 617–18 (1987).

300. *T.E.*, 58 F.Supp. 3d at 355 (quoting Dear Colleague Letter from Russlynn Ali, Assistant Sec’y for Civil Rights, Off. for Civ. Rts., U.S. Dep’t of Educ. (Oct. 26, 2010)).

301. *T.E.*, 58 F.Supp. 3d at 355.

302. *Id.* at 356.

Thus, the critical issue thus comes into view. Examinations of the cases reveal that a traditionally deferential judiciary is shifting its approach to resolving disputes over school policy. The rationale of these cases, to say nothing of the outcomes, push past the presumption that school officials act for the public good, leaving behind a sharper tool for assessing the fit of school policies with the education mission. The backbone for this reform is the growing belief of policy makers that, “[o]ne . . . who voluntarily takes the custody of another under circumstances such as to deprive the other of his normal opportunities for protection is under [a duty to protect the other against unreasonable risk of physical harm].”³⁰³

Put another way, what is at issue may not be ideological agreement with the external reforms by the courts. Rather, it reflects judicial recognition of a hierarchy of deference, or as one court puts it, “a high level of deference with respect to the General Assembly’s decision-making.”³⁰⁴ Louis Fischer describes the situation more bluntly, arguing that the judicial shift will become more prominent rather than abate because of “the phenomenal growth of legislation and other sources of regulation related to schooling.”³⁰⁵ The shift in judicial review is very much what one would expect given the conflicts between the external mandates and school decision-making. Whatever else the cases may represent, they offer dramatic proof of the vigorous enforcement of the external reforms in the school environment.

303. *Munn v. Hotchkiss Sch.*, 165 A.3d 1167, 1176 (Conn. 2017) (upholding duty to warn or protect against foreseeable risks in a case involving a student who contracted tick-borne encephalitis on school trip).

304. *C.S. v. State*, 8 N.E.3d 668, 676 (Ind. 2014) (upholding the criminal conviction of a school administrator who delayed four hours reporting a sexual assault).

305. Fischer, *supra* note 4, at 708; see also Matt Gross, *Chapter 419: Cyber Sexual Bullying, “Sexting” in Schools, and the Growing Need to Educate the Youth*, 48 U. PAC. L. REV. 555, 574 (2017) (“Within the past decade, California passed significant legislation on bullying and expanded the definition, and with each new amendment, the Legislature has shown an awareness of a growing problem and passed legislation.”).

Restorative Justice Liability: School Discipline Reform and the Right to Safe Schools

BERNARD JAMES*

Part V: School Discipline Reform and Liability

PART FIVE OF A FIVE-PART SERIES

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I. INTRODUCTION

Now it is time to confront the third great question: At what tipping point should student injury claims succeed when based on the allegation that educators, through policy or custom, are indifferent to the risk of harm? In the first part, we must place external reforms into the school environment to examine at greater depth the interplay between school discipline reform and the demands of the outside world. The second part focuses on the characteristics of discipline reform that increase the risk of liability for educators. The most important conclusion is that under the rubric of “restorative justice,” schools blunt the effectiveness of school discipline reforms because their institutional

* Professor of Constitutional Law, Caruso School of Law, Pepperdine University.

interests frequently align directly against student safety. These conflicting interests, which take form of “excessive tolerance,” affect the welfare of students and effectively manipulate the scope and direction of school discipline reform.

A. Placing External Reforms

A straight line connects the fruits of excessive tolerance—minimal sanction severity for serious offences, apathy to the probability of recurrence, and disinterest for collaborative assessments—with an unreasonable risk of campus disorder and victimization for which educators are culpable. Because this culpability is based on what schools fail to do in relation to the demands of the external reforms, it is easy to define the scope of liability and difficult for schools to hide behind restorative justice theory. Given the systematic nonfeasance in a growing number of cases, it should be of no small comfort to students that the changes in the underlying laws equip courts to provide a remedy for violations of their right to a safe learning environment.¹

At the outset, it was observed that school discipline reform is organized around elements of restorative justice, emphasizing the elimination of predetermined punitive outcomes, particularly expulsions and suspensions.² It was also noted that in practice, quite often the main impulse of school discipline reform has been to be as unlike zero tolerance as possible.³ Kim Fries and Todd DeMitchell explain this

1. See Michelle Parthum, *Using Litigation to Address Violence in Urban Public Schools*, 88 WASH. U. L. REV. 1021, 1042 (2011) (“Courts will not be required to exceed their institutional knowledge to create policy, because they are leaving to school districts the responsibility for creating their own, tailored school improvement plans. For the same reason, this does not violate the separation of powers by usurping the policy-making function to the judiciary; local school districts, whose management is subject to political checks, will be responsible for creating and implementing these plans.”).

2. See Bernard James, *Restorative Justice Liability: School Discipline Reform and the Right to Safe Schools* (pt. 1), 51 MEM. L. REV. 557, 568–69 (2021).

3. See *id.* For a definition of zero tolerance, see RUSSELL SKIBA ET AL., ARE ZERO TOLERANCE POLICIES EFFECTIVE IN THE SCHOOLS? AN EVIDENTIARY REVIEW AND RECOMMENDATIONS 2 (2008) [hereinafter *Zero Tolerance Task Force Report*], <https://www.apa.org/pubs/info/reports/zero-tolerance> (“Zero tolerance is a philosophy or policy that mandates the application of predetermined consequences, most often severe and punitive in nature, that are intended to be applied regardless of the apparent

thinking in their study on zero tolerance, concluding that “zero-tolerance policies were formulated with the best of intentions However . . . in a desire to be tough, no-nonsense, and scrupulously equal in punishment, schools have sacrificed measured and proportional responses for mechanical, non-discretionary decision-making . . . [which] is derauling the educational process.”⁴

However, educators are experiencing adversity in implementing policies to replace zero tolerance.⁵ This is because doing away with zero tolerance addresses the demands of student safety only halfway, if at all.⁶ The hopes placed on anti-zero-tolerance policies—school discipline through proportional punishments that are free of bias—are proving to be problematic.⁷ Researchers explain that eliminating zero-

severity of the behavior, mitigating circumstances, or situational context. Such an approach is intended to deter future transgressions by sending a message that no form of a given unacceptable behavior will be tolerated under any circumstances.”).

4. Kim Fries & Todd A. DeMitchell, *Zero Tolerance and the Paradox of Fairness: Viewpoints from the Classroom*, 36 J.L. & EDUC. 211, 212–14 (2007).

5. See Lydia Nussbaum, *Realizing Restorative Justice: Legal Rules and Standards for School Discipline Reform*, 69 HASTINGS L.J. 583, 618 (2018) (“All of these legislative interventions, although surely well intentioned, fall far short of institutionalizing an effective, restorative justice alternative to zero-tolerance discipline.”); Annalise Buth & Lynn Cohn, *Looking at Justice Through a Lens of Healing and Reconnection*, 13 NW. J.L. & SOC. POL’Y 1, 9 (2017) (“In 2014, [Chicago Public Schools] further transitioned away from the zero-tolerance discipline policy [Chicago Public Schools] announced that suspensions and expulsions reached a record low for the 2015–2016 school year as a result of promoting social and emotional learning and restorative practices to improve school culture. Since the 2012 revisions, the out-of-school suspension rate decreased by 67%, and the expulsion rate decreased by 74%. However, a number of challenges to instituting restorative practices in [Chicago Public] schools endure.”).

6. For an examination of the difficulties experienced implementing anti-zero-tolerance policies, see Rebecca Morton, *Returning “Decision” to School Discipline Decisions: An Analysis of Recent, Anti-Zero Tolerance Legislation*, 91 WASH. U. L. REV. 757, 777–78 (2014) (“It may be more difficult to apply anti-zero tolerance consideration of intent to students who exhibit disruptive oppositional behavior as opposed to a child who commits a discrete violation by bringing an illicit object or substance to school. When disciplining a disruptively defiant student, intent may be difficult to parse out, especially if such behavior is a result of a learning or emotional disability.”).

7. See Larry Ferlazzo, Opinion, *What It Takes to Apply Restorative Practices in Schools*, EDUC. WK. TEACHER (Jan. 14, 2020),

tolerance returns to educators the subjective decision-making authority that animated school discipline prior to the rise of zero tolerance.⁸ Abolishing zero-tolerance does nothing to remove the paradox present in school discipline processes,⁹ that Fries and DeMitchell describe as, “the paradox of fairness through [teachers’] decisions of when to escalate a discipline decision and when to handle it in the classroom.”¹⁰ The research of John Garman and Ray Walker on the due process issues surrounding zero-tolerance policies, concurs, opining that the removal of zero tolerance will make it necessary to train educators to “understand how to be careful not to allow a laudable and general desire to create a safe school environment to inflate clearly trivial and non-threatening situations into major events by failing to use common sense.”¹¹ This paradox sits uncomfortably alongside another, namely,

https://blogs.edweek.org/teachers/classroom_qa_with_larry_ferlazzo/2020/01/what_it_takes_to_apply_restorative_practices_in_schools.html (“Teachers should be aware that implementing restorative practices may not be as simple as it seems. Avoid being discouraged when a classroom culture shift does not happen overnight. Be patient and persistent.”); Juan Perez Jr., *Teachers Complain About Revised CPS Discipline Policy*, CHI. TRIB. (Feb. 25, 2015), <https://www.chicagotribune.com/news/ct-cps-discipline-concerns-met-20150225-story.html> (“‘We don’t have the capacity to go about this in the holistic method that the Student Code of Conduct mandates,’ [a special education teacher at at De Diego Community Academy] said. ‘It’s a great idea, but it was really irresponsibly put in place in my opinion.’”).

8. Morton, *supra* note 6, at 772 (“[A]nti-zero-tolerance policies try to address issues of school safety and disciplinary fairness . . . through encouragement of administrator discretion and examination of incident-specific factors when making disciplinary decisions.”).

9. For an example of an anti-zero-tolerance law that grants administrators significant discretion to suspend students for a wide array of minor and subjective infractions, see TENN. CODE ANN. § 49-6-3401(a)(13) (2019), which lists behavior “prejudicial to good order or discipline” as a “good and sufficient reason” for suspension. See also ACLU OF FLA. ET AL., STILL HAVEN’T SHUT OFF THE SCHOOL-TO-PRISON PIPELINE: EVALUATING THE IMPACT OF FLORIDA’S NEW ZERO-TOLERANCE LAW 8–9 (2011) (“[T]he vast majority of districts have not altered the other policy conditions that make racially disproportionate discipline possible, such as: [g]ranting excessive discretion to school officials . . .”).

10. Fries & DeMitchell, *supra* note 4, at 229.

11. John J. Garman & Ray Walker, *The Zero-Tolerance Discipline Plan and Due Process: Elements of a Model Resolving Conflicts Between Discipline and Fairness*, 1 FAULK. L. R. 289, 319 (2010).

the documented timidity of school officials.¹² This timidity manifests as a reluctance to exert authority, in part because they fear litigation, but also because they are no longer sure that they know what is right, or if they do, that they have any right to impose it.¹³ Multiple studies advise caution in reforming school discipline policies,¹⁴ not least “because of anti-zero-tolerance policies’ emphasis on discretion and judgment.”¹⁵

Until schools confront the problems that surround anti-zero-tolerance policy implementation, students are left with a system of half-measures in which both the old approaches as well as the reforms fall under suspicion.¹⁶ Students might agree with the premise behind zero

12. See Bernard James & Joanne E. K. Larson, *The Doctrine of Deference: Shifting Constitutional Presumptions and the Supreme Court’s Restatement of Student Rights*, 56 S.C. L. REV. 1, 5–6 (2004) (“A palpable frustration about the role of student rights undermines many good faith efforts to implement effective policies. The inability to eliminate any of the nagging elements in the spectrum of advice . . . and the relative certainty of second-guessing by the courts have led to timidity and inaction in education problem solving.”).

13. See John Rosales, *Threatened and Attacked By Students: When Work Hurts*, NEA NEWS (June 20, 2019), <https://www.nea.org/advocating-for-change/new-from-nea/threatened-and-attacked-students-when-work-hurts> (asserting that “too many of our teachers have been pressured to not report or tell others of the incidents that are happening in their classrooms”); James S. Coleman, *Private Schools, Public Schools, and the Public Interest*, 46 PUB. INT. L. J. 19, 24 (1981) (Coleman’s research correlates discipline timidity to a decrease in school climate as well as student achievement. Coleman defines an effective school as one which maximizes two factors related to student achievement: a palpable increase in student engagement in academic activities and a strict disciplinary climate.)

14. See Nussbaum, *supra* note 5, at 633 (“[A]n important lesson for school discipline reformers is that adults, and especially school administrators, exercise considerable discretion over who is referred for discipline, who is diverted to a restorative process, and who is punished with exclusion.”).

15. Morton, *supra* note 6, at 782 (“Thus, to assuage concerns about discriminatory enforcement, it will be increasingly important to monitor the results of discretionary decision-making to ensure the discretion is used to examine circumstances surrounding behavioral incidents and not as a pretext for discriminating against certain classes of students.”).

16. See Anne Gregory et al., *The Achievement Gap and the Discipline Gap: Two Sides of the Same Coin?*, 39 EDUC. RESEARCHER 59, 62–63 (2010) (discussing that minority students were more likely to be “differentially selected for discipline consequences” (emphasis added)); THOMAS RUDD, KIRWAN INST. FOR THE STUDY OF RACE & ETHNICITY, OHIO STATE UNIV., RACIAL DISPROPORTIONALITY IN SCHOOL

tolerance reform, e.g., that it is wise to replace policies created in response to issues schools faced in the 1980s. But their reasonable expectation, now shared by policymakers, is that the reforms succeed, not just on a few students in a controlled research environment, but daily to maintain a climate where learning can take place free of disruptions and victimizations. Zero tolerance, after all, was an active, vital part of the response to “violent crime in the United States [that] increased sharply in the 1980s and early 1990s,”¹⁷ when many began to view the public school as a “target rich environment,”¹⁸ and therefore it must

DISCIPLINE 3 (2014), <http://kirwaninstitute.osu.edu/wp-content/uploads/2014/02/racial-disproportionality-schools-02.pdf> (discussing that teachers are implicitly biased towards African Americans in the classroom, which results in “racial disproportionality in school discipline”).

17. JEFFREY BUTTS & JEREMY TRAVIS, URBAN INST., *THE RISE AND FALL OF AMERICAN YOUTH VIOLENCE: 1980 TO 2000* 2 (2002), <https://www.urban.org/sites/default/files/publication/60381/410437-The-Rise-and-Fall-of-American-Youth-Violence.PDF> (“[T]he United States experienced sharply growing rates of juvenile violence during the 1980s and early 1990s. If these trends had continued, it would have caused a national crisis. The number of juvenile arrests for Violent Index offenses (i.e., murder, forcible rape, robbery, and aggravated assault) grew 64 percent between 1980 and 1994. Juvenile arrests for murder jumped 99 percent during that time. The juvenile arrest rate for murder shot up 167 percent between 1994 and 1993 alone . . .”).

18. In the school context, a “target-rich environment” refers to the spate of school shootings and bullying that descended upon the schools in the last two decades of the 20th century. See BRYAN VOSSEKUIL ET AL., U.S. SECRET SERV. & U.S. DEP’T OF EDUC., *THE FINAL REPORT AND FINDINGS OF THE SAFE SCHOOL INITIATIVE: IMPLICATIONS FOR THE PREVENTION OF SCHOOL ATTACKS IN THE UNITED STATES* 7 (2004), <https://www2.ed.gov/admins/lead/safety/preventingattacksreport.pdf> (“[T]argeted school violence has become a driving force behind the efforts of school officials, law enforcement professionals, and parents to identify steps that can be taken to prevent incidents of violence in their schools.”); see also Daniel B. Weddle, *Bullying in Schools: The Disconnect Between Empirical Research and Constitutional, Statutory, and Tort Duties to Supervise*, 77 TEMP. L. REV. 641, 651 (2004) (“[B]ullying ‘is a problem which flourishes best on a bed of secrecy, hidden from those who could help.’ It occurs behind the backs of adults who might intervene and depends upon the immaturity or fear that prevents victims and bystanders from finding help for the victims. Although exposing the problem and addressing it directly most often tends to discourage further bullying student victims themselves tend not to trust adults enough to ask for help because they perceive little chance of real help” (quoting VALERIE E. BESAG, *BULLIES AND VICTIMS IN SCHOOLS: A GUIDE TO UNDERSTANDING AND MANAGEMENT* 6 (1989))).

have had the capacity to fulfill basic safety demands at least for three decades.¹⁹

Garman and Walker note that because of the continuing high rate of school victimizations the solution to safe schools is found not in a removal of zero tolerance, but rather in “a common-sense relaxation.”²⁰ Dominic Zarecki’s empirical study on the negative effects of suspension bans on academic growth and school climate supports this conclusion.²¹ Zarecki’s study tested “three distinct hypotheses,”²² and “the totality of evidence heavily favors the conclusion that the [suspension] ban harmed academic growth.”²³ Zarecki recommends that “[d]istricts would be wise to try a variety of more gradual options, evaluate their impacts, and then make an informed choice as to how to

19. See BUTTS & TRAVIS, *supra* note 17, at 1–3 (“The results demonstrate that while young people helped to generate the growth in violence before 1994, they contributed an even more disproportionate share to the decline in violence after 1994. . . . Explanations for the crime decline include . . . growing cultural intolerance for violent behavior, changes in the market for illegal drugs, new policies to regulate access to firearms, expanded imprisonment, the growth of community policing, and other criminal justice innovations.”).

