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Preventing Violence in Ohio's Schools

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PREVENTING VIOLENCE IN OHIO'S SCHOOLS

PREVENTING VIOLENCE IN OHIO'S SCHOOLS*

I. INTRODUCTION

Springfield, Oregon, May 21, 1998: A fifteen-year-old student pulls a semiautomatic rifle from his trench coat and begins mercilessly firing into the crowd gathered in the school cafeteria.¹ Two students are dead and twenty-four others are injured.²

Jonesboro, Arkansas, March 24, 1998: Two students in combat gear, ages eleven and thirteen, initiate a massacre as their classmates vacate the building during a false fire alarm.³ Four students and one teacher are dead, and ten others are injured.⁴

* This article was written prior to the events at Columine High School.

¹John Ritter & Marty Kasindorf, *Nobody Took Him Seriously: Oregon Student "Joked" He Would "Get People,"* USA TODAY, May 22, 1998, at 3A. According to witnesses, at one point, Kip Kinkel approached a classmate cowering underneath a table, put a foot on the boy's body, and shot him in the chest. *Id.* As Kinkel stopped to reload his gun after "mowing down students as they dove under tables for cover," he was tackled by a seriously wounded classmate. *Id.* An investigation of Kinkel's house uncovered the bodies of his parents, several hundred rounds of ammunition on the living room floor, homemade explosives, fireworks, and bomb-making books. Maxine Bernstein, *Police Papers Detail Kinkel Findings,* PORTLAND OREGONIAN, Oct. 2, 1998, at A1. Kinkel was indicted on fifty-eight charges, including four counts of aggravated murder and twenty-five counts of attempted aggravated murder. *Id.* See discussion *infra* note 72. A trial date is scheduled for April 6, 1999, and Kinkel will be tried as an adult in regards to the murder charges. *Id.* Although Kinkel had frequently mentioned that it would be fun to kill, Kinkel's friends proclaimed that he was no different than most of his classmates. Ritter & Kasindorf, *supra*. On the day prior to his rampage, Kinkel was arrested and suspended for bringing a stolen firearm to school. *Id.*

²*Suspect in School Shooting Formally Charged,* CHICAGO TRIBUNE, June 17, 1998, at 16.

³Peter Katal, *Arkansas Boys Stole Family Guns,* USA TODAY, Mar. 26, 1998, at 1A. Mitchell Johnson held out chairs for girls, regularly attended church, and sang with a choir at a nursing home. Steve Mills, et al., *Jonesboro Boys Called Angels--And Bullies: Adults Knew Pair as Good Kids; Children Saw a Darker Side,* CHICAGO TRIBUNE, Mar. 29, 1998, at 1. However, Johnson also bullied children to tears, bragged about being a member of a Los Angeles gang, and warned his schoolmates that they would discover who would live and who would die. *Id.* Andrew Golden collected model airplanes and trading cards and was known for his friendliness. *Id.* However, Golden was a bully and often threatened his neighbors while riding his bike. *Id.* On March 25, the boys played hooky from school, loaded Johnson's parents' van with nine handguns and rifles, a crossbow, nine knives, camping gear, and food. *Id.* Johnson and Golden then hid in a grove of trees and waited for their targets. *Id.* The juveniles are serving their sentences at a juvenile detention camp. Carol Morello, *Arkansas Vows to Toughen Laws on Penalizing Young Felons,* USA TODAY, Aug.

West Paducah, Kentucky, December 1, 1997: A fourteen-year-old student ambushes a prayer group meeting at his high school.⁵ Three students are dead, and five others are injured.⁶

These tragic headlines shocked the nation and prompted Americans to rank the safety of children as their most prominent concern.⁷ These headlines also sparked vigorous debates regarding the causes of juvenile violence, in particular, violence in rural communities⁸ and schools.⁹ Access to guns.¹⁰ Poor parenting.¹¹ Television and

13, 1998, at 10A. Pursuant to Arkansas law, unless the state constructs a facility to hold eighteen to twenty-year-old offenders, Johnson and Golden will be released on their eighteenth birthdays. *Id.*

⁴ *Two Arkansas Boys Guilty of Ambush Killings*, CHICAGO TRIBUNE, Aug. 25, 1998, at 3.

⁵ Michael Carneal pleaded guilty, but mentally ill, to charges that included three counts of murder. *School District Chief Says Shooting Spree Wasn't Preventable; Parents of Slain Students File Suit*, THE CINCINNATI ENQUIRER, Dec. 4, 1998, at D1D. His school writing portfolio contained essays that were graphically violent. *Id.* In addition, Carneal proclaimed that he had brought guns to school and showed them to his classmates on two prior occasions. *Teens Sent Signals Before Killings; Paper Examines Talk at Schools*, THE CINCINNATI ENQUIRER, Dec. 7, 1998, at B3. Carneal admitted that a movie he had watched contained a scene that was similar to his killing spree. Mary Powers & Anna Byrd Davis, *Guns, Rural Kids, Rage, the South: Lethal Mix? Cluster of Killings Likely has Many Causes*, THE COMMERCIAL APPEAL, April 5, 1998, at A1. In *The Basketball Diaries*, a high school student dreams about breaking down the door of a classroom and opening fire on his classmates. *Id.*

⁶ *School District Chief Says Shooting Spree Wasn't Preventable*, *supra* note 5, at D1D.

⁷ *Safe at School: Clinton Plays on Fears with No Serious Basis to Profit From Short-Term Federal Largesse*, THE PLAIN DEALER, Oct. 21, 1998, at 8B.

⁸ Juvenile homicides rarely occur in rural areas, and are "still overwhelmingly an inner city phenomenon." Vincent Schiraldi, *Making Sense of Juvenile Homicides in America*, 13-SUM CRIM. JUST. 63, 63 (1998). According to a Justice Policy Institute study, almost one third of all arrests for juvenile homicides in 1995 occurred in either Chicago, Detroit, Los Angeles, or New York city. *Id.* During 1997, 1,800 juvenile homicide arrests were made in urban communities, while ninety-three were made in rural areas. *Id.*

⁹ Powers & Davis, *supra* note 5, at A1 (discussing the views of a child psychiatrist and medical director who compares juvenile crime to a slot machine since children explode when the "right variables surface in the right amounts").

¹⁰ Schiraldi, *supra* note 8, at 63. Between 1984 and 1994, juvenile arrests for homicides with guns quadrupled, yet the rate for homicides committed by other means did not increase. *Id.* According to Schiraldi, these statistics indicate that greater access to guns has created an increase in juvenile violence, because if children in the 1990's were simply more murder-prone, there would be increases in homicides committed with and without guns. *Id.* In Ohio, Governor Taft proposed a "safe storage" law, which would make gun owners legally accountable for safely securing their firearms and ammunition. *Toward Safer Schools*, THE

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movies.¹² Video games.¹³ Music.¹⁴ Violence in the home.¹⁵ Poverty.¹⁶ Drugs.¹⁷ The

CINCINNATI POST, May 27, 1998, at 14A. In addition, Taft supported a law that would make negligent parents subject to criminal sanctions if a student brings a gun to school. *Id.*

¹¹See Linda A. Chapin, *Out of Control? The Uses and Abuses of Parental Liability Laws to Control Juvenile Delinquency in the United States*, 37 SANTA CLARA L. REV. 621, 672 (1997). Chapin examines tort and criminal parental liability laws, and concludes that enactment of these laws is not a particularly effective solution to the problem of juvenile delinquency since children are often beyond their parents' control. *Id.* Although current empirical studies indicate that a child's decision to commit juvenile delinquent acts may be influenced by a parent's actions, this research is not conclusive. *Id.* at 669. Many researchers agree "that a 'bad' parent is not the sole cause of a 'bad' child," and recognize that the relationship between parenting and a child's juvenile delinquent acts is extremely complex. *Id.* at 671. Significantly, a 1988 study concluded that consistent child-rearing practices, which can be taught, decrease juvenile delinquency by increasing the child's attachment to the parent. *Id.* Section 3313.663 of the Ohio Revised Code states that a board of education "may adopt a policy requiring the parent or guardian of any student who is suspended or expelled by the district . . . to attend a parental education or training program provided by the district." OHIO REV. CODE ANN. § 3313.663(A) (West 1998). In addition, the board of education may also adopt a policy regarding parental education if a student is "truant or habitually absent from school." § 3313.663(B). See also OHIO REV. CODE ANN. § 2151.411 (West 1998) (containing provisions regarding parental liability for the acts of a delinquent child).

¹² Patricia M. Wald, *Doing Right by Our Kids: A Case Study in the Perils of Making Policy on Television Violence*, 23 U. BALT. L. REV. 397, 397 (1994). "Hundreds of studies done since the early 1960s . . . using a variety of techniques--broadly agree that children of both sexes who are heavy viewers of TV are more aggressive than children who are light viewers." *Id.* at 399 (quoting a noted professor of human development and family studies). Wald notes that although there have been numerous congressional hearings relating to violence on television, these hearings have been uneventful. *Id.* The search for a solution is impacted by the existence of First Amendment protections, advancing technology that allows parents to prevent their children from viewing television violence, and the belief that the government should not unduly meddle with parental choice. *Id.* at 404. According to a professor of pediatrics, "Clearly the biggest message from movies and TV is that violence is an acceptable solution to complex problems." Karen S. Peterson & Glenn O'Neal, *Society More Violent; So are its Children*, USA TODAY, Mar. 25, 1998, at 3A (quoting Vic Strasburger, a professor at the University of New Mexico School of Medicine).

¹³Joan I. Duffy, *Alexander Links Video Games, Societal Violence*, THE COMMERCIAL APPEAL, April 17, 1998, at B2 (discussing the effects of "ultra-violent games that put the player in the role of rampaging killer").

¹⁴See Bill Ellis, *Rap Defends Itself in Wake of Teacher's Testimony*, THE COMMERCIAL APPEAL, June 18, 1998, at C1 (indicating that a teacher testified before a U.S. Senate committee that rap music played a role in the Jonesboro killing spree, and arguing that members of society must look beyond rap music to explain outbreaks of violence with our schools).

¹⁵*Experience and Genes May Lead to Violence: Researchers Cite Abuse, Inconsistent Nurturing of Child: "These are Complex Problems,"* ST. LOUIS POST-DISPATCH, Mar. 29,

Internet.¹⁸ An increase in the number of gangs.¹⁹ Although disagreement exists

1998, at D1. Research by neuroscientists indicates that childhood experiences, including mental and physical abuse, violence, and neglect, actually leave a “footprint” on a child’s nervous system that changes brain chemistry. *Id.* According to James Garbarino, a sociologist at Cornell University, children are “little scientists” who recognize that their little brother stops whining when their mother hits him. Kate Taylor, *Expert Says Violent Children are Hurt at Home and Need Compassion*, PORTLAND OREGONIAN, Oct. 30, 1998, at D9. Children learn that violence is effective. *Id.*

¹⁶Schiraldi, *supra* note 8, at 63. According to Schiraldi, the “dual impact” of increased rates of child poverty and unprecedented access to guns distinguishes children in the United States from those in other Western nations and from children of past generations. *Id.* A 1995 report asserts that America has the highest rate of child poverty as compared to seventeen industrialized countries, and one in every four American children live in poverty. *Id.* Although Switzerland has high rates of gun ownership, its homicide rates are lower than those in the United States. *Id.* at 63-64. Significantly, our country has three times as many children in poverty per capita as Switzerland. *Id.* at 64. Although violence in the media, video games, and music has not decreased, Schiraldi argues that a thirty percent reduction in juvenile homicides must be attributed to a decrease in child poverty and access to guns. *Id.* at 64. *See also* Christian Pfeiffer, *Juvenile Crime and Violence in Europe*, 23 CRIME & JUST. 255, 257-58 (1998) (arguing that although poverty in and of itself does not seem to be risk factor for youth violence, it becomes a risk factor when children in poverty are unable to see ways to improve their positions in society).

¹⁷Michael J. Sniffen, *Crime Rises in Schools Since ‘89, Report Says*, THE PLAIN DEALER, April 13, 1998, at 1A. According to a survey, 65.3 percent of students indicated that cocaine, crack, marijuana, uppers or downers were accessible at school. *Id.* In addition, the drug trade has turned many urban communities into “war zones.” Paul M. Bogos, “Expelled. No Excuses. No Exceptions.”—Michigan’s Zero-Tolerance Policy in Response to School Violence: M.C.L.A. Section 380.1311, 74 U. DET. MERCY L. REV. 357, 361 (1997).

¹⁸*Does Internet Spur Children to Make Bombs?*, PORTLAND OREGONIAN, Oct. 2, 1998, at C6. Information that explains how to build bombs is readily available to children who can access the Internet at home or at school. *Id.* A spokesperson for the federal Bureau of Alcohol, Tobacco & Firearms proclaimed that “young, fertile minds with lots of information and no experience” is a “cocktail for disaster.” *Id.* During the first month of the 1998 school year, approximately twelve schools were evacuated after students made bomb threats. *Id.*

¹⁹Linda M. Schmidt, *A Brief History of Ohio Gang Trends*, OHIO SCHOOL LAW JOURNAL, 1998 OHIO SCHOOL L. J. 69, 69. According to Linda Schmidt, an Community Outreach Specialist with the FBI in Cleveland, Ohio, law enforcement officers, educators, and parents need to utilize keen observation skills to recognize today’s gang members. *Id.* Gang members have abandoned blatant gang colors, and have substituted subtle identifiers. *Id.* at 69-70. When the Rollin’ 20 Crips migrated into Ohio from California, the Crips and Bloods moved further into rural areas. *Id.* at 70. Schmidt recalls:

I met a 12-year-old farm boy from central Ohio who was on probation for his part in stealing his uncle’s rifle collection He became enamored with the Crips as they came into his community to recruit middle school

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regarding the causes of juvenile violence, its effects are indisputable.²⁰ Juvenile violence has created a climate of pervasive fear throughout America's schools, and fear adversely affects the learning process.²¹

During the 1997-98 school year, forty students were killed on school property.²² Throughout the country, state legislators are uniting with the federal government²³ and local school districts to address the eruption of savagery within the

kids to traffic drugs for them.

