Nebraska Law Review

Volume 94 | Issue 3 Article 7

2016

A Legal-Conceptual Framework for the School-to-Prison Pipeline: Fewer Opportunities for Rehabilitation for Public School Students

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Note*

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I. INTRODUCTION

The environment in which American students attend public schools has changed dramatically over the past thirty years. Students today attend school in the shadow of perennial school shooting massacres, interact with law enforcement officers permanently patrolling their halls, and may be exposed to drug and gang activity never contemplated when their parents or grandparents were students.[1] One of the most dramatic, and constitutionally significant, changes affecting students today is the reshaped landscape of how students are disciplined[2] by various state actors,[3] both in and out of school.

When a student[4] is accused of committing an offense at school, the matter may be adjudicated in three distinct venues—within the school itself, through a juvenile court proceeding, or in adult criminal court. Depending upon the forum and the type of sanction imposed, one of three very different theoretical models will apply. Each model bestows a particular set of procedural and substantive constitutional rights upon the accused. This Note labels these three models the Criminal Punishment Model,[5] the Juvenile Justice Model,[6] and the

1. James M. Peden, *Through a Glass Darkly: Educating with Zero Tolerance*, 10 KAN. J.L. PUB. POL'Y 369, 369 (2000) ("Despite recent statistics showing a decrease of student violence in our public schools, isolated incidents of extreme violence and loss of life have occupied the public consciousness . . . . Statistics notwithstanding, students in public schools fear for their own personal safety.").
2. This Note uses the term "discipline" to refer to a panoply of methods by which students are accused, adjudicated, and sanctioned. As discussed *infra* Part II, the label that attaches to the form of discipline, and the state actor administering it, can critically affect a subject student's rights.
3. For authority holding that public school officials are state actors, see *infra* note 81.
4. This Note uses the term "student" to refer to an American juvenile attending public school.
5. The term "criminal punishment" can be seen as definitionally redundant given that the imposition of punishment is the sole criterion by which a sanction is determined to be "criminal." *See infra* note 21. Nevertheless, this Note employs the label given the Supreme Court's implied willingness to consider certain school sanctions as punishment while simultaneously rejecting the label of "criminal." *See infra* note 112 and accompanying text.
6. Though this Note employs the names "Criminal Punishment" and "Juvenile Justice" for these respective Models, the labels are, by no means, uniform throughout the published corpus on the topic.

School Discipline Model.[7] This Note examines what rights and remedies attend each model, how these models interact, and, most importantly, how they have changed over the past fifty years. This Note posits that a confluence of trends has made it more likely that students subject to school discipline will be transferred or passed between models, almost always resulting in the imposition of a more punitive sanction upon the student. Despite the increasing fluidity with which students may be transferred between models, students' rights remain rigidly affixed within each model.

This evolution in the treatment of students has been labeled in a myriad of works and publications as the "school-to-prison pipeline."[8] While this research trail is well-trodden, much of its focus has been on the impact of such trends, particularly its disparate application to certain minority groups of students.[9] This Note attempts to identify the conceptual framework underlying the school-to-prison pipeline via an analysis of the rights attendant to the above-described models. Depending upon which model applies, certain constitutional protections may be due the accused student. Correspondingly, the state may be limited in the type and nature of sanction it may impose.

While both the Criminal Punishment and Juvenile Justice Models, and their attendant rights, have been extensively discussed by both legal scholars and courts of law,[10] the School Discipline Model remains relatively undefined, both in its parameters and the rights due students within it.[11] This Note also attempts to more fully articulate

7. This Note uses the term "School Discipline Model" to refer primarily to the codes of conduct and their corresponding sanctions imposed upon students by public school districts in the United States.

8. *See, e.g.*, Dean Hill Rivkin, *Decriminalizing Students with Disabilities*, 54 N.Y.L. SCH. L. REV. 909, 911 n.5 (2009) ("The school-to-prison pipeline refers to systemic policies and practices that push our nation's schoolchildren, especially at-risk children, out of classrooms and into the juvenile and criminal justice systems."); Chauncee D. Smith, *Deconstructing the Pipeline: Evaluating School-to-Prison Pipeline Equal Protection Cases Through a Structural Racism Framework*, 36 FORDHAM URB. L.J. 1009, 1012 (2009) ("The phrase 'school-to-prison pipeline' conceptually categorizes an ambiguous, yet seemingly systematic, process through which a wide range of education and criminal justice policies and practices collectively result in students of color being disparately pushed out of school and into prison.").

9. For an overview of some of the relevant literature, see *infra* notes 139–85.

10. For one of the most comprehensive articulations of these two models, see Martin R. Gardner, *Punishment and Juvenile Justice: A Conceptual Framework for Assessing Constitutional Rights of Youthful Offenders*, 35 VAND. L. REV. 791 (1982).

11. This dearth of conceptual analyses is likely attributable to courts' extreme deference to school authorities in disciplining students. See *infra* note 76 for a discussion of this deference. As such, school disciplinary authority operates in a relative vacuum of constitutional guidance. *See infra* notes 124–80 and accompanying text. This is not to say that the history and constitutional limits of school discipline have gone unexamined. For a thorough legal and historical analysis of school discipline, see Avarita L. Hanson, *Have Zero Tolerance School Discipline*

the School Discipline Model, primarily through the analysis of two landmark Supreme Court cases: *Goss v. Lopez*[12] and *Ingraham v. Wright*.[13] Through these two cases, the School Discipline Model is revealed as one in which students, though entitled to a modicum of constitutional oversight, are at the behest of school officials, who exercise near total discretion in the types of sanctions imposed and whether or not the student is ultimately referred to law enforcement or the juvenile justice system.[14]

Seen through the framework of these three models, the school-to-prison pipeline is best understood as a consort of state policies and practices that ease and encourage the transfer of students between models, generally away from school discipline towards criminal punishment.[15] Consequently, this transfer tends to reduce or eliminate rehabilitation opportunities for offending students, in favor of sanctions more punitive in character. This Note finally argues that these effects are undesirable and counterproductive as a means of maintaining the school environment and preparing a student for life as a functional citizen within our democracy.[16]

Policies Turned into a Nightmare? The American Dream's Promise of Equal Educational Opportunity Grounded in Brown v. Board of Education, 9 U.C. DAVIS J. JUV. L. & POL'Y 289 (2005). However, most of the relevant literature has not attempted to articulate a conceptual framework for school discipline, as has been extensively done with both juvenile justice and criminal punishment. *See supra* note 10.

12. 419 U.S. 565 (1975).

13. 430 U.S. 651 (1977).

14. This referral effects a transfer of the student from the School Discipline Model to either the Juvenile Justice or Criminal Punishment Models. Though not extensively discussed in this Note, it is entirely possible, even likely, for students to be sanctioned in both the School Discipline Model and one of the other two models for the same offense. *See infra* note 19 and accompanying text. In fact, the referral in and of itself can be considered a school discipline sanction if it results in the deprivation of the student's education comparable to a suspension. See *infra* notes 84–102 and accompanying text for a discussion of out-of-school suspension as a deprivation of students' property interest in their education. However, juveniles can only be sanctioned either in juvenile or criminal court for certain offenses, but not both. *See infra* notes 58–61 and accompanying text.

15. *See infra* subsection II.B.3 and section III.B.

16. *See* James E. Ryan, *The Supreme Court and Public Schools*, 86 VA. L. REV. 1335, 1340 (2000) (noting that one traditional goal of public schools has been to teach students "to be responsible and participatory members of society"); *id.* at 1429 ("[M]any educational philosophies stress the importance of preparing students for their lives as adults by providing not only analytical training but also the social skills and habits needed to become productive and responsible members of a democratic society.").

II. THREE MODELS FOR REGULATING JUVENILE CONDUCT

A. The Criminal Punishment Model

1. Rights Attendant to the Criminal Punishment Model

Throughout American history, courts have struggled to define the concept of criminal punishment.[17] Attempting this challenge is not simply an esoteric exercise in judicial philosophy. Rather, understanding the framework by which the state imposes a restraint upon one of its citizens is a critical determination. Only if the actions taken or threatened by the government constitute the imposition of *punishment* is the offender entitled to certain constitutional protections. Critically, the government may not be constitutionally required to prove the elements of its charges against a defendant beyond a reasonable doubt.[18] As its text indicates, the Eighth Amendment's ban on cruel and unusual punishment only applies to actions labeled as such, and not, for instance, to government-imposed treatment for mental illness, regardless of the unpleasantness it incidentally imposes.[19] Additional rights only applicable to punishment include the Fifth Amendment's guarantees against self-incrimination and double jeopardy,[20] the Sixth Amendment's right to a jury trial, and the right to counsel.[21] Additionally, only criminal punishment is subject to the Ex Post Facto Clause, which prohibits punishment for conduct that oc-

17. *See infra* note 25 and accompanying text.
18. *See infra* notes 49–52.
19. U.S. CONST. amend. VIII ("Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual *punishments* inflicted." (emphasis added)); *see* Ingraham v. Wright, 430 U.S. 651, 670 & n.39 (1977) (finding the Eighth Amendment inapplicable to school discipline, because "an imposition must be 'punishment' for the Cruel and Unusual Punishments Clause to apply"); Bell v. Wolfish, 441 U.S. 520, 528 (1979) ("The pretrial detainees whose rights are at stake in this case . . . are innocent men and women who have been convicted of no crimes. Their claim is not that they have been subjected to cruel and unusual punishment . . . but that to subject them to any form of punishment at all is an unconstitutional deprivation of their liberty.").
20. U.S. CONST. amend. V ("No person shall . . . be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself . . . ."); *see* Kansas v. Hendricks, 521 U.S. 346, 369–70 (1997) (holding that the constitutional prohibition against double jeopardy did not apply to a Kansas sex-offender registry because the registry was non-penal; therefore, its imposition did not constitute a second prosecution). *But see* J. Morris Clark, *Civil and Criminal Penalties and Forfeitures: A Framework for Constitutional Analysis*, 60 MINN. L. REV. 379, 382 n.10 (1976) ("The double jeopardy clause has been restricted to 'criminal' punishment despite the lack of an explicit textual reference to criminal prosecutions." (citing JAY A. SIGLER, DOUBLE JEOPARDY 39 (1969))).
21. U.S. CONST. amend. VI ("In all *criminal prosecutions*, the accused shall enjoy the right to a . . . trial, by an impartial jury . . . ." (emphasis added)). Generally, criminal law is identified and distinguished by its imposition of punishment. As discussed by Professor Gardner:

curs prior to the enactment of the conduct's proscription.[22] Finally, individuals have a liberty interest in being free from punishment and, thus, are entitled to due process under the Fourteenth Amendment prior to punishment's imposition.[23]