20. See Garman & Walker, *supra* note 11, at 320 (a critique of school discipline reform that concludes that “there is little questioning of it now, except on the relatively uncommon occasions when common sense goes so awry as to suspend a student for possessing a nail clipper or paper scissors or being stubborn or generally unruly. The public has accepted the ‘necessity’ of these policies because they believe them, rightly or wrongly, to be the best way to ensure the safety of children and adolescents in public schools.”).

21. Dominic Zarecki, *Banning Progress: Suspension Bans and Schoolwide Academic Growth* 17 (May 23, 2018) (unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3176650.

22. *Id.* at 6. The first hypothesis was that “[c]hange in academic growth should be higher (lower) in LAUSD than in the rest of California.” Second, that “[t]he gap found in [the first hypothesis] should be even larger for schools that gave the banned suspensions before the LAUSD policy shift.” Further, that “[t]here should be almost no gap for schools that did not give the banned suspensions before the LAUSD policy shift.” The third and final hypothesis posited that “[a]mong schools in LAUSD, change in academic growth should be highest (lowest) in schools that used to give the most of those suspensions before the LAUSD policy shift.” *Id.*

23. *Id.* at 16. Zarecki’s study goes further to prove that “bans will harm growth in schools that previously gave defiance suspensions, and these schools disproportionately serve African America and Latino students. In other words, suspension bans appear to widen the racial achievement gap.” *Id.*

proceed.”²⁴ What is important is that students and parents find themselves nonplussed that the so called “restorative justice” policies underperform, an ineffectiveness brought to light in a rising tide of criticism,²⁵ and research.²⁶ If educators have noted this fact, then they have made no serious effort to explain it.

One of the more troubling aspects of the underperformance is that schools publicize their restorative justice reforms without putting their restorative rhetoric into practice: talking the talk without walking the walk. Outside of education, restorative theory is being opportunely expressed, transmitted, and incorporated into policy reforms.²⁷

24. *Id.* at 17.

25. *See* Perez, *supra* note 7 (“‘There were no structures put in place to support this code of conduct,’ said Megan Shaunnessy, a special education teacher at De Diego Community Academy. ‘It’s just basically been a totally lawless few months.’”); Jay Rey, *Buffalo Teacher Survey Points to Disruptive Students, Lack of Discipline*, BUFFALO NEWS (Jan. 29, 2018), https://buffalonews.com/news/local/education/buffalo-teacher-survey-points-to-disruptive-students-lack-of-discipline/article_a3c99653-9374-5131-8742-09274b929704.html (“‘What we are seeing is a directive from the district to lower the suspension rates . . . [t]his directive is being implemented by some administrators not reporting suspensions, not suspending students for serious and disruptive acts and insufficient support personnel assigned to schools to determine and correct the source of the disruptive student behaviors.’”); Melanie Asmar, *Students, Teachers Plead for Denver District To Do More in Face of Rising Gun Violence*, COLO. INDEP. (Feb. 4, 2020), <https://www.coloradoindependent.com/2020/02/04/denver-schools-youth-violence/> (“‘At a meeting last month, principals, teachers, and students pleaded with Denver Public Schools leaders for changes they say will help make their schools safer ‘We’re not here to ask you to save us,’ Chavira, the high school senior, said. ‘We’re here to ask you to care enough to do something with our requests. Lives are at stake.’”).

26. *See* Steven Brantley, *Restorative Justice in the Classroom: A Pipeline to Nowhere for All*, 28 GEO. MASON U. CIV. RTS. L.J. 69, 72 (2017) (“[I]n school districts across the country, restorative justice has resulted in the inverse of one of the main problems it was intended to address: instead of suspensions and other more punitive, traditional methods of discipline being used for almost all offenses including minor infractions, the almost entirely non-punitive restorative justice model is now used for all offenses, including seriously disruptive and violent infractions.”); Jill Barshay, *The Promise of ‘Restorative Justice’ Starts to Falter Under Rigorous Research: Studies in Pittsburgh and Maine Show Difficulty of Implementing Trendy Alternative to Traditional Discipline*, HECHINGER REPORT (May 6, 2019), <https://hechingerreport.org/the-promise-of-restorative-justice-starts-to-falter-under-rigorous-research/>.

27. *See* Lara Bazelon & Bruce A. Green, *Victims’ Rights from a Restorative Perspective*, 17 OHIO ST. J. CRIM. L. 293, 333 (2020) (“‘Studies and successful programs such as Common Justice and RESTORE have demonstrated that restorative

A summary of these developments will help put the failure of schools in perspective. Empirical comparisons of restorative justice with the common wisdom on punitive policies have a unique place in criminology, research, and policy reform.²⁸ The research sorts out the common wisdom about crime and punishment with scientific proof for the efficacy of new approaches to old problems,²⁹ helping a generation of policymakers understand restorative theory, e.g., which programs are most effective in which circumstances.³⁰ It informs strategy selection using evidence-based methods for translating restorative theory into problem-solving practices.³¹

justice programs founded on principles of victim-centeredness and offender accountability with a focus on rigor, repair, and community involvement are suited to all crimes, including those involving violence.”); Barton Poulson, *A Third Voice: A Review of Empirical Research on Psychological Outcomes of Restorative Justice*, 2003 UTAH L. REV. 167, 167–68. (documenting the results of seven studies using data from programs in the United States, Canada, England, and Australia and concluding that restorative justice outperformed traditional adjudicatory processes under every metric).

28. See Lawrence W. Sherman, *Domestic Violence and Restorative Justice: Answering Key Questions*, 8 VA. J. SOC. POL’Y & L. 263, 267 (2000) (“Restorative justice is thus different from both “retributive” justice, which is more punitive than most American courts, and ‘standard’—or low probability of punishment—justice. The differences between restorative and standard justice are found in the following dimensions: repairing harm, listening to victims, deliberative democracy, egalitarian procedures, and informal social control. Neither retributive nor standard justice employ any of these features.”)

29. See Albert W. Dzur & Susan M. Olson, *The Value of Community Participation in Restorative Justice*, 35 J. SOC. PHILOSOPHY 91, 93 (2004) (“Crime is a dysfunctional way of saying something, and punishment . . . is an equally dysfunctional way of answering.”); John Braithwaite, *The Essence of Responsive Regulation*, 44 U.B.C. L. REV. 475, 485 (2011) (“Restorative justice is an approach where at the base of a pyramid of sanctions, all the stakeholders affected by an injustice have an opportunity to discuss how they have been hurt by it, their needs, and what might be done to repair the harm and prevent recurrence.”).

30. See Lawrence W. Sherman et al., *Are Restorative Justice Conferences Effective in Reducing Repeat Offending? Findings from a Campbell Systematic Review*, 31 J. QUANTITATIVE CRIMINOLOGY 1, 17–19 (2015) (meta-analysis finding that “on average, [restorative justice conferences] cause a modest but highly cost-effective reduction in the frequency of repeat offending”).

31. See Sherman et al., *supra* note 30, at 1; DAVID B. WILSON ET AL., EFFECTIVENESS OF RESTORATIVE JUSTICE PRINCIPLES IN JUVENILE JUSTICE: A META-ANALYSIS 4 (2017), <https://www.ojp.gov/pdffiles1/ojdp/grants/250872.pdf> (describing the effectiveness of restorative justice programs, including the finding that

Four characteristics of restorative theory shape strategy selection: (1) Encounter: creating opportunities for victims, offenders, their families and community members to meet to discuss the crime and its impact on them; (2) Amends: expecting wrongdoers to take steps to repair the harm they have caused; (3) Reintegration: seeking to restore victims and offenders to wholeness, to become contributing members to the community; and (4) Inclusion: providing opportunities for parties with a stake in a specific crime or incident to participate in its resolution.³²

By now, a generation of federal and state policymakers have a history of incorporating restorative theory in a range of reforms.³³ Their commitment is palpable in criminal justice reforms, pivoting away from the notion that crime is a singular wrongdoing against the state and toward personalizing the injury, measuring community harm, and identifying the needs of affected stakeholders.³⁴ Renee Warden's

restorative justice programs “showed a moderate reduction in future delinquent behavior”); KATHERINE BECKETT & MARTINA KARTMAN, UNIV. OF WASH., MASS INCARCERATION AND RESTORATIVE JUSTICE: PROMISING POSSIBILITIES 7 (2016), http://www.jsis.washington.edu/humanrights/wp-content/uploads/sites/22/2017/02/Restorative_Justice_Report_Beckett_Kartman_2016.pdf (describing a meta-analysis of a sample of 11,950 juveniles which found that restorative justice programs had a 34 percent reduction in recidivism).

32. See John Braithwaite, *Principles of Restorative Justice*, in RESTORATIVE JUSTICE & CRIMINAL JUSTICE 1–19 (2003), <http://johnbraithwaite.com/wp-content/uploads/2016/03/Principles%20of%20Restorative%20Justice.pdf>.

33. For a detailed account of the technical assistance provided by the USDOJ through the Balanced and Restorative Justice Demonstration Project, see PETER FREIVALDS, OFF. OF JUV. JUST. & DELINQUENCY PREVENTION, BALANCED AND RESTORATIVE JUSTICE PROJECT (1996), <http://www.ncjrs.gov/pdffiles/91415.pdf> (“Balanced and Restorative Justice (BARJ) has advantages over traditional justice system models such as the treatment (or medical) and the punishment (or retributive) models, which remain in constant conflict with one another. Unlike these other models, BARJ underscores the importance of the victim (individual or community) in the justice process and requires the offender to actively pursue restoration of the victim by paying restitution, performing community service, or both.”).

34. See Miriam Krinsky & Taylor Phares, *Accountability and Repair: The Prosecutor's Case for Restorative Justice*, 64 N.Y. L. SCH. L. REV. 31, 43 (2020) (describing success of several programs, including the Justice Center Peacemaking Program: “Nearly 80% of the 39 cases completed through the Justice Center process completed peacemaking successfully. Of those participants that completed peacemaking successfully, 90% received a straight dismissal of their case, while 10% received an adjournment in contemplation of dismissal.”).

study on the role of empathy in restorative justice implementation found that “[t]he most prevalent tool of restorative justice [is] Victim-Offender Mediation, [with] approximately three hundred programs in the United States and over ninety percent satisfaction from participants.”³⁵

It is clear that outside of education, policymakers are aware of and understand restorative theory, implementing policies that with a growing awareness of its virtues and limitations. This ongoing translation of restorative theory is noteworthy in its array of programs with high rates of victim satisfaction and offender accountability.³⁶

Indeed, the satisfaction metric holds fast when policymakers tinker with the model framework³⁷ by introducing new elements.³⁸

35. Renee Warden, *Where Is the Empathy? Understanding Offenders' Experience of Empathy and Its Impact on Restorative Justice*, 87 UMKC L. REV. 953, 956 (2019); see also Daniel Luedtke, Note, *Progression in the Age of Recession: Restorative Justice and White-Collar Crime in Post-Recession America*, 9 BROOK. J. CORP. FIN. & COM. L. REV. 311, 320 (2014) (“America has made great strides in the field of restorative justice, the programs that practice it employ methods derived from more developed programs in other countries, many of which embrace a democratic approach to conflict resolution.”)

36. See generally MARK S. UMBREIT ET AL., JUVENILE VICTIM OFFENDER MEDIATION IN SIX OREGON COUNTIES: FINAL REPORT (2001), http://rjp.dl.umn.edu/sites/rjp.dl.umn.edu/files/media/juvenile_vom_oregon.pdf; see also Lawrence W. Sherman et al., Ctr. for Restorative Just. & Peacemaking, *Twelve Experiments in Restorative Justice: The Jerry Lee Program of Randomized Trials in Restorative Justice Conferences*, 11 J. EXPERIMENTAL CRIMINOLOGY 501 (2007).

37. Currently VOM is implemented in at least four legislative models: (1) Comprehensive VOM Legislative Framework; (2) Specific Statutory Provision for VOM; (3) Basic Statutory Provision for VOM; (4) Programs that May Include VOM. See Elizabeth Lightfoot & Mark S. Umbreit, *An Analysis of State Statutory Provisions for Victim-Offender Mediation*, 15 CRIM. JUST. POL'Y REV. 418, 421 (2004); see also Warden, *supra* note 35, at 957 (“[T]hree models—Circle Sentencing, Family Group Conferencing, and Victim-Offender Mediation—exemplify formal programs designated and implemented as restorative justice initiatives. However, restorative justice may also take the shape of other programs that embrace its values without identifying as restorative justice, or in informal practices exercised by the discretion of criminal justice practitioners.”).

38. This is especially true in the recent emphasis on apology in VOMs. See Heather Strand & Lawrence Sherman, *Repairing the Harm: Victims and Restorative Justice*, 2003 UTAH L. REV. 15, 27 (2003) (citing GABRIELLE M. MAXWELL & ALLISON MORRIS, FAMILY, VICTIMS AND CULTURE: YOUTH JUSTICE IN NEW ZEALAND (1993)) (“The opportunity restorative justice allows to come face-to-face with an offender

Recently, the preference shaping tools within restorative justice are being customized to good effect in fields not intuitively compatible, such as domestic violence³⁹ and faith-based programs.⁴⁰ Research also suggests, but not without disagreement,⁴¹ that “[s]ystemic use of restorative justice processes lead to general deterrence and to a decrease in the

clearly enhances the likelihood of an apology being offered: indeed, apology is usually seen as central to the process of restoration. Furthermore, it appears that the expression of remorse and a genuine desire for reconciliation on the part of the offender is a significant predictor of offenders’ desistance from future offending.”).

39. See Rhea V. Almeida & Ken Dolan-Delvecchio, *Addressing Culture in Batterer’s Intervention: The Asian Indian Community as an Illustrative Example*, 5 VIOLENCE AGAINST WOMEN 654, 667–82 (1999); Donna Coker, *Enhancing Autonomy for Battered Women: Lessons from Navajo Peacemaking*, 47 UCLA L. REV. 1, 37 (1999), https://repository.law.miami.edu/cgi/viewcontent.cgi?article=1289&context=fac_articles (court diversion program within the Navajo Nation that is overseen by the judiciary).

40. See Mark William Bakker, Comment, *Repairing the Breach and Reconciling the Discordant: Mediation in the Criminal Justice System*, 72 N.C. L. REV. 1479, 1512 (1994) (“[T]he birth and growth of VORP can be credited in large part to the role of the church as an institution and to the work of individual church members. They contend that Biblical ideals make up the vision and values of VORP.”); Amy J. Cohen, *Moral Restorative Justice: A Political Genealogy of Activism and Neoliberalism in the United States*, 104 MINN. L. REV. 889, 939 (2019) (“[T]he Church ‘brings unique resources to offenders that government programs cannot hope to effect,’ namely, love and communion.”).