Id. In Ohio, new legislation relating to gang violence went into effect on January 1, 1999. *See* H.B. 2, 122nd Leg. (Ohio 1998)(codified in scattered sections of OHIO REV. CODE ANN.). This legislation increases penalties for criminal activities committed by gangs and authorizes fingerprinting and photographing of juveniles who participate in gang crime. *Id.*

²⁰*See* Bogos, *supra* note 17, at 363.

²¹*Id.* According to a child behaviorist, "There's no doubt that our violent society has eroded the security and safety of our schools and is creating an environment of fear, anxiety, and trauma that is counterproductive to learning." *Id.* (quoting Bill Steele, child behaviorist at Detroit's Institute of Trauma and Loss in Children). According to a mental health specialist, students who encounter fear release "stress hormones" that change their brain chemistry and impede their capacity to learn. Donna Robb, *Akron Officials Hear Clintons' Take on Safety*, THE PLAIN DEALER, Oct. 16, 1998, at 1B. Some students actually refuse to attend school because they fear that their lives are in danger. Jonathon Wren, "Alternative Schools for Disruptive Youths"--A Cure for What Ails School Districts Plagued by Violence?, 2 VA. J. SOC. POL'Y & L. 307, 311 (1995). In addition, fear of violence makes it difficult for school districts to recruit and retain good teachers. *Id.* Teachers may refuse to confront unruly students because they do not want to jeopardize their own safety. *Id.*

²²Erin Kelly, *School Safest Place for Kids Despite Violence, Study Finds*, THE CINCINNATI ENQUIRER, July 29, 1998, at A10. According to a report by a "criminal justice think tank," recent headlines have created a "misperception that schools are dangerous." The report argues that the safest place for a child to be is school. *Id.* The report points out that ninety percent of all childhood deaths take place either in the home or in the vicinity of the home. *Id.* Jason Ziedenberg, an author of the report, believes that legislation to fund officers at schools is a misallocation of resources. *Id.*

²³The federal government has enacted legislation to battle violence in America's schools. First, The Safe and Drug-Free Schools and Communities Act of 1986 provides state grants for substance abuse education and violence prevention programs. Pub. L. No. 100-236, 105 Stat. 61 et seq. (1986). Second, the Safe Schools Act of 1994 created a grant program to support local efforts by schools to reduce violence. Pub. L. No. 103-227, 108 Stat. 204 et seq. (1994). According to Title VII of the Act, its purpose is "to help local school systems achieve Goal Six of the National Education Goals, which provides that by the year 2000, every school in American will be free of drugs and violence . . ." Pub. L. No. 103-227, Title VII, § 701, 108 Stat. 204 et seq. (1994). Third, the Gun-Free Schools Act of 1994 requires states receiving federal funds to expel any student who carries a gun to school. 20 U.S.C. § 8921 (1994). *See* discussion *infra* Part III.B. Also, during a White House conference regarding school safety, President Clinton announced initiatives totaling \$65 million that would fund additional

nation's schools.²⁴ Although none of the homicides occurred in Ohio, over one thousand Ohio students were expelled last year after bringing guns to school.²⁵

This Comment evaluates alternative schools and their potential to cure the epidemic of school violence. Part II analyzes schools' potential liability for failing to protect students from harm. Part III examines the emergence of "zero-tolerance" laws.

Although courts frequently uphold the authority of schools to suspend and expel students,²⁶ Part IV maintains that school officials cannot violate students' constitutional rights. Part V describes alternative education programs and analyzes their ability to avert violence. Part VI examines Ohio's efforts to prevent crime in schools and recommends strategies that focus on targeting, diverting, and preventing juvenile violence. Schools that suspend and expel students without providing alternative

community police and school resource officers. *Safe at School: Clinton Plays on Fears*, *supra* note 7, at 8B. The President also announced initiatives totaling at least \$25 million that would be used by ten cities to implement safety measures such as metal detectors and extra police patrols. *Id.* Republican leaders who are skeptical of an increasing federal role in local schools have blocked many of President Clinton's education priorities. Sandra Sobieraj, *Clinton Calls for Cooperation to Improve Nation's Schools*, THE CINCINNATI ENQUIRER, May 9, 1998, at A7B. *See also* S. 9, 106th Cong. (1999) (proposing to combat gang-related crime in schools and communities, reform the juvenile justice system, promote drug prevention programs, and assist crime victims).

²⁴Robert C. Cloud, *Federal, State, and Local Responses to Public School Violence*, 120 ED. LAW REP. 877, (page number unavailable) (1997). For example, in response to the shootings in Arkansas, Governor Mike Huckabee (Arkansas) appointed a juvenile justice task force to assist in formulating new juvenile justice legislation. *Huckabee Favors Longer Juvenile Lockups Endorses Task Force Proposals on Dealing with Violent Youth*, THE COMMERCIAL APPEAL, Dec. 4, 1998, at A20. The Governor's Working Group on Juvenile Justice recommends adult sentencing for violent offenders as young as ten, with the potential for transfers to adult prisons. *Id.* In addition, the task force's report advocates additional after-school programs, parental responsibility classes, a public awareness campaign against violence in the media, and extra funding for truancy officers and school counselors. *Id.* Also, subsequent to the killings in Oregon, Congressman DeFazio (Oregon) conferred with experts, parents, and students and put together a package that focuses on preventing juvenile violence. David Sarasohn, *Can D.C. Hear the Kids?*, PORTLAND OREGONIAN, Sept. 6, 1998, at G4. His package includes proposals for additional funding for local child abuse programs, community juvenile prevention programs, and expansion of the National Guard Youth Challenge Program. *Id.* In addition, DeFazio's package contains a proposal to increase insurance coverage for treatment of mental illnesses. *Id.*

²⁵*Columbus; School Safety a Priority*, DAYTON DAILY NEWS, Jan. 25, 1999, at 3B. Across the nation, almost one million students brought guns to school during 1997-98. Tia Schneider Denenberg, et al., *Reducing Violence in U.S. Schools*, 53-NOV DISP. RESOL. J. 28, 30 (1998).

²⁶*See infra* note 81 and accompanying text.

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education may perpetuate the infestation of violence within the entire community.²⁷ Therefore, as Part VII concludes, the Ohio legislature should require alternative education for all students who are suspended or expelled.

II. SCHOOLS' LIABILITY FOR FAILING TO PROTECT STUDENTS

Previously, the common law doctrine of official immunity protected public officials from liability for torts²⁸ committed during the performance of their official duties.²⁹ However, the enactment of 42 U.S.C. § 1983³⁰ abrogated this common law doctrine and allowed victims of school violence to sue public school officials³¹ in federal court.³² Section 1983 provides a remedy³³ for plaintiffs who are deprived of an independently existing federal right.³⁴ In *Ingraham v. Wright*,³⁵ the United States

²⁷See discussion *infra* Part V.B.

²⁸According to Black's Law Dictionary, a 'tort' is "[a] private or civil wrong or injury . . . for which the court will provide a remedy There must always be a violation of some duty owing to plaintiff, and generally such duty must arise by operation of law" BLACK'S LAW DICTIONARY 1036 (6th ed. 1991).

²⁹Cloud, *supra* note 24, at (page number unavailable). The doctrine of official immunity evolved from the medieval belief that since the king ruled by divine right, he could do no wrong. *Id.* In addition, the doctrine dictated that because the state and its agencies are sovereign, they could not be sued unless they consented to be sued. *Id.* This doctrine was widely accepted in early American common law. *Id.* Proponents of official immunity proclaimed that the doctrine allowed public officials to fulfill their duties with confidence and fervor, and therefore, it benefited the public. *Id.*

³⁰Section 1983 states:

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 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 (1994).

³¹Potential defendants include public school board members, teachers, and administrators. Cloud, *supra* note 24, at (page number unavailable). Under Section 1983, Defendants must be sued in their individual capacities. *Id.*

³²*Id.*

³³Under Section 1983, money damages and injunctive relief are available. See R. Craig Wood & Mark D. Chestnutt, *Violence in U.S. Schools: The Problems and Some Responses*, 97ED. LAW REP. 619, 631-32 (1995).

³⁴Cloud, *supra* note 24, at (page number unavailable). See *Wood v. Strickland*, 420 U.S. 308 (1975) (holding that a Section 1983 action is not available to review evidentiary questions in school disciplinary proceedings, to interpret school regulations, or to review the exercise of

Supreme Court held that a student's right to his or her bodily integrity is a liberty interest that is protected by Constitution.³⁶ Therefore, students who are victims of school violence can argue that they were deprived of an existing federal right.³⁷

First, students can establish liability under Section 1983 by demonstrating that their relationship with the school was a "special relationship" that gave rise to an affirmative legal duty³⁸ of protection.³⁹ In *Deshaney v. Winnebago County Department of Social Services*,⁴⁰ the United States Supreme Court asserted that although the general rule is that states do not have an affirmative constitutional duty to protect their citizens,⁴¹ a duty can arise when a state restrains a citizen's personal liberty.⁴² Because

discretion by school officials unless the exercise involved violations under the Constitution).

³⁵430 U.S. 651 (1977) (holding that the Eighth Amendment's guarantee against cruel and unusual punishment does not apply to corporal punishment in public schools, and although a liberty interest is implicated, prior notice and a hearing are not required). See also OHIO REV. CODE ANN. § 3319.41 (West 1998) (containing provisions relating to corporal punishment in schools).

³⁶Ingraham, 430 U.S. at 673-74. The Court proclaimed:

[W]here school authorities, acting under color of state law, deliberately decide to punish a child for misconduct by restraining the child and inflicting appreciable physical pain, we hold that Fourteenth Amendment liberty interests are implicated.

Id. at 674. Although Ingraham related to corporal punishment of students, federal courts have "readily accepted" it as the foundation for other actions involving school violence. Deborah Austern Colson, *Safe Enough to Learn: Placing an Affirmative Duty of Protection on Public Schools Under 42 U.S.C. Section 1983*, 30 HARV. C.R.-C.L. L. REV. 169, 172 (1995).

³⁷Colson, *supra* note 36, at 172.

³⁸Wren argues that schools also have a moral obligation to protect children while they attend public school. Wren, *supra* note 21, at 318. According to Wren, this moral obligation arises pursuant to compulsory attendance laws, and in addition, because schools "play such a fundamental role in children's lives." *Id.*

³⁹Landra Ewing, *When Going to School Becomes an Act of Courage: Students Need Protection from Violence*, 36 BRANDEIS J. FAM. L. 627, 642 (1997-98).

⁴⁰489 U.S. 189 (1989). In *Deshaney*, state social workers left Joshua, a young child, in the care of his father, even though they know that the father was abusive. *Id.* at 192-93. The Supreme Court held that the State of Wisconsin was not liable for the subsequent injuries that the father inflicted on Joshua. *Id.* at 200-01. The Court reasoned that the State did not have an affirmative duty to protect Joshua since the child lived at home and was not in the State's custody. *Id.* at 201.

⁴¹The Supreme Court proclaimed:

[Nothing] 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. The Clause is phrased as a limitation on the State's power to act, not as a guarantee of certain minimal levels of safety

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compulsory school attendance laws⁴³ bind students' personal liberty, it can be argued that a custodial relationship⁴⁴ arises between the school and the students and creates an affirmative duty of protection.⁴⁵ However, most federal courts have held that mandatory school attendance laws do not create an affirmative duty to protect students from harm.⁴⁶

and security. [Nor] does history support such an expansive reading of the constitutional text. [Its] purpose was to protect the people from the State, not to ensure that the State protected them from each other.

Id. at 195.

⁴²The Supreme Court stated:

It is true that in certain limited circumstances the Constitution imposes upon the State affirmative duties of care and protection with respect to particular individuals . . . [But these cases] stand only for the proposition that when the State takes a person into its custody and holds him there against his will, the Constitution imposes upon it a corresponding duty to assume some responsibility for his safety and general well-being. [The] affirmative duty to protect arises . . . from the limitation which it has imposed on his freedom to act on his own behalf.

Id. at 198-200. Significantly, the Court noted that a state may have an affirmative duty of protection even when its citizen is not incarcerated in a state prison. *Id.* at 200. Chief Justice Rehnquist indicated that a state foster home may be a special relationship that creates an affirmative duty of protection. *Id.* at 201 n.9. Therefore, depending on the degree of state involvement, *Deshaney* left open the potential of finding a special relationship in the school setting. Colson, *supra* note 36, at 174.

⁴³All fifty states have compulsory attendance legislation. Bogos, *supra* note 17, at 365.

⁴⁴A custodial relationship exists when an individual is taken into the custody of the state and held there against his will. *Deshaney*, 489 U.S. at 199-200 (citing *Youngberg v. Romeo*, 457 U.S. 307, 317 (1982); *Estelle v. Gamble*, 429 U.S. 97, 103-04 (1976)).