2. A Framework for Recognizing Criminal Punishment

Given the extensive constitutional implications of the state's imposition of punishment, a clear analytical framework for determining when state action constitutes punishment is critical.[24] Nonetheless, the United States Supreme Court has struggled for well over one hundred years to provide a workable definition of state-imposed punish-

> The best candidate for a conceptual proposition about the criminal law is that the infliction of "punishment" is sufficient to render a legal process criminal in nature. In the United States, the labeling of a process as "criminal" triggers certain basic constitutional guarantees, such as the right to counsel and the right to a jury trial. As a test for when processes are criminal, the Supreme Court unhesitatingly invokes the concept of "punishment" as the relevant criterion. That a sanction is inflicted in the criminal courts for a violation of the criminal code is sufficient to classify the sanction as "punitive," but there are recurrent problems in assessing the punitive nature of other sanctions, such as administrative commitment, expatriation, deportation, fines for custom violations and the deprivation of social security benefits. That the legislature has identified these sanctions as civil in nature does not control the constitutional issue, for if the sanction is "punitive," if it constitutes "punishment," then regardless of the legislative label, the process is criminal and the constitutional guarantees apply. If we wish to understand the criminal law, we must first understand its most prominent feature: the infliction of punishment.
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> Martin R. Gardner, *Punitive Juvenile Justice and Public Trials by Jury: Sixth Amendment Applications in a Post-*McKeiver *World*, 91 NEB. L. REV. 1, 12 n.44 (2012) (quoting GEORGE P. FLETCHER, RETHINKING CRIMINAL LAW 408–09 (1978)). In this sense, the presence of punishment, or lack thereof, defines when an act is considered "criminal."

22. *See* U.S. CONST. art. I, § 9, cl. 3 ("No Bill of Attainder or ex post facto Law shall be passed."); *id.* art. I, § 10, cl. 2 ("No State shall . . . pass any . . . ex post facto law."); *Hendricks*, 521 U.S. at 369–71 (holding that neither the constitutional prohibition against double jeopardy nor the Ex Post Facto Clause applied to a Kansas sex-offender registry because the registry was non-penal; thus its imposition did not constitute a second prosecution, and the Ex Post Facto Clause applies "exclusively to penal statutes" (citing Cal. Dep't of Corrs. v. Morales, 514 U.S. 499, 505 (1995))); Flemming v. Nestor, 363 U.S. 603 (1960) (holding that termination of a deported citizen's social security benefits was not "punishment" and, therefore, could be imposed for conduct predating the relevant statute without violating the Ex Post Facto Clause).

23. *See, e.g.*, Bell v. Wolfish, 441 U.S. 520, 535 (1979) ("[U]nder the Due Process Clause, a detainee may not be punished prior to an adjudication of guilt . . . .").

24. *See, e.g.*, Clark, *supra* note 20, at 383 (extolling upon the need to distinguish between punishment and regulatory fines or forfeitures, so that affected citizen's rights are clearly defined).

ment.[25] However, certain principals can be gleaned from the Court's oeuvre addressing the concept of punishment.[26] A synthesis of relevant case law reveals that the Court will find a sanction to be punitive under the following conditions:

(1) If the sanction is labeled punitive by the legislature, it is conclusively presumed to be so.
(2) If the legislative label or intent indicates that the sanction is "civil," it will be presumed to be so unless it is shown "by the clearest proof" to be punitive under the following conception of punishment:
    (a) The sanction involves an unpleasant restraint purposely imposed by the state;
    (b) The sanction is imposed upon a person because of an offense;
    (c) The sanction is imposed to achieve the purposes of punishment—retribution and deterrence;
    (d) The extent and duration of the unpleasant restraint is known, within some possible limits, at the time of its imposition; and
    (e) The sanction is generally imposed upon offenders deemed to be blameworthy.[27]

As to (2)(c)'s question of intent, the Supreme Court stated in *Bell v. Wolfish*: "[I]f a restriction or condition is not reasonably related to a legitimate goal—if it is arbitrary or purposeless—a court permissibly may infer that the purpose of the governmental action is punishment that may not constitutionally be inflicted upon detainees *qua* detainees."[28] Thus, a legislature's stated purpose of an imposed sanction would not necessarily be controlling. Also noteworthy is the fact that under this framework, the question of legislative intent asks whether the legislature's stated intent can be ascertained as its actual intent based upon the design of the sanction. Any finding that the legislature did not actually intend the sanction to be punishment is conclusive evidence of non-punishment, as accidental punishment is logically impossible under this framework.[29]

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25. *See* Cummings v. Missouri, 71 U.S. (4 Wall.) 277 (1866); Gardner, *supra* note 21, at 13 & n.46 ("The Court first attempted to define punishment in mid-nineteenth century cases arising under the Bill of Attainder and Ex Post Facto Clauses."); Clark, *supra* note 20, at 382 ("The Court has never developed a principled explanation of why identical sanctions should trigger certain criminal constitutional safeguards but not others.").
26. For an extensive discussion of the Court's development of this case law, see Gardner, *supra* note 10, at 797–822.
27. Gardner, *supra* note 21, at 15–16.
28. *Bell*, 441 U.S. at 539.
29. Accidental punishment would lack the requisite intention to inflict the retribution or deterrence required by the Court's framework. Thus, courts must avoid the temptation to determine punishment by the effect of the sanction upon the offender. *See* Gardner, *supra* note 21, at 17 n.61 ("If punishment is defined solely in terms of the impact of a sanction on its recipient, without regard to questions of motivation for imposing it, virtually all coercive sanctions would become punitive, thus making it impossible to draw necessary distinctions between . . . punishment and coercive rehabilitation."); HERBERT L. PACKER, THE LIMITS OF THE CRIMINAL SANCTION 19–31 (1968) (discussing why the "impact the-

B. The Juvenile Justice Model

1. Rehabilitative Beginnings

In contrast to the defining punitive characteristic of the Criminal Justice Model,[30] the Juvenile Justice Model began solely with a rehabilitative purpose.[31] Rather than impose punishment as retribution for an offense,[32] the Juvenile Justice Model, informed by the social science of the time, viewed youth offenders as possessing a condition in need of correction.[33] The reasoning, still applicable today, was that because of their youth and continuing development, juveniles were more amenable to rehabilitation and less of a threat to society at large than offending adults.[34] The procedural structure of this model was the near opposite of the adversarial system that defined adult criminal courts.[35] Collecting information about the child was prioritized so that the judge, ostensibly possessing especial knowledge of child development, could better render an appropriate "diagnosis."[36] Because the ultimate issue was the child's welfare and rehabilitation, juries and lawyer-advocates were seen as inapposite, and the judge was to

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ory" of identifying punishment is insufficient). *But see* Estelle v. Gamble, 429 U.S. 97, 116 (1976) (Stevens, J., dissenting) ("[W]hether the [constitutional ban on cruel and unusual punishment] has been violated should turn on the character of the punishment rather than the motivation of the individual who inflicted it.").

30. However, see ANDREW VON HIRSCH, DOING JUSTICE: THE CHOICE OF PUNISHMENTS 9–10 (1976), for a discussion about the influence of the rehabilitative model in the criminal justice system during the latter half of the Twentieth Century. *See also* Barry C. Feld, *The Juvenile Court Meets the Principle of Offense: Punishment, Treatment, and the Difference It Makes*, 68 B.U. L. REV. 821, 823–24 (1988) (describing the creation of the juvenile justice system as part of a broad progressive effort to reform the entire justice system into more rehabilitative model).

31. Elizabeth S. Scott & Thomas Grisso, *The Evolution of Adolescence: A Developmental Perspective on Juvenile Justice Reform*, 88 J. CRIM. L. & CRIMINOLOGY 137, 141 (1997) ("The creation at the turn of the century of a separate system of juvenile justice, committed to rehabilitation of young offenders, was a product of the social reform movement of that period.").

32. Prior to the creation of separate juvenile courts of justice at the dawn of the twentieth century, juvenile offenders received the same criminal adjudication as adult offenders, although a common law "infancy defense" existed. Andrew Walkover, *The Infancy Defense in the New Juvenile Court*, 31 UCLA L. REV. 503, 509–12 (1984).

33. Feld, *supra* note 30, at 824 & n.9; *see also In re* Gault, 387 U.S. 1, 79 (1967) (Stewart, J., dissenting) ("[A] juvenile proceeding's whole purpose and mission is the very opposite of the mission and purpose of a prosecution in a criminal court.").

34. Feld, *supra* note 30, at 824.

35. Barry C. Feld, *Criminalizing Juvenile Justice: Rules of Procedure for the Juvenile Court*, 69 MINN. L. REV. 141, 150 (1984) ("[The juvenile court] modified courtroom procedures to eliminate any implication of a criminal proceeding.").

36. *Id.*

sit next to the child to lend the proceedings an air of informality.[37] Sentences were indeterminate, based solely upon the particular needs of the child, and not influenced by the alleged offense.[38]

2. Recognizing Due Process Rights in Juvenile Justice

This rehabilitative model operated in nearly every state for much of the twentieth century. However, beginning in the 1960s, a "renaissance of retribution"[39] fundamentally changed how juvenile courts treated and sentenced youth offenders.[40] Instead of solely perceiving youth offenders as bearing a condition in need of treatment, juvenile courts, increasingly throughout the 1970s, 80s, and 90s, began to prescribe sentences so as to make juvenile offenders answer for their crimes.[41] This change in sentencing can be seen in the use of backward-looking factors in determining sentences, specifically the nature and perceived heinousness of the crime, and the record of the convicted offender.[42]

As juvenile courts grew increasingly punitive, courts of law began to recognize additional constitutional protections due juvenile offenders.[43] In a series of cases spanning thirty years, the United States Supreme Court recognized a number of constitutional safeguards due youth defendants in juvenile court.[44]

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37. Gardner, *supra* note 21, at 9 ("The proceedings were themselves deemed rehabilitative, with the judge acting as a father figure ready to sit next to the youth and 'on occasion put his arm around his shoulders and draw the lad to him' in a show of 'care and solicitude.'" (quoting Julian W. Mack, *The Juvenile Court*, 23 HARV. L. REV. 104, 119–20 (1909))); Feld*, supra* note 30, at 150–51.