41. See Zvi D. Gabbay, *Exploring the Limits of the Restorative Justice Paradigm: Restorative Justice and White-Collar Crime*, 8 CARDOZO J. CONFLICT RESOL. 421, 468 (2007) (“[E]specially in white-collar and corporate sentencing, the law and the Sentencing Guidelines arguably provide judges and prosecutors with a variety of options that are based on those alternative methods in addition to the conventional sanctions. Again, restorative justice may not have much to contribute.”); Darren Bush, *Law and Economics of Restorative Justice: Why Restorative Justice Cannot and Should Not Be Solely About Restoration*, 2003 UTAH L. REV. 439, 467 (2003) (“In sum, there are no deterrence aspects to restorative justice.”).

crime rate,”⁴² because of “offender satisfaction with both corporate and traditional individual restorative justice programs.”⁴³

Understood from this perspective, the failure of school-based restorative justice is hypocritical to restorative theory and inconsistent with the responsive regulations outside of education. There are three reasons schools underperform: First, the severity of the harm to students demonstrated in the cases where school responses to campus hazards have been characteristically haphazard and particularly humiliating and degrading to the victims. Litigation brought against state and local governments is notoriously effective as data,⁴⁴ shedding light onto policy failures. The cases convey a narrative in which schools fail to act while having actual knowledge or constructive knowledge of credible warnings about students at risk of harm,⁴⁵ or fail to set up an

42. Hadar Dancig-Rosenberg & Tali Gal, *Restorative Criminal Justice*, 34 CARDOZO L. REV. 2313, 2327–28 (2013) (“The alliance between victims and community members that is created through restorative processes produces greater satisfaction and trust, consequently increasing the percentages of reported new crimes. The rise in the reporting rates increases the risk of being caught and hence the reluctance of potential offenders to commit offenses.”)

43. John Braithwaite, *Restorative Justice: Assessing Optimistic and Pessimistic Accounts*, 25 CRIME & JUST. 1, 26 (1999) (“[O]ffender satisfaction with both corporate and traditional individual restorative justice programs has been extremely high. The evidence of offenders being restored in the sense of desisting from criminal conduct is encouraging with victim-offender mediation, conferencing, restorative business regulatory programs, and whole-school antibullying programs, though not peer mediation programs for bullying.”).

44. See Ahmed E. Taha, *Data and Selection Bias: A Case Study*, 75 UMKC L. REV. 171, 173 (2006) (“Empirical research of civil litigation often focuses on a particular level of the litigation pyramid; the outcomes of cases that reach a particular level of the pyramid are studied.”); David A. Hoffman et. al., *Docketology, District Courts, and Doctrine*, 85 WASH. U.L. REV. 681, 686 (2007) (“Opinionologists typically proceed by gathering a sample of opinions collected from the Westlaw or Lexis databases. They then engage in content analysis: coding opinions for selected variables, they attempt to explain changes in legal rules using statistical regressions.”)

45. See, e.g., *Moore v. Houston Cty. Bd. of Educ.*, 358 S.W.3d 612, 619 (Tenn. Ct. App. 2011); *J.A. v. Corpus Christi Indep. School Dist.*, No. 17-182, 2018 WL 4469861, at *3–10 (S.D. Tex. Sept. 18, 2018); *Nation v. Piedmont Indep. Sch. Dist.* No. 22, No. 18-1090, 2019 WL 4452953, at *7–11 (W.D. Okla. Sept. 17, 2019).

effective system for detecting risks,⁴⁶ or exhibit a systematic failure to utilize that system.⁴⁷

For example, a middle school student was in put in fear for his safety by chronic bullying, eventually suffering a broken nose, jaw, and persistent and continuing head trauma in *Moore v. Houston County Board of Education*, where school officials were found jointly and severally liable for failing to act to prevent an attack on a student by classmates whose harassment took place in classes, hallways, sponsored events, and the school bus. The judges found that educators were not immune from damages for injuries when they knew that the student or perpetrators had threatened and bullied the victim or student in prior incidents and failed to intervene despite the complaints of parents.⁴⁸

In *Prendergast ex rel. L.P. v. Wylie Independent School District*,⁴⁹ the special needs high school student was bullied, humiliated, stabbed while in class, and assaulted in the hallway which was filmed by his assailants when school officials failed to intervene despite being aware of the mistreatment by students and staff. The court held that “[s]chools cannot avoid liability by turning a blind eye to maltreatment of vulnerable students.”⁵⁰

The third category is illustrated in the New Jersey case of *M.H. v. C.M.*,⁵¹ where the daily sexual assaults of a special needs student

46. See *Marson v. Thomason*, 438 S.W.3d 292, 296–300 (Ky. 2014); *T.E. v. Pine Bush Cent. Sch. Dist.*, 58 F. Supp. 3d 332, 368–72 (S.D.N.Y. 2014).

47. See, e.g., *Marson*, 438 S.W.3d at 296–300 (educator liable for failing to supervise students as they entered gymnasium causing blind middle school student to fall from improperly extended bleacher after being directed to climb the bleachers); *Prendergast ex rel. L.P. v. Wylie Indep. Sch. Dist.*, No. 18-00020, 2018 WL 6710034, at *8–9 (E.D. Tex. Dec. 4, 2018), *report and recommendation adopted*, No. 18-20, 2018 WL 6705536 (E.D. Tex. Dec. 20, 2018) (school not immune for deliberate indifference to bullying and harassment to which they were aware of and contributed to through overt acts or unwillingness to intervene); *Bellflower Unified Sch. Dist. v. Comm’n on Prof’l Competence*, No. 26-2523, 2016 WL 1706727, at *3, *7–8 (Cal. Ct. App. Apr. 26, 2016) (educator culpable for “[w]illful refusal to perform regular assignments without reasonable cause, as prescribed by the rules and regulations of the employing school district,” for failing to report a drug sale on campus by a student who had been repeatedly suspended for misbehavior).

48. *Moore*, 358 S.W.3d at 619.

49. 2018 WL 6705536, at *9 n.13

50. *Id.*

51. 2020 WL 6281686, at *1–12.

were kept quiet by school officials who neither intervened nor reported the incidents thinking was best “not have the information spread.”⁵² The United States District Court refused to dismiss a Title IX claim, holding that liability is appropriate when a school acts unreasonably in light of the known circumstances and in a manner that permits a finding of deliberate indifference.⁵³ Key to the decision in the case was the fact that the federal remedy was enacted for the benefit of students who are injured when a school has “actual knowledge of discrimination in the recipient’s programs or is aware of underlying facts that actually indicate a substantial danger to its students.”⁵⁴

The second reason that schools underperform on restorative justice is that there is palpable distress inflicted on school personnel who, drawing upon their own experiences, speak with a full knowledge of the failures of restorative justice reforms. These testimonies establish that campus safety is being compromised by foreseeable and chronic incidents to which the reforms are knowingly ineffective.⁵⁵ The insight here is notable and significant because educators tend keep their experiences to themselves.⁵⁶ Educators are signaling the alarm that the climate in schools is one of lawlessness,⁵⁷ or that “[c]lasses are being disrupted, student learning is being decreased . . . in all grade levels,⁵⁸ or that “[w]e have fights here almost every day . . . [t]he kids walk around

52. *Id.* at *3.

53. *Id.* at *6.

54. *Id.* at *5 (quoting *Bostic v. Smyrna Sch. Dist.*, 418 F.3d 355, 361 (3d Cir. 2005)); *Gebser v. Lago Vista Ind. Sch. Dist.*, 524 U.S. 274, 290 (1998).

55. CATHERINE H. AUGUSTINE ET AL., CAN RESTORATIVE PRACTICES IMPROVE SCHOOL CLIMATE AND CURB SUSPENSIONS? AN EVALUATION OF THE IMPACT OF RESTORATIVE PRACTICES IN A MID-SIZED URBAN SCHOOL DISTRICT 35 (2018).

56. In a 2018 study by The Ohio State University, educators reported that 80.9% informed an administrator about the incident, approximately 86.6% told a co-worker, and 76.1% kept the news from family. See Anderman et al., *Teachers’ Reactions To Experiences Of Violence: An Attributional Analysis*, 21 SOC. PSYCHOL. EDUC. 621, 634 (2018); see also Rosales, *supra* note 13 (“[T]oo many of our teachers have been pressured to not report or tell others of the incidents that are happening in their classrooms.”).

57. Perez, *supra* note 7.

58. Erin Duffy, ‘OPS, We Have a Problem,’ *School Board Is Told as Teachers Plead for Help with Disruptive Students*, OMAHA WORLD-HERALD (Nov. 10, 2016), https://omaha.com/news/education/ops-we-have-a-problem-school-board-is-told-as-teachers-plead-for-help-with/article_13f40e31-5367-5cb8-83f3-ac03db3ec97f.html.

and say, ‘We can’t get suspended—we don’t care what you say,’”⁵⁹ and that students, correctly perceiving an advantage in the chaos, telling educators, “I’m going to torture you. I’m doing this because I can’t be removed.”⁶⁰

One study of teachers’ attitudes found that “[a]bout half of staff [] indicated that “student attitudes” were a barrier to implementing restorative practices. This conclusion is explained in the survey by a teacher:

There are several students who have not benefitted from the use of restorative practices at all. Rather, they disrespect it and scoff at it as a lenient form of discipline. These students, however few they may be . . . are disruptive to other students’ learning and disruptive to their classroom, and the whole school in general. Because of these students, it becomes harder to implement restorative practices on the whole I feel that restorative practices [don’t] address such students at all, rather it fails them entirely and ultimately is the foundation for all of the failings we have experienced with restorative practices as a whole.⁶¹

The same study reports that “about one-third of surveyed staff indicated that “the message from the district seemed to them to be that responses to incidents ought to be addressed through restorative practices only,”⁶² rebutting the expectation of campus educators that “using restorative practices did not preclude disciplinary action.”⁶³

The research by Max Eden documents these experiences from school personnel in ten public school districts:

59. Mary Pasciak, *Attacks on Teachers Revive Touchy Issue of Student Suspensions*, BUFFALO NEWS (Dec. 13, 2012), https://buffalonews.com/news/local/attacks-on-teachers-revive-touchy-issue-of-student-suspensions/article_8a45ec18-d349-58dc-983c-10ec5c84608c.html.

60. Walter E. Williams, Opinion, *The Chaotic Injustice of ‘Restorative Justice’*, DAILY COMM. (Mar. 28, 2017), <https://www.dailycommercial.com/opinion/20170328/williams-chaotic-injustice-of-restorative-justice> (quoting a former Philadelphia teacher who testified before the U.S. Commission on Civil Rights).

61. AUGUSTINE ET AL., *supra* note 55.

62. *Id.*

63. *Id.*

In Wisconsin, 77% of the teachers reported that discipline reform had a negative effect on student behavior, though 69% of the teachers reported that when a student returns to class after restorative intervention that student was not ready to re-engage with learning.

In Colorado, 66% percent of the teachers disagreed that the new policies were effective. Further they disagreed that the policies put all students first and allowed for quality learning environment. Sixty percent of the Denver teacher said that discipline incidents were not being properly documented. This same cohort of teachers reported mental health issues. Thirty percent of the Denver teachers were concerned for their personal safety.

In Oklahoma, a teacher lamented that “[w]e were told that referrals would not require suspension unless there was blood.” A colleague added, “[s]tudents are yelling, cursing, hitting, and screaming at teachers and nothing is being done but teachers are being told to teach and ignore the behaviors These students know there is nothing a teacher can do. Good students are now suffering because of the abuse and issues plaguing these classrooms.”⁶⁴

The survey data from the other school districts confirm these internal assessments of discipline reform.⁶⁵ A government official in a large midwestern school district, concluded a news conference that announced data showing the doubling of occurrences of assaults on teachers and staff, with the comment that the ineffective restorative justice policies had created a “public health crisis.”⁶⁶

64. Tim Willert, *Many Oklahoma City School District Teachers Criticize Discipline Policies in Survey*, OKLAHOMAN (Oct. 31, 2015), <https://oklahoman.com/article/5457335/many-oklahoma-city-school-district-teachers-criticize-discipline-policies-in-survey>.

65. The other school districts involved in the study were Oklahoma City, Oklahoma, Baton Rouge, Louisiana, Indianapolis, Indiana, Jackson, Mississippi, Tampa Bay, Florida, Portland, Oregon, Syracuse, and New York. See AUGUSTINE ET AL., *supra* note 55.

66. Brian Lambert, *Violence in St. Paul Schools Called ‘Public Health Crisis’*, MINNPOST, (Dec. 9, 2015), <https://www.minnpost.com/glean/2015/12/violence-st-paul-schools-called-public-health-crisis/>.

This testimony by educators confirms that the failure of school discipline policies is spawning an atmosphere in which students fend for themselves while teachers and staff are at risk of physical violence sufficiently intense that some have taken medical leave,⁶⁷ while others wear protective gear such as bite sleeves or Kevlar equipment to prevent injury.⁶⁸

A 2018 study by the National Center for Education Statistics found that a higher percentage of public-school teachers had reported being threatened with the injury or had been physically attacked than in almost all previous years.⁶⁹

The American Psychological Association (“APA”) Report on the climate of public-school campuses that coincides with school disciplinary reforms recommends that schools prepare to replace teachers who leave the profession prematurely.⁷⁰ A review of the APA data finds that 80% of the nation’s teachers have been victims of threats or physical violence.

67. See Ryan McKinnon, *Oak Park Teachers Fear for Students, Themselves: Violence Is on the Rise, Thanks to a Bevy of New Policies and Staffing Woes*, HERALD TRIB. (June 30, 2019), <https://www.heraldtribune.com/news/20190630/oak-park-teachers-fear-for-students-themselves> (“[The teacher] would be on medical leave for nearly eight months. He lost 86% of hearing until surgery removed the blood pooling around his ear drum. He still has a static buzz that doctors say may be with him the rest of his life—a noise that makes sleeping difficult.”).

68. OR. EDUC. ASS’N., *A CRISIS OF DISRUPTED LEARNING: CONDITIONS IN OUR SCHOOLS AND RECOMMENDED SOLUTIONS* 10 (2019), http://opb-imgserve-production.s3-website-us-west-2.amazonaws.com/original/a_crisis_of_disrupted_learning_1549344834428.pdf.

69. See K. WANG ET AL., U.S. DEP’T OF EDUC., *INDICATORS OF SCHOOL CRIME AND SAFETY: 2019* (2020), <https://nces.ed.gov/programs/crimeindicators/index.asp> (10% of public-school teachers reported being threatened with injury by a student; 6% reported that they’d been physically attacked.).

70. See DOROTHY ESPELAGE & LINDA REDDY, AM. PSYCH. ASS’N, *A SILENT NATIONAL CRISIS: VIOLENCE AGAINST TEACHERS* (2016) (citing AM. PSYCH. ASS’N BD. OF EDUC. AFFS. TASK FORCE ON CLASSROOM VIOLENCE DIRECTED AGAINST TEACHERS, *UNDERSTANDING AND PREVENTING VIOLENCE DIRECTED AGAINST TEACHERS: RECOMMENDATIONS FOR A NATIONAL RESEARCH, PRACTICE AND POLICY AGENDA* (2011)). The report notes that eighty percent of the nation’s teachers have been victims of threats or physical violence. Many suggest that restorative justice policies are responsible for the crisis. It recommends schools prepare to replace teachers who leave the profession “prematurely. *Id.*; see also Rosales, *supra* note 13 (“[M]ore and more educators are ending up in the emergency room. While some are forced to use their medical leave, others choose instead to resign.”).

A Wisconsin middle school teacher's resignation, made at a school board meeting, underscores the APA report: "I am here today, it is with great sadness, that I inform you of my resignation from the Green Bay School District," the teacher said. "I fear for my safety, every day We are in danger every day that we show up to our school, students, and staff are physically, verbally, emotionally, and mentally, sexually abused every single day in the building."⁷¹

A 2019 report from the Oregon Education Association in which researchers surveyed more than two thousand public school educators made the following findings:

Educators and students are reporting that they feel unsafe. A third of poll respondents said they were scared for students' safety at school because of this issue, and a quarter said they were concerned about their own safety. Anecdotally, educators, principals, superintendents, school board members, and families have reported weekly and even daily room clears as becoming commonplace.⁷²

Third, the depth of the harm to the education mission in studies that correlate ineffective restorative justice policies with a deleterious impact on school climate and student achievement.⁷³ Simply put, the

71. Brittany Ford, *Longtime Green Bay Teacher Resigns, Raises Concerns Of Safety At Middle School*, FOX 11 NEWS (June 27, 2017), <https://fox11online.com/news/local/green-bay/long-time-washington-middle-teacher-resigns-raises-concerns-of-safety-at-the-school>.