⁴⁵*Ewing*, *supra* note 39, at 642. See also Maggie J. Randall Robb, *A School's Duty to Protect Students From Peer-Inflicted Abuse: Nabozny v. Podlesny*, 22 U. DAYTON L. REV. 317 (1997) (arguing that public schools have an affirmative duty to protect students from physical harm and harassment by other students, and reasoning that students do not have complete freedom to act on their own behalf).

⁴⁶Colson, *supra* note 36, at 178-79. Courts that refuse to impose a duty of protection frequently reason that children do not rely on schools for their basic needs, and students can refuse to attend school. *Id.* at 183. In addition, these courts base their decisions on the notion of parental sovereignty, which holds that parents are the "primary caretakers" of their children. *Id.* at 184. See also *Meyer v. Nebraska*, 262 U.S. 390, 401 (1923) (holding that a state law forbidding the teaching of a foreign language as invalid since it interfered with "the power of parents to control the education of their own"); *Pierce v. Society of the Sisters of the Holy Names of Jesus and Mary*, 268 U.S. 510, 535 (1925) (holding that a state law requiring all students to attend public schools as invalid since a child "is not the mere creature of the State; those who nurture him and direct his destiny have the right . . . to recognize and prepare him for additional obligations"). However, the reasoning of these courts is based on

Second, students can establish liability under Section 1983 by showing that the school acted with “deliberate indifference” to the student’s constitutional rights and directly caused injury.⁴⁷ To establish “deliberate indifference,” students must show that the school knew of prior violence and failed to take action to ensure the future safety of its students.⁴⁸

A good faith defense is available to school officials who are sued pursuant to Section 1983.⁴⁹ In *Wood v. Strickland*,⁵⁰ the United States Supreme Court held that school officials are entitled to qualified immunity if they acted in good faith, and if they did not know and reasonably should not have known that their actions would violate a student’s constitutional rights.⁵¹

outdated assumptions regarding the current role of families in the United States. Colson, *supra* note 36, at 184. Public schools frequently participate in after-school programs that function as substitutes for parental care. *Id.* at 185. Also, schools frequently provide students with their basic needs, including meals. *Id.* at 185-86. In addition, public schools have stepped in to protect students by installing metal detectors and hiring security guards. *Id.* at 186. According to Ewing, “Courts should be more open to arguments that students are in the [school’s] custodial care [T]he structured environment . . . strictly limits students’ freedom. Consequently, students are forced to rely, often to their detriment, on school officials to provide a safe environment” Ewing, *supra* note 39, at 643. *See also* Bogos, *supra* note 17, at 367-68 (asserting that schools have a duty of protection pursuant to the common law doctrine of *in loco parentis*, which holds that public schools assume custody of students while they attend school and deprive them of protection from their parents or guardians).

⁴⁷Ewing, *supra* note 39, at 642. The “deliberate indifference” standard relates to two categories of cases. Colson, *supra* note 36, at 175. First, plaintiffs have attempted to use a “custom, policy or practice” theory and establish that the school implemented a custom, policy, or practice that either invited or condoned violence against students. *Id.* at 174-75. However, courts have held that if the violence is committed by students rather than state actors, the school cannot be liable under this theory, even if the school contributed to the harm. *Id.* at 176. The “custom, policy or practice” theory is primarily utilized in actions involving sexual abuse by a teacher or other school official. *Id.* Second, plaintiffs have tried to prevail under a “state-created danger” theory and demonstrate that school officials affirmatively created the danger that caused the harm. *Id.* at 174.

⁴⁸Ewing, *supra* note 39, at 644. If the student fails to show prior violent acts, the court will dismiss the case for failure to state a claim. *Id.* *See also* Colson, *supra* note 36, at 177-78 (indicating that a majority of courts are “reluctant to find deliberate indifference in the absence of severe misjudgment on the part of a state actor”).

⁴⁹Wood & Chestnutt, *supra* note 33, at 632.

⁵⁰*Wood v. Strickland*, 420 U.S. 308 (1975). In *Wood*, two high school students were expelled after spiking the punch at an extracurricular organization meeting at the school. *Id.* at 311-13.

⁵¹*Id.* at 322. The Supreme Court reasoned:

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In the alternative, victims of school violence may sue school officials in state court.⁵² In many states, schools have a duty to protect students pursuant to state legislation and school board regulations.⁵³ However, a majority of these tort claims do not succeed.⁵⁴ In addition, because some state statutes impose caps on damage awards or immunize public officials from certain tort actions, a plaintiff may prefer to bring an action in federal court under Section 1983.⁵⁵

When schools neglect students' safety, they should be liable to students who must attend school and become victims of violence.⁵⁶ Schools have traditionally utilized suspensions and expulsions to combat violence.⁵⁷ If schools fear potential liability, they will intensify their focus on preventing school violence.⁵⁸

III. PREVENTING VIOLENCE: SUSPENSIONS AND EXPULSIONS

A. *In General*

Each year, almost one and a half million students miss a significant portion of

The imposition of monetary costs for mistakes which were not unreasonable in the light of all the circumstances would undoubtedly deter even the most conscientious school decisionmaker from exercising his judgment independently, forcefully, and in a manner best serving the long-term interest of the school and the students.

Id. at 319-20. In contrast, a good faith defense is not available to a municipality in a Section 1983 action. *Owen v. City of Independence*, 445 U.S. 622 (1980).

⁵²Colson, *supra* note 36, at 171. Plaintiffs frequently sue under theories of negligence, gross negligence, strict liability, and failure to supervise. Ewing, *supra* note 39, at 633.

⁵³Wren, *supra* note 21, at 315-16. *See also* Steven F. Huefner, *Affirmative Duties in the Public Schools After Deshaney*, 90 COLUM. L. REV. 1940, 1970 n. 189 (1990) (listing examples of state legislation that imposes a duty of protection on school officials).

⁵⁴Ewing, *supra* note 39, at 633. These cases frequently end in summary judgment, dismissal for failure to state a claim, or courts set aside the verdicts. *Id.* at 648.

⁵⁵Colson, *supra* note 36, at 171. Also, pursuant to the federal Civil Rights Attorneys' Fees Award Act of 1976, victorious plaintiffs can recover attorney's fees and costs. *Id.*

⁵⁶Ewing, *supra* note 39, at 643. School officials are in the best position to prevent violence and protect children from harm. *Id.* at 644.

⁵⁷Bogos, *supra* note 17, at 364.

⁵⁸Colson, *supra* note 36, at 196-97. *But see* David M. Pedersen, *A Homemade Switchblade Knife and a Bent Fort: Judicial Place Setting and Student Discipline*, 31 CREIGHTON L. REV. 1053, 1102-1103 (1998) (arguing that litigation distracts school officials from their duties, creates "serious public perception concerns" that undermine crucial public support, and sometimes drains money from tight school budgets).

school due to expulsion or suspension.⁵⁹ Suspensions and expulsions are similar methods of discipline because they both remove a student from school classes and activities.⁶⁰ Suspension is a short-term discharge of a student, while expulsion is the removal of a student for an extended period of time.⁶¹ In general, school districts derive their power to suspend or expel students pursuant to state statutes, and they delegate authority to teachers and principals.⁶² Grounds for suspensions and expulsions vary among states, and even among school districts.⁶³

B. "Zero-tolerance" Laws

Pursuant to the Gun-Free Schools Act of 1994,⁶⁴ each state receiving federal funding pursuant to the Elementary and Secondary Education Act⁶⁵ must expel any student who possesses a weapon on school grounds for at least one year.⁶⁶ Not

⁵⁹Roni R. Reed, *Education and the State Constitutions: Alternatives for Suspended and Expelled Students*, 81 CORNELL L. REV. 582, 603 (1996). Only approximately three percent of these students have committed major offenses. *Id.*

⁶⁰*Id.* at 584.

⁶¹*Id.*

⁶²*Id.* at 584. The level of discretion provided to the schools varies considerably from state to state. Bogos, *supra* note 17, at 367. In general, teachers and principals have tremendous discretion to determine whether a student has violated a rule and the nature of the punishment to be imposed. Reed, *supra* note 59, at 584. Reed cites statistics indicating that minority students are consistently suspended at much higher rates than non-minority students. *Id.* at 607-8. According to Reed, this disparity may result from the discretionary nature of the suspension and expulsion rules. *Id.* at 608.

⁶³Philip T.K. Daniel & Karen Bond Coriell, *Suspension and Expulsion in America's Public Schools: Has Unfairness Resulted from a Narrowing of Due Process?*, 13 HAMLIN J. PUB. L. & POL'Y 1, 8 (1992). The following infractions are representative of legitimate grounds for expulsion in Ohio schools: Intoxication; Sexual misconduct; Theft; Vandalism; Extortion/coercion; Trespassing; Gross insubordination; Fighting; School disruption; Profanity/verbal abuse; Possessions or use of weapons or dangerous instruments; Sale, use, or possession of drugs; Assault/Battery; Sexual Offenses; Arson; Bomb threats/false alarms; Volatile acts; Other illegal or inappropriate conduct. *Id.* at 8-9. See OHIO REV. CODE ANN. § 3313.661 (West 1998) (containing provisions authorizing boards of education to adopt policies that outline the types of misconduct for which students may be suspended or expelled). See also Amy E. Mulligan, *Alternative Education in Massachusetts: Giving Every Student a Chance to Succeed*, 6 B.U. PUB. INT. L.J. 629, 635-37 (1997) (reviewing numerous state statutes and discussing offenses resulting in suspension or expulsion).

⁶⁴20 U.S.C. § 8921 (1994).

⁶⁵20 U.S.C. § 6301 (1994).

⁶⁶20 U.S.C. § 8921. The statute states, in part:

[E]ach State receiving Federal funds under this chapter shall have in effect a State law requiring local educational agencies to expel from school for a

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surprisingly, all fifty states have enacted legislation that mandates the immediate expulsion of students who possess weapons⁶⁷ on school property.⁶⁸ These laws are frequently referred to as “zero-tolerance” laws.⁶⁹

During the 1996-97 school year, over six thousand students were expelled for bringing firearms to school.⁷⁰ In addition, these students may face charges in juvenile courts⁷¹ or adult courts⁷² since most states have criminal laws that outlaw juvenile

period of not less than one year a student who is determined to have brought a weapon to a school under the jurisdiction of local educational agencies in that State, except that such State law shall allow the chief administering officer of such local educational agency to modify such expulsion requirement for a student on a case-by-case basis.

20 U.S.C. § 8921(b)(1). On October 22, 1994, President Clinton reinforced this legislation by issuing a Presidential Memorandum requiring federal agencies to help in ensuring “vigorous enforcement” of the Act. *Id.*

⁶⁷Certain states have extended the definition of “weapons” to encompass slingshots, brass knuckles, razors, and other dangerous objects. Bogos, *supra* note 17, at 375.

⁶⁸6093 *U.S. Students Ousted for Carrying Guns*, THE CINCINNATI ENQUIRER, May 9, 1998, at A5. Certain states have extended their zero-tolerance policies to authorize the expulsion of students who bring weapons on a school bus or to an activity sponsored by the school. Bogos *supra* note 17, at 375. Pursuant to section 3313.66 of the Ohio Revised Code:

(B)(2) [T]he superintendent of schools . . . shall expel a pupil from school for a period of one year for bringing a firearm to a school operated by the board of education of the district or on to any other property owned or controlled by the board, except that the superintendent may reduce this requirement on a case-by-case basis in accordance with the policy adopted by the board

(B)(3) The board of education . . . may adopt a resolution authorizing the superintendent of schools to expel a pupil from school for a period not to exceed one year for bringing a knife to a school operated by the board or onto any other property owned or controlled by the board or for possessing a firearm or knife at a school or on any other property owned or controlled by the board which firearm or knife was initially brought onto school board property by another person.

OHIO REV. CODE ANN. § 3313.66 (West 1998).

⁶⁹Bogos, *supra* note 17, at 374.

⁷⁰6093 *U.S. Students Ousted*, *supra* note 68, at A5. Because this is the first year this statistic was compiled, there is no way to determine whether expulsions have increased or decreased. *Id.* In addition, this statistic does not indicate how many students brought firearms to school and were not caught. *Id.* Pursuant to the Gun-Free Schools Act of 1994, state law can authorize local school boards to modify the one-year requirement on a case-by-case basis. 20 U.S.C. § 8921(b)(1) (1994). One third of the expulsions during the 1996-97 school year were shortened to less than a year. 6093 *U.S. Students Ousted*, *supra* note 68, at A5.