38. Feld*, supra* note 30, at 150–51. Both of these characteristics speak to a rehabilitative purpose, and their converse, a sentence for a specific amount of time determined by the nature of the offense, would be characteristic of multiple factors indicating criminal punishment. *See supra* text accompanying note 27 ("The sanction is imposed to achieve the purposes of punishment—retribution and deterrence . . . [and] [t]he extent and duration of the unpleasant restraint is known, within some possible limits, at the time of its imposition . . . .").

39. *See* Martin R. Gardner, *The Renaissance of Retribution—An Examination of Doing Justice*, 1976 WIS. L. REV. 781 (1976).

40. Feld, *supra* note 30, at 151 ("Despite occasional challenges and criticism of some conceptual or administrative aspects of juvenile justice, no sustained and systematic examination of the juvenile court occurred until the 1960s.").

41. Gardner, *supra* note 21, at 22–23.

42. *Id.* at 23–24.

43. Feld, *supra* note 30, at 151 (describing the "due process revolution" that shifted "the juvenile court from a social welfare agency into a legal institution").

44. Debate remains as to whether the Court's recognition of constitutional rights due youth offenders in juvenile proceedings was an acknowledgement of the punitive nature already present in the juvenile system, or if the Court's decisions caused the juvenile justice model to assume additional punitive characteristics. *Compare In re* Gault, 387 U.S. 1, 27–29 (1967) (holding that juvenile offenders are entitled to due process, in part, because of the similarities between the juvenile and criminal court models), *with In re* Winship, 397 U.S. 358, 376 (1970) (Burger,

One of the first cases to mark the sea change in juvenile rights was *In Re Gault*,[45] in which the Court found that juveniles facing incarceration in a juvenile facility were entitled to due process prior to conviction. The Court held that the Due Process Clause of the Fourteenth Amendment requires that juveniles be granted notice of charges, and be able to confront, cross-examine, and call witnesses.[46] Additionally, juveniles possess a right to counsel, which flows from the Fifth Amendment, because juvenile proceedings are so analogous to criminal proceedings.[47] In so holding, the Court implicitly conveyed a deep skepticism of the rehabilitative nature of the juvenile system.[48] At the very least, this finding is a tacit, but inescapable, acknowledgement that the Court regarded the juvenile system as a mixture of punishment and rehabilitation.[49]

Shortly thereafter, the Court applied similar reasoning in *In Re Winship*.[50] There, the Court held that the government, in a juvenile proceeding, is required by the Due Process Clause of the Fourteenth Amendment to prove each element of an alleged offense beyond a reasonable doubt if the alleged offense would be considered criminal if committed by an adult.[51] The Court found that this requirement is imposed to protect the accused from the stigma and risk of lost liberty carried by a conviction.[52] Even though these factors are equally pre-

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J., dissenting) ("I cannot regard it as a manifestation of progress to transform juvenile courts into criminal courts, which is what we are well on the way to accomplishing."); Feld, *supra* note 30, at 141 (describing *Gault* as "precipitat[ing]" the "procedural revolution that . . . transformed the juvenile court" into a model more closely resembling a criminal proceeding).

45. 387 U.S. 1; *see* Feld, *supra* note 30, at 151 (identifying *Gault* as the first case of the "due process revolution" of the juvenile court); *see also* Kent v. United States, 383 U.S. 541, 562 (1966) (holding that juveniles have a right to "the essentials of due process and fair treatment" before being waived from juvenile to adult court).
46. *In re Gault*, 387 U.S. at 12–48.
47. *Id.* at 47–49.
48. *Id.*
49. *See* Gardner, *supra* note 10, at 823–25 (noting that, though *Gault* refused to hold juvenile proceedings constituted punishment, the conclusion "that the Court saw the sanction imposed in *Gault* as punitive is difficult to avoid"). See Gardner, *supra* note 21, at 18–22, for an explanation as to why a sanction cannot simultaneously be imposed as punishment and rehabilitation for purposes of constitutional analysis.
50. 397 U.S. 358 (1970).
51. *Id.* at 365–66 ("We made clear in [*Gault*] that civil labels and good intentions do not themselves obviate the need for criminal due process safeguards in juvenile courts, for a proceeding where the issue is whether the child will be found to be delinquent and subjected to the loss of his liberty for years is comparable in seriousness to a felony prosecution." (citation and internal quotation marks omitted)).
52. *Id.* at 367 ("[I]ntervention [by a court] cannot take the form of subjecting the child to the stigma of a finding that he violated a criminal law and to the possibility of institutional confinement on proof insufficient to convict him were he an adult.").

sent in criminal convictions that impose punishment, the Court avoided finding that the juvenile system was punitive.[53]

Just one year later, the Court, in *McKeiver v. Pennsylvania*,[54] abated its expansion of the rights required in juvenile proceedings when it held that such proceedings do not constitutionally require a trial by jury.[55] In distinguishing the holdings in *Gault* and *Winship*, the Court noted that the protections afforded in those cases worked to ensure and promote accurate fact-finding.[56] As jury trials did not contribute to such a function, they were not constitutionally mandated at the juvenile level.[57]

Four years later, the Court's reasoning further aligned the juvenile justice system with criminal punishment in *Breed v. Jones*.[58] In *Breed*, the Court found that because juvenile proceedings were sufficiently analogous to those in adult criminal court, the proscription against double jeopardy applied, and a juvenile could not be prosecuted subsequently in adult court after an adjudication in juvenile court.[59] In comparing the potential sanctions in criminal and juvenile court, the Court concluded:

> [I]n terms of potential consequences, there is little to distinguish an adjudicatory hearing such as was held in this case from a traditional criminal prosecution. For that reason, it engenders elements of anxiety and insecurity in a juvenile, and imposes a heavy personal strain . . . . Under our decisions we can find no persuasive distinction in that regard between the proceeding conducted in this case . . . and a criminal prosecution, each of which is designed to vindicate the very vital interest in enforcement of criminal laws. . . . Jeopardy attached when respondent was put to trial before the trier of the facts, that is, when the Juvenile Court . . . began to hear evidence.[60]

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53. Gardner, *supra* note 10, at 828.

54. 403 U.S. 528 (1971).

55. *Id.* at 534–41. The Court held that jury trials were not required even if a conviction could result in incarceration or the alleged offense would be considered a crime if committed by an adult. *Id.*

56. *Id.* at 543 ("The requirements of notice, counsel, confrontation, cross-examination, and standard of proof naturally flowed from [an emphasis on accurate factfinding]. But one cannot say that in our legal system the jury is a necessary component of accurate factfinding."). Though acknowledging *Gault*'s finding that the right against self-incrimination in juvenile proceedings does flow from due process considerations, the Court omitted it when listing the rights identified in *Gault* that emphasized accurate fact-finding. *Id.* at 532, 543. See Gardner, *supra* note 10, at 829–32 & n.224, for a discussion of the implications of the Court's refusal to address this irreconcilability between the *McKeiver* and *Gault* decisions.

57. *McKeiver*, 403 U.S. at 543. *But see id.* at 565–66 (Douglas, J., dissenting) (enumerating reasons why a jury trial might promote more accurate fact-finding in the juvenile context).

58. 421 U.S. 519 (1975).

59. *Id.* at 529–30.

60. *Id.* at 530–31 (citations and internal quotation marks omitted).

In reaching its conclusion, the Court did not cite to the Fifth Amendment or considerations of due process, but rather to the lack of distinction between the criminal and juvenile justice models in the specific context of placing the accused in "jeopardy."[61]

3. A Retributive Renaissance in Juvenile Courts

As discussed in subsection II.B.2, in the 1970s, states began to legislate a more punitive purpose for juvenile courts, far removed from the purely rehabilitative purpose of their founding.[62] Rather than looking to rehabilitate an offender, new or amended laws and sanctions were designed to make offenders, juvenile or otherwise, answer for their crimes and deter future crime.[63] States mainly employed four "strategies" for shifting juvenile courts to a more retributive model: (1) easing the requirements for waiving juvenile offenders into adult court; (2) adding traditionally punitive purposes, such as offender accountability, public safety, or retribution, to purpose clauses of juvenile court statutes; (3) increasing the use of determinate sentencing of juvenile offenders; and (4) mandating minimum sentences for the conviction of specific offenses.[64]

States eased the process by which a juvenile is waived into adult criminal court primarily through three methods: (1) expanding the ability of juvenile court judges to waive students into criminal court after an evidentiary hearing; (2) removing juvenile courts' jurisdiction based upon the age or alleged offense of the juvenile; and (3) allowing state prosecutors discretion to "directly file" charges against juveniles in adult criminal court by granting concurrent jurisdiction to juvenile and adult courts over older juveniles charged with particular of-

61. *See id.* For a discussion of the Court's misapplication of the effect theory in *Gault* and *Breed*, and why the Court would have found the sanctions at issue to be punitive had it applied the proper analytical framework, see Gardner, *supra* note 10, at 832–33. Gardner further summarizes *Gault*'s, *Winship*'s, *McKeiver*'s, and *Breed*'s treatment of the punitive framework cited at *supra* note 27 thusly:

> *Gault*, *Winship*, *McKeiver*, and *Breed* illustrate three manifestations of punishment's analytical role in juvenile cases. In some instances, as in *Gault* and *Winship*, the concept may operate merely as an alternative means to obtain the same results yielded by the fundamental fairness standard. In other cases, however, as exemplified by *McKeiver*, different outcomes may result depending upon whether fundamental fairness or the concept of punishment is applied. Finally, *Breed* suggests that certain issues are properly analyzed entirely in terms of the concept of punishment without reference to fundamental fairness.

Gardner, *supra* note 10, at 833.

62. *See supra* notes 39–42.