72. See OR. EDUC. ASS'N, *supra* note 68.

73. The weight of this conclusion points directly at state constitutional law rather than a right to education under the U.S. Constitution. One need not quibble about the holding of *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 56–59 (1973). On the other side of the hedge, all states provide a guarantee to a public education. This right is stated in various provisions of state constitutions and statutes. Moreover, their existence triggers federal constitutional protection through the Due Process and Equal Protection Clauses. See generally Areto A. Imoukhuede, *Enforcing the Right to Public Education*, 72 ARK. L. REV. 443 (2019). See also Evan S. Stolove, *Pursuing the Educational Rights of Homeless Children: An Overview for Advocates*, 53 MD. L. REV. 1344, 1357 (1994), <https://core.ac.uk/download/pdf/56357931.pdf> ("Once a state has granted a child the right to an education, it cannot deny that right without due process of the law. How much process is due is a question of federal constitutional law.").

right to an education is being compromised. The findings in these studies are responsible for a shift in tone in the scholarship from a chorus of optimism and toward declarations of concern that the underperformance of schools is giving rise to measurable negative effects, e.g., a climate of disrespect, more violence, more substance abuse, and a “significant differential racial impact in which minority students experienced the worst climate shifts.”⁷⁴

Zarecki’s 2018 study comparing the climate effects of restorative justice reforms of the Los Angeles Unified School District found that academic achievement suffered.⁷⁵ These findings complement the results of an earlier 2001 study by Daniel McFarland that found that poorly implemented discipline reforms diminish learning opportunities for students.⁷⁶ Josh Kinsler’s 2013 study also identified negative effects of restorative justice policy on school climate and student achievement.⁷⁷ The 2015 study by Lauren Sartain, Elaine M. Alensworth, and Shanette Porter, corroborated the negative effects on school climate of a restorative justice policy that eliminated mandatory

74. MAX EDEN, MANHATTAN INST. FOR POL’Y RSCH., SCHOOL DISCIPLINE REFORM AND DISORDER: EVIDENCE FROM NEW YORK CITY PUBLIC SCHOOLS 2012–16 5–9 (Mar. 14, 2017), <https://media4.manhattan-institute.org/sites/default/files/R-ME-0217v2.pdf>.

75. Zarecki, *supra* note 21, at 15 (“The harm to school climate is likely an important mechanism by which suspension bans harm academic growth.”).

76. Daniel A. McFarland, *Student Resistance: How the Formal and Informal Organization of Classrooms Facilitate Everyday Forms of Student Defiance*, 107 AM. J. SOCIO. 612, 654 (2001) (“[R]esults indicate that most any student will breach tasks and attempt to control the classroom situation if they are afforded social opportunities.”).

77. Josh Kinsler, *School Discipline: A Source or Salve for the Racial Achievement Gap*, 54 INT’L ECON. REV. 355, 379 (2013) (“The expected increase in achievement costs associated with disruptive behavior is five times as large for [B]lack students as it is for [W]hite students. From the policymaker’s perspective, this is not an attractive trade-off. The racial gap in discipline has received some public and political attention, but the achievement gap has been a major focus of educational policy over the past decade. Thus, a superintendent seeking to close the discipline gap between [W]hite and [B]lack students will not want to rely on a simple rule-based policy since any public relations gain in terms of discipline will likely be swamped by the criticisms surrounding the growing achievement gap.”).

ten-day suspensions for the most severe offenses and required schools to obtain central office approval for suspensions.⁷⁸

The 2017 study by Matthew Steinberg and Johanna Lacoë found a correlation between ineffective restorative justice policies, school climate, and student achievement.⁷⁹ The 2017 study by Max Eden measured the shift in school climate in New York City schools using a distribution-of-differences analysis of data from 2011–12 to 2015–16 and linked those changes to suspension rates.⁸⁰ Eden found that discipline reform had a “significant disparate impact by race, harming minority students the most.”⁸¹ Eden also found “a disparate impact in school climate by socioeconomic status, harming low-income students the most.”⁸²

The correlation between ineffective restorative justice policies and a disproportionate negative impact on minority students should prompt a reexamination of the relationship between school discipline reform and critical race theory.⁸³ Steven Brantley’s examination of the disparate racial impact of school discipline reforms explains that “a school district’s adherence to certain policies or practices, with full

78. LAUREN SARTAIN ET AL., *SUSPENDING CHICAGO’S STUDENTS* 30 (Ann Lindner ed.) (2015) (using data from the Chicago school district) (“[T]eacher and student reports of climate actually got worse. Teachers reported the school climate was more disruptive after the policy took effect, and the effects were larger in schools that were using more long suspensions pre-policy. Students also reported having worse relationships with peers after the policy took place than before.”).

79. MATTHEW P. STEINBERG & JOHANNA LACOE, *THE ACADEMIC AND BEHAVIORAL CONSEQUENCES OF DISCIPLINE POLICY REFORM: EVIDENCE FROM PHILADELPHIA* 32 (2017) (“The poorest, most racially homogenous, and most academically challenged schools were the least compliant. Peers in these schools experienced a decline in performance [T]he district-wide decline in conduct suspensions for Black students coincided with an increase in the number of non-conduct suspensions for minority students. As a result, racial disproportionality actually increased in the wake of the district’s policy change.”).

80. EDEN, *supra* note 74.

81. *Id.* at 22.

82. *Id.*

83. This is because the disparate rate of student suspensions by race is for many the primary justification for discipline reform. See Thalia González, *Keeping Kids in Schools: Restorative Justice, Punitive Discipline, and the School to Prison Pipeline*, 41 J.L. & EDUC. 281, 310 (2012) (“The goals of the restorative justice project include reducing student referrals to juvenile justice and decreasing in-school and out-of-school suspensions and expulsions, in particular for minority students.”).

knowledge of the predictable effects of such adherence upon [different races] in a school system should be considered in assessing whether that district's policies produce a disparate impact among its students in violation of the Equal Protection Clause."⁸⁴

This constitutional dimension casts restorative justice reforms in a different light, prompting two formerly optimistic scholars to reprise their data and acknowledge that "[f]or other subgroups, such as African American students and all students in predominantly African American schools, there was a decrease in both suspensions and achievement, which hints that—in some cases—keeping misbehaving students in class might be detrimental to learning."⁸⁵

Brantley argues that the "unconstitutional deprivation of the disruptive students' classmates' right to an education,"⁸⁶ puts traditional remedies for race-based discrimination in play solely because educators persist with reforms that do not work:

[S]chool officials are intentionally continuing to pursue a course of action—the restorative justice model of discipline—that they know, or should know, will be felt disproportionately in schools populated largely by minority students. . . . The restorative justice model expands the disparate impact on minority students by affecting not just the offending student, but also, as a result of restorative justice practices keeping the offending student in the classroom, the offending student's classmates, whose learning process continues to be disrupted, and who are, on average, also of minority races."⁸⁷

These three facts, connecting bad policies and bad effects, put the failure of schools in perspective and can be understood to validate a breakdown in one of schools' most fundamental mechanisms for collective action, e.g., to end harmful practices in which the whole of the education enterprise continues to bear the ultimate cost. More importantly, these facts bring to light the factor that explains and justifies

84. Brantley, *supra* note 26, at 89.

85. John Engberg & Catherine H. Augustine, *Commentary: The Impact of Restorative Practices*, RAND BLOG (Jan. 17, 2019), <https://www.rand.org/blog/2019/01/the-impact-of-restorative-practices.html>.

86. Brantley, *supra* note 26, at 94.

87. *Id.* at 90–91.

the public policy shift toward the increasingly rigorous liability standards directed at schools: the degree of harm risked and caused in spite of the knowledge of bad policies and bad effects. Lilah Hume Wolf, in an examination of the challenges facing charter schools, succinctly predicts the common thread in student allegations: sticking with an ineffective policy and as a result “failing ‘to do the obvious’ despite the high risk of harm and knowledge of such risk.”⁸⁸

It is important to keep in mind how much information presents itself to educators in sorting out school incidents under school-based restorative justice policies. In addition, compliance with the provisions of the external reforms place more information before educators with obligations to act upon or pass forward for action by other agencies.⁸⁹ American jurisprudence has a great deal to say about liability for harm inflicted on others by one with authority who possesses knowledge of the conditions which brought about the harm.⁹⁰

88. Lilah Hume Wolf, Note, *Knowledge Is Power: Assessing the Legal Challenges of Teaching Character in Charter Schools*, 26 STAN. L. & POL’Y REV. 671, 695 (2015); see also *Dinsmoor v. City of Phoenix*, 468 P.3d 745, 754 (Ariz. Ct. App. 2020) (affirming the refusal by the lower court to dismiss a gross negligence case arising out of an off-campus shooting in which two students were killed). Applying Arizona law that removed foreseeability from the duty framework, the court held that “[a] school unquestionably has a duty to address situations of which school officials become aware in dealing with students” *Id.* at 751. The court held that in the context of the shooter’s known history of violence a jury could conclude that educators should have taken some action to protect the threatened student. *Id.* at 752.

89. See Bernard James, *Restorative Justice Liability: School Discipline Reform and the Right to Safe Schools* (pt. 3), 51 MEM. L. REV. 557, 632 (2021).

90. See *Munn v. Hotchkiss Sch.*, 24 F. Supp. 3d 155 (D. Conn. 2014), *aff’d* 724 F. App’x 25 (2d Cir. 2018) (affirming a jury verdict against a school for failure to protect students from known threats to their health and safety during sponsored trip). The school argued that it bore no legal duty because it could not have foreseen the risk of students contracting insect-borne diseases. *Id.* at 170. Applying Connecticut law that makes the question of duty a matter of law for the court to decide before the case-specific facts are considered, the court held that “[a]s a matter of law, Hotchkiss undoubtedly owed Munn, a minor child in its care, a duty to protect her from known threats to her health and safety . . . at a minimum Hotchkiss has a legal duty ‘to use care . . . [in] circumstances under which a reasonable person [in the defendant’s position], knowing what he knew or should have known, would anticipate that harm of the general nature of that suffered was likely to result from his act or failure to act.’” *Id.*

This “scienter” rule of liability is not as malleable as scholarly debates make it out to be.⁹¹ Indeed, it is rigorously applied in federal and state laws to such an extent that positive knowledge and deliberate ignorance are equally capable of supporting liability.⁹² In the educational context, this is reflected in the provisions of a variety of federal and state laws.⁹³ Under federal law, the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution provides a private right of action for students who experience the disparate impact of school policies to which educators have “full knowledge of the predictable effects of such adherence upon [different races]”⁹⁴

Similarly, scienter-based failures to protect students serve as a staging ground for liability under 42 U.S.C. § 1983.⁹⁵ Section 1983

91. See Karen M. Hansen, “Knowing” Environmental Crimes, 16 WM. MITCHELL L. REV. 987, 989, n.10 (1990) (“[T]he word ‘knowledge’ has been taken to mean many different things”); Daniel S. Kleinberger, *Guilty Knowledge*, 22 WM. MITCHELL L. REV. 953, 969, n.90 (1996) (“In determining tort liability, the knowledge which the actor has or should have is usually of great importance. This is particularly true in cases of negligence and in torts which, like deceit or malicious prosecution, are based upon the fact that the defendant has acted improperly in view of the knowledge which he has.”).

92. “Positive knowledge” is awareness that a circumstance exists or is exceedingly certain to occur. “Deliberate ignorance” is a substitute for proof of positive knowledge. Often associated with “willful blindness,” it infers knowledge where a person consciously disregards the nature of his actions in order to avoid learning the truth. It applies an objective lens, e.g., that a reasonable person in the same circumstances would have been aware, giving rise to the conclusion that the defendant purposely avoided acquiring such knowledge. See Jessica A. Kozlov-Davis, Note, *A Hybrid Approach to the Use of Deliberate Ignorance in Conspiracy Cases*, 100 MICH. L. REV. 473, 475–76.

93. This knowledge often takes the form of a Dear Colleague Letter from the U.S. Department of Education. See Dear Colleague Letter from Assistant Sec’y for Civ. Rts. Russlynn Ali, U.S. Dep’t of Educ. (Oct. 26, 2010), <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201010.pdf>.

94. See U.S. CONST. amend. XIV, § 1; *Columbus Bd. of Educ. v. Penick*, 443 U.S. 449, 465 (1979) (ruling that the clause applies when a school maintains policies that it knows produce a disparate impact of a suspect classification such as race); see also Brantley, *supra* note 26, at 89 (“[T]he facts strongly suggest that [New York City’s] new restorative justice model of school discipline is resulting in increasingly violent and disruptive effects on the classroom environment, and that those effects are disproportionately felt in schools with large populations of minority students.”).

95. “Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes

provides for the liability of educators who “cause [a student] to be subjected” to the loss of a federally secured right.⁹⁶ The individual educator who inflicts the injury is liable.⁹⁷ The school itself is liable for acts done pursuant to a policy that authorizes or ratifies the individual’s conduct.⁹⁸ Most importantly, if student injuries result from an educator’s failure to perform an act that is required by law, the “policy” requirement is satisfied based on the school’s “deliberate indifference” to a frequently recurring circumstance.⁹⁹ While color of law is easily satisfied in cases involving harm inflicted by public schools, the real work in § 1983 cases involves identifying a right on which relief can be granted. Student injury claims involving failed school discipline policies typically arise under the Due Process Clause of the Fourteenth Amendment.

Federal courts have assiduously sorted the wheat from the weeds in the doctrine of substantive due process.¹⁰⁰ As it applies to

to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress” 42 U.S.C. § 1983.

96. *See id.*

97. *See Collins v. City of Harker Heights*, 503 U.S. 115, 120 (1992) (“[P]roper analysis requires us to separate two different issues when a § 1983 claim is asserted against a municipality: (1) whether plaintiff’s harm was caused by a constitutional violation, and (2) if so, whether the city is responsible for that violation.”); *Doe v. Smith*, 470 F.3d 331, 336 (7th Cir. 2006) (upholding a § 1983 action against a public-school administrator who used his authority to abuse his students sexually) In *Doe v. Smith*, the court notes, “Action is taken under color of state law when it is made possible only because the wrongdoer is clothed with the authority of state law.” *Id.* (quoting *United States v. Classic*, 313 U.S. 299, 326 (1941)).

98. *See Monell v. Dep’t of Soc. Servs.*, 436 U.S. 658, 690–91 (1978); *City of St. Louis v. Praprotnik*, 485 U.S. 112, 127 (1988) (plurality opinion).

99. *See City of Canton v. Harris*, 489 U.S. 378, 388 (1989).

100. Ryan C. Williams, *The One and Only Substantive Due Process Clause*, 120 YALE L.J. 408, 426–27 (2010) (“With the Supreme Court’s retreat from its *Lochner*-era substantive due process jurisprudence in the late 1930s, substantive due process entered an era of uncertainty in which the continued viability of the doctrine was placed in some doubt. Gradually, however, a new paradigm of substantive due process decision-making began to emerge. . . . This new approach, which is the Court’s currently prevailing framework for dealing with substantive due process claims, places principal emphasis on identifying a narrow category of liberty interests that are deemed sufficiently “fundamental” to warrant heightened scrutiny.”).

student injury claims, four elements shape liability. First, students have a right to be free from sexual abuse at the hands of a state actor.¹⁰¹ Second, schools do not ordinarily have an affirmative duty to protect students from harm inflicted by third-parties.¹⁰² Third, state compulsory attendance laws, without more, do not create the kind of special relationship that would make schools liable for failing to protect students from the injurious acts of private third parties.¹⁰³ Fourth, the “state-created danger” exception permits student claims when schools play a role in creating or enhancing the danger to which students are exposed and subsequently victimized.¹⁰⁴

The judicial shift in applying § 1983 liability for harmful discipline policies is demonstrated in *Gremo v. Karlin*, where the United States District Court held that a high school student who was beaten by a group of students was justified in asserting a substantive due process claim as a remedy.¹⁰⁵ The court agreed that allegations that the school habit of concealing information about violence in schools, failing to properly apply the school safety policy, and cultivating an atmosphere in which educators would fail to report incidents of school violence

101. See *Youngberg v. Romeo*, 457 U.S. 307 (1982); see also *Albright v. Oliver*, 510 U.S. 266, 271–73 (1994); *Stoneking v. Bradford Area Sch. Dist.*, 882 F.2d 720, 726 (3d Cir.1989); *Doe v. Taylor Indep. Sch. Dist.*, 15 F.3d 443, 451 (5th Cir. 1994) (en banc).