⁷¹During the end of the nineteenth century, the Progressives initiated a reform movement

aimed at creating a separate criminal justice system for juveniles. Holly Beatty, *Is the Trend to Expand Juvenile Transfer Statutes Just an Easy Answer to Complex Problem?*, 26 U. TOLEDO L. REV. 979, 980-81 (1995). The Progressives asserted that juvenile crimes were caused by external forces in society rather than the child's free will. *Id.* Therefore, the juvenile courts focused on rehabilitation rather than punishment. *Id.* In addition, legislatures gave juvenile court judges extremely broad discretion to determine the optimum treatment for each juvenile. *Id.* at 982. During the 1960's, opponents of the amount of discretion possessed by juvenile judges asserted that a lack of procedural safeguards violated juveniles' constitutional rights. *Id.* at 983. In *Kent v. United States*, the Supreme Court mandated that procedural rights that juvenile judges must follow when transferring a juvenile offender to adult court. 383 U.S. 541, 561-63 (1966). See *infra* note 72 for a more detailed discussion of the *Kent* decision. The Supreme Court subsequently decided *In re Gault*, and held that juveniles are entitled to procedural safeguards during the adjudication process. 387 U.S. 1, 30-31 (1967). Accordingly, the Court stated that juveniles have the right to adequate notice of all charges, the right to representation by an attorney, the right to confront and cross-examine witnesses. *Id.* at 30. In addition, the Court asserted that the privilege against self-incrimination applies to juveniles. *Id.* Critics of the Supreme Court's decisions argue that they "helped push the juvenile system more toward the adult criminal system." Beatty, *supra*, at 989. Today, many experts contend that the juvenile justice system has almost completely eliminated its focus on rehabilitation. Susan R. Bell, *Ohio Gets Tough on Juvenile Crime: An Analysis of Ohio's 1996 Amendments Concerning the Bindover of Violent Juvenile Offenders to the Adult System and Related Legislation*, 66 U. CIN. L. REV. 207, 207 (1997). A "get tough" approach has evolved due to public outrage at horrible juvenile crimes and a subsequent loss of faith in the potential for rehabilitation. Danielle R. Oddo, *Removing Confidentiality Protections and the "Get Tough" Rhetoric: What Has Gone Wrong with the Juvenile Justice System?*, 18 BC. THIRD WORLD L.J. 105, 113 (1998). This approach promotes transferring additional juveniles to the adult court system, imposing harsh juvenile penalties, and reducing juvenile confidentiality protections. *Id.* However, critics of this "get tough" philosophy argue that society should focus on crime prevention by developing alternatives to incarceration for first-time juvenile offenders. Elaine R. Jones, *The Failure of the "Get Tough" Crime Policy*, 20 U. DAYTON L. REV. 803, 805-06 (1995). In addition, some commentators insist that the juvenile court should be abolished. See, e.g., Barry C. Feld, *Abolish the Juvenile Court: Youthfulness, Criminal Responsibility, and Sentencing Policy*, 88 J. CRIM. L. & CRIMINOLOGY 68 (1997) (arguing that because today's juvenile courts do not provide rehabilitation or justice, states should abolish juvenile courts and recognize age as a mitigating factor).

⁷²The act of moving a juvenile's case from the juvenile court to the adult court system is referred to as "transfer" or "bindover." Bell, *supra* note 71, at 213. Until the late 1960's, juveniles were rarely transferred to the adult court system. *Id.* The Supreme Court's decision in *Kent v. United States* was "central" to the enactment of legislation authorizing bindover. *Id.* at 214. The *Kent* Court conceived bindover as a way to remove juveniles from the juvenile court system when rehabilitation appears to be improbable. *Id.* In *Kent*, the Supreme Court mandated that certain procedural requirements must be followed when a juvenile is transferred to adult court. 383 U.S. 541, 561-63. The Court established eight factors that juvenile judges must examine in cases involving bindover: (1) the potential danger to the

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community and the seriousness of the crime; (2) the amount of violence and premeditation involved; (3) whether the crime was against a person or property; (4) the probability of an indictment by the grand jury; (5) whether the offender's partners in the alleged crime were adults; (6) the offender's level of maturity; (7) the existence of a prior record; and (8) the potential for rehabilitation in the juvenile system. *Id.* at 566-67. The Court proclaimed that juvenile court jurisdiction would be waived if the crime possesses "prosecutive merit and . . . is heinous or of an aggravated character, or . . . represents a pattern of repeated offenses [indicating] the juvenile may be beyond rehabilitation under Juvenile Court procedures, or if the public needs the protection afforded by such action." *Id.* at 566. Thirty-seven states have codified the factors enumerated in the Kent decision. Jeffrey B. Pine, *Juvenile Waiver in Rhode Island*, 2 ROGER WILLIAMS U. L. REV. 257, 263 (1997). The current trend is moving away from allowing judicial discretion in the bindover process and toward mandatory bindovers. Bell, *supra* note 71, at 214. Ohio Revised Code section 2151.26 takes a "get tough" approach and requires the bindover of juveniles in certain circumstances, reduces the age for discretionary bindover to fourteen, and mandates that juvenile judges must examine certain factors that favor bindover. OHIO REV. CODE. ANN. § 2151.26 (West 1998). *See* Bell, *supra* note 71 (analyzing Ohio's bindover legislation, concluding that Ohio's bindover laws are effective, and making a recommendation for taking Ohio's legislation one step further in balancing the needs of society and juveniles). Current research shows that although state legislation frequently targets first-time juvenile offenders, repeat offenders are more likely to commit additional crimes. Richard E. Redding, *Juveniles Transferred to Criminal Court: Legal Reform Proposals Based on Social Science Research*, 1997 UTAH L. REV. 709, 733-41 (1997). Also, studies regarding decision making, psychosocial development, and sociological influences indicate that many juveniles may not have sufficient cognitive abilities to be held to adult standards of conduct. *Id.* at 721-33; Elizabeth S. Scott & Thomas Grisso, *The Evolution of Adolescence: A Developmental Perspective on Juvenile Justice Reform*, 88 J. CRIM. L. & CRIMINOLOGY 137 (1997) (providing an extensive analysis of developmental psychology and concluding that adolescents possess cognitive and psychosocial immaturity). In addition, although bindover was created to protect society from violent juvenile offenders, most juveniles who are transferred to adult courts have been charged with nonviolent crimes against property. Bell, *supra* note 71, at 218. Therefore, critics argue that significant reforms relating to current transfer statutes are necessary. *See, e.g.,* Redding, *supra* at 743-60 (asserting that mandatory transfer statutes should be abolished, competency evaluations must be conducted prior to transfer hearings, decision-making guidelines need to be concise, and juvenile court jurisdiction should be extended to allow the imposition of sentences into adulthood); Beatty, *supra* note 71, at 1011-16 (noting that legislators must examine the negative impact adult prisons can have on juveniles since juveniles who are transferred to the adult court system will eventually be released into society); Laureen D'Ambra, *A Legal Response to Juvenile Crime: Why Waiver of Juvenile Offenders is Not a Panacea*, 2 ROGER WILLIAMS U. L. REV. 277 (1977) at 303 (arguing that both society and juvenile offenders receive superior benefits when juvenile courts retain jurisdiction). *But see* Pine, *supra* at 276 (concluding that transfer "must be seen as a device to increase the expediency and authority of justice to victims of violent crime").

possession of certain weapons.⁷³ In the absence of state legislation, public schools do not have an affirmative duty to provide expelled students with alternative education under the Gun-Free Schools Act of 1994.⁷⁴ Therefore, state legislation does not always provide alternative education programs for these students.⁷⁵

Critics should concede that zero-tolerance laws further the goal of creating weapon-free schools.⁷⁶ However, there is concern that these laws may be “over inclusive” since they may be applied to students who are not dangerous.⁷⁷ For example, students are sometimes penalized for possessing bottle openers and nail clippers.⁷⁸ Critics also argue that although zero-tolerance laws will deter some students from bringing guns to school, these laws will not protect students from classmates who continue to carry weapons despite potential penalties.⁷⁹ In addition, zero-tolerance laws

⁷³Bogos, *supra* note 17, at 371-72. Forty states have criminal laws that prohibit the possessions of guns on or near school property. *Id.* Criminal penalties vary from jurisdiction to jurisdiction. *Id.* at 372. In many states, possession of a weapon on or close to school property is an aggravated offense. Robert E. Shepherd, Jr. & Anthony J. DeMarco, *Weapons in Schools and Zero Tolerance*, 11-SUM CRIM. JUST. 46, 47 (1996). Therefore, a juvenile facing this charge may be subject to the jurisdiction of the adult court or a mandatory minimum period of confinement in a juvenile facility. *Id.* According to Shepherd, “The expulsion of the youth may influence the imposition of a more severe sanction in court and, conversely, the decision to utilize an alternative to expulsion may influence the exercise of leniency by a judge.” *Id.* at 48. *See also The Next Question: How Should We Deal With Students Who Bring Guns to School?*, PORTLAND OREGONIAN, June 4, 1998, at 2 (discussing Kip Kinkel’s killing spree in Oregon, and noting that students who bring guns to school in Oregon are rarely arrested, and if they are arrested, they are frequently released into the custody of their parents, as Kinkel was).

⁷⁴The Gun-Free Schools Act of 1994 states:

Nothing in this subchapter shall be construed to prevent a State from allowing a local educational agency that has expelled a student from such a student’s regular school setting from providing educational services to such student in an alternative setting.

20 U.S.C. § 8921(b)(2).

⁷⁵Bogos, *supra* note 17, at 359. *See, e.g.,* Mulligan, *supra* note 63 (discussing numerous state statutory provisions relating to alternative education and determining that Massachusetts should provide mandatory alternative education for all students who are suspended or expelled).

⁷⁶*See* Bogos, *supra* note 17, at 378-80.

⁷⁷Wren, *supra* note 21, at 330. Many students who carry weapons do not intend to commit a violent act, but instead, are concerned that they may need protection. Wood & Chestnutt, *supra* note 33, at 620.

⁷⁸Lisa Petrillo, *Zero Tolerance at Schools: One Strike and They Were Out; Was the Punishment Fair? You be the Judge...*, SAN DIEGO UNION & TRIBUNE, Nov. 24, 1995, at B1.

⁷⁹Colson, *supra* note 36, at 196.

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may not prevent violence in our schools and communities if troubled students are permitted to roam the streets.⁸⁰

Significantly, although courts frequently uphold the authority of schools to suspend and expel students,⁸¹ school officials cannot violate students' constitutional rights.⁸² America's children do not "shed their constitutional rights . . . at the school house gate."⁸³

IV. STUDENTS' CONSTITUTIONAL RIGHTS

A. *Search and Seizure: The Fourth Amendment*

⁸⁰Denberg et al., *supra* note 25, at 32. According to the authors, "Just as summarily discharging a disruptive or threatening employee rarely leaves the workplace more secure, suspension of a student without evaluation and remedial action is an inherently hazardous step." *Id.* See discussion *infra* Part V.B.

⁸¹Daniel & Coriell, *supra* note 63, at 7. Pedersen examined fifty-four recent lower court decisions involving a variety of student discipline issues. Pedersen, *supra* note 58, at 1081-82. Pedersen concludes that courts have consistently recognized that school officials must possess "substantial discretion" to make determinations relating to "the appropriate severity of a punishment for student misconduct." *Id.* at 1086. This discretion is necessary to create an atmosphere of respect within the school, and in addition, school officials possess superior knowledge regarding appropriate penalties for students. *Id.* at 1105. Pedersen offers three suggestions to "help solidify" the trend toward allowing school officials to make disciplinary decisions with greater autonomy. *Id.* at 1105. First, courts should articulate their holdings with clarity. *Id.* Second, courts should always err on the side of providing school officials with autonomy. However, courts should intervene when school officials ignore their own policies or when a student's constitutional rights have been violated. *Id.* Finally, courts should impose penalties when cases without merit are filed. *Id.*

⁸²Daniel & Coriell, *supra* note 63, at 7.

⁸³*Tinker v. Des Moines Indep. Community School Dist.*, 393 U.S. 503, 506 (1969) (holding that the suspensions of two students for wearing arm bands in protest of the Vietnam war violated the student's First Amendment rights to free speech because the arm bands did not create a material disruption or infringe on the rights of others). *But see* Anne Proffitt Dupre, *Should Students Have Constitutional Rights? Keeping Order in the Public Schools*, 65 GEO. WASH. L. REV. 49, 50 (1996). According to Dupre:

Constitutional doctrine has made it more difficult for the public schools to reclaim the order and discipline necessary to educate students. Although the deterioration of other institutions that are important to the child--family, religion, and community--has certainly played a part in this tragedy, the Supreme Court must also accept responsibility The Court's analysis in the school power cases has exacerbated the loss of respect, deference, and trust in the public school as an institution and has wrongly insinuated that these qualities are incompatible with liberty.

Id. at 50-51.

The ability of school officials to prevent crime in schools depends on their ability to search students.⁸⁴ The Fourth Amendment of the United States Constitution proclaims that “[t]he right of the people to be secure in their persons . . . against unreasonable searches and seizures, shall not be violated.”⁸⁵ When law enforcement officers conduct school searches, they are constrained by standards that govern all police searches.⁸⁶ However, the Supreme Court has established less rigorous standards for searches⁸⁷ conducted by school officials.⁸⁸

In *New Jersey v. T.L.O.*,⁸⁹ the United States Supreme Court addressed whether the Fourth Amendment’s restriction on unreasonable searches and seizures applies to school officials.⁹⁰ The Court asserted that the Fourth Amendment is applicable,⁹¹ and

⁸⁴Wood & Chestnutt, *supra* note 33, at 622.

⁸⁵U.S. CONST. amend. IV.

⁸⁶Shepherd, *supra* note 73, at 47. Law enforcement officers must meet a probable cause standard. Wood & Chestnutt, *supra* note 33, at 623. According to the Supreme Court, probable cause exists when the “facts and circumstances within [the officers’] knowledge and of which they had reasonably trustworthy information [are] sufficient in themselves to warrant a man of reasonable caution in the belief that an offense has been or is being committed.” *Brinegar v. United States*, 338 U.S. 160, 175-76 (1949) (citation omitted). Police officers become involved in school searches when they give tips to school officials or school security guards, investigate criminal acts that were initiated outside of the school, or when schools hire police or request police assistance. Jacqueline A. Stefkovich & Judith A. Miller, *Law Enforcement Officers in Public Schools: Student Citizens in Safe Havens?*, 1999 B.Y.U. EDUC. & L.J. 25, 33 (1999) (stating that when police involvement in school searches is limited, courts sometimes apply the reasonable suspicion standard, and analyzing doctrines to consider in developing a standard for police participation in school searches).