63. Gardner, *supra* note 21, at 22–23.

64. Martin L. Forst & Martha-Elin Blomquist, *Cracking Down on Juveniles: The Changing Ideology of Youth Corrections*, 5 NOTRE DAME J.L. ETHICS & PUB. POL'Y 323, 323–24 (1991). Note how these four "strategies" align with the punitive framework articulated in *supra* text accompanying note 27.

fenses.[65] The overall effect of these new waiver provisions was to provide states a variety of methods by which they could choose, or even mandate, that a juvenile, whom the state previously would have sought to rehabilitate, be subjected to a punitive sanction for his or her offense.[66]

While enactments easing the waiver of juveniles into adult court work to punish accused juveniles through adult sanctions, determinate sentences and mandatory minimum sentencing laws introduce punitive sanctions into the juvenile court itself. On a theoretical level, determinate sentence laws are the ultimate rejection of the rehabilitative model.[67] They remove any consideration for the needs of the accused or his or her amenability to rehabilitation.[68] Rather, they are solely concerned with the act committed and the accused's prior behavior.

Determinate sentencing laws, as adopted in several states, may take the form of presumptive guidelines that depend on the accused's age, his record, and the seriousness of the offense.[69] Alternatively, a state may use "offense-based criteria," including mandatory minimums, with long sentences for serious offenses that grow proportionately shorter for lesser crimes.[70] Lastly, a state may retain overall

65. Barry C. Feld, *Unmitigated Punishment: Adolescent Criminal Responsibility and LWOP Sentences*, 10 J.L. & FAM. STUD. 11, 39–40 (2007); *see also* JOLANTA JUSZKIEWICZ, YOUTH CRIME/ADULT TIME: IS JUSTICE SERVED? 1 (2000), *archived at* http://perma.unl.edu/59KV-TEMB ("[Measures passed by states to send more youth to criminal court include]: lowering the age at which juveniles can be prosecuted as adults; greatly expanding the categories of crimes for which youth are automatically prosecuted in criminal court; giving prosecutors the exclusive authority to decide which juveniles are charged as adults; and limiting the discretion of judges to overturn decisions by prosecutors and law enforcement officials."). While many early laws establishing juvenile courts vested the courts with absolute discretion to transfer a case to adult criminal court, the Supreme Court held in *Kent v. United States*, 383 U.S. 541 (1966) that juveniles were entitled to several due process rights before transfer. *See* Forst & Blomquist, *supra* note 64, at 338. Despite these protections, the Court has not struck down any of the increasingly popular waiver statutes, even though it may contain exceedingly vague language. *See id.* (noting that since 1970, approximately half of the state legislatures have passed new waiver provisions, many of which contained extremely vague language, such as "amenability to treatment," "dangerousness," "protection of the public," and "best interests of the public welfare").

66. *See also* JUSZKIEWICZ, *supra* note 65, at 4 (noting that in 2005, the prosecutor or legislature—rather than a judge—decided whether to charge a juvenile as an adult 85% of the time).

67. *See* Gardner, *supra* note 21, at 24–25 ("Clearly, the offense-oriented, determinate sentencing movement constitutes a clear invocation of the punitive sanction, and stands in stark contrast to the offender-oriented, indeterminate dispositional scheme reflected in traditional rehabilitative juvenile justice." (citation omitted)).

68. *See id.*

69. *See, e.g.*, WASH. REV. CODE ANN. § 13.40.010(2) (West 2010).

70. Gardner, *supra* note 21, at 24.

indeterminate sentencing, but employ determinate sentences for repeat offenders or serious offenses.[71]

From their purely rehabilitative beginnings, juvenile courts in America, both in their treatment and sentencing of juvenile offenders, have incorporated several aspects of the criminal justice system and its underlying punitive purpose. Despite the increasing opportunities for the visitation of punishment upon offending juveniles, a limited set of constitutional protections, primarily grounded in the concept of due process, attend juvenile proceedings in most states.

C. The School Discipline Model

1. Sparse Constitutional Origins

Unlike the designed and intentional beginnings of the juvenile justice system, the legal framework surrounding the regulation of student behavior by school officials in American public schools developed slowly and hesitantly in the face of the changing educational landscape. For much of early American history, education was entirely voluntary on the part of the student and his or her parents.[72] Under such a scheme, sending a child to school could be seen as an implicit waiver of the student's constitutional rights[73] or a delegation of authority from the student's parents to the school officials.[74] Whatever the legal theory empowering officials in early American schools, students for much of the nation's history enjoyed virtually no constitu-

71. *Id.*

72. *See* David B. Tyack, *Ways of Seeing: An Essay on the History of Compulsory Schooling*, 46 HARV. EDUC. REV. 355, 361–62 (1976) (noting that public attitudes in America did not significantly shift in favor of compulsory education until late into the nineteenth century).

73. A similar, though distinct, argument theoretically could apply today to students attending private American schools in which the officials are private employees and not state actors. See *infra* note 81 for a discussion of public school officials as state actors.

74. A school official (or any agent) so authorized by such a delegation is said to act *in loco parentis*. The Court specifically rejected the notion that this type of authority applies to public school students *viz a viz* school officials. New Jersey v. T.L.O., 469 U.S. 325, 336 (1985) ("[The reasoning of *in loco parentis*] is in tension with contemporary reality and the teachings of this Court."). Though the Supreme Court has never explicitly held that school officials historically acted *in loco parentis*, at least one member of the Court has advocated for a "return" to such a legal standard for all public school students. *See, e.g.*, Safford Unified Sch. Dist. No. 1 v. Redding, 557 U.S. 364, 383 (2009) (Thomas, J., dissenting) (arguing that a search of a student, though violative of the Fourth Amendment, should be upheld under an *in loco parentis* standard); Morse v. Frederick, 551 U.S. 393, 410–22 (2007) (Thomas, J., concurring) (advocating for an application of an *in loco parentis* standard to public school students as grounds for overturning prior constitutional limits on school officials' conduct (citing Lander v. Seaver, 32 Vt. 114 (1859))).

tional rights while at school.[75] Considering this absence of constitutional protections, there should be little surprise that the United States Supreme Court and the judiciaries of nearly all states have shown a strong aversion to defining the rights of students in public schools.[76] This aversion has resulted in a near absolute deference to school officials in maintaining discipline in schools as they see fit.[77]

Arguably, the first case to signal a willingness by the Court to forego this deference was *Tinker v. Des Moines Independent Community School District*.[78] In *Tinker*, the Court held that public students were entitled to certain First Amendment rights while in school.[79] The Court subsequently found that students, while in school, also enjoyed limited Fourth Amendment protections in *New Jersey v. T.L.O.*[80] In both cases, the Court held that for constitutional purposes, school officials were state actors.[81] While the cases represented a dramatic acknowledgement of previously unrecognized rights, the protections the Court articulated were substantially reduced from

75. See Barry C. Feld, T.L.O. *and* Redding*'s Unanswered (Misanswered) Fourth Amendment Questions: Few Rights and Fewer Remedies*, 80 MISS. L.J. 847, 847–48 (2011), for a discussion of the various theories cited by the Court for rejecting certain constitutional protections for public school students.

76. This deference to school officials additionally demonstrates deference to the legislative branch of state governments, as school districts and their legal authority exist as grants of state power and are manifestations of a state's right to educate its citizens. *See, e.g.*, Goss v. Lopez, 419 U.S. 565, 578 (1975) ("Judicial interposition in the operation of the public school system of the Nation raises problems requiring care and restraint. . . . By and large, public education in our Nation is committed to the control of state and local authorities."); Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 507 (1969) ("[T]he Court has repeatedly emphasized the need for affirming the comprehensive authority of the States and of school officials, consistent with fundamental constitutional safeguards, to prescribe and control conduct in the schools."); J.P. *ex rel*. A.P. v. Millard Pub. Schs., 285 Neb. 890, 899, 830 N.W.2d 453, 461 (2013) ("A school district is a creature of statute and possesses no other powers other than those granted by the Legislature."). In this sense, deferring to the authority of school officials upholds the tenets of both the separation of powers and, in the case of federal courts, federalism.

77. *See supra* note 76; *infra* subsection II.C.3.

78. 393 U.S. 503.

79. *Id.* at 506 ("It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.").

80. 469 U.S. 325 (1985).

81. *See Tinker*, 393 U.S. at 507 ("The Fourteenth Amendment, as now applied to the States, protects the citizen against the State itself and all of its creatures—Boards of Education not excepted." (internal quotation marks omitted) (citing W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 637 (1943))); *T.L.O.*, 469 U.S. at 336–37 (noting that because school officials are subject to the First and Fourteenth Amendment rights of their students, they are subject to certain Fourth Amendment rights as well (citing *Tinker*, 393 U.S. 503; *Goss*, 419 U.S. 565; Ingraham v. Wright, 430 U.S. 651 (1977))).

those enjoyed by citizens in a general public context.[82] Though some speculated at the time that these cases heralded a shift in the judiciary's approach to public schools, subsequent cases have generally shown that the Court's reluctance to interfere in school officials' maintenance of the school environment remains resolute.[83]

2. Students' Rights and Punishment in Schools

Given its reluctance to interfere in the school environment, there should be little surprise that the Court has struggled to define the constitutional rights of students in regards to school-imposed sanctions.[84] Two cases, in particular, demonstrate the difficulty experienced by the Court in assessing a school's ability to punish its students in light of the judiciary's strong reluctance to interfere in the workings of public schools: *Goss v. Lopez*[85] and *Ingraham v. Wright*.[86] The end result is that while students are entitled to a limited set of rights flowing from the Due Process Clause of the Constitution, the vitality of these rights to limit or police abusive school disciplinary practices is highly questionable.

a. Goss v. Lopez

In *Goss*, the Court considered what, if any, due process rights were owed Ohio school students subjected to ten-day school suspensions.[87] The students in the case had been suspended for destruction of school property and refusal to disperse from a gathering upon official instruc-

82. *See Tinker*, 393 U.S. at 513 ("[C]onduct by the student, in class or out of it, which for any reason . . . materially disrupts classwork or involves substantial disorder or invasion of the rights of others is, of course, not immunized by the constitutional guarantee of freedom of speech."); *T.L.O.*, 469 U.S. at 340–41 (holding that searches of students by school officials require neither prior obtainment of a warrant nor probable cause, but simply must be "reasonable[ ] under all the circumstances").

83. *See* Myron Schreck, *The Fourth Amendment in the Public Schools: Issues for the 1990s and Beyond*, 25 URB. LAW. 117, 122–30 (1993) ("After *T.L.O.*, courts have generally upheld school searches and seizures. Of twenty-three post-1985 cases that addressed the issue of reasonable suspicion, only three cases held that the school officials lacked reasonable suspicion to search a particular location.").