102. See *Deshaney v. Winnebago Cnty. Dep’t of Soc. Servs.*, 489 U.S. 189, 195 (1989) (“[N]othing in the language of the Due Process Clause itself requires the State to protect the life, liberty, and property of its citizens against invasion by private actors.”).

103. See *D.R. v. Middle Bucks Area Vocational Tech. Sch.*, 972 F.2d 1364, 1372–73 (3d Cir. 1992); *J.O. v. Alton Cmty. Unit Sch. Dist. 11*, 909 F.2d 267, 272–73 (7th Cir. 1990). But see *Taylor v. Ledbetter*, 818 F.2d 791, 797 (11th Cir. 1987) (finding a special relationship present in foster home placement).

104. “If the state puts a man in a position of danger from private persons and then fails to protect him, it will not be heard to say that its role was merely passive; it is as much an active tortfeasor as if it had thrown him into a snake pit.” *Bowers v. DeVito*, 686 F.2d 616, 618 (7th Cir. 1982); see also *Deshaney*, 489 U.S. at 201 (“While the State may have been aware of the dangers that Joshua faced in the free world, it played no part in their creation, nor did it do anything to render him any more vulnerable to them.”).

105. 363 F. Supp. 2d 771, 792 (E.D. Pa. 2005).

were culpable under the § 1983.¹⁰⁶ More recent court decisions follow this trend.¹⁰⁷

Title VI of the Civil Rights Act of 1964, provides a private right of damages against a school district for student-to-student harassment if the school district was deliberately indifferent to the harm.¹⁰⁸ Title IX of the Education Amendments of 1972¹⁰⁹ provides students a private right of action for gender-based injuries received in school when the victim can show that (1) an appropriate person at the school (2) had actual knowledge of facts indicating a substantial danger to students and (3) acted with deliberate indifference to that danger.¹¹⁰ In the context of Title IX, “[a]n educational institution has “actual knowledge” if

106. *Id.* (“[T]he City of Philadelphia and the School District of Philadelphia, may be held responsible for that constitutional violation because of their policies and/or customs.”).

107. *See, e.g.,* A.T. v. Baldo, 798 F. App’x 80, 84 (9th Cir. 2019) (holding an elementary school student with special needs entitled to assert substantive due process claim when restraint or containment policies harmed the student yet officials continued with course of treatment without reevaluation); Doe v. Town of Wayland, 179 F. Supp. 3d 155, 169, 173 (D. Mass. 2016) (upholding claim of sexually abused student upon facts suggesting that the school encouraged the perpetrator, who they knew had previously sexually abused children, to form friendship with victim’s older brother, and that they failed to inform the victim’s parents about the student’s prior acts of sexual abuse); Doe1 v. Bos. Pub. Sch., No. 17-11653-ADB, 2019 WL 1005498, at *4 (D. Mass. Mar. 1, 2019) (upholding claim of sexually assaulted student because defendant’s actions left students more vulnerable to assault by suppressing and delaying the filing of a mandated report on child abuse); Doe v. Reg’l Sch. Unit No. 21, No. 2:19-00341-NT, 2020 WL 2820197, at *12–13 (D. Me. May 29, 2020) (upholding student 1983 claim based on allegations that the school was put on notice of inappropriate conduct on the part of a teacher, and that despite this notice, failed to reasonably investigate or initiate remedial action, and that this increased the threat of harm).

108. The statute provides: “No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.” 42 U.S.C. § 2000d; *see also* 34 C.F.R. § 100.3(a) (2020).

109. *See generally* Title IX of the Education Amendments Act of 1972, 20 U.S.C. § 1681.

110. Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274, 277 (1998); Davis v. Monroe Cnty. Bd. of Educ., 526 U.S. 629, 643 (1999); Bostic v. Smyrna Sch. Dist., 418 F.3d 355, 361 (3d Cir. 2005); Caroline Edgar, Comment, *A Preponderance of the Evidence: The Appropriate Standard in Title IX Sexual Harassment Proceedings*, 6 ADMIN. L. REV. ACCORD 85, 97 (2020) (“First and foremost, Title IX is a civil rights statute.”).

it knows the underlying facts, indicating sufficiently substantial danger to students, and was therefore aware of the danger.”¹¹¹

In *T.B. v. New Kensington-Arnold School District*,¹¹² a federal court ruled that school officials can be liable for violating student rights under the Title IX of the Education Amendments Act of 1972 when student-on-student harassment is ignored.¹¹³ The court ruled that educators have a duty to intervene when they possess “actual notice,” which it defines as enough knowledge of the harassment that they reasonably could have responded with remedial measures. In a case in which the undisputed facts showed that school officials received repeated notice of the sexual harassment, the court characterized the duty to intervene:

“Actual notice” or “actual knowledge” exists when an “appropriate person” knows the underlying facts, indicating sufficiently substantial danger to students, and was therefore aware of the danger. As Defendant states, the notice requirement “does not set the bar so high that a school district is not put on notice until it receives a clearly credible report of sexual abuse from the plaintiff-student.” “The institution must have possessed enough knowledge of the harassment that it reasonably could have responded with remedial measures to address the kind of harassment upon which plaintiff’s legal claim is based.”¹¹⁴

111. *Bostic*, 418 F.3d at 361 (quoting KEVIN F. O’MALLEY ET AL., 3C FEDERAL JURY PRACTICE & INSTRUCTIONS § 177.36 (5th ed. 2001)); see also *Baynard v. Malone*, 268 F.3d 228, 238 n.9 (4th Cir. 2001) (“[A] Title IX plaintiff is not required to demonstrate actual knowledge that a particular student was being abused.”).

112. No. 15-606, 2016 WL 6879569, at *8 (W.D. Pa. Nov. 22, 2016).

113. See generally Title IX of the Education Amendments Act of 1972, 20 U.S.C. § 1681.

114. *New Kensington-Arnold School District*, 2016 WL 6879569, at *6 (quoting *Bostic v. Smyrna Sch. Dist.*, 418 F.3d 355, 361 (3d Cir. 2005); then quoting *Escue v. N. OK. College*, 450 F.3d 1146, 1154 (10th Cir. 2006); and then quoting *Stahling v. Metro. Gov’t of Nashville*, No. 3:07-0797, 2008 WL 4279839, at *10 (M.D. Tenn. Sept. 12, 2008).

Schools face a rigorous form of judicial review under this standard in the era of school discipline reform.¹¹⁵ The deliberate indifference requirement is met when a student can show by a preponderance of the evidence that the school had actual knowledge of prior facts and that its response, or lack thereof, was clearly unreasonable in light of known circumstances.¹¹⁶ The failure to respond is *per se* unreasonable. And where a school has knowledge that its policies are inadequate and ineffective and it continues to use those same methods to no avail, courts uniformly find a violation of Title IX.¹¹⁷

Section 504 of the Rehabilitation Act of 1973¹¹⁸ applies a similar standard of culpability for student injured based on their disability who can show that the school failed to adequately respond to the bullying.¹¹⁹ Section 504, along with Title II of the Americans with Disabilities Act of 1990,¹²⁰ provides two separate remedies, one for the

115. See *Baynard*, 268 F.3d at 238 n.9 (“[A] Title IX plaintiff is not required to demonstrate actual knowledge that a particular student was being abused.”); Karen J. Krogman, Comment, *Protecting Our Children: Reforming Statutory Provisions to Address Reporting, Investigating, and Disclosing Sexual Abuse in Public Schools*, 2011 MICH. ST. L. REV. 1605, 1615 (2011) (“Once the proper school official is on notice of the alleged sexual abuse, the official has a duty to respond to the allegations by taking action to eliminate the behavior and must not act with deliberate indifference.”).

116. *Davis v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 642–43 (1999); see also *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 290 (1998) (“The premise, in other words, is an official decision by the recipient not to remedy the violation.”).

117. See U.S. DEP’T OF EDUC., SEXUAL HARASSMENT GUIDANCE, <https://www2.ed.gov/about/offices/list/ocr/docs/sexhar00.html> (“The critical issue under Title IX is whether responsive action that a school could reasonably be expected to take is effective in ending the sexual harassment and in preventing its recurrence. If treating sexual harassment merely as inappropriate behavior is not effective in ending the harassment or in preventing it from escalating, schools must take additional steps to ensure that students know that the conduct is prohibited sex discrimination.”).

118. 29 U.S.C. § 794.

119. The student must show: (1) he or she is an individual with a disability; (2) he or she was harassed based on that disability; (3) the harassment was sufficiently severe or pervasive that it altered the condition of his or her education and created an abusive educational environment; (4) the defendant knew about the harassment; and (5) the defendant was deliberately indifferent to the harassment. See *Werth v. Bd. of Dirs.*, 472 F. Supp. 2d 1113, 1127 (2007). See, e.g., *L.M.P. ex rel. E.P. v. Sch. Bd. of Broward Cnty., Fla.*, 516 F. Supp. 2d 1294, 1301 (S.D. Fla. 2007); *S.S. v. E. Ky. Univ.*, 532 F.3d 445, 454 (6th Cir. 2008); *Moore v. Chilton Cnty. Bd. of Educ.*, 936 F. Supp. 2d 1300, 1314 (M.D. Ala. 2013).

120. 42 U.S.C. § 12132.

failure of a school to intervene to stop the bullying, and another remedy for the failure to make reasonable accommodations to address the effects of the bullying on the learning environment.¹²¹ When schools fail the “bad faith or gross misjudgment” standard for claims under § 504 and Title II such that the victimized student cannot learn,¹²² then the remedies contained in the Individuals with Disabilities Education Act can be asserted.¹²³

This pattern is recognizable in state laws.¹²⁴ In Colorado, the Claire Davis School Safety Act¹²⁵ permits victims to sue districts for liability if they fail to ensure the safety of students and staff on school property or at district-sponsored events. The Claire Davis Act is named in honor of the victim of the campus shooting that investigators concluded might have been prevented if the school had properly trained school personnel on how to share its information with other agencies.¹²⁶

Similarly, Utah law recognizes a special relationship between a school district and a child attending one of its schools giving rise to a

121. Jessica Brookshire, *Civil Liability for Bullying: How Federal Statutes and State Tort Law Can Protect Our Children*, 45 CUMB. L. REV. 351, 383–85 (2015).

122. *Id.* at 385 (“When a disabled student is denied a ‘free appropriate public education’ (often referred to as ‘FAPE’) as a result of bullying, then the bullying conduct may also violate the IDEA.”).

123. 20 U.S.C. § 1412(a)(1)(A).

124. See Peter J. Maher et al., *Governmental and Official Immunity for School Districts and Their Employees: Alive and Well?*, 19 KAN. J.L. & PUB. POL’Y 234, 242–44 (2010) (“[T]he fifty states are approximately evenly split as to whether their general rule is immunity or liability . . . the most common exception is for discretionary functions. . .”).

125. See COLO. REV. STAT. 24-10-106.3 (2019).

126. See Robin Hattersley-Gray, *Arapahoe Shooting Report Highlights Flaws in District’s Threat Assessment Process*, CAMPUS SAFETY MAG. (Jan. 18, 2016), https://www.campussafetymagazine.com/news/arapahoe_shooting_report_highlights_flaws_in_districts_threat_assessment_pr (“The threat assessors didn’t follow some of the procedures on the assessment and action plan form. Often there was no explanation of the rationale for the decisions made in the assessment. [The school district] didn’t provide schools with adequate resources to train staff on ‘how to recognize warning signs and what to do,’ nor did it communicate some of its expectations to school-level staff.”); see also SAFE HAVENS INT’L, ARAPAHOE HIGH SCHOOL ACTIVE-SHOOTER INCIDENT, POST-INCIDENT REVIEW (Jan. 13, 2016) https://safehavensinternational.org/wp-content/uploads/SHI-AHS_Post-Incident_Review.pdf.

duty of care,¹²⁷ and waives governmental immunity “as to any injury proximately caused by a negligent act or omission of an employee committed within the scope of employment.”¹²⁸ Tennessee holds schools liable for failure to implement its own school policies to prevent ongoing violence and harassment of which it has knowledge.¹²⁹ Immunity will no longer cover decisions that are unreasonable in light of what the educators know.¹³⁰

Ohio waives sovereign immunity and the public-duty defense when schools both fail to act and report their knowledge of student victimization.¹³¹ Ohio law imposes “a special responsibility to protect those children committed to their care and control . . . [such that] a school board has an obligation to deal with an instrumentality of harm to one of its students at school for the benefit of all of its students.”¹³²

Finally, Florida reform “has established an explicit duty of school boards and teachers to supervise the activity of students under their care and control.”¹³³ As a result, schools are liable for failing to follow its own discipline policies in light of the knowledge of the violent history of a student,¹³⁴ making student injury claims no longer a

127. *Young v. Salt Lake City Sch. Dist.*, 52 P.3d 1230, 1236 (2004) (holding that the extent of the relationship is limited to the district’s custody over that child and that the school was not liable for the failure to protect a student who was riding a bicycle to school).

128. UTAH CODE ANN. § 63G-7-301(2)(i) (2021).

129. *Moore v. Houston Cnty. Bd. of Educ.*, 358 S.W.3d 612, 619 (Tenn. Ct. App. 2011).

130. *Id.* (“HCMS administrators were on notice that Tyler intended to harm Trevor.”).

131. *Yates v. Mansfield Bd. of Educ.*, 808 N.E.2d 861, 870–71 (Ohio 2004).

132. *Id.* For a thorough discussion of the Yates case, see Jason P. Nance & Philip T.K. Daniel, *Protecting Students from Abuse: Public School District Liability for Student Sexual Abuse Under State Child Abuse Reporting Laws*, 36 J.L. & EDUC. 33, 37 (2007) (“The standard under the Ohio child abuse reporting statute resembles strict liability, such that if a school official fails to report the allegation of abuse to a child services agency and that teacher subsequently abuses another student, the school district will be held civilly liable as a matter of law.”).

133. *Comuntzis v. Pinellas Cnty. Sch. Bd.*, 508 So.2d 750, 751 (Fla. Dist. Ct. App. 1987).

134. *Duval Cnty. Sch. Bd. v. Buchanan ex rel. Cox*, 131 So. 3d 821, 822 (Fla. Dist. Ct. App. 2014) (“Terry—the attacker—had an extensive disciplinary history, including bullying, fighting, disruption of classes, and—shortly before the attack on

simple negligence claim, but a claim connected to the explicit duty of supervision outlined by Florida law.

The legal consequences of scienter-based failures to protect students does not bode well for schools. One judge summarizes it this way: “a school district can be liable where school officials act with such deliberate or reckless indifference to known or reasonably discoverable harm occurring to students as to project a policy practice or custom that condones or encourages the abuse of a student.”¹³⁵

Another judge, in refusing to dismiss a chronic bullying case, pinpoints the proof of the shift toward more rigorous judicial review: the denial of school motions to dismiss student claims, noting, “the question of whether defendants were on notice regarding the potential for bullying, but failed to respond to the threat as a prudent parent would, is close enough to preclude summary judgment.”¹³⁶ In other words, going forward, summary dismissals will be inappropriate because of issues surrounding the effects of restorative justice discipline rules, e.g., whether the knowledge of the bad effects of discipline policies constitute constructive notice to the school. An injured student’s allegations of knowledge preclude dismissal when they link the provisions of the discipline policy to the incident.

When deciding a motion to dismiss or summary judgment courts do not decide if the injured student will ultimately prevail, only whether the student has stated a claim regarding the bad effects of school discipline policy under which he/she may possibly prevail.¹³⁷ This might seem a small thing, but public school districts know firsthand that even

Buchanan—possession of a blade, the latter to be punished by an in-school suspension”).

135. *Elliott v. New Miami Bd. of Educ.*, 799 F. Supp. 818, 823 (S.D. Ohio 1992) (citing William Vallente, *School District and Official Liability for Teacher Sexual Abuse of Students Under 42 U.S.C. § 1983*, 57 W. EDUC. L. REP. 645, 650–51 (1990)).

136. *C.T. v. Valley Stream Union Free Sch. Dist.*, 201 F. Supp. 3d 307, 324 (E.D.N.Y. 2016).

137. It is also important to remember that under Rule 56 of the Federal Rules of Civil Procedure, “summary judgment is proper only ‘if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.’” FED. R. CIV. P. 56. Trial courts must deny summary judgment if “the evidence is such that a reasonable jury could return a verdict for the nonmoving party.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

this small change—surviving the early barrage of motions to dismiss—can have an enormous effect on case outcomes, to say nothing of policy reform.¹³⁸

What is important is that courts now possess the tools to rigorously assess the reasonableness of school disciplinary practices in light of the changes in the underlying laws. The United States District Court in Florida applies this principle when it ruled that a fourteen-year-old female student, who reported bullying and sexual harassment, sufficiently stated a Title IX claim.