⁸⁷In the school environment,

[a] student search is an attempt . . . to gain access to any item that is shielded from public view and located in a protected place or thing . . .

Virtually any attempt to find or discover something hidden from public view will be considered a search in a school setting.

J. Chad Mitchell, *An Alternative Approach to the Fourth Amendment in Public Schools: Balancing Students’ Rights with School Safety*, 1998 B.Y.U. L. REV. 1207, n.11 (1998) (quoting Jon M. Van Dyke & Melvin M. Sakurai, Checklists for Searches and Seizures in Public Schools 2-1 to 2-2(1998)).

⁸⁸See Wood & Chestnutt, *supra* note 33, at 622-23.

⁸⁹469 U.S. 325 (1985) (upholding the validity of a search of a high school student for cigarettes that ultimately uncovered evidence of marijuana possession).

⁹⁰*T.L.O.*, 469 U.S. at 333, 337, 340. Prior to the Supreme Court’s decision in *T.L.O.*, lower courts disagreed regarding whether the constraints of the Fourth Amendment applied to schools. Dupre, *supra* note 83, at 62. Some courts held that the Fourth Amendment applied in full, while other courts held that teachers were not restrained by the Fourth Amendment because

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held that the legality of a student search hinges “on the reasonableness, under all the circumstances, of the search.”⁹² First, a student search is permissible if the school officials have a reasonable suspicion⁹³ that the student has violated, or is violating, a school rule.⁹⁴ Second, the measures utilized by the school officials must be reasonably related to the goals of the search and not excessively intrusive in light of the nature of the offense and the student’s age and sex.⁹⁵

In *T.L.O.* the Court stated that its holding allows teachers and school officials to “regulate their conduct according to the dictates of reason and common sense.”⁹⁶ However, critics of the “reasonable suspicion” standard assert that it deters teachers from disciplining students and maintaining order in the classroom.⁹⁷ They argue that the standard is “murky,” and consequently, teachers who are fearful of lawsuits avoid addressing discipline problems.⁹⁸

Because lockers are school property, courts frequently hold that school

they acted with the authority of the parent rather than the authority of the State. *Id.* Courts sometimes created standards that were in the middle of each extreme. *Id.* The Supreme Court has not addressed whether the exclusionary rule is available to students when schools violate their constitutional rights. Mitchell, *supra* note 87, at 1210. The exclusionary rule mandates that evidence acquired pursuant to an illegal search or seizure must be suppressed from the criminal proceeding. *Id.* at 1209. Lower courts are divided on whether the exclusionary rule should be available as a remedy in school disciplinary proceedings. *Id.* at 1230. Mitchell addresses opponents’ and proponents’ arguments, and outlines a proposal to be utilized by school districts to deter Fourth Amendment violations and protect students from violence at school. *Id.* at 1230-39.

⁹¹*T.L.O.*, 469 U.S. at 333, 337, 340.

⁹²*Id.* at 341. According to the Court, a search is reasonable if the “action was justified at its inception,” and if it “was reasonably related in scope to the circumstances which justified the interference in the first place. *Id.* (quoting *Terry v. Ohio*, 392 U.S. 1, 20 (1968)). In reaching its holding, the Court balanced the student’s “legitimate expectation of privacy” with the school’s “legitimate need to maintain an environment in which learning can take place.” *Id.* at 340.

⁹³Reasonable suspicion is a lower standard than the probable cause standard that law enforcement officers are generally required to meet. Wood & Chestnutt, *supra* note 33, at 623.

⁹⁴*T.L.O.*, 469 U.S. at 341-42.

⁹⁵*Id.* at 342.

⁹⁶*Id.* at 343.

⁹⁷Dupre, *supra* note 83, at 95.

⁹⁸*Id.* at 95. See also *T.L.O.*, 469 U.S. at 365 (Brennan, J., concurring in part, dissenting in part) (stating that the “amorphous ‘reasonableness under all the circumstances’ standard freshly coined by the court today will likely spawn increased litigation and greater uncertainty among teachers and administrators”).

officials may inspect lockers when suspicion does not exist.⁹⁹ In contrast, other states provide protections against unreasonable locker searches based on students' reasonable expectations of privacy.¹⁰⁰ Furthermore, courts frequently hold that metal detector searches are constitutional.¹⁰¹

In *Vernonia School District 47J v. Acton*,¹⁰² the United States Supreme Court

⁹⁹Wood & Chestnutt, *supra* note 33, at 625-26. These courts usually refuse to categorize a locker inspection as a "search" within the Fourth Amendment. *Id.* However, if the locker contains an item that is closed, such as a backpack, reasonable suspicion is probably required. *Id.* at 626. Pursuant to Ohio Revised Code section 3313.20(B):

(B)(1) The board of education . . . may adopt a written policy that authorizes principals . . . to do one or both of the following:

(a) Search any pupil's locker and the contents . . . if the principal reasonably suspects that the locker or its contents contains evidence of a pupil's violation of a criminal statute or of a school rule;

(b) Search any pupil's locker and the contents . . . at any time if the board of education posts in a conspicuous place in each school . . . a notice that the lockers are the property of the board of education and that the lockers and the contents . . . are subject to random search at any time without regard to whether there is a reasonable suspicion

(2) A board of education's adoption of or failure to adopt a written policy . . . does not prevent the principal . . . from searching at any time the locker of any pupil and the contents . . . if an emergency situation exists or appears to exist that immediately threatens the health or safety of any person, or threatens to damage or destroy any property, under the control of the board of education and if a search of lockers and the contents . . . is reasonably necessary to avert that threat or apparent threat.

OHIO REV. CODE ANN. § 3313.20 (West 1998).

¹⁰⁰Wood & Chestnutt, *supra* note 33, at 626 (citing *Com. v. Snyder*, 597 N.E.2d 1363 (Mass. 1992)). According to Wood, schools should distribute a policy to students reserving the school's rights to inspect lockers. *Id.* If a locker inspection is subsequently challenged in court, the school can make an argument that the student did not have a reasonable expectation of privacy. *Id.*

¹⁰¹Wren, *supra* note 21, at 337. The Supreme Court has not ruled on the constitutionality of metal detector searches in public schools, and lower courts usually balance the need for the search with its invasiveness. *Id.* The Supreme Court has upheld the constitutionality of metal detector searches in airports, and recognized that individuals enter the airport on a voluntary basis. *See, e.g., National Treasury Employees Union v. Von Raab*, 489 U.S. 656, 675 n.3. (1989). It can be argued that there is a fundamental difference between metal detector searches in schools and metal detector searches in airports and museums. Wren, *supra* note 21, at 337-38. Because school attendance is compulsory, the nature of the search is not voluntary, and therefore, a different constitutional analysis may be warranted. *Id.* at 337.

¹⁰²515 U.S. 646 (1995).

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disregarded students' Fourth Amendment rights¹⁰³ when it upheld the validity of a school policy authorizing random drug testing of student athletes.¹⁰⁴ For the first time, the Court allowed school officials to search students on a random basis without any suspicion that the students violated a school rule.¹⁰⁵ Critics of *Acton* express concern that the Supreme Court "has gone one step further towards totally abrogating students' Fourth Amendment rights."¹⁰⁶ However, the Court's decision enhances the ability of schools to create a safe and orderly learning environment.¹⁰⁷

¹⁰³Steven J. Poturalski, *Vernonia School District 47J v. Acton: The Decimation of Public School Students' Fourth Amendment Rights*, 27 U. TOL. L. REV. 505, 506 (1996). In *Acton*, the Supreme Court disregarded its holding in *T.L.O.*, which requires that "reasonable suspicion" must exist before a school official can conduct a student search. *Id.*

¹⁰⁴*Acton*, 505 U.S. at 665. The Court reasoned that the student athletes' privacy interests were negligible because these students undress in locker rooms, and they receive mandatory physical examinations. *Id.* at 657. Therefore, the Court determined, the students' privacy interests were outweighed by the school's interest in maintaining discipline. *Id.* at 664-65. In addition, Dupre contends that drug testing based on individual suspicion destroys the teacher-student relationship. Dupre, *supra* note 83, at 100-01. Dupre argues that the Acton Court recognized the importance of trust in student-teacher relationships by refusing to turn teachers into accusers and adversaries. *Id.* at 100. Also, when testing is based on individual suspicion, there is a risk that unruly students will be arbitrarily tested. *Id.*

¹⁰⁵Dupre, *supra* note 83, at 52.

¹⁰⁶Poturalski, *supra* note 103, at 524. According to Poturalski:

Acton is not only a large step backward for student constitutional rights, but it is also a significant step backwards for Fourth Amendment jurisprudence in general [T]he Court is opening the door to numerous possibilities to subject, not only students, but adults, to intrusive searches absent any degree of individualized suspicion in the name of some public policy concern. While curbing the abuse of drugs and alcohol among our public school students is a noble and worthwhile cause, it should not be used to tear apart basic privacy rights to which all people, not just students, are entitled.

Id. at 543. See also Dupre, *supra* note 83, at 105 (arguing that it is unfair to teach students about constitutional rights unless we ensure that these rights apply to students).

¹⁰⁷Dupre, *supra* note 83, at 104-05. Studies indicate that students do not learn as well in public schools as they do in private and parochial schools. *Id.* at 104. One study concluded that the major difference between private and public schools was the existence of a "safer, more disciplined, and more orderly learning environment." *Id.* Significantly, this study controlled for student backgrounds. *Id.* Dupre asserts:

To the extent that Acton will help the public school start to regain the respect, deference, and trust that is so necessary to an institution that attempts to inspire serious learning, it is truly a commendable opinion. For if we are unwilling to defer to teachers when they are motivated by "legitimate school concerns"; if we are unconcerned about the lack of respect that students show . . . if we are unwilling to trust public school

B. Procedural Due Process: The Fourteenth Amendment

Pursuant to the Fourteenth Amendment of the United States Constitution, the government cannot “deprive any person of life, liberty, or property without due process of law.”¹⁰⁸ In the landmark decision of *Goss v. Lopez*,¹⁰⁹ nine public high school students were suspended for ten days without a hearing.¹¹⁰ The United States Supreme Court asserted that a “student’s legitimate entitlement to a public education [is] a property interest which is protected by the Due Process Clause and . . . may not be taken away for misconduct without adherence to the minimum procedure required by that clause.”¹¹¹ In addition, the Court stated that students possess a liberty interest in protecting their “good name, reputation, honor or integrity” that is also protected by the Due Process Clause.¹¹² Therefore, the Court determined, states cannot unilaterally determine that wrongdoing occurred and suspend or expel students without providing procedural safeguards.¹¹³

The Court held that the students were denied due process because public

educators to implement necessary disciplinary measures so that serious learning can and will take place, we should disband our nation’s public schools and declare them a failed experiment.

Id. at 105.

¹⁰⁸U.S. CONST. amend. XIV, § 1. According to judicial opinions and legal analyses, the purpose of this language is to provide protection from arbitrary or capricious actions of the government that interfere with life, liberty, or property interests. Patty Blackburn Tillman, *Procedural Due Process for Texas Public School Students Receiving Disciplinary Transfers to Alternative Education Programs*, 3 TEX. WESLEYAN L. REV. 209, 212-13 (1996). Substantive due process prohibits a state from infringing on an individual’s fundamental rights by furnishing a means for challenging the substance of a law or policy. *Id.* at 213. Furthermore, procedural due process relates to the actual procedures that are involved when official decisions are made. *Id.* at 213-14. The due process analysis is identical for expulsions and suspensions. Reed, *supra* note 59, at 584.

¹⁰⁹419 U.S. 565 (1975).

¹¹⁰419 U.S. at 568-70. Six of the students were immediately suspended for disobedient conduct that occurred in the presence of the school principal. *Id.* at 569. One student participated in a group demonstration in the school auditorium and was suspended because he refused to obey the principal’s order to leave. *Id.* at 569-70. Another student was immediately suspended after physically attacking a police officer who was attempting to remove the other student from the auditorium. *Id.* at 570.

¹¹¹*Goss*, 419 U.S. at 574.

¹¹²*Id.* at 574.

¹¹³*Id.* at 576.

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schools must provide students with “some kind of hearing” and “some kind of notice.”¹¹⁴ Dicta in the Court’s opinion indicates that the procedural requirements established by *Goss* apply to short-term suspensions.¹¹⁵ A series of federal court decisions established the procedural requirements for long-term suspensions and expulsions, which are more rigorous than the requirements for short-term suspensions.¹¹⁶

In *Goss*, the Court recognized that a “modicum of discipline and order is essential if the educational function is to be performed.”¹¹⁷ However, students who are faced with suspension or expulsion are guaranteed minimum due process under the Fourteenth Amendment.¹¹⁸ In addition, courts, state statutes and local school board regulations outline specific procedural guidelines that must be provided.¹¹⁹

¹¹⁴*Id.* at 579. The Court recognized that when a student presents an imminent danger, the school may immediately remove the student from the premises, but notice of a hearing must be provide to the student as soon as practicable. *Id.* at 582. *See also* OHIO REV.CODE ANN. § 3313.66(C) (West 1998).

¹¹⁵*Goss*, 419 U.S. at 576.

¹¹⁶*Reed*, *supra* note 59, at 586.

¹¹⁷*Goss*, 419 U.S. at 580.

¹¹⁸*Goss*, 419 U.S. at 579. *See also* Tillman, *supra* note 108, at 228-29. (arguing that students should also be provided with notice and a hearing prior to being transferred to alternative schools since these transfers can deprive students of educational opportunities).