84. While both *Tinker* and *T.L.O.* dealt with students subjected to school sanctions, this Note focuses on the rights specifically attendant the procedures immediately preceding an imposition of a student sanction.

85. 419 U.S. 565.

86. 430 U.S. 651.

87. While a school suspension may seem a trivial sanction compared to the potential incarceration and deprivations of liberty discussed in the preceding sections of this Note, the Court has held, and this Note argues, that suspension is a serious sanction to visit upon a student of any age considering its implications for the student's education. *See Goss*, 419 U.S. at 576 ("[T]he total exclusion from the educational process for more than a trivial period, and certainly if the suspension is for 10 days, is a serious event in the life of the suspended child.").

tion to do so.[88] At the time, state law made education compulsory for the students and authorized high school principals, within their complete discretion, to suspend students without a prior hearing.[89] The Court concluded that because Ohio law extended compulsory education to all students, the defendants had a property interest in their education.[90] Additionally, the students possessed a liberty interest in their reputations,[91] which they risked losing due to the suspensions.[92] Because of these interests, the students were constitutionally due some process before their deprivation, rather than "any procedure the school [chose] no matter how arbitrary."[93]

The Court determined that students were due, at a minimum, an informal notice and a hearing regarding the suspension.[94] Rather than a formalized proceeding, the notice simply needed to inform the student of the alleged infraction, and a hearing needed only be an informal opportunity for the accused student to tell his or her version of the relevant events.[95] The Court stated these two requirements could, and most often would, occur simultaneously,[96] and that most

88. *Id.* at 569–70.

89. *Id.* at 570–73 (citing OHIO REV. CODE ANN. §§ 3313.66, 3313.48, 3313.64 (1972 & Supp. 1973)).

90. *Id.* at 573–74. The Court rejected an argument from the State of Ohio that the students possessed no such interest in their education because they had no constitutional entitlement to it. *Id.* at 572–73 ("'[Protected interests] are created and their dimensions are defined' by an independent source such as state statutes or rules entitling the citizen to certain benefits." (quoting Bd. of Regents v. Roth, 408 U.S. 564, 577 (1972))).

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

92. *Id.* ("If sustained and recorded, [the charges of misconduct precipitating the suspension] could seriously damage the students' standing with their fellow pupils and their teachers as well as interfere with later opportunities for higher education and employment.").

93. *Id.* at 576. In so holding, the Court noted that a ten-day suspension of a student is "not *de minimis*," considering that "education is perhaps the most important function of state and local governments." *Id.* (internal quotation marks omitted) (citing Brown v. Bd. of Educ., 347 U.S. 483, 493 (1954)).

94. *Id.* at 581–82.

95. *Id.* The Court also rejected the argument that judicial review of the suspension pursuant to OHIO REV. CODE ANN. § 2506.01 (West 1973) provided the requisite process for two reasons: (1) the judicial review was deferential to the determination of the suspending principal; and (2) there was no stay of the suspension pending review. *Goss,* 469 U.S. at 581 n.10. Thus, there may be deprivation of protected interests in the meantime, for which the student would have no recourse. *Id.*

96. *Goss*, 419 U.S. at 582 ("[T]he disciplinarian may informally discuss the alleged misconduct with the student minutes after it has occurred. We hold only that, in being given the opportunity to explain his version of the facts at this discussion, the student first be told what he is accused of doing and what the basis of the

prudent school districts would already be following these procedures.[97]

The Court opined that the procedures imposed would not constitute an undue burden on school districts, and the school district that was a party to the litigation already possessed substantially similar procedures.[98] Apparently eager to avoid burdening the school system with subsequent expansions of students' rights,[99] the Court listed some of the rights to which students were not entitled prior to a suspension:

> We stop short of construing the Due Process Clause to require, countrywide, that hearings in connection with short suspensions must afford the student the opportunity to secure counsel, to confront and cross-examine witnesses supporting the charge, or to call his own witnesses to verify his version of the incident.[100]

In reaching this holding, the Court noted that further constitutional requirements may strain school resources and, in so doing, reduce the efficacy of suspension as a tool for maintaining discipline sufficient to outweigh suspension's benefits to the school environ-

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accusation is."). The Court held that while "as a general rule [the] notice and hearing should precede removal of the student," those students who present "a continuing danger to persons or property or an ongoing threat of disrupting the academic process" could be removed immediately, but the requisite hearing and notice should follow as soon as practicable afterwards. *Id.* at 582–83.

97. *Id.* at 583 ("[W]e have imposed requirements which are, if anything, less than a fair-minded school principal would impose upon himself in order to avoid unfair suspensions.").

98. *Id.* This acknowledgement by the Court begs the question why the Court decided to enumerate these rights if they were already being observed, given the strong judicial deference to school officials in maintaining the school environment. Additionally, one struggles to think of a circumstance in which an even quasi-competent school official would suspend a student without informing him or her as to why and hearing what the student's response might be. In that sense, the Court broke substantial ground to judicially mandate common sense.

99. *Id.* at 578 ("We are also mindful of our own admonition: 'Judicial interposition in the operation of the public schools raises problems requiring care and restraint. . . . By and large, public education in our Nation is committed to the control of local and state authorities.'" (quoting Epperson v. Arkansas, 393 U.S. 97, 104 (1968))).

100. *Id.* at 583.

ment.[101] In this sense, the Court validated the ten-day school suspension as a tool for maintaining school discipline.[102]

b. Ingraham v. Wright

Ingraham was a suit brought by students who had been corporally punished by school officials in Florida.[103] The students alleged that the corporal punishment was both cruel and unusual punishment under the Eighth Amendment and a violation of their due process rights to notice and a hearing, as mandated by *Goss v. Lopez*.[104] The Court recognized that while Florida law specifically authorized corporal punishment,[105] school officials additionally possessed a common law right to punish corporally.[106] Thus, even though only twenty-one

101. *Id.* ("To impose in each such case even truncated trial-type procedures might well overwhelm administrative facilities in many places and, by diverting resources, cost more than it would save in educational effectiveness. Moreover, further formalizing the suspension process and escalating its formality and adversary nature may not only make it too costly as a regular disciplinary tool but also destroy its effectiveness as part of the teaching process."). In acknowledging this balance, the Court noted that suspensions longer than ten days and expulsions may require additional due process protections. *Id.* at 584 ("We should also make it clear that we have addressed ourselves solely to the short suspension, not exceeding 10 days. Longer suspensions or expulsions for the remainder of the school term, or permanently, may require more formal procedures. Nor do we put aside the possibility that in unusual situations, although involving only a short suspension, something more than the rudimentary procedures will be required.").

102. *Id.* at 580 ("Suspension is considered not only to be a necessary tool to maintain order but a valuable educational device.").

103. Ingraham v. Wright, 430 U.S. 651, 653 (1977). The Court noted that the punishments administered by the school at issue appeared to be "exceptionally harsh" in relation to the rest of the district. *Id.* at 657. The beatings caused one student to suffer a hematoma that required medical attention and prolonged convalescence away from school. Another student temporarily lost the use of one arm. *Id*.

104. *Id.* at 653–55. For a discussion of *Goss*, see *supra* text accompanying notes 87–102.

105. *Ingraham*, 430 U.S. at 655–56 & n.6 (citing FLA. STAT. ANN. § 232.27 (1961)). Though not all schools administered the punishment, per internal policies, those that did were bound by three statutory safeguards:

> (1) The use of corporal punishment shall be approved in principle by the principal before it is used, but approval is not necessary for each specific instance in which it is used.
> (2) A teacher or principal may administer corporal punishment only in the presence of another adult who is informed beforehand, and in the student's presence, of the reason for the punishment.
> (3) A teacher or principal who has administered punishment shall, upon request, provide the pupil's parent or guardian with a written explanation of the reason for the punishment and the name of the other [adult] who was present.

Id. at 655 n.6 (citing FLA. STAT. ANN. § 232.27).

106. *Id.* at 659–61 (citing 1 WILLIAM BLACKSTONE, COMMENTARIES *134, *453; 3 *id.* at *120; RESTATEMENT (SECOND) OF TORTS §§ 147(2), 153(2) (1965)). In examining teacher authority to punish, the Court acknowledged that such authority was not

states at the time explicitly authorized corporal punishment by school officials, such punishment was available in all states that did not specifically prohibit the practice.[107] This common law right also gave students a cause of action for damages if the punishment proved excessive.[108]

The Court first rejected the argument that corporal punishment, as administered in this case, constituted cruel and unusual punishment under the Eighth Amendment.[109] The Court examined the drafting history of the Eighth Amendment to determine that the drafters intended the amendment to apply only to *criminal* punishment.[110] Distinguishing types of punishment as either criminal or non-criminal runs counter to the bulk of relevant scholarship, which holds that the imposition of punishment is the defining criterion of criminality.[111] Nevertheless, the Court distinguished school punishment from criminal punishment on the differing characteristics between the school and prison environments.[112] Because of these

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a delegation of parental authority, but flowed from the state's power to educate its citizens and to maintain group discipline in doing so. *Id.* at 662.

107. *Id.* at 662–64. At the time, only two states—Massachusetts and New Jersey—statutorily barred corporal punishment by teachers. *Id.* at 663. Today, at least twenty-two states expressly prohibit the practice by statute, and several more have implicitly outlawed it, for example through limiting the use of force by school officials to self-defense. C.C. Swisher, *Constitutional Abuse of Public School Students: An Argument for Overruling* Ingraham v. Wright, 8 WHITTIER J. CHILD. & FAM. ADVOC. 3, 54–55 (2008) (enumerating the school corporal punishment laws of almost every state in the Union and several school districts). Even in states whose statutory schemes expressly permit or are silent as to corporal punishment, many school districts prohibit or simply do not practice it. *Id.* at 55–58.

108. *Ingraham*, 430 U.S. at 663–64. Factors to be considered in determining excessiveness include the child's past attitude and behavior, "the nature and severity of the punishment, the age and strength of the child, and the availability of less severe but equally effective" disciplinary measures. *Id.* at 662 (citing 1 FOWLER V. HARPER & FLEMING JAMES, JR., LAW OF TORTS § 3.20 (1st ed. 1956); RESTATEMENT (SECOND) OF TORTS § 150, cmts. c–e).