In *Doe v. School Board of Miami-Dade County*,¹³⁹ the student alleged that school officials were deliberately indifferent by failing to put her in separate classes from her assailants, hindering her transfer to a new school district, and waiting months before reporting her case to law enforcement. As to knowledge, the court observed that “the Complaint’s allegations support a plausible inference that the Principal and Assistant Principals actually knew of—or at least were willfully blind to—Plaintiff’s unwillingness to participate in the sexual conduct, but that they hoped to be relieved of the burden of having to conduct a full investigation of Jane’s claims and take proper disciplinary and rehabilitative actions.”¹⁴⁰

As to deliberate indifference, the court held that “the allegations support a plausible inference that the school employees buried their heads in the sand, failed to conduct reasonable investigations into Jane’s side of the story.”¹⁴¹ On sovereign immunity the court held that sovereign immunity would not apply if the plaintiff could show that educators did not properly implement the “policies and plans [that] have been made to protect and care for students.”¹⁴² Similarly, in

138. See Adam C. Pritchard & Hillary Sale, *What Counts as Fraud? An Empirical Study of Motions to Dismiss Under the Private Securities Litigation Reform Act*, 2 J. EMPIRICAL LEG. STUD. 125, 128 (2005) (“Cases that are not dismissed on a motion to dismiss or at summary judgment... invariably settle.”); see also Minna J. Kotkin, *Outing Outcomes: An Empirical Study of Confidential Employment Discrimination Settlements*, 64 WASH. & LEE L. REV. 111, 113 (2007) (“[S]ettlement outcomes, which account for 70% of case resolutions, have been rendered invisible because of confidential settlement agreements Why do settlement outcomes matter? For the same reasons that verdicts matter: They affect public perceptions and public policy.”).

139. 403 F. Supp. 3d 1241 (S.D. Fla. 2019)

140. *Id.* at 1258–59.

141. *Id.* at 1260.

142. *Id.* at 1267–68.

Virginia, the United States District Court held that allegations that a school administrators had knowledge of teacher-on-student sexual abuse and yet failed to take action were sufficient to support a state law claim of gross negligence.

In *Graham v. City of Manassas School Board*,¹⁴³ the parents of the students asserted the claim based on evidence that before the teacher was arrested and charged he openly consorted with the students around the school, displayed affection for them, [and that] mothers complained about the relationship . . . and local police had attempted to investigate allegations.¹⁴⁴ The court upheld the claim noting that “after having been informed of concerns about [the teacher’s] behavior, local police attempted to investigate those allegations; although no criminal charges resulted from those efforts, the investigation certainly put Howard on notice that there were reasons to be concerned.”¹⁴⁵

However one judges the success or failure of school discipline reform it is important to consider how it can be improved. There are many reasons why government might perform poorly, but one critical reason is conflicts of interest. Schools are failing in their discipline reform efforts because their institutional and personal interests are often adverse to the students’ right to a safe learning environment.¹⁴⁶ The adversity created by conflicts of interest are an inherent part of the school discipline reform dilemma.

143. 390 F. Supp. 3d 702 (E.D. Va. 2019).

144. *Id.* at 713–14.

145. *Id.* at 714.

146. Criminal law scholars will recognize this language from the formula for ineffective assistance of counsel claims based on a breach of counsel’s duty of loyalty when the lawyer simultaneously represent conflicting interests. *See, e.g.*, *Glasser v. United States*, 315 U.S. 60, 65 (1942); *Holloway v. Arkansas*, 435 U.S. 475, 478 (1978); *Cuyler v. Sullivan*, 446 U.S. 335, 345–48 (1980). What is important here is that this standard works against school officials who unreasonably elevate the interests of perpetrators over those of present and potential victims. *See* Charlie Gerstein, *Dependent Counsel*, 16 *STAN. J. CIV. RTS. & CIV. LIBERTIES* 147, 174–75 (2020) (“[T]he Sixth Amendment conflict-of-interest doctrine in cases [hold] . . . that the assistance of counsel’ guaranteed by the Sixth Amendment . . . gives rise to a trial court’s duty to inquire into the possibility of a conflict where a single attorney is representing codefendants or where it is otherwise reasonable to suspect that conflicting interests might arise, and to insist on separate representation of defendants with conflicting interests wherever the court knows or should know of the existence of an actual conflict.”).

Conflicts of interest matter in school safety especially when schools implement their discipline reforms without resolving the conflicting interests. Unable to protect the victim or address the needs of the accused student, schools attempt to “serve two masters” by favoring outcomes that protect the institution under the pretense of restorative justice. Systemic failures to report incidents should be understood as furthering the school’s interest to have the campus appear safe. The educator’s own interests are at stake as well, shedding light on how the investigation of incidents that cannot be concealed are often resolved with an official finding that, in fact, nothing took place.

Conflicts of interest in education compromise decision-making, and they can do so in a number of ways. The risk of harm in which student are placed is obvious in some situations and more implicit in others. For example, funding limitations are an obvious constraint;¹⁴⁷ lack of time to complete the necessary training is more implicit.¹⁴⁸ So too are the failure of schools to provide an adequate support and assessments structure for ongoing implementation.¹⁴⁹ One type traditionally and more effectively dealt with by law is a direct conflict with a ministerial obligation.

Two common examples are the teacher who witnesses but fails to report an incident of child abuse and the administrator who fails to

147. See Lauren Brauer, *Legislative Update: Zero Tolerance to Zero Suspensions—An Analysis of LAUSD’s New Discipline Policy*, 36 CHILD. LEGAL RTS. J. 141, 143–44 (2016) (“LAUSD has plans to create restorative justice circles, and refer students with behavior issues to services. However, these plans are problematic because of the severe lack of adequate funding to execute them.”); Cara Suvall, *Restorative Justice in Schools: Learning from Jena High School*, 44 HARV. CIV. RTS.–CIV. LIBERTIES L. REV. 547, 569 (2009) (“Without supplemental sources of funding, it is unlikely that schools will have the financial resources to develop their restorative justice programs, given the existing pressure on schools’ budgets and personnel resources.”).

148. See, e.g., Eric Westervelt, *An Alternative to Suspension and Expulsion: ‘Circle Up!’*, NPR (Dec. 17, 2014, 3:42 AM), <http://www.npr.org/sections/ed/2014/12/17/347383068/an-alternative-to-suspension-and-expulsion-circle-up> (describing a school attempting to implement restorative justice failed without teacher buy-in and proper training).

149. See, e.g., Teresa Watanabe & Howard Blume, *Why Some LAUSD Teachers Are Balking at a New Approach to Discipline Problems*, L.A. TIMES (Nov. 7, 2015), <http://www.latimes.com/local/education/la-me-school-discipline-20151108-story.html>.

signal the alarm when a crime is committed on campus. These types of acts, already prohibited, are difficult to conceal and easy to discourage. But the other type of conflict is notoriously difficult to address because it has both institutional and personal dimensions. Unable to protect the victim or address the needs of the accused student, schools attempt to “serve two masters” by favoring outcomes that protect the institution under the pretense of restorative justice. Blue-slipping (the failure to accurately record and report suspensions) should be understood as furthering the school’s interest to have the campus appear successful in the metric that holds sway in many districts. The educator’s own interests are at stake as well, shedding light why investigations of the incident are concealed or misrepresented.

Other difficult conflicts are more a matter of bias or perspective. The best example involves disciplinary outcomes laden with issues of race, gender, and sexual orientation. Educators care about the quality of the learning environment but also have developed a personal and institutional self-interest in avoiding the mere accusation of bias, discrimination, or racism. In other words, bias response protocols are effectively manipulating the scope and direction of school discipline reform.

The study by Lauren Sartain, Elaine M. Allensworth, and Shanette Porter, of discipline reform in the Chicago Public Schools concluded that disparities in suspension rates by students’ race and ethnicity were driven, not by bias, but by uneven distribution of students across different schools in the district and the uneven allocation of resources and support personnel “to mitigate negative effects on classroom climate when potentially disruptive students are in school longer.”¹⁵⁰ They conclude that “we see that in schools with very high suspension rates, a greater use of restorative practices to accompany suspensions is actually associated with worse school climate.”¹⁵¹

There is substantial racial segregation across schools:
Most schools either serve student bodies that are over 90
percent African American, or under 20 percent African
American. There is also sorting of students based on

150. LAUREN SARTAIN ET AL., UNIV. OF CHI. CONSORTIUM ON CHI. SCH. RSCH., *SUSPENDING CHICAGO’S STUDENTS* 55 (2015), <https://consortium.uchicago.edu/sites/default/files/2018-10/Suspending%20Chicagos%20Students.pdf>.

151. *Id.* at 54.

neighborhood poverty and incoming achievement levels. Segregation on multiple dimensions is exacerbated at the high school level where there are more options for higher-achieving students, with neighborhood schools in high-poverty areas of the city sometimes seen as a last resort for students who could not get into higher-performing schools. This means that schools across the district face very different challenges. Schools with high concentrations of poor, low-achieving African American students often rely heavily on suspensions and even arrests, while schools that serve more advantaged student populations have fewer behavioral and safety issues to address. Because schools serve such different students, what works in one school to reduce suspensions may not work in another.¹⁵²

Josh Kinsler's 2013 study on the relationship between school discipline, student behavior, and achievement,¹⁵³ also found that in more segregated counties, "[B]lack students [were] more likely to be exposed to harsh discipline since the proportion of minority students is higher in these counties."¹⁵⁴ Even so, Kinsler's data revealed that "integrating schools can close [and in one county did eliminate] both the discipline and achievement gaps."¹⁵⁵ Moreover Kinsler's research suggests that "discipline may affect achievement positively through its effect on student behavior."¹⁵⁶

The most important conclusion of his research was to highlight the shortcomings of chasing the race/discipline gap through a strict rule of suspension reduction.¹⁵⁷ Kinsler concludes that "a superintendent

152. *Id.*

153. Kinsler, *supra* note 77, at 355–56.

154. *Id.* at 361.

155. *Id.* at 355.

156. *Id.* at 373 ("Longer suspensions reduce poor behavior in school.").

157. *Id.* at 382 ("It is widely believed that suspensions harm performance and that minority students are often targeted for lengthy suspensions. Proponents argue that suspensions, and discipline more generally, are necessary in order to maintain a healthy learning environment. In this article, I estimate a simple model of school discipline, student behavior, and student achievement that encompasses these varying viewpoints. I find that the threat of suspension deters students from ever committing an infraction, particularly those students who pose the greatest risk for poor behavior.

seeking to close the discipline gap between White and Black students will not want to rely on a simple rule-based policy since any public relations gain in terms of discipline will likely be swamped by the criticisms surrounding the growing achievement gap.”¹⁵⁸

Talcott Franklin, Dennis C. Taylor, and Ann Beytagh, in their study on conflicts of interest in higher education, argue that internal conflicts produce “clouded judgment” that “prevent the kind of clear-headed thinking required to ameliorate this significant problem.”¹⁵⁹ The result is a “blind spot” when creating and implementing reform.¹⁶⁰ Their research shows these blind spots can lead educators to ignore research and to fail to comply with their own internal policies. This suggests that educators who believe that suspensions harm performance and that minority students are unfairly targeted for lengthy suspensions in K–12 schools may compromise restorative justice reforms in favor of their own solutions.

The process of strategy selection illustrates how schools stumble into conflicts of interest that manipulate the scope and direction of school discipline reform. Successful strategy selection and implementation of restorative theory requires all policymakers to transcend three challenges. The first challenge involves translating restorative theory into a pragmatic language to empower policy formation. This is necessary because “[t]here is no definition of restorative justice that everyone agrees with.”¹⁶¹ Restorative justice is not substantive policy.¹⁶²

Losing classroom time as a result of suspension has a small negative impact on the performance, whereas exposure to disruptive behavior significantly reduces achievement.”).

158. *Id.* at 379.

159. Talcott J. Franklin et al., *Addressing Conflicts of Interest in the Context of Campus Sexual Violence*, 1 B.Y.U. EDUC. & L.J. 1, 56 (2017).

160. *Id.* at 53 (“[A]s a result of the blind spot created by conflicts of interest, higher education institutions fail to heed their own research.”).

161. VAN WORMER ET AL., *RESTORATIVE JUSTICE TODAY: PRACTICAL APPLICATIONS* 8 (2013).

162. See Mark S. Umbreit et al., *Restorative Justice: An Empirically Grounded Movement Facing Many Opportunities and Pitfalls*, 8 CARDOZO J. CONFLICT RESOL. 511, 518 (2007) (“Restorative justice is not a list of specific programs or a clear blueprint for systemic change. It requires a radically different way of viewing, understanding, and responding to the presence of crime within our communities.”).

It is accurately referred to as “meta-strategy”¹⁶³ – a theory that makes more effective substantive policies designed to emphasize “the marginalization of punishment,”¹⁶⁴ or repairing the harm to the victim.¹⁶⁵ Generically, restorative justice is “a process of bringing together the individuals who have been affected by an offense and having them agree on how to repair the harm,”¹⁶⁶ although this is not accurate for “partial restorative practices.”¹⁶⁷ Erik Luna’s research on strategy selection explains that translation of restorative theory is animated by the goal of “collectively reach[ing] agreement on a “penalty” or “restorative justice sanction.”¹⁶⁸

163. HOWARD ZEHR, *THE LITTLE BOOK OF RESTORATIVE JUSTICE* 3 (2002) (“[R]estorative justice’ encompasses a variety of programs and practices, at its core it is a set of principles, a philosophy, an alternate set of ‘guiding questions.’ Ultimately restorative justice provides an alternative framework for thinking about wrongdoing.”).

164. John Braithwaite, *A Future Where Punishment Is Marginalized: Realistic or Utopian?*, 46 *UCLA L. Rev.* 1727, 1728 (1999) (“[R]estorative justice is one promising alternative for a future in which punishment is marginalized.”).

165. See Jan Peter Dembinski, *Restorative Justice in Vermont: Part Two*, 30 *VT. B.J.* 49 (2004) (“The Senate Institutions Committee, chaired by Senator Vincent Illuzzi, crafted the actual wording of the policy. According to Senator Illuzzi, legislators had expressed a growing concern that victims were not being represented very well in the criminal justice system. Enacting the restorative justice policy was one of the ways the legislature ensured that victims’ needs were given the attention they deserved.”).

166. ZEHR, *supra* note 163; see also Tina S. Ikpa, Note, *Balancing Restorative Justice Principles and Due Process Rights in Order to Reform the Criminal Justice System*, 24 *WASH. U. J.L. & POL’Y* 301, 310 (2007) (“Restorative justice is a process to involve, to the extent possible, those who have a stake in a specific offense and to collectively identify and address harms, needs, and obligations, in order to heal and put things as right as possible.”).

167. See WORMER, *supra* note 161, at 36 (“There are ranges of restorative justice practices, from “fully restorative” to “mostly restorative” to “partially restorative.” The main criterion for determining where a particular practice fits in the restorative gauge is based on who participates in the process. A fully restorative practice includes the participation of all direct stakeholders: the victim, the offender, their families and friends. A restorative practice with only the victim or offender is a “partially restorative” practice. For reconciliation purposes, a partially restorative practice is not as ideal as a fully restorative practice, but still offers important benefits.”).

168. Erik Luna, *Punishment Theory, Holism, and the Procedural Conception of Restorative Justice*, 2003 *UTAH L. REV.* 205, 228.

When restorative justice theory is lost in translation, the primary symptoms are confusion and timidity in implementation.¹⁶⁹ Inside education, research shows that schools, “do a poor job of translating restorative philosophy into actionable policy.”¹⁷⁰

According to one study of school implementation, “those who reported not understanding restorative practices, also reported using them more than half a standard deviation less frequently. Those who reported knowing more than some of the elements reported significantly higher use.”¹⁷¹ Another study confirms these symptoms, finding that elementary school teachers wanted “more conceptual information to ground their understanding and sense of mastery.”¹⁷² The researchers concluded that organizational change within schools is reliant on a pragmatic language “because it guides the journey of implementation, including the development of implementation objectives . . . [allowing teachers to more clearly see the fit] between the school’s existing vision and [restorative practices].”¹⁷³ Even so, outside of education, restorative theory is efficaciously translated through models that “depend on well-defined variables,”¹⁷⁴ that “highlights the importance of more fully understanding the mechanisms at work within them.”¹⁷⁵ Therefore, the fate of successful school discipline reform is not beyond the reach of schools to create or identify a lexicon for enabling effectual reforms.