¹¹⁹Daniel & Coriell, *supra* note 63, at 9. Many state legislatures and courts dictate that schools must provide students with the following procedural safeguards:

- *Written notice of the charges, the intention to expel, and the place, time, and circumstances of the hearing, with sufficient time for a defense to be prepared.
- *A full and fair hearing before an impartial adjudicator.
- *The right to legal counsel.
- *The opportunity to present witnesses or evidence.
- *The opportunity to cross-examine opposing witnesses.
- *Some type of written record demonstrating that the decision was based on the evidence presented at the hearings.

Id. at 9-10. *See* OHIO REV. CODE ANN. § 3313.66 (West 1998) (outlining the procedural requirements for suspensions and expulsions). *See also* Pedersen, *supra* note 58, at 1092 (reviewing numerous state cases and concluding that due process in expulsion proceedings “is a highly flexible concept” and that due process in these hearings is not as rigorous as due process in criminal proceedings); Mulligan, *supra* note 63, at 637-39 (reviewing numerous state statutes providing procedural safeguards). Bogos, *supra* note 17, at 370-71 (discussing procedural provisions in various state statutes).

C. Students' Right to an Education

Under the United States Constitution, students do not have a fundamental right to receive a public education.¹²⁰ However, every state constitution contains an education clause, which may be a crucial source of protection for students who are expelled or suspended.¹²¹

Some state courts have proclaimed that the right to an education is a fundamental right.¹²² In these states, students who are expelled or suspended own

¹²⁰San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1, 35 (1973). Plaintiffs asserted that Texas's system of financing public education violated the Equal Protection Clause. *Id.* at 1. According to Plaintiffs, because financing was determined by the amount of taxable property in each school district, interdistrict disparities in per-pupil expenditures that favored the wealthy. *Id.* The Supreme Court acknowledged that education is important, yet held that it is not a fundamental right guaranteed by the Constitution. *Id.* at 35. The Court applied a rational basis standard of review and determined that the school funding system did not violate the equal protection clause because it was rationally related to the legitimate state purpose of permitting local control of educational programs. *Id.* at 55. In *Plyler v. Doe*, Plaintiffs challenged a Texas law that authorized local school districts to deny free public education to children that are not legal citizens of the United States. 457 U.S. 202, 205 (1982). The Supreme Court seemed to impose a level of scrutiny on state legislation relating to education that was higher than the rational basis test. Reed, *supra* note 59, at 590. The Court, reiterating that education is not a fundamental right, held that the law violated the Equal Protection Clause because Texas could not demonstrate a "substantial state interest." *Plyler*, 457 U.S. at 230. However, because the majority did not specifically acknowledge that they were imposing this higher level of scrutiny, it is doubtful that a suspended or expelled student could successfully state a claim for alternative education under the United States Constitution. Reed, *supra* note 59, at 591.

¹²¹Reed, *supra* note 59, at 582. Throughout our nation's history, state constitutions have been utilized to protect citizens' civil rights. *Id.* at 592. Significantly, there has been a recent increase in civil rights claims under state constitutions. *Id.* at 591. State constitutions frequently offer "great advantages" to litigants. *Id.* at 592. First, the United States Supreme Court is often reluctant to expand civil rights under the United States Constitution. *Id.* Second, the Supreme Court is prohibited from reviewing a state court decision if it is based on the state's constitution and the decision does not cite federal precedent. *Id.* at 592-93. Consequently, state constitutions may provide greater protection for rights that exist under the federal constitution, or protect rights that are not protected by the federal constitution. *Id.*

¹²²Reed, *supra* note 59, at 583 (citing *Serrano v. Priest*, 557 P.2d 929 (Cal. 1976); *District of Wilkinsburg v. Wilkinsburg Educ. Ass'n*, 667 A.2d 5 (Pa. 1995)). Certain courts examine the education clause independently and do not apply an equal protection analysis. *Id.* at 594-96 (citing *Seattle School District No. 1 v. State*, 585 P.2d 71 (Wash. 1978); *Robinson v. Cahill*, 303

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an enforceable right, and therefore, the state should supply these students with alternative education programs.¹²³ However, a majority of these decisions were reached in cases involving the constitutionality of state public school funding systems.¹²⁴ In addition, the characterization and degree of protection that courts have given to this right have varied.¹²⁵ Therefore, it is difficult to predict the outcome of a claim for alternative education.¹²⁶

School districts that fail to provide these students with alternative education programs may be violating their right to receive an education.¹²⁷ In addition, school districts should create alternative education programs to prevent violence in our schools, and also in our communities.¹²⁸

V. ALTERNATIVE SCHOOLS

*[E]ducation is perhaps the most important function of state and local governments [I]t is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment [I]t is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education.*¹²⁹

A.2d 273 (N.J. 1973)). Many courts hold that education is a fundamental right and then apply an equal protection analysis to that right. *Id.* at 597.

¹²³*Id.* at 582-83. When a fundamental right is at stake, courts apply a strict scrutiny equal protection analysis. *Id.* at 583. Under this analysis, the state's imposition of suspensions or expulsions without provisions for alternative education is not narrowly tailored to the state's interest in preventing violence in the schools. *Id.*

¹²⁴*Id.* at 597.

¹²⁵*Id.* at 597-602. In jurisdictions that apply an equal protection analysis, the standard of review varies. *Id.* Although numerous courts apply a strict scrutiny analysis, other courts apply an intermediate level of scrutiny. *Id.* North Carolina courts state have held that students have a fundamental right to equal *access* to education that does not entitle students to actually *receive* an equal education. *Id.* at 600.

¹²⁶*Id.* at 600.

¹²⁷See discussion *supra* Part IV.C.

¹²⁸See discussion *infra* Part V.B.

¹²⁹*Brown v. Board of Education*, 347 U.S. 483, 493 (1954). *But see* Tillman, *supra* note 108, at 225 (arguing that because enrollment in alternative education programs may stigmatize students, the resulting damage to these students' reputations may "severely impact" their

Historically, educators established alternative schools for students with learning disabilities, teenage mothers, and truants.¹³⁰ During the last decade, numerous school districts throughout the country have created alternative education programs for students who have been suspended or expelled.¹³¹ In addition, a majority of states mandate that school districts provide alternative education programs to students who are expelled pursuant to zero-tolerance policies.¹³²

Various factors have contributed to the creation of additional alternative education programs. First, the public has placed tremendous pressure on legislators to implement violence prevention and intervention strategies.¹³³ Second, teachers claim that they spend a majority of their time focusing on a tiny minority of disruptive students.¹³⁴ Third, juvenile detention centers throughout the nation are

grades and future employment opportunities).

¹³⁰Wren, *supra* note 21, at 342. See also J. Herbie DiFonzo, *Deprived of "Fatal Liberty": The Rhetoric of Child Saving and the Reality of Juvenile Incarceration*, 26 U. TOL. L. REV. 855, 873 (1995) (describing "supplementary schools" in the nineteenth century, which frequently "lumped all children who were adjudged to need separate schools: the handicapped, blacks and Native Americans, and the incorrigible and delinquents").

¹³¹See, e.g., Steve Bickerstaff, et al., *Preserving the Opportunity for Education: Texas' Alternative Education Programs for Disruptive Youth*, 26 J.L. & EDUC. 1, 1 (1997) (discussing alternative education programs and juvenile justice alternative education programs in Texas, and asserting that Texas appears to be the first state to establish a "zero tolerance" system and continue to provide an education to virtually all students who are expelled or suspended); Reed, *supra* note 59, at 587-89 (describing various alternative education programs throughout the country, and noting that the creation of alternative schools is necessary in states recognizing a right to education); Stanley Matthew Burgess, *Missouri's Safe Schools Act: An Attempt to Ensure a Safe Education Opportunity*, 66 UMKC L. REV. 603, 624-26 (1998) (providing an extensive discussion of the alternative education provisions in Missouri's Safe Schools Act and discussing various programs that have been established in the state); Tillman, *supra* note 108 (analyzing alternative education programs in Texas, which have been established in every school district, and asserting that Texas legislation fails to mandate that students receive due process prior to being transferred to these programs).

¹³²Bogos, *supra* note 17, at 376-77. Bogos cites various state statutes, including Ariz. Rev. Stat. Ann. § 15-841 (1995); Cal. Educ. Code § 48915 (West 1994); Conn. Gen. Stat. Ann. § 10-233d (West 1995); Ga. Code Ann. § 20-2-751.1 (1995); N.M. Stat. Ann. § 22-5-4.7 (Michie 1995); N.D. Cent. Code § 15-49-13 (1994); N.J. Stat. Ann. § 18A:37-8 (West 1995); Tex. Educ. Code Ann. § 37.007 (West 1995); Va. Code Ann. § 221-257 (Michie 1995). *Id.* at nn.134-36.

¹³³Wren, *supra* note 21, at 345-46. See discussion *supra* note 7 and accompanying text.

¹³⁴Wren, *supra* note 21, at 346. *But see* Bogos, *supra* note 17, at 381 (stating that according to the National School Boards Association, suspension actually rewards teachers and school

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overcrowded.¹³⁵*A. Characteristics of Alternative Schools*

Although a majority of the students in alternative schools are disadvantaged, many students come from middle-class backgrounds.¹³⁶ Alternative schools often combine the stringent controls of correctional institutions¹³⁷ with small class sizes¹³⁸ and personalized courses of study.¹³⁹ When students attend school, they are a “captive audience.”¹⁴⁰ Alternative schools

officials for dodging their responsibilities in the classroom).

¹³⁵Wren, *supra* note 21, at 346. According to James Backstrom, co-chair of the Juvenile Justice Committee of the National District Attorneys Association, the lack of juvenile detention facilities is a major problem throughout the country. James C. Backstrom, *A Common Sense Approach to Housing Juvenile Offenders in Adult Detention Facilities*, 32-DEC. PROSECUTOR, 32, 32 (1998). Therefore, law enforcement officials should be given the discretion to house serious juvenile offenders in adult facilities if segregation can be guaranteed. *Id.* at 33. Furthermore, according to Streib, space is not available in juvenile detention facilities because “[w]e have cluttered them with drug offenders and others who do not pose a threat comparable to that of violent juveniles.” Victor L. Streib, *Sentencing Juvenile Murderers: Punish the Last Offender or Save the Next Victim?*, 26 U. TOL L. REV. 765, 774 (1995).

¹³⁶Wren, *supra* note 21, at 343.

¹³⁷Bogos, *supra* note 17, at 382-83. Students must attend all of their classes, and they are frequently required to relinquish their leather jackets jewelry, beepers, and cellular phones while they are attending school. *Id.* Students may be escorted to the restroom. Tillman, *supra* note 108, at 223. Some programs utilize urine tests to determine whether students are using drugs. Wren, *supra* note 21, at 345. In addition, law enforcement officers often patrol many of these schools. *Id.*

¹³⁸One study indicates that when class size is reduced to less than twenty students, the behavior and academic performance of students improves tremendously. Sobieraj, *supra* note 23, at A7B. President Clinton has cited this study to support increased funding to hire 100,000 additional teachers. *Id.* See also Robert Greene, *School Violence: Clinton Unveils Initiatives*, DAYTON DAILY NEWS, Oct. 16, 1998, at 8A. But see Ethan Bronner, *Suddenly, Many Politicians Wave Education Flag; Candidates Vowing to Improve Schools*, THE CINCINNATI ENQUIRER, Sept. 20, 1998, at A8 (noting a “leading conservative voice in education” insists that class sizes in America have been shrinking for the past fifty years and that class reduction schemes are problematic, costly, and will bring additional unqualified teachers into schools).

¹³⁹Wren, *supra* note 21, at 344.

¹⁴⁰Jones, *supra* note 71, at 806 (arguing that the “get tough” approach is unsuccessful, and asserting that society needs “non-incarceration alternatives” that provide first-time offenders with a structured environment and another chance).

frequently teach self-control, promote bonding between the students, offer family outreach services, encourage a sense of community service, and provide active counselors.¹⁴¹

Opponents of alternative education express concerns regarding the overall safety in these schools,¹⁴² and they argue that these programs are merely “warehouses” or “dumping grounds” for students.¹⁴³ However, school districts typically implement strategies to ensure the effectiveness of alternative schools.¹⁴⁴ Although critics insist that alternative schools have a negative fiscal impact on local and state governments, alternative education programs cost less than incarceration.¹⁴⁵

B. Ability of Alternative Schools to Prevent Violence

According to a report by the Office of Juvenile Justice and Delinquency Prevention, “[d]iversion and treatment programs provide some of the most promising examples of violence prevention techniques that work with youth

¹⁴¹Wren, *supra* note 21, at 345.

¹⁴²The alternative schools in a Miami school district report up to ten times more violent offenses per student than the conventional schools. Wren, *supra* note 21, at 351.

¹⁴³Bogos, *supra* note 17, at 384-85. In certain alternative schools, students may receive classroom instruction that is academically inferior. Tillman, *supra* note 108, at 223.

¹⁴⁴Bogos, *supra* note 17, at 385. According to an expert in the area of alternative education: [First], schools should develop individual plans for each student that articulate what he or she needs and how the setting will provide it. [Second], the settings need to be adequately staffed with well-qualified regular teachers, counselors, and mentors that can provide each student with more personal guidance . . . [Third], school leaders should set up clear accountability mechanisms for teachers, school staff members, parents, and the students for delivering. [Fourth], services at the alternative schools need to be well connected with other community services in the area. [Fifth], the Districts need to build corridors and incentives for how students get back into the regular setting so that they do not become marginalized and tracked again. Finally, school leaders, teachers, and others need to work together over how to keep more of these students in school in the first place.