109. *Id.* at 664 ("We adhere to this longstanding limitation and hold that the Eighth Amendment does not apply to the paddling of children as a means of maintaining discipline in public schools.").

110. *Id.* at 665 ("Although the reference to 'criminal cases' was eliminated from the final draft, the preservation of a similar reference in the preamble indicates that the deletion was without substantive significance. Thus, Blackstone treated each of the provision's three prohibitions as bearing only on criminal proceedings and judgments." (citation omitted) (citing 4 WILLIAM BLACKSTONE, COMMENTARIES *297, *379)).

111. *See supra* note 21.

112. The Court stated:

> The prisoner and the schoolchild stand in wholly different circumstances, separated by the harsh facts of criminal conviction and incarceration. The prisoner's conviction entitles the State to classify him as a "criminal," and his incarceration deprives him of the freedom "to be with family and friends and to form the other enduring attachments of nor-

inherent differences, the Court concluded, "[W]hen public school teachers or administrators impose disciplinary corporal punishment, the Eighth Amendment is inapplicable."[113]

The Court next considered the students' claims that the beatings were a deprivation of their due process rights, as articulated in *Goss v. Lopez*.[114] While the Court recognized that students possess a liberty interest in being free from punishment, *Goss*' hearing and notice requirements were inapplicable because the punishment at issue (corpo-

> mal life." Prison brutality . . . is "part of the total punishment to which the individual is being subjected for his crime and, as such, is a proper subject for Eighth Amendment scrutiny." . . .
>
> The schoolchild has little need for the protection of the Eighth Amendment. Though attendance may not always be voluntary, the public school remains an open institution. Except perhaps when very young, the child is not physically restrained from leaving school during school hours; and at the end of the school day, the child is invariably free to return home. Even while at school, the child brings with him the support of family and friends and is rarely apart from teachers and other pupils who may witness and protest any instances of mistreatment.

Ingraham, 430 U.S. at 669–70 (footnotes and citations omitted) (quoting Morrissey v. Brewer, 408 U.S. 471, 482 (1972); Ingraham v. Wright, 525 F.2d 909, 915 (5th Cir. 1976)). While the Court's imagery reaches the obvious conclusion that school-imposed corporal punishment is generally far less severe than adult incarceration, and avoids the arguably absurd result of requiring jury trials and appointed counsel prior to the imposition of school punishment, the Court's approach to distinguishing criminal sanctions from school punishment provides insufficient theoretical criteria for future cases reminiscent of Justice Stewart's infamous declaration "I know it when I see it." Jacobellis v. Ohio, 378 U.S. 184, 197 (1964) (Stewart, J., concurring). Additionally, the Court cited several prior Eighth Amendment cases to support its assertion that the amendment only applied in a criminal context. *See Ingraham*, 430 U.S. at 667–68 ("In the few cases where the Court has had occasion to confront claims that impositions outside the criminal process constituted cruel and unusual punishment, it has had no difficulty finding the Eighth Amendment inapplicable." (citing Fong Yue Ting v. United States, 149 U.S. 698 (1893); Mahler v. Eby, 264 U.S. 32 (1924); Bugajewitz v. Adams, 228 U.S. 585 (1913); Uphaus v. Wyman, 360 U.S. 72 (1959))). However, those cases more closely adhered to the proper theoretical framework in that they determined whether the sanction imposed was *punishment*, not whether it was *criminal*. *See, e.g.*, *Mahler*, 264 U.S. at 39 ("It is well settled that deportation, while it may be burdensome and severe for the alien, is not a *punishment*." (emphasis added)); *Uphaus*, 360 U.S. at 81–82 (recognizing that confinement for contempt is a civil compulsion to comply with a court order without distinguishing criminality and punishment). In this sense, the Court may have done better in *Ingraham* to hold that the beatings were not punishment at all, because they lacked the requisite retributive character. *See supra* text accompanying note 27. Under this theory, corporal punishment may be rehabilitative in that it is designed to correct the child's behavior to allow the child to take full advantage of the educational environment. The Court alluded to such a notion when distinguishing *Goss v. Lopez,* 419 U.S. 565 (1975), later in the opinion. *See Ingraham*, 430 U.S. at 674 n.43 ("The purpose of corporal punishment is to correct a child's behavior without interrupting his education.").

113. *Ingraham*, 430 U.S. at 671.

114. *Id.* at 672–74.

ral punishment) did not constitute a substantial deprivation, as did the punishment in *Goss* (suspension), and, thus, the students' property interests were not implicated.[115] Therefore, the only question was whether the students were deprived of a due process interest in being free from punishment.[116] As to the question of the students' substantive rights, the Court determined that so long as the punishment remained "reasonable"[117] and within "the limits of the common-law privilege,"[118] there was no substantive violation.[119]

In addition to the question of substantive rights, the Court concluded that students were entitled to certain procedural safeguards to "minimize the risk of wrongful punishment and provide for the resolution of disputed questions of justification."[120] However, the Court held that, since the protected liberty interest was defined by its historical limitations,[121] the common law remedies available and the statutory protections[122] afforded students provided sufficient protection.[123] Further, the Court noted that any additional safeguards, though po-

115. *Id.* at 674 & n.43 ("That corporal punishment may, in a rare case, have the unintended effect of temporarily removing a child from school affords no basis for concluding that the practice itself deprives students of property protected by the Fourteenth Amendment.").
116. *Id.* at 674.
117. *Id.* at 675–76 ("[T]here could be no recovery [at common law] against a teacher who gave only 'moderate correction' to a child. To the extent that the force used was reasonable in light of its purpose, it was not wrongful, but rather 'justifiable or lawful.'").
118. *Id.* at 676 ("[Reasonable corporal punishment] represents the balance struck by this country between the child's interest in personal security and the traditional view that some limited corporal punishment may be necessary in the course of a child's education. Under that longstanding accommodation of interests, there can be no deprivation of substantive rights as long as disciplinary corporal punishment is within the limits of the common-law privilege." (citations and internal quotation marks omitted)).
119. *Id.*
120. *Id.* at 675–76.
121. *Id.* at 675 ("Because it is rooted in history, the child's liberty interest in avoiding corporal punishment while in the care of public school authorities is subject to historical limitations.").
122. The Court recognized that under the common law and Florida statutes, a student would have a claim for damages against a teacher who inflicted excessive punishment. *Id.* at 676–77. If the punishment were inflicted with malice, the teacher would potentially be subject to criminal prosecution. *Id.*
123. *Id.* at 678 ("In those cases where severe punishment is contemplated, the available civil and criminal sanctions for abuse—considered in light of the openness of the school environment—afford significant protection against unjustified corporal punishment. Teachers and school authorities are unlikely to inflict corporal punishment unnecessarily or excessively when a possible consequence of doing so is the institution of civil or criminal proceedings against them."). Additionally, the Court held that the civil penalties afforded students distinguished the case from *Goss*, which held that hearings were required prior to the imposition of a ten-day suspension. *Id.* at 678 n.46 (discussing Goss v. Lopez, 419 U.S. 565 (1975)).

tentially helpful in averting future abuse or wrongfully inflicted beatings, would likely outweigh the cost to school discipline.[124]

3. What Goss *and* Ingraham *Tell Us About Students' Rights in School*

The Court's approaches in *Goss* and *Ingraham*, as evinced by the *Ingraham* Court's repeated attempts to distinguish *Goss*,[125] are irreconcilable in at least one respect. While both cases involved disputed school disciplinary practices, in which the Court heard evidence that internal procedures were not observed, the *Goss* Court found it necessary to establish a due process standard,[126] even though it was almost certainly being met by nearly all school districts already.[127] Conversely, *Ingraham* found that due process protections were inapplicable precisely because safeguards were already in place.[128] Though the *Ingraham* Court attempted to distinguish *Goss*, it is difficult to see *Ingraham* as anything except a rejection of the *Goss* Court's willingness to prescribe constitutional standards in regulating the school environment.

Despite this fundamental contradiction, certain inferences can be gleaned from the two decisions. First, the Court's traditional aversion to interfering with school discipline remains almost categorical. In *Goss*, the Court only mandated extremely minimal procedures that were almost certainly effected already, while in *Ingraham*, the Court took pains to avoid any insertion of judicial authority into school discipline, despite the somewhat gruesome nature[129] of the injuries.[130]

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124. The Court cited several reasons why a teacher, though he or she may believe they are justified in administering corporal punishment, may impose some less effective means of maintaining discipline in order to avoid a hearing, such as the risk of losing the respect of the students if the teacher's request to administer the punishment were to be denied. *Id.* at 680–81 & n.50. The Court's concern that a teacher may be overruled in a hearing seems to imagine a much more elaborate proceeding than the one actually described in *Goss*. *See Goss*, 419 U.S. at 582 ("In the great majority of cases the disciplinarian may informally discuss the alleged misconduct with the student minutes after it has occurred. We hold only that, in being given an opportunity to explain his version of the facts at this discussion, the student first be told what he is accused of doing and what the basis of the accusation is.").
125. *See supra* notes 114–19, 123 and accompanying text.
126. *See supra* notes 94–100 and accompanying text.
127. *See supra* note 98 and accompanying text.
128. *See supra* notes 119–23 and accompanying text.
129. *See supra* note 103.
130. One example of how the Court's analysis faltered in attempting to justify its holding is in its use of a problematic Fourth Amendment analogy. *See* Ingraham v. Wright, 430 U.S. 651, 679–80 (1977). The Court likened its view of the common law remedies for corporal punishment to the ability of peace officers to make warrantless arrests at common law despite the warrant requirement of the Fourth Amendment. *Id.* In this sense, both the school official's and the arresting of-

Additionally, the Court regards the spheres of criminal punishment and school punishment as entirely separate;[131] thus, students' constitutional protection from punishment must flow from due process, rather than the prohibition against cruel and unusual punishment.

In summary, the Court's articulation of rights due students in public schools has been slow and reluctant over the pasty fifty years. Even when the Court holds that students are entitled to constitutional protections, the rights outlined are often minimal and far reduced from those enjoyed by the students outside of the school context. Furthermore, the Court's mandate of certain rights has, at times, been marked by a subsequent retreat or scaling-back of its willingness to interfere with school officials' discretion to maintain the school environment.[132] The end result is that students in public schools are generally disciplined at the complete discretion of school officials. Any judicial protections of students must come from their minimal due process interests or some state-mandated judicial remedy.