169. See CATHERIN H. AUGUSTINE ET AL., CAN RESTORATIVE PRACTICES IMPROVE SCHOOL CLIMATE AND CURB SUSPENSIONS? AN EVALUATION OF THE IMPACT OF RESTORATIVE PRACTICES IN A MID-SIZED URBAN SCHOOL DISTRICT 42 (2018), https://www.rand.org/pubs/research_reports/RR2840.html.

170. Nussbaum, *supra* note 5, at 614.

171. *Id.* at 42.

172. MARILYN ARMOUR & JELENA TODIC, UNIV. OF TX. AT AUSTIN SCH. OF SOC. WORK, RESTORATIVE PRACTICES AT A CHARTER K–3 ELEMENTARY SCHOOL (2016), <https://irjrd.org/wp-content/uploads/2016/01/FINAL-Restorative-Practices-at-an-Elementary-Charter-School-in-the-South-.pdf>.

173. *Id.* at 39.

174. Alana Saulnier & Diane Sivasubramaniam, *Restorative Justice: Underlying Mechanisms and Future Directions*, 18 NEW CRIM. L. REV. 510, 514 (2015) (“[I]ncluding positive victim and offender evaluations, offender reintegration and reduced recidivism, and public perceptions of appropriate justice.”).

175. *Id.*

B. Characteristics of Discipline Reform that Increase the Risk of Liability for Educators

The second challenge is closely connected to the first. Because of the popular reception and rapid proliferation of restorative justice theory, it is now fashionable to use “restorative justice” to refer to a broad and distorted range of concepts under the guise of repairing the harm, restoring victims, addressing sanction concerns together, etc.¹⁷⁶ Researchers warn that “[restorative justice] cannot merely be grafted onto whatever theory, practice, agenda, or intervention one wishes. This would render the term . . . nothing more than a signifier of good or moral intentions, in short, a buzzword.”¹⁷⁷

The study by Annalise Buth and Lynn Cohn describe this tendency as “resulting in a nonlinear evolution [in which] [e]very practice, including family group conferencing, peacemaking circles, and victim-offender dialogue, has its own distinctive history.”¹⁷⁸ Bluth and Cohn conclude that “under the inevitable pressures of working in the real world, restorative justice has sometimes been subtly co-opted or diverted from its principles in good faith but with unintended negative consequences.”¹⁷⁹

Howard Zehr identifies five prominent misconceptions about forgiveness, mediation, wrongdoing, recidivism, and program implementation that account for the diversion of core principles and objectives.¹⁸⁰ The problems that arise when restorative justice is subverted

176. See Buth & Cohn, *supra* note 5, at 2 (“Defining ‘restorative justice’ is challenging because of differing and overlapping theoretical foundations and conceptions. While the diversity contributes to a dynamic and evolving concept, it also creates a level of confusion and conflict.”).

177. Joseph Robinson & Jennifer Hudson, *Restorative Justice: A Typology and Critical Appraisal*, 23 WILLAMETTE J. INT’L L. & DISP. RESOL. 335, 365 (2016).

178. *Id.* at 2–3.

179. *Id.*; see also ZEHR, *supra* note 163, at 4.

180. ZEHR, *supra* note 163, at 6–9. (“1. Restorative justice is not primarily about forgiveness or reconciliation. Reconciliation is the prerogative of the victim, as is forgiveness. Offenders are usually required to complete their punishment even if forgiven. 2. Restorative justice is not mediation. An encounter is not always chosen or appropriate. No meeting between a victim and the offender is appropriate unless the parties are assumed to be on a level moral playing field, often with responsibilities that may need to be shared on all sides as a result of the incident. 3. [T]o participate in most restorative justice encounters, a wrongdoer must admit to some level of

outside its theoretical ambit include “tensions and indeed some outright contradictions.”¹⁸¹ The research by Kathleen Daly found that officials who misappropriate restorative theory tend to promise more than they can deliver, “inflat[ing] expectations of what restorative justice can achieve.”¹⁸² Daly concludes that the term should be restricted “not to limit the potential applicability of [restorative justice] to other domains or as a political project for social change but rather to conceptualize justice practices in concrete terms, not as aspirations or values.”¹⁸³

Outside education, the solution to this dilemma has been to keep the main thing the main thing. James Coben’s and Penelope Harley’s study of the criminal justice system defines this as “the recognition that the traditional justice system leaves the needs of victim and offender unmet and the wounds of both unhealed. Victims need the chance to speak about the trauma they have experienced. The fact that the victim is not at the center of the traditional justice system creates yet more suffering. In turn, many offenders suffer from a poor sense of self-

responsibility for the offense, and an important component of such programs is to name and acknowledge the wrongdoing. The neutral language of mediation may be misleading and even offensive in such cases. 4. Restorative justice is not primarily designed to reduce recidivism. Reduced recidivism is an expected byproduct, but restorative justice is done first of all because it is the right thing to do: victims’ needs should be addressed, offenders should be encouraged to take responsibility, those affected by an offense should be involved in the process, regardless of whether offenders “get it” and reduce their offending. 5. Restorative justice is not a particular program or a blueprint. Restorative justice is not a map but the principles of restorative justice can be seen as a compass pointing in a direction. At minimum, restorative justice is an invitation for dialogue and exploration in the context of victim-offender encounters.”).

181. See Robinson & Hudson, *supra* note 177, at 364. (“We argue that these are especially acute perhaps because the rapid institutionalization of [restorative justice] practice has outstripped and outpaced the development of coherent and cohesive theorizing and allowed multiple strands of theory and practice to shelter uneasily under the same conceptual umbrella.”).

182. See Kathleen Daly, *The Limits of Restorative Justice*, in HANDBOOK OF RESTORATIVE JUSTICE: A GLOBAL PERSPECTIVE 134, 137 (Dennis Sullivan & Larry Tiff eds., 2006) (“Advocates have made astonishing claims for what restorative justice can achieve and what it can do for victims, offenders, their family members, and communities. Thus, a gap arises, in part from inflated expectations of what restorative justice can achieve.”).

183. *Id.* at 35.

worth, and time in prison can compound a sense of lack of personal power and worth.”¹⁸⁴

The 2013 study of successful reforms in the criminal justice system by Hadar Dancig-Rosenberg, Tali Gal found that “[t]he alliance between victims and community members that is created through restorative processes produces greater satisfaction and trust, consequently increasing the percentages of reported new crimes. The rise in the reporting rates increases the risk of being caught and hence the reluctance of potential offenders to commit offenses.”¹⁸⁵

A more recent evaluation by Sari Kanner, Dana Rosen, Yosef Zohar, and Michal Alberstein found restorative theory poised to be “applied as an inherent part of the main door to the criminal process—the preliminary hearing and the promotion of plea bargains.”¹⁸⁶ Their study confirmed the importance of steadfast adherence to restorative theory in reform implementation, concluding that “the principles of conflict resolution and the application of restorative practices, as opposed to restorative justice in its full sense, are relevant to conducting most of the judicial proceedings employed today.”¹⁸⁷

In education, misconceptions and subversions of restorative theory account for a dramatic shift in the focus of discipline reform away from student safety causing “considerable confusion and poor practices.”¹⁸⁸ Lydia Nussbaum’s study found that educators “focus on either preventative practices or responsive practices, not both, therefore adding to the confusion about whether restorative justice is a preventative, classroom management technique or a disciplinary diversion.”¹⁸⁹ Nussbaum concludes that “this general ambiguity problem is further compounded by the fact that, in just the educational setting alone,

184. James Coben & Penelope Harley, *Intentional Conversations About Restorative Justice, Mediation and the Practice of Law*, 25 *HAMLIN J. PUB. L. & POL’Y* 235, 246 (2004); see also Howard J. Vogel, *Healing the Trauma of America’s Past: Restorative Justice, Honest Patriotism, and the Legacy of Ethnic Cleansing*, 55 *BUFFALO L. REV.* 981, 1011 (2007).

185. Dancig-Rosenberg & Gal, *supra* note 42, at 2327–28.

186. Sari Luz Kanner et. al., *Managerial Judicial Conflict Resolution (Jcr) of Plea Bargaining: Shadows of Law and Conflict Resolution*, 22 *NEW CRIM. L. REV.* 494, 502 (2019).

187. *Id.*

188. Nussbaum, *supra* note 5, at 615.

189. *Id.* at 617.

schools interpret restorative justice divergently.¹⁹⁰ As a result, it is not surprising that “those participating in [a restorative justice] process may not know what is supposed to happen, how they are supposed to act, nor what the optimal result should be.”¹⁹¹

The single best example of subversion of restorative theory is the underreported practice of “blue slipping,” in which schools, under pressure to keep suspension rates low, worship the suspension metric by sending disruptive students home informally while failing to record them as suspended.¹⁹² “Blue slipping” violates traditional disciplinary norms just as surely as it violates restorative justice norms and should be understood as subversion. This subversion is controlled from the highest levels through “a directive from the district to lower the suspension rates by . . . not reporting suspensions, not suspending students for serious and disruptive acts and insufficient support personnel assigned to schools to determine and correct the source of the disruptive student behaviors.”¹⁹³

A student in one district “was suspended at least 12 times in the 2016–2017 school year, but only one suspension was officially recorded.”¹⁹⁴ The data for monthly suspensions in that district showed that “students spent a total of 406 days in suspension [for the given month]. Only 15 percent of those were officially recorded.”¹⁹⁵ An unrepentant central administrator in one school district explained that “‘blue slipping,’ doesn’t violate any rules, and can be an effective way

190. *Id.* at 615 (“Reform advocates seeking to institutionalize restorative justice in schools should neither assume that ‘restorative justice,’ on its own, offers a coherent, concise concept or methodology for schools nor that schools will pursue the most promising, whole school approach.”).

191. *See* Daly, *supra* note 182, at 137.

192. The original use of “blue slipping” is to let parents know when a student missed an assignment. The blue slip includes a request to the parents to encourage their child to keep up with assignments. *See* Mario Koran, *Discipline Policies Complicate Response to Violent Episodes at Lincoln High*, VOICE OF SAN DIEGO (Mar. 28, 2018), <https://www.voiceofsandiego.org/topics/education/discipline-policies-complicate-response-to-violent-episodes-at-lincoln-high/>.

193. *See* Rey, *supra* note 25.

194. Alexandro Matos & Emma Brown, *Some D.C. High Schools Are Reporting Only a Fraction of Suspensions*, WASH. POST (July 17, 2017), https://www.washingtonpost.com/local/education/some-dc-high-schools-reported-only-a-small-fraction-of-suspensions/2017/07/17/045c387e-5762-11e7-ba90-f5875b7d1876_story.html.

195. *Id.*

to diffuse a tense situation.”¹⁹⁶ However, the investigation into the practice in that district found that “sending students home appears nowhere on the district’s Uniform Discipline Plan.”¹⁹⁷ “Blue slipping” is a particular temptation for schools that experience an increase in suspensions when beginning to implement restorative justice discipline reforms.¹⁹⁸

A teacher in an urban school district responded to a survey on discipline reform by noting that students were being suspended for teacher assaults “for one day and then they are sent back to class. All of this is being done in the name of statistical improvement and at the expense of teachers’ and students’ wellness.”¹⁹⁹ By worshipping the suspension metric, the school slips backward into deception and ultimately into deliberate indifference to student safety, “put[ting] into question the accuracy of the school’s—and potentially the district’s—suspension rates,”²⁰⁰ and pipeline into the juvenile justice system it so keenly wishes to avoid.²⁰¹ One study warns that “[i]n the absence of a

196. Mario Koran, *The Learning Curve: ‘Restorative Justice’ Can Make Schools More Violent If Not Done Right*, VOICE OF SAN DIEGO (Mar. 29, 2018), <https://www.voiceofsandiego.org/topics/education/the-learning-curve-restorative-justice-can-make-schools-more-violent-if-not-done-right/>.

197. *Id.*

198. Erica L. Green, *Baltimore Suspending Many More Students from School*, BALT. SUN (Nov. 15, 2016), <http://www.baltimoresun.com/news/maryland/education/bs-md-ci-school-suspension-increase-20161031-story.html> (finding that suspensions went up twenty-five percent).

199. Nicole Gorman, *Teachers Report Poor Training Following District’s New Behavior Plan to Reduce Student Suspensions*, EDUC. WORLD (July 18, 2016), https://www.educationworld.com/a_news/teachers-report-poor-training-following-district%E2%80%99s-new-behavior-plan-reduce-student (citing Eric Weddle, *Survey: IPS Teachers Undertrained in New Behavior Policy*, WFYI INDIANAPOLIS (July 17, 2016), <https://www.wfyi.org/news/articles/survey-ips-teachers-undertrained-behavior-policy>).

200. *Id.*

201. This is one explanation for the disjunction experienced by the Madison School District in Wisconsin where suspensions decreased but racial disparity increased when reforming discipline policies. Since its Behavior Education Plan went into effect for the 2014–2015 school year, out-of-school suspensions across the school district dropped thirty-two percent, but the racial disproportionality of suspensions actually increased, calling into question the suspension metric. See Pat Schneider, *Bad Behavior: Critics Say Kids Get Away with Too Much Under Madison School District’s New Policy*, WIS. STATE J. (July 1, 2015),

well-defined protocol within schools, along with adequate supports and resources, police and other ‘external’ options would be the default response.”²⁰²

The third challenge complicating restorative justice theory conversion centers on organizational behavior when officials attempt to transplant a model of restorative justice that fails to address the issues that brought about the need for the reform in the first place.²⁰³ “One size fits all” transplantation,²⁰⁴ typically results in an ineffective mutation of the imported model.²⁰⁵ Policy reform necessarily affects lives, habits, and relationships that cannot be automatically altered such that organizational reforms are “unlikely to be successful unless they take into account local context.”²⁰⁶

https://madison.com/news/local/education/bad-behavior-critics-say-kids-get-away-with-too-much/article_2232b13a-1f55-11e5-b02d-7b8d5358976a.html. Significantly, the Behavior Education Plan being implemented was controlled solely by the suspensions metric. See *Behavior Education Plan*, MADISON METRO. SCH. DIST., <https://support.madison.k12.wi.us/bep> (last visited May 18, 2021).

202. APRIL K. LEWIS ET AL., U.S. DEP’T OF JUST. OFF. OF JUST. PROGRAMS, PROMOTING SCHOOL SAFETY: A COMPREHENSIVE EMOTIONAL AND BEHAVIORAL HEALTH MODEL 1 (2019), <https://www.ncjrs.gov/pdffiles1/nij/252849.pdf>.

203. See AUGUSTINE ET AL., *supra* note 169, at 43 (“Measuring fidelity in education interventions works best when the intervention has a strong research base and the delivery of the intervention can be standardized. It is more complex when, as is the case here, the intervention requires culture and behavior change in the setting in which it is implemented.”).

204. See Daniel Berkowitz et al., *The Transplant Effect*, 51 AM. J. COMP. L. 163, 168 (2003) (“[I]f the law was not adapted to local conditions, or if it was imposed via colonization and the population within the transplant was not familiar with the law, then we would expect that initial demand for using these laws to be weak. Legal intermediaries would have a more difficult time developing the law to match the demand.”).

205. This is called the “transplant effect.” See *id.* at 175 (“A legal order [that] function[s] less effectively than origins or transplants that either adapted the law to local conditions and/or had a population that was familiar with the transplanted law.”). For background on legal transplant concepts, see generally William Ewald, *Comparative Justice (II): The Logic of Legal Transplants*, 43 AM. J. COMP. L. 489 (1995); Jonathan M. Miller, *A Typology of Legal Transplants: Using Sociology, Legal History and Argentine Examples to Explain the Transplant Process*, 51 AM. J. COMP. L. 839 (2003).