Id. (quoting Michael Casserly, Executive Director of The Council of the Great City School in Washington and expert in the area of alternative education).

¹⁴⁵*Id.* at 386.

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involved in gun violence.”¹⁴⁶ First, alternative schools prevent violence in schools and communities because these programs prevent offenders from roaming the streets.¹⁴⁷ Second, alternative education programs focus on the rehabilitation of troubled students.¹⁴⁸ Third, providing juveniles with an education will deter future criminal activity.¹⁴⁹

According to studies, students who are expelled commit crimes within one year.¹⁵⁰ Therefore, states must enact provisions guaranteeing alternative education programs to prevent violence in schools and our communities.¹⁵¹

VI. ANALYSIS OF OHIO'S EFFORTS TO PREVENT VIOLENCE IN SCHOOLS

A. *Suspension, Expulsion and Ohio Senate Bill I*

¹⁴⁶Office of Juvenile Justice and Delinquency Prevention, U.S. Department of Justice, *Reducing Youth Gun Violence: An Overview of Programs and Initiatives* 17 (1996).

¹⁴⁷Bogos, *supra* note 17, at 384. Significantly, studies indicate that expelled students commit a criminal act within one year. *Id.* In addition, the Florida legislature discovered a disturbing correlation between the rising crime rate and the number of suspended and expelled students.

Usah Ramachandran, *School Safety Act*, 14 GA. ST. U. L. REV. 155, 161 (1997) (discussing Georgia's school safety act, which provides for alternative education for suspended and expelled students).

¹⁴⁸Bogos, *supra* note 17, at 383-84. *See supra* note 141 and accompanying text.

¹⁴⁹Bogos, *supra* note 17, at 383. According to the National School Boards Association, “traditional approaches—such as punishment, removing troublemakers, and similar measures—often harden delinquent behavior patterns . . .” *Id.* at 381 (quoting the National School Boards Association). A report relating to alternative education programs declared “[i]f we fail to provide all school-aged children with an adequate education, we will ultimately pay a greater price in increased spending on the . . . criminal justice and correctional systems.” Mulligan, *supra* note 63, at 642 (citing the Massachusetts Commission on Alternative Education and MassJobs Council, *Report on Alternative Education* 11 (Sept. 1994)). In addition, there is a positive correlation between suspensions or expulsions and dropping out of school. Reed, *supra* note 59, at 606. According to a study, dropping out of school is positively associated with subsequent criminal acts. *Id.* In addition, dropping out is related to unemployment, lower earning capacities, and the need for public assistance. *Id.* Therefore, when suspended and expelled students do not enroll in alternative education programs, society is forced to face the social costs associated with dropping out, which include later criminal activity. *Id.* at 607.

¹⁵⁰Bogos, *supra* note 17, at 384.

¹⁵¹*See* discussion *infra* Part VI.C.2.

Ohio legislators hope that the School Safety and Discipline Bill (Senate Bill 1)¹⁵² that was introduced this year will calm anxieties relating to school safety in Ohio.¹⁵³ In particular, this proposed legislation strengthens Ohio's expulsion laws.¹⁵⁴ First, Senate Bill 1 closes loopholes that allow students to avoid expulsion by transferring to another school.¹⁵⁵ Second, Senate Bill 1 enables boards of education to adopt policies authorizing the expulsion of students who commit certain acts that result in serious physical harm to persons or property.¹⁵⁶

¹⁵²S. 1, 123rd Leg., Regular Sess. (Ohio 1999) (codified in scattered sections of OHIO REV. CODE ANN.). Senate Bill 1 contains several provisions relating to the suspension and expulsion of students. *Id.* In addition, this proposed legislation grants Ohio courts discretion to increase penalties for crimes committed in "school safety zones," mandates that school districts adopt comprehensive school safety plans for each building in the district, and requires the Ohio School Facilities Commission to consider safety when reviewing design plans for classroom facility construction projects. *Id.* In addition, Senate Bill 1 substitutes "school safety zone" for "school," and "school premises." *Id.*

¹⁵³*Columbus: School Safety a Priority*, *supra* note 25, at 3B. Senate Bill 1 has top priority for this legislative session, and is expected to be well-received in both the Senate and the House. *Id.* During 1998, thirty-six states considered school safety bills. *Id.* See also Burgess, *supra* note 131 (analyzing Missouri's Safe Schools Act, which includes provisions regarding the transfer of school records, communications relating to discipline files, alternative education, and disabled students); Ramachandran, *supra* note 147 (discussing Georgia's school safety act, which imposes extensive notification requirements on state courts and schools, and contains provisions regarding alternative schools, school codes of conduct, and expulsions).

¹⁵⁴S. 1, 123rd Leg., Regular Sess. (Ohio 1999). Sections 3313.66, 3313.661, and 3313.662 of the Ohio Revised Code contain Ohio's suspension, expulsion, and zero-tolerance provisions. OHIO REV. CODE ANN. §§ 3313.66, 3313.661, 3313.62 (West 1998). See *supra* notes 63, 68, 114, and 119.

¹⁵⁵OHIO REV. CODE ANN. § 3313.66(B)(6) (West 1999). Senate Bill 1 added the following paragraph to section 3313.66 of the Ohio Revised Code:

A superintendent of schools . . . shall initiate expulsion proceedings . . . with respect to any pupil who has committed an act warranting expulsion under the district's policy regarding expulsion even if the pupil has withdrawn from school for any reason after the incident that gives rise to the hearing but prior to the hearing or decision to impose the expulsion. If, following the hearing, the pupil would have been expelled for a period of time had the pupil still been enrolled in the school, the expulsion shall be imposed for the same length of time as on a pupil who has not withdrawn from the school.

Id.

¹⁵⁶OHIO REV. CODE ANN. § 3313.66(B)(4) (West 1999). Senate Bill 1 added the following paragraph to section 3313.66 of the Ohio Revised Code:

The board of education . . . may adopt a resolution establishing a policy . . .

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B. Alternative Schools in Ohio

Section 3313.533 of the Ohio Revised Code, effective October 29, 1996, empowers a board of education to create and maintain an alternative school.¹⁵⁷ According to the statute, the purpose of the school is to meet the needs of students “who are on suspension, who are having truancy problems, who are experiencing academic failure, who have a history of class disruption, or who are exhibiting other academic or behavioral problems . . .”¹⁵⁸

that authorizes the superintendent of schools to expel a pupil from school for a period not to exceed one year for committing an act that is a criminal offense when committed by an adult and that results in serious physical harm to persons . . . or to property . . . while the pupil is at school, on any other property owned or controlled by the board, or at an interscholastic competition, an extracurricular event, or any other school program or activity.

Id.

¹⁵⁷OHIO REV. CODE ANN. § 3313.533 (West 1998). The board of education shall be the governing board, and shall draft and implement a plan for the alternative school. § 3313.533(A)(3). The plan shall include, but not be limited to:

- (a) Specification of the reasons for which students will be accepted for assignment to the school and any criteria for admission that are to be used by the board to approve or disapprove the assignment of students to the school;
- (b) Specification of the criteria and procedures that will be used for returning students who have been assigned to the school back to the regular education program of the district;
- (c) An evaluation plan for assessing the effectiveness of the school and its educational program and reporting the results of the evaluation to the public.

Id. In addition, the plan may include:

- (1) A requirement that on each school day students must attend school or participate in other programs . . . for a period equal to the minimum school day . . . plus any additional time required in the plan or by the chief administrative officer;
- (2) Restrictions on student participation in extracurricular or interscholastic activities;
- (3) A requirement that students wear uniforms prescribed by the district board of education.

§ 3313.533(B).

¹⁵⁸§ 3313.533(A)(1).

Pursuant to section 3313.66(I) of the Ohio Revised Code, “during the period of the expulsion, the board of education . . . *may* provide educational services to the student in an alternative setting.”¹⁵⁹ However, section 3313.534 of the Ohio Revised Code, effective July 1, 1998, mandates that certain school districts shall establish at least one alternative school to serve students with “severe discipline problems” no later than July 1, 1999.¹⁶⁰ In addition, any other school district that has a “significantly substandard graduation rate” after July 1, 1999 shall also establish an alternative school.¹⁶¹

C. Recommendations

An effective approach to preventing violence in Ohio’s schools should combine strategies that focus on targeting, diverting, and preventing juvenile violence.¹⁶²

1. Targeting Juvenile Offenders

Ohio must target juvenile offenders who pose a serious danger to society and impose severe punitive sanctions.¹⁶³ First, community protection should never

¹⁵⁹ §313.66(I).

¹⁶⁰ § 3313.534. This section mandates:

No later than July 1, 1999, each of the big eight school districts, as defined in section 3314.02 of the Revised Code, shall establish under section 3313.533 of the Revised Code at least one alternative school to meet the educational needs of students with severe discipline problems, including, but not limited to, excessive truancy, excessive disruption in the classroom, and multiple suspensions or expulsions.

Id.

¹⁶¹ *Id.*

¹⁶² Stephen J. Schulhofer, *Youth Crime-And What Not to Do About It*, 31 VAL. U. L. REV. 435, 444 (1997).

¹⁶³ *Id.* at 444. According to Schulhofer, severe punishment should be used “sparingly and selectively.” *Id.* See also Scott & Grisso, *supra* note 72, at 182 (providing a developmental analysis of juvenile delinquency, and asserting that younger offenders are more likely to become career criminals than offenders who begin criminal activities during mid-adolescence). See also Susan A. Burns, *Is Ohio Juvenile Justice Still Serving Its Purpose?*, 29 AKRON L. REV. 335 (1996) (analyzing Ohio’s mandatory bindover provisions, which provide for mandatory transfers of serious juvenile offenders, and proposing that the best solution to “reinstate the juvenile court’s identity” is to develop a transitional system for serious juvenile

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be sacrificed.¹⁶⁴ However, a rational assessment of risk, rather than public fear, should determine whether an offender is incarcerated.¹⁶⁵ Second, juvenile offenders must be held personally accountable to their victims and communities.¹⁶⁶ Third, these offenders must be provided with opportunities to become responsible adults.¹⁶⁷

offenders); Bell, *supra* note 71 (evaluating Ohio's bindover provisions, concluding that these laws are effective, and making additional recommendations for balancing the needs of both society and juveniles).

¹⁶⁴The Honorable Ronald D. Spon, *Juvenile Justice: A Work "In Progress,"* 10 REGENT UL. REV. 29, 49-50 (1998). The Honorable Ronald D. Spon (Richland County Court of Common Pleas, Division of Domestic Relations and Juvenile Court) has implemented the "Balanced Approach" of juvenile justice in his court. *Id.* at 37. According to the Balanced Approach, the juvenile justice system must serve the needs and concerns of the community, the victims, and the juvenile. *Id.* The three primary goals of the Balanced Approach are community protection, personal accountability, and competency development. *Id.* at 40. The juvenile justice codes in at least fourteen states contain elements of the Balanced Approach. *Id.* at 37.

In addition, several juvenile courts in Ohio use the Balanced Approach, and the Ohio Department of Youth Services is incorporating this approach into its programs. *Id.*

¹⁶⁵*Id.* at 46.

¹⁶⁶*Id.* at 41-43. Traditionally, punishments such as drug screening, curfews, and essay assignments were imposed on juveniles. *Id.* at 41. However, an offender must recognize that he has an obligation to his victim rather than to the State. *Id.* Therefore, offenders should participate in community service, restitution, and victim-offender mediation. *Id.* The offender must comprehend that "his actions have consequences, that he has wronged another human being, that he is responsible for his actions, and that he is capable of repairing the harm." *Id.* at 42. See also Stephanie A. Beauregard, *Court-Connected Juvenile Victim-Offender Mediation: An Appealing Alternative for Ohio's Juvenile Delinquents*, 13 OHIO ST. J. ON DISP. RESOL. 1005 (1998) (describing the process of juvenile victim-offender mediation, presenting a detailed analysis of numerous juvenile victim-offender mediation programs in Ohio, and concluding that preliminary findings of several Ohio programs indicate that victim-offender mediation programs alter delinquent behavior); Debra Baker, *Juvenile Mediation: Innovative Dispute Resolution or Bad Faith Bargaining?*, 27 U. TOL L. REV. 897 (1996) (discussing juvenile victim-mediation programs from a contractual perspective and analyzing issues relating to capacity, unconscionability and good faith and fair dealing). *But see* Streib, *supra* note 135, at 785 (asserting that victim's families are "not helpful . . . in finding rational solutions to the violent crime problem" because they "have no particular knowledge about how to prevent future homicides").

¹⁶⁷Spon, *supra* note 164, at 44-45. Administrators must evaluate the juvenile's "personal, social, emotional, psychological, and educational" strengths and weaknesses. *Id.* at 44. According to the Honorable Ronald D. Spon, "[P]romoting long-term positive behavior requires discovering these human needs, resources, and dynamics which promote wholeness and personal well being." *Id.* at 45.

2. Diverting Juvenile Offenders

Despite sensational media coverage of juvenile crime, incarceration should not be impulsively imposed on all juveniles.¹⁶⁸ Ohio should divert juvenile offenders by channeling them into effective violence prevention programs.¹⁶⁹ According to a partial listing by the Board of Education, there are close to fifty alternative schools in Ohio.¹⁷⁰ Although the Ohio legislature has taken steps to

¹⁶⁸Schulhofer, *supra* note 162, at 444. Categorically punitive strategies are extremely counterproductive. *Id.* When a court sentences a juvenile to ten years in prison for a petty theft, the juvenile will spend his formative years receiving an intense education regarding the ways of crime and violence. *Id.* Ten years later, a hardened criminal will be released from the prison. *Id.* In addition, Streib asserts that it is “impossible” to deter juvenile criminal activity by imposing harsh juvenile penalties since a young offender will not conduct a cost-benefit analysis of crime and punishment. Streib, *supra* note 135, at 774.