III. THE SCHOOL-TO-PRISON PIPELINE

As discussed by this Note, the Criminal Punishment, Juvenile Justice, and School Discipline Models are theoretically distinct and mutually exclusive concepts. Each model carries certain attendant rights and very different underlying motivations. Despite these jurisprudential partitions, the American public high school student may find himself adjudicated under any three of these models.[133] The punishment or sanction imposed can substantially deprive the student of his interest in education, reputation, or freedom from punishment.[134] Indeed,

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ficer's determinations are subject to judicial scrutiny to safeguard constitutional rights. *Id.* at 679–80 & n.48. The dissent correctly responded by noting that a warrantless arrest is but "the first stage of an elaborate system of procedural protections" and that "The Constitution requires the State to provide a fair and reliable determination of probable cause by a judicial officer *prior* to the imposition of any significant pretrial restraint of liberty other than a brief period of detention." *Id.* at 698–99 (White, J., dissenting) (emphasis added) (internal quotation marks omitted) (citing Gerstein v. Pugh, 420 U.S. 103, 125 & n.27 (1975)). Such safeguards are a "probable-cause determination prior to any significant period of pretrial incarceration, rather than a damages action or suppression hearing, that affords the suspect due process." *Id.* at 699. Thus, while a subsequent probable cause determination for a warrantless arrest *prevents* the substantial infringement of constitutional rights, a subsequent damages action for wrongful corporal punishment merely compensates for a liberty interest deprivation already suffered.

131. *See supra* note 113.

132. *See supra* notes 83, 126–30 and accompanying text.

133. *See supra* note 14.

134. *See supra* section II.C.

such a deprivation can further hinder a student's ability to succeed in the classroom and after exiting the education system.[135]

Recent trends in the administration of school discipline have caused the practical boundaries of the three models to grow less distinct. The result is that students in public schools are more likely to incur concurrent sanctions in both the education and either the juvenile or criminal spheres. Additionally, as the character of the juvenile court has grown more punitive, students are left with fewer opportunities for rehabilitation. Certain in-school conduct, which might previously have been considered typical adolescent behavior, now warrants referral to the juvenile system.[136] Three recent trends in public school discipline are primarily responsible for the criminalization of student conduct: (1) the proliferation of "zero-tolerance policies;" (2) additional—often mandatory—referral of students to the juvenile justice system; (3) and the expanding prevalence of "school resource officers" (SROs) in schools.[137]

A. Zero-Tolerance Policies

A zero-tolerance policy is any law or regulation that "mandates predetermined consequences or punishments for specific offenses."[138] Although, the 1990s saw a decrease in overall school violence,[139] zero-tolerance policies gained popularity, primarily in response to the spate of horrific school shootings that occurred during that period.[140] In this regard, the policies were intended, ostensibly, as a student-safety mechanism, which would remove dangerous students from the environment as soon as the school became aware of the threat they posed.[141]

The forerunner for the proliferation of zero-tolerance policies was the Gun-Free Schools Act of 1994.[142] The Act essentially required states, under pain of losing substantial federal education funding, to

135. See, for example, Jessica Feierman, Marsha Levick & Ami Mody, *The School-to-Prison Pipeline . . . and Back: Obstacles and Remedies for the Re-Enrollment of Adjudicated Youth*, 54 N.Y.L. SCH. L. REV. 1115 (2009), for a discussion about the difficulties experienced by students reintegrating into the school environment after their release from juvenile detention facilities and alternative education programs.

136. *See infra* section III.B.

137. Deborah N. Archer, *Introduction: Challenging the School-to-Prison Pipeline*, 54 N.Y.L. SCH. L. REV. 867, 868–71 (2009).

138. Hanson, *supra* note 11, at 301 n.32 (quoting PHILLIP KAUFMAN ET AL., U.S. DEP'T OF EDUC. & U.S. DEP'T OF JUSTICE, INDICATORS OF SCHOOL CRIME AND SAFETY 121 (1998)).

139. Peden, *supra* note 1, at 369.

140. *See* Hanson, *supra* note 11, at 303.

141. *Id.* at 302.

142. Gun-Free Schools Act, 20 U.S.C. § 8921 (1994) (recodified at 20 U.S.C. § 7151 (2010)).

enact legislation mandating the expulsion of any student found to have knowingly brought a firearm to school.[143] All fifty states subsequently enacted the legislation.[144] In 2001, the No Child Left Behind Act expanded the 1994 Act, requiring states to mandate expulsion for any student who possessed a firearm at school.[145]

These initial zero-tolerance policies mandated severe punishments for students bringing firearms into the school environment, which can be seen as a logical response to the perceived increase in gun violence in schools.[146] However, since the 1994 Act, school districts and legislatures have enacted zero-tolerance policies that contemplate a host of juvenile transgressions far more benign than the firearm violations originally contemplated.[147] These policies progress from the obviously violent to the arguably trivial. The expansion began with non-firearm weapons, such as brass knuckles,[148] and quickly encompassed drug possession on school property,[149] gang-related activities,[150] tobacco and alcohol violations,[151] and even tardiness or truancy.[152]

The end result of zero-tolerance policies is a pantheon of transgressions that automatically result in the offending student's extended removal from the educational environment. Often, the acts warranting this removal would be considered pedestrian juvenile misbehavior—actions meriting correction, but whose commission does not arouse immediate concern for student safety or the integrity of the education

143. *See* Hanson, *supra* note 11, at 303–04.

144. *Id.* at 304.

145. *Id.* at 305.

146. CATHERINE Y. KIM, DANIEL J. LOSEN & DAMON T. HEWITT, THE SCHOOL-TO-PRISON PIPELINE: STRUCTURING LEGAL REFORM 79 (2010).

147. *See* Hanson, *supra* note 11, at 300–01; Peden, *supra* note 1, at 370.

148. *See* Hanson, *supra* note 11, at 308 n.57 (discussing various states' expansions of the statutory definition of "weapon" to include items such as explosives, throwing stars, and air guns (citing N.M. STAT. ANN. § 22-5-4.7(c)(2) (Michie 1995); NEV. REV. STAT. ANN. § 392.466(7)(b) (Michie 1995); WASH. REV. CODE ANN. § 9.41.280 (l)(c)-(e) (West 1995))).

149. Hanson, *supra* note 11, at 307–08 ("[M]any state and local authorities broadened zero tolerance policies to encompass not only illegal drug use and possession, but also legal drugs, including common over-the-counter medications and look-alike substances.").

150. Frances P. Solari & Julienne E. M. Balshaw, *Outlawed and Exiled: Zero Tolerance and Second Generation Race Discrimination in Public Schools*, 29 N.C. CENT. L.J. 147, 149 (2007). Often the regulations proscribing such conduct are poorly drafted and, thus, vaguely defined. *Id.* at 149–50.

151. KIM, LOSEN & HEWITT, *supra* note 146, at 79. For specific examples of seemingly benign conduct subjected to zero-tolerance sanctions, see ADVANCEMENT PROJECT & C.R. PROJECT, HARV. UNIV., OPPORTUNITIES SUSPENDED: THE DEVASTATING CONSEQUENCES OF ZERO TOLERANCE AND SCHOOL DISCIPLINE 15 (2000) [hereinafter OPPORTUNITIES SUSPENDED].

152. Solari & Balshaw, *supra* note 150, at 149.

environment.[153] Though the policies, in one sense, can be seen as removing discretion on the part of school officials, the vague definitions of qualifying acts, such as gang membership, may imbue school officials with near absolute discretion to remove any students they choose.[154]

B. Referral of Students to the Juvenile System for Misconduct in School

In addition to state legislatures mandating particular sanctions for various transgressions, forty-three states now require school districts to refer students to law enforcement for a variety of school policy violations, many of which would not be considered criminal acts if committed by adults.[155] In the absence of legislative compulsion, such as mandatory reporting laws, many school districts refer students or turn over evidence to state authorities as a matter of internal policy.[156] The effect is that students are increasingly finding themselves in juvenile court or being criminally cited for acts most would consider typical of adolescent behavior.[157]

These policies place school officials in an awkward, if not misleading, position in the life of the student. The official operates in a nonadversarial system, presumably working to engage the student in furtherance of the student's best interests and education. The official ideally cultivates a relationship of trust and communicates to the student that the official is present to assist and better the student.[158] However, under mandatory reporting, or even voluntary reporting, the official may use this trusting relationship to extract as much infor-

153. *See* Hanson, *supra* note 11, at 329 ("[A]ctions formerly considered childish or adolescent acts, even actions where there is no violence . . . have taken on or been given criminal definition, along with criminal consequences.").

154. *See id.* at 302 ("Zero tolerance policies have an inherent aspect of absoluteness for punishment, but paradoxically they also have subjectivity in their definitions of punishable behaviors."); Peden, *supra* note 1, at 371 ("[D]isciplinary policies termed 'zero tolerance,' define punishable behavior in subjective terms."). For a review of constitutional challenges to school discipline regulations for being void for vagueness, see Solari & Balshaw, *supra* note 150, at 173–80.

155. OPPORTUNITIES SUSPENDED, *supra* note 151, at 49. Though most states require only the reporting of the commission of a crime, often school districts, possibly out of concern for compliance with state law, will refer students for conduct that does not necessarily rise to the level of criminal activity. *Id.*

156. *Id.*

157. *See* John R. Emschwiller & Gary Fields, *For More Teens, Arrests by Police Replace School Discipline*, WALL ST. J. (Oct. 20, 2014), http://www.wsj.com/articles/for-more-teens-arrests-by-police-replace-school-discipline-1413858602 (relaying the story of teens whose discipline for acts as benign as water-balloon fights and science experiments led to arrests and criminal charges).

158. *See* Hanson, *supra* note 11, at 325–26 (identifying high school as a critical time in an adolescent's life to develop strong bonds with adults).

mation as possible from the student.[159] This information is then presented to law enforcement acting in an adversarial system to possibly prosecute the student.[160]

C. The Rise of the School Resource Officer

Though the concept has existed for around seventy years, use of the school resource officer (SRO)[161] exploded in popularity during the 1990s, in part, as a response to school shooting massacres.[162] Though there is limited data as to the number of SROs in America, approximately 20,000 are on duty in American schools every day.[163]

The duties of an SRO are a hybrid of traditional law enforcement responsibilities and educational objectives. As law enforcement, SROs patrol school premises, investigate criminal complaints, handle students who violate school rules or laws, and respond to student disruptions of the school day and after-school activities.[164] As a school-police liaison, SROs ideally educate students and school staff about the prevention of crime and violence, act as mentors to students, and improve the juvenile-police relationship at large.[165] Often, SROs who are assigned to the school environment full-time ("true" SROs)[166] receive extensive training in school-based policing.[167]

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159. Though beyond the scope of this Note, for a fuller overview of public school students' Fourth Amendment rights in school, see Brian J. Fahey, Note, J.P. *ex rel.* A.P. v. Millard Public Schools*: A Limit on School Authority and What It Means for Students' Fourth Amendment Rights in Nebraska*, 93 NEB. L. REV. 1012 (2015); Feld, *supra* note 75; Martin R. Gardner, *Student Privacy in the Wake of* T.L.O.*: An Appeal for an Individualized Suspicion Requirement for Valid Searches and Seizures in the Schools*, 22 GA. L. REV. 897 (1988).

160. *See* OPPORTUNITIES SUSPENDED, *supra* note 151, at 15–16.

161. Matthew T. Theriot, *School Resource Officers and the Criminalization of Student Behavior*, 37 J. CRIM. JUST. 280, 280 (2009). This Note defines "School Resource Officer" as a law enforcement officer who is specifically assigned to staff, monitor, or patrol public schools during the school day.

162. *Id.* SROs were but one of several types of additional school security measures that gained popularity at the same time. *Id.*

163. *Id.* at 281 ("While it is difficult to know the exact number of school resource officers, it is estimated that there might be more than 20,000 law enforcement officers patrolling schools in the United States."); Emschwiller & Fields, *supra* note 157 ("The number of school police officers rose 55% to about 19,000 in the 10 years [preceding] 2007.").

164. See Lisa H. Thurau & Johanna Wald, *Controlling Partners: When Law Enforcement Meets Discipline in Public Schools*, 54 N.Y.L. SCH. L. REV. 977, 991–93 (2009), for a discussion of the various models by which SROs' school assignments are structured.

165. *Id.* at 989–90.

166. Some cases have distinguished between true SROs and "outside" officers and applied disparate standards of conduct to each. *Id.* at 985 (citing R.D.S. v. State, 245 S.W.3d 356 (Tenn. 2008); T.S. v. State, 863 N.E.2d 362 (Ind. Ct. App. 2007)).

167. See *id*. at 998–1000 for specific examples of SRO training regimens.

Though empirical data is limited, studies show that SROs can have a profound effect on the disciplinary practices of schools. Schools with SROs tend to a see a relatively small, though notable, decrease in arrests for weapon possessions.[168] Schools regularly staffed by SROs have students arrested for "disorderly conduct" at more than double the average rate.[169] Lastly, the presence of SROs tends to transform any investigation of wrongdoing by a school official into a collaboration between the official and the SRO.[170] Often, regulations are unclear as to which person directs the investigation, and whether the primary objective is enforcement of the criminal law or maintenance of the educational environment.[171]

Despite a growing body of literature raising concerns about the potentially detrimental effects on students of expanded SRO presence, SROs remain entrenched in schools, if for no other reason than that SROs serve as additional staff members, almost always at no or rela-

168. Theriot, *supra* note 161, at 285. Theriot theorizes that the decrease in weapons possessions may be due to potential offenders' fear of arrest if caught, or that students may feel safer at school because of an officer's presence and, thus, less of a need to come to school armed. *Id.*

169. *Id.*

170. *See* Thurau & Wald, *supra* note 164, at 984 ("The access to SROs for consultation on whether an act is an arrestable offense increases the likelihood that school administrators will use such information for police functions.").

171. *Id.* at 1006 ("[T]he power of SROs, in conjunction with some principals' expectations and pressure for arrest, and in a context with little external oversight, has led to officers having unprecedented power in deciding who and how to charge, and into which door of the juvenile justice system the youth will enter . . . ."). Despite the presence of law enforcement, courts still bypass Fourth Amendment scrutiny and only require the substantially less rigorous reasonable suspicion standard to uphold searches as constitutionally valid. KIM, LOSEN & HEWITT, *supra* note 146, at 120–21 (citing Shade v. City of Farmington, 309 F.3d 1054, 1062 (8th Cir. 2002); Cason v. Cook, 810 F.2d 188, 192 (8th Cir. 1987); Tarter v. Raybuck, 742 F.2d 977, 983–84 (6th Cir. 1984); Vassallo v. Lando, 591 F. Supp. 2d 172, 194 (E.D.N.Y. 2008); Johnson v. City of Lincoln Park, 434 F. Supp. 2d 467, 475 (E.D. Mich. 2006); Rudolph *ex rel.* Williams v. Lowndes Cnty. Bd. of Educ., 242 F. Supp. 2d 1107, 1114 (M.D. Ala. 2003); *In re* Angelica D.B., 564 N.W.2d 682, 690–91 (Wis. 1997); *In re* J.F.M., 607 S.E.2d 304, 307 (N.C. Ct. App, 2005); *In re* Josue T. 989 P.2d 431, 436 (N.M. Ct. App. 1999); Coronado v. State, 835 S.W.2d 636, 639 (Tex. Crim. App. 1992)). The Court articulated the reasonable suspicion standard as it applies to school officials in *New Jersey v. T.L.O.*, 469 U.S. 325, 340–41 (1985). *See supra* note 82. For specific examples of how low a threshold "reasonable suspicion" has proven to be, see Martin H. Belsky, *Random vs. Suspicion-Based Drug Testing in the Public Schools—A Surprising Civil Liberties Dilemma*, 27 OKLA. CITY U. L. REV. 1, 19–20 (2002) ("How easily is the 'reasonable suspicion' test met? Behavior, hearsay, seemingly innocent comments, and observations can all form legitimate bases for action. The courts will most likely accept *any* articulated basis for a showing of reasonableness." (footnotes omitted)).

tively little cost to the school district.[172] In fact, a minority of school districts is expanding their delegation of disciplinary authority to law enforcement.[173]

IV. THE NEGATIVE CONSEQUENCES OF THE PIPELINE

A. Counterproductive Results

Perhaps the most fundamental objection to the increasingly punitive character of school discipline is its detrimental effects on the punished student. Rather than reforming a student's conduct, thus enabling the student to perform better academically, sanctions that remove the student from the school environment generally serve to deprive the student of his educational interest, force him to fall further behind his peers, and cut him off from the ideally supportive community of friends and teachers.[174]

Despite the ubiquity of school suspensions and their implicit approval by the Supreme Court,[175] research suggests that suspensions of students, particularly those served out of school,[176] do little to correct student behavior.[177] Further, removing the student from the educational environment may simply reinforce resentment in the student, detach him from the educational environment, and cause him to fall further behind in his studies.[178]

Because out-of-school suspension removes the student from the education environment completely, the act essentially places all of the

172. *See* Thurau & Wald, *supra* note 164, at 984 (noting that in a case study of sixteen school districts employing SROs, only one school district paid the entire cost of the SRO and that SROs were easier to acquire than social workers).

173. OPPORTUNITIES SUSPENDED, *supra* note 151, at 15.

174. *See id.* at 11 ("[Suspended students] often interpret suspension as a one-way ticket out of school—a message of rejection that alienates them from ever returning to school." (quoting Susan Black, *Locked Out: Why Suspension and Expulsion Should Be Your Court of Last Resort*, AM. SCH. BOARD J., Jan. 1999, at 36)).

175. *See supra* note 102 and accompanying text.

176. While this Note is primarily concerned with the out-of-school suspension, the question of whether the increasingly popular in-school suspension functions more effectively with any statistical significance is the subject of increasing scholarship. See Neil Blomberg, *Effective Discipline for Misbehavior: In School vs. Out of School Suspension*, 27 CONCEPT: AN INTER-DISCIPLINARY J. OF GRADUATE STUD. 1 (2004), for a comparison of non-repeat referral rates, academic performance, and drop-out rates between students subject to in-school versus out-of-school suspensions.

177. *See* DANIEL J. LOSEN & JONATHAN GILLESPIE, OPPORTUNITIES SUSPENDED: THE DISPARATE IMPACT OF DISCIPLINARY EXCLUSION FROM SCHOOL 8 (2012).

178. Peden, *supra* note 1, at 371 ("We should not minimize the effect that expulsion or suspension from school has on a young life. Aside from interrupting a student's academic progress, removal from school for any appreciable time as a disciplinary penalty can deprive her of the society of her peers just as incarceration does the criminal . . . .").

blame for the misconduct on the student, rather than the school district for failing to instill the proper behavior.[179] Consequently, the school district has no cause to examine its own policies and behavior in its treatment of the child leading up to or following the suspension or expulsion.[180] Additionally, students whose inappropriate behavior may be at least partially attributable to factors in their home environment are further exposed to the environment without any additional support.[181]

The Advancement Project's report, "*Opportunities Suspended*," cited two primary development goals of the education system for the individual student: "the development of strong and trusting relationships with key adults in their lives, particularly those in their schools" and "the formation of positive attitudes towards fairness and justice."[182] The study concluded that exclusionary discipline policies "often further alienate students from school and exacerbate the behaviors they seek to remedy."[183]

B. Disproportionate Effect on Minority and Learning-Disabled Students

While exclusionary school discipline policies may be ineffective in reforming student conduct, they also tend to be visited upon minority student groups disproportionately. Statistical research has shown that students of color are subjected to suspensions and expulsions at a higher rate than their white peers.[184] Students of color who are referred or reported to juvenile court are also at risk of disproportionate

179. Blomberg, *supra* note 176, at 2–4.
180. *Id*.
181. *Id.* at 3 (discussing the urging of health professionals to limit out-of-school suspensions to help identify students needing treatment for depression, abuse, or mental illness); *see* Sheryl A. Hemphill et al., *The Effect of School Suspensions and Arrests on Subsequent Adolescent Antisocial Behavior in Australia and the United States*, 39 J. ADOLESCENT HEALTH 736, 741 (2006) (concluding that subjecting students to suspension increases antisocial behavior at a statistically significant rate).
182. OPPORTUNITIES SUSPENDED, *supra* note 151, at 10.
183. *Id.* What is more, students who are reintroduced to the educational environment, either from a school suspension