206. Gil Lan, *American Legal Realism Goes to China: The China Puzzle and Law Reform*, 51 AM. BUS. L.J. 365, 390 (2014); see also Mariana Prado & Michael Trebilcock, *Path Dependence, Development, and the Dynamics of Institutional*

Pierre Legrand, in his critique on legal change, argues that “one size fits all” prescriptions of legal reform cannot occur across jurisdictions because the meaning and significance of law is specific to the community that interprets it.²⁰⁷ The research by Daniel Berkowitz, Katharina Pistor, and Jean-Francois Richard concludes, “change of norms requires the change of minds, not only among subordinate personnel, but also and foremost among agency heads.”²⁰⁸ They also argue that “for the law to be effective, it must be meaningful in the context in which it is applied so citizens have an incentive to use the law and to demand institutions that work to enforce and develop the law.”²⁰⁹ But “one size fits all” policymaking persists because “[p]olitically it is easier to send money to . . . agencies without asking them to find out what works. [But] that episodic approach is a mistake.”²¹⁰

In the school context, RAND Corporation researchers found that the most effective means of implementation and supervision of restorative justice methods, therefore, is through an adaptive approach that allows officials to continually analyze the new policies after they are implemented in a continuous learning process of potential unintended consequences.

The RAND study nearly half of the educators surveyed attributed frustration in implementing discipline reforms to the misfit between the general focus of the reforms and specific campus needs. One

Reform, 59 U. TORONTO L.J. 341, 354 (2009) (“[A]t the individual level, the institutional structure inherited from the past may reflect a set of beliefs that are impervious to change, either because the proposed changes run counter to that belief system or because the proposed alteration in institutions threatens the leaders and entrepreneurs of existing organizations.”).

207. See Pierre Legrand, *The Impossibility of ‘Legal Transplants,’* 4 MAASTRICHT J. EUR. & COMP. L. 111, 118 (1997) (“Meaning simply does not lend itself to transplantation. There always remains an irreducible element of autochthony constraining the epistemological receptivity to the incorporation of a rule from another jurisdiction, therefore limiting the possibility of effective legal transplantation itself.”).

208. Berkowitz et al., *supra* note 204, at 167–68 (“Our basic argument is that for law to be effective, a demand for law must exist so that the law on the books will actually be used in practice and legal intermediaries responsible for developing the law are responsive to this demand.”).

209. See *id.* at 167.

210. James Q. Wilson, *Crime and Public Policy*, in *CRIME AND PUBLIC POLICY* 619, 629 (James Q. Wilson & Petersilia, eds. 2011).

educator lamented that the polices, “did not address [disruptive] students at all, rather it fails them entirely.”²¹¹

This sentiment is reflected in the internal criticisms of school-based restorative justice programs in districts where it is installed as a “one size fits all” panacea.²¹² In the Los Angeles Unified School District, educators complained that school discipline reform was being “pushed through by the Board of Education” without proper fitting.²¹³ One educator opined, “[i]t’s called the devil in the details. Sometimes it means stopping what you’re doing and then do it right in a few places, and then do it right everywhere.”²¹⁴ In the Chicago City schools the complaint was that “[i]t’s being implemented in a hodgepodge fashion.”²¹⁵ Another educator observed that the problem was that the reforms were being implemented “in the holistic method that the Student Code of Conduct mandates. . . . It’s a great idea, but it was really irresponsibly put in place.”²¹⁶ In the Buffalo City schools the misfit surfaced in complaints that “[i]t is also but a small part of ensuring a decrease in disruptive student behavior and not a solution to the more serious acts of disruptive student behavior.”²¹⁷

The failure of schools to more effectively convert restorative justice theory into practice cannot be due to school-based culture and traditions being particularly unsuitable to restorative justice processes. This attempt to apply a form of oppositional culture theory fails for lack of empirical support and common sense.²¹⁸ Neither the dynamics of

211. *Id.*

212. *See* Perez, *supra* note 7 (“Teachers at a West Town school say a revised student discipline code that scales back suspensions and expulsions has left them struggling to deal with unruly students ‘Here’s the problem,’ said Michael Brunson, the Chicago Teachers Union recording secretary. ‘It’s difficult to go from a zero-tolerance mentality to a restorative justice mentality, because it’s a whole different way of looking at things. To really do restorative justice, there have to be certain things in place.’”).

213. *See* Watanabe & Blume, *supra* note 149.

214. *Id.*

215. *See* Perez, *supra* note 7.

216. *Id.*

217. *See* Rey, *supra* note 25.

218. In academia, oppositional culture theory describes the social science debate concerning Black families’ values toward education. One side of the theory posits that upwardly mobile Black families are cynical toward education because of their belief that implicit and overt discrimination diminishes the value of their education

collective problem-solving nor other restorative justice processes impose anything with which schools are unfamiliar. Indeed, at the outset, the significant internal criticism of restorative justice policies was introduced with the observation that “the extent to which there is widespread internal criticism of the effects of school-based restorative justice is remarkable, and more and more of this criticism is being made public.”²¹⁹ There it was established that “teachers’ first concern is an increase in violence in schools”²²⁰ then the propensity of the violence to manifest as abusive behavior toward instructors and support personnel,²²¹ and finally its capacity to compromise the learning environment.²²² Granted that these are all somewhat ad hoc. They are nonetheless important because they represent what is actually happening.

To what standard were these educators basing their assessments? From what experiences were they able to determine that the anti-zero-tolerance policies were failing to protect the learning environment? In other words, what justified their dismissive attitude to the

compared to White people. This, according to the theory has a downward effect on the prospects of their children measurable in negative personal expectations and peer rejection. See Erin McNamara Horvat & Kristine S. Lewis, *Reassessing the “Burden of ‘Acting White’”: The Importance of Peer Groups in Managing Academic Success*, 76 SOC. EDUC. 265, 265 (2003). The opposing side of the theory argues that this assumption fails under closer empirical scrutiny that shows increasing support for academic achievement within peer groups without regard for race. See James W. Ainsworth-Darnell & Douglas B. Downey, *Assessing the Oppositional Culture Explanation for Racial/Ethnic Differences in School Performance*, 63 AM. SOC. REV. 536, 537 (1998) (finding that the key assumptions of the oppositional culture theory fail when “systematically compar[ing] the perceptions of occupational opportunity and resistance to school access” across several racial groups).

219. See Bernard James, *Restorative Justice Liability: School Discipline Reform and the Right to Safe Schools* (pt. 1), 51 MEM. L. REV. 557, 570–71 (2021); see also Opinion, *Actions To Quell School Fights Welcomed*, STAR PRESS (Dec. 5, 2015), <https://www.thestarpress.com/story/opinion/editorials/2015/12/05/actions-quell-school-fights-welcomed/76792238/> (“The school board decided to change the student handbook at the request of administrators to make fighting “more consequential” for students.”); Justin Murphy, *Bolgen Vargas, Adam Urbanski Clash on School Violence*, DEMOCRAT & CHRONICLE (Nov. 18, 2015), <https://www.democratandchronicle.com/story/news/2015/11/18/vargas-rta-rcsd-urbanski/75983254/> (“The teachers’ first concern is an increase in violence in schools. The union reports that assaults on teachers have risen precipitously, in part as a result of changes in discipline policies.”).

220. See Murphy, *supra* note 219.

221. *Id.*

222. *Id.*

replacement policies? Nothing seems more self-evident than the fact that educators have a history with the themes, goals, and objectives of restorative justice. The processes of restorative justice are recognizable to these educators, indeed to generations of school officials who prior to zero tolerance, put to effective use versions of victim-offender mediation,²²³ family group conferencing,²²⁴ and the circle approach,²²⁵ long before anyone knew enough to formalize the vocabulary.²²⁶

223. Victim-offender mediation, “involve[s] a meeting between the victim and offender facilitated by a trained mediator. With the assistance of the mediator, the victim and offender begin to resolve the conflict and to construct their own approach to achieving justice in the face of their particular crime.” See Christopher Bright, *Victim Offender Mediation*, CTR. FOR JUST. & RECONCILIATION, <http://restorativejustice.org/restorative-justice/about-restorative-justice/tutorial-intro-to-restorative-justice/lesson-3-programs/victim-offender-mediation/>. Lynn Branham’s statutory analysis on restorative practices concludes that “victim-offender mediation fails to meet the parameters of being fully restorative when, as often happens, participants are confined to the person who caused the harm, the victim, and the mediator, with others (the ‘community’) absent who could lend perspective about the harm the crime caused and how it can best be remediated.” Lynn S. Branham, “*Stealing Conflicts? No More?: The Gaps and Anti-Restorative Elements in States’ Restorative-Justice Laws*,” 64 ST. LOUIS U. L.J. 145, 160 (2020).

224. “Family group conferencing (FGC) is similar to [victim-offender mediation], but . . . involves a broader group of people—such as family, friends, coworkers, and teachers—to resolve the criminal incident.” Mary Ellen Reimund, *The Law and Restorative Justice: Friend or Foe? A Systemic Look at the Legal Issues in Restorative Justice*, 53 DRAKE L. REV. 667, 676 (2005). Reimund says of this method was devised to operate primarily in the juvenile justice setting. *Id.*

225. Circles, often called sentencing circles, were implemented “as an alternative way of sentencing that involves all stakeholders.” KAY PRANIS ET AL., PEACEMAKING CIRCLES: FROM CRIME TO COMMUNITY 21 (2003). Christopher Lee’s study of sentencing circles notes that the circle is “extremely expansive—consisting of all interested parties such as the victim, the offender, their supportive friends and family members, and even interested community members. . . . The final decision is made by a consensus of the entire circle ensuring that “every participant has a stake in the circle’s success. If a decision cannot be made, as with other restorative justice processes, the case can be referred to the traditional criminal justice system.” Christopher D. Lee, *They All Laughed at Christopher Columbus When He Said the World Was Round: The Not-So-Radical and Reasonable Need for a Restorative Justice Model Statute*, 30 ST. LOUIS U. PUB. L. REV. 523, 550 (2011).

226. See Judith Kafka, *The History of “Zero Tolerance,”* in AMERICAN PUBLIC SCHOOLING 17, 120 (2011) (Teachers and schools were expected to teach students how to behave. Today, however, the educative purposes of discipline have been eclipsed by a system of punishment.”).

A veteran teacher, writing about the perceived novelty of the reforms, commented that “I’ve been practicing elements of [restorative justice] throughout my 27-year teaching career. When students in my classroom do something disruptive, I chastise the behavior and give them the opportunity to backtrack and apologize. ‘Fix it,’ I say. ‘Make it right.’ Almost without exception, they do.”²²⁷ The teacher then opines on the failure of the anti-zero-tolerance policies reforms. “Restorative justice in many districts has recklessly morphed into *de facto* ‘no student removal’ policies that are every bit as flawed as the inflexible zero-tolerance policies they were designed to replace.”²²⁸

Therefore, the discourse and collective action that dominate restorative justice practices in the child welfare,²²⁹ and the juvenile justice systems,²³⁰ are a staple feature of the education mission, with educators acting collaboratively with students and parent stakeholders for much of the learning that takes place and that is self-evident in the resolution campus incidents.²³¹ The framework of restorative justice does

227. Richard Ullman, *Restorative Justice: The Zero-Tolerance-Policy Overcorrection*, EDUC. WK. (Sept. 13, 2016), <https://www.edweek.org/leadership/opinion-restorative-justice-the-zero-tolerance-policy-overcorrection/2016/09>.

228. *Id.*

229. In child welfare, see examples of collaborative assessments in protecting vulnerable children. See, e.g., Rachel Lugay, *Positive Youth Development Networks: The Community-Based Solution to Juvenile Delinquency and Other Problem Behaviors*, 23 RICH. PUB. INT. L. REV. 355, 373 (2020) (“Positive Youth Development programs and practices are most impactful when a standardized model is implemented in all states. The standardized model should be one that addresses multiple common risk factors by engaging youth in pro-social activities build resiliency to problem behaviors. Community program networks, mandating interconnected community efforts, will ease access into necessary youth and family services.”).

230. In juvenile justice, see a common use of collaborative assessments to determine judicial waiver questions known as the “Kent factors.” See *Kent v. United States*, 383 U.S. 541, 560–62 (1966); see also Amanda NeMoyer, *Kent Revisited: Aligning Judicial Waiver Criteria with More Than Fifty Years of Social Science Research*, 42 VT. L. REV. 441, 477 (2018) (revising the Kent factors to place special emphasis on the current practice of determining “[w]hether assessments identifying both risk factors for future offending and protective factors that reduce the likelihood of future offending suggest that community protection requires waiver. Such assessments should also consider available resources that might provide additional support to the youth and thereby facilitate rehabilitation within the juvenile system”).

231. See Bernard James, *Restorative Justice Liability: School Discipline Reform and the Right to Safe Schools* (pt. 2), 51 MEM. L. REV. 557, 593–99 (2021).

not create the difficulties that prevent schools from acting as protectors of students. One of the early empirical studies of zero-tolerance policies,²³² describes discipline strategy in the pre-zero-tolerance environment, with following observation: “schools tended to involve teachers in disciplinary decisions and tended to perceive disciplinary policy as a “flexible guideline” rather than a “rigid document.”²³³ The research found that these educators were “more likely to report the use of positive reinforcement for positive behaviors as part of a school wide plan, and were also more likely to involve both parents and related services personnel in the formulation of the school wide discipline plan.”²³⁴

Outside of education, officials are producing a body of restorative justice practices that in spite of these challenges, is sufficiently robust to inform a wide variety of applications, including many of the policy, planning, and legal functions surrounding school safety.²³⁵ Inside education, the internal disparagement, reproach, and criticism that restorative justice policies are underperforming is the product of visceral astonishment that something already within the province of education could be so poorly executed.²³⁶

II. CONCLUSION

Policymakers have begun to think and speak about student safety with an attentiveness to detail that once was beyond their notice. In the comprehensive reforms, they agree that school officials should be cloaked in a form of parental authority to their students. However, the cumulative effect of the changes in the underlying laws pertaining to juveniles effectively revise in loco parentis, pairing the authority to

232. Zero Tolerance Task Force Report, *supra* note 3.

233. *Id.* at 44.

234. *Id.*

235. See González, *The Legalization of Restorative Justice: A Fifty-State Empirical Analysis*, 2019 UTAH L. REV. 1027, 1056 (2019) (“[A]n increasing number of states have codified restorative justice within the education system. This legislative trend will likely increase as local school-based restorative justice policies and practices continue to gain momentum. According to the Consortium on Negotiation and Conflict Resolution, in 2017, twenty-two bills were introduced specifically addressing school-based restorative justice. Thus, we may observe a shift away from the current trend, at macro-or micro-levels, of higher association with criminal and juvenile justice processes.”).

236. See Brantley, *supra* note 26, at 90–91.

discipline with a duty to protect in the light of the emerging science on child protection. While the final form and substance of the external reforms will be the subject of considerable debate, a new liability landscape is emerging through substantive and procedural mandates, private rights of action, and exceptions to traditional immunities.

What is important is that these reforms provide tools with which the courts can work. As a result of the changes in the underlying laws courts are less averse to second-guessing decision making that place students at risk. The shift in judicial review is in direct response to the poor implementation of restorative justice policies in public schools in the light of the changes in the underlying laws. Only in form is the template of school-based restorative justice recognizable to the parent theory that emphasizes victim/offender mediation, reconciliation, and rehabilitation through a process graduated discipline. The incongruence of school discipline outcomes and the demands of child safety reforms is producing a narrative in which courts are beginning to recognize that a school can be held liable for failing to act in ways reasonably calculated to end the harassment, particularly when educators have specific notice of the dangerous conduct by a fellow student. In applying this standard to student injury claims, courts deem the failure to comply with mandatory reporting obligations to be reckless conduct that eliminates governmental immunity and defeats claims for dismissal so as to permit thorough discovery of school discipline customs. The shift toward a preference for discovery in student injury cases forces a school facing liability to show that despite the amount of information school-based restorative justice policies cultivates that it lacked sufficient knowledge of the danger such that the incident was not foreseeable or that the event occurred so quickly and spontaneously that it could not be prevented.

Education in the United States is essentially a local matter. Even so, the liability cases currently working their way through the judicial system should concern scholars in child welfare, social anthropology, political science, and civil rights. Local educators may be eager to reform discipline policies, but they face two problems. First, they will continue to experience difficulties keeping their footing on the slippery slope of a liability model in which courts assess the reasonableness of their policies in the light of the emerging science on child protection.

Second, without an integrated view of campus safety that keeps as its central focus the goal of a safe learning environment, discipline

policies animated by philosophies that limit its capacity to resolve patterns of foreseeable disruptions effectively deny equal access to an education for victimized students.