¹⁶⁹Schulhofer, *supra* note 162, at 444-45. According to the Office of Juvenile Justice and Delinquency Prevention, diversion programs throughout the country have been successful. *Id.* For example, in Indiana and Arizona, juveniles who are not hard-core delinquents can avoid prosecution by enrolling in a firearms -prevention course. *Id.* at 445. In Boston, student who bring weapons on school property receive a social, academic, and psychological evaluation. *Id.* Resources that are used to fund tremendous increases in incarceration should be used to support diversion programs. *Id.*

¹⁷⁰Partial Listing of Ohio Alternative Schools/ Programs that Target Students with Disruptive Behavior, October 13, 1998, Ohio Department of Education. This partial listing includes the following programs: *Urban Schools Initiative Districts: Akron:* High School Off-Site (9-12 grades); Saturn Program (6-12 grades); Phoenix Programs (9-12 grades); Oasis (6-8 grades) *Canton:* Passages (9-12 grades) *Cincinnati:* Project Succeed Academy (K-8 grades) *Cleveland:* Eleanor Gerson School (9-12 grades); Cleveland Alternative (6-12 grades); The EASE Program (1-5 grades) *Cleveland Heights/ University Heights:* Bellfaire School (6-12 grades) *Columbus:* I-PASS (K-12 grades) *Dayton:* Green JROTC Academy (9-12 grades); ISUS (9-12 grades) *East Cleveland:* Saturday School Program (9-12 grades); East Cleveland Alternative Academy (9-12 grades) *Hamilton:* HOPE (8-12 grades); RESCUE (7-12 grades) *Lima:* Lima Alternative HS (9-12 grades) *Lorain:* JUMP Start (8-9 grades) *Mansfield:* Mansfield City Schools Alternative Education Program Array (6-12 grades); Alternative to Suspension within Schools Program (7-12 grades) *Middletown:* Garfield Alternative Education Center (9-12 grades) *Springfield:* Keifer Alternative Center (9-12 grades); S.CO.P.E. (6-8 grades) *Toledo:* East Toledo Community Program (5-6 grades); Bridges Program (1-6 grades); Saturday Options to Suspension (1-12 grades) *Warren:* Washington Center (7-10 grades) *Youngstown:* Alternative School (5-9 grades); Alternative to Expulsion Program (7-12 grades) *Education Service Centers: Augulaize:* Augulaize County Opportunity for Youth Programs (9-12 grades) *Cuyahoga:* Eleanor Gerson School (9-12 grades) *Erie/Ottawa:* Edison HS Friday School Program (9-12 grades); Vermilion HS In-School Suspension & After School Detention Programs (9-12 grades) *Licking:* Newark HS Phase II After School Program (9-10

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prevent school violence, legislation should mandate that all students who are suspended or expelled must be provided with an alternative education.¹⁷¹

Schools cannot condone dangerous behavior in the classroom. However, schools that suspend and expel students without providing alternative education perpetuate the infestation of violence within the entire community.¹⁷² The combination of suspensions, expulsions and alternative education programs will prevent violence in our schools and communities.¹⁷³

3. Preventing Violence by Juveniles

*“[W]hen it comes to violence, there are few surprises. Well-adjusted kids just don’t turn bad overnight. Dangerous kids spend their entire childhoods warning us.”*¹⁷⁴

Third, Ohio’s legislature and school districts must adopt programs that will prevent juvenile violence.¹⁷⁵ Significantly, prior to each of the shooting rampages in

grades) *Lorain*: Lorain County Academy (12-16 years); *Lucas*: OASIS (4-7 grades) *Orville*: OASIS (4-8 grades); *Portage*: Portage County Opportunity School (13-18 years); *Sandusky*: The Sandusky County Alternative School (7-12 grades) *Stark/ East Stark*: Passages (9-12 grades); The Armory Program (6-8 grades); Mainstreet School (9-12 grades) *Summit*: Program Interval Opportunity School (8-12 grades) *Wood*: Wood County Alternative School (7-12 grades) *Wooster*: Boys Village School (12-18 years); The Opportunities School (9-12 grades). See also Scott Stephens, *Schools to Tackle Expulsion Issues: Byrd-Bennett Wants Students Off Streets*, THE PLAIN DEALER, January 10, 1999 (discussing suspensions, expulsions, and alternative education programs in the Cleveland area).

¹⁷¹ See discussion *supra* Part V.B.

¹⁷² See discussion Part V.B.

¹⁷³ See discussion *supra* Parts III.B. and V.B.

¹⁷⁴ Jonathan Kellerman, *Few Surprises When it Comes to Violence*, USA TODAY, Mar. 27, 1998, at 13A. Jonathon Kellerman is a child clinical psychologist and clinical professor of pediatrics at USC School of Medicine. *Id.*

¹⁷⁵ See Schulhofer, *supra* note 162, at 445. According to Schulhofer,

The bottom line is that talk of waging “war” on crime focuses attention in the wrong way on the wrong part of the problem. If the “war” metaphor is appropriate at all, we should not be throwing all our troops and all our resources into a near-futile effort to respond to the symptoms of the last stages of delinquency - a part of the battlefield where our “enemy” is already deeply entrenched on ground that we can take only be a costly uphill struggle.

Id. at 446.

Oregon, Arkansas, and Kentucky, unmistakable warning signs of the future violence existed.¹⁷⁶

Ohio's schools will be "crisis-prepared" rather than "crisis-prone" if each school district implements violence prevention¹⁷⁷ and intervention¹⁷⁸ strategies.¹⁷⁹ Section 3313.534 of the Ohio Revised Code requires that each board of education adopt a policy "for violent, disruptive, or inappropriate behavior . . . and establish strategies to address such behavior that range from prevention to intervention" no later than July 1, 1999.¹⁸⁰

¹⁷⁶See *supra* notes 1, 3, and 5 and accompanying text. See also Denenberg, et al., *supra* note 25, at 31-32 (recognizing that "these boys had been signaling to peers," and asserting that schools must encourage students to report all threatening comments and behavior); *Teens Sent Signals Before the Killing*, *supra* note 5, at B3.

¹⁷⁷Prevention concentrates on detecting warning signals and minimizing the stress and hostility that often precedes violence. Denenberg, et al., *supra* note 25, at 28.

¹⁷⁸Intervention focuses on responding quickly and effectively to potentially violent situations. Denenberg, et al., *supra* note 25, at 28. The Ohio Department of Education created a voluntary Safe Schools Audit, which assists school districts in determining whether school buildings are safe and prepared for emergency situations. *Columbus; School Safety a Priority*, *supra* note 25, at 3B.

¹⁷⁹See Denenberg, et al., *supra* note 25, at 28-30. Schools that are "crisis-prone" disregard warning signals, do not adopt preventative measures, and consequently, merely react to violent events. *Id.* at 29. In contrast, schools that are "crisis-prepared" adopt violence prevention strategies. *Id.* at 29-30. Pursuant to President Clinton's direction, federal officials drafted an early warning guide to assist adults in reaching troubled children. *Guide: Signs for Potential Violence*, PORTLAND OREGONIAN, Sept. 1, 1998, at B4. This guide, "Early Warning, Timely Response," was sent to all private and public schools during August, 1998, and is available on two Web sites: <http://www.ed.gov/offices/OSERS/OSEP/earlywrn.html> and <http://www.naspweb.org/center.html>. *Id.* According to the report, early warning signs of potential violence include social withdrawal, excessive feelings of isolation and rejection, being a victim of physical violence or sexual abuse, feelings of being bullied, poor academic performance, expression of violence in drawings and writings, uncontrolled anger, patterns of bullying, history of discipline problems and aggressive behavior, prejudicial attitudes, drug and alcohol use, gang membership, access to firearms, and threats of violence. *Id.*

¹⁸⁰OHIO REV. CODE ANN. § 3313.534 (West 1998). Schools across Ohio are addressing prevention and intervention of violence within schools. See, e.g., Marcia Treadway, *Security; School Safety a Hot Topic*, DAYTON DAILY NEWS, Dec. 10, 1998, at Z31 (discussing proactive measures in Sugarcreek, Ohio, that include updating and revising manuals and crisis plans, initiating consistent communication between school officials and local law enforcement agencies, and hiring a company to conduct a school security assessment); Sandra Clark, *Grant Will Help Elyria Learn of School Violence*, THE PLAIN DEALER, Jan. 8, 1999, at 1B (noting that although the Elyria police department receives few calls regarding school

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Schools should initiate the implementation of prevention programs during the early stages of childhood development.¹⁸¹ Each district should create a crisis prevention and response team¹⁸² Also, mediation and conflict resolution programs should be implemented.¹⁸³ Furthermore, because students who have the potential to be violent come from extremely diverse backgrounds,¹⁸⁴ schools should not target a particular group of students for treatment.¹⁸⁵ In contrast, violence

violence, school officials applied for and received a \$133,617 grant from the U.S. Department of Justice to study whether violence is a problem in the school system).

¹⁸¹ Schulhofer, *supra* note 162, at 445. Although the Head Start program costs approximately \$4,500 per child per year, Schulhofer asserts that studies show long-term positive effects, and he notes that custodial confinement can cost up to \$50,000 per juvenile per year. *Id.* at 445-46.

According to Schulhofer, prevention programs should also concentrate on nutrition and health care. *Id.* at 446. Simple health problems such as an ear infection can cause frustration in school and lead to learning difficulties and aggression. *Id.*

¹⁸² Denenberg, et al., *supra* note 25, at 32-33. These teams should be responsible for facilitating communication and identifying threatening situations, consulting expert risk assessors, and coordinating community resources. *Id.*

¹⁸³ Ewing, *supra* note 39, at 647 (discussing the Resolving Conflict Creatively Program and the Violence Prevention Programs, which promote conflict resolution though means that are not violent). *See also* Marsha Lynn Merrill, *No More Sacrifices on the Altar of Educational Excellence: ADR & At-Risk Students*, 9 OHIO ST. J. ON DISP. RESOL. 275 (1994) (discussing at-risk students and offering a proposal for incorporating alternative dispute resolution into school curriculums); Frank G. Evans & Linda J. Butler, *Violence in Our Schools: Conflict Resolution and Peer Mediation as a Preventive Remedy*, 3 NO. 1 DISP. RESOL. MAG. 8 (1996) (discussing the benefits of conflict resolution and peer mediation programs, noting that over 4,000 schools have implemented these programs, and asserting that this approach “offers a promising alternative to reduce the rate of school violence”); Denenberg, et al., *supra* note 25, at 33-34 (describing the success of various mediation and conflict resolution programs throughout the country); Todd A. Turnblom, *Reducing School Disorder Through Mediation*, 1995 B.Y.U. EDUC. & L.J. 62 (1995) (analyzing the factors that cause disorder in schools, and concluding that although research has been biased and poorly designed, dispute resolution appears to decrease unruly behavior).

¹⁸⁴ *See, e.g.*, Laurie Schaffner, *Female Juvenile Delinquency: Sexual Solutions, Gender Bias, and Juvenile Justice*, 9 HASTINGS WOMEN'S L.J. 1 (1998) (analyzing the factors that contribute to female juvenile delinquency and suggesting strategies for intervention); Debra Gwartney, *Double Bind of Boys Concerns Psychologist*, PORTLAND OREGONIAN, Oct. 17, 1998, at B8 (discussing a clinical psychologist's analysis of factors that contribute to violence by males).

¹⁸⁵ Cloud, *supra* note 24, at (page number unavailable). *See also* Charles Vergon, *Male Academies for At-Risk Urban Youth: Legal and Policy Lessons from the Detroit Experience*, 79 ED. LAW REP. 351 (1993) (analyzing the creation of academies targeting at-risk males, and

prevention programs should be comprehensive and broad-based.¹⁸⁶

VII. CONCLUSION

Over six thousand students were expelled throughout the country last year after bringing weapons to school, yet one half of these students were not placed in alternative education programs.¹⁸⁷ When students endanger the safety their classmates and teachers, they should not be allowed to remain in our schools. Ohio's efforts to prevent crime in schools should include strategies that focus on targeting, diverting, and preventing juvenile violence.¹⁸⁸ In particular, the combination of suspensions, expulsions and alternative education programs will avert violence in our schools and communities.¹⁸⁹ Although the Ohio legislature has taken steps to prevent school violence, state legislation should mandate that all suspended and expelled students must be provided with an alternative education.¹⁹⁰

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concluding that schools must be attentive to the needs of both male and female students and implement programs that do not arbitrarily favor certain students based on group characteristics). *But see* Michael John Weber, *Immersed in an Educational Crisis: Alternative Programs for African-American Males*, 45 STAN. L. REV. 1099 (1993) (analyzing the creation of African-American all-male schools designed to improve the academic performance of African-American boys, discussing constitutional challenges, and concluding that this approach should be implemented if further empirical data supports the creation of these schools).

¹⁸⁶Cloud, *supra* note 24, at (page number unavailable) (listing the components of successful violence prevention strategies at the local school level).

¹⁸⁷Robb, *supra* note 21, at 1B.

¹⁸⁸See discussion *supra* Part VI.C.

¹⁸⁹See discussion *supra* Parts III.B. and V.B.

¹⁹⁰See discussion *supra* Part VI.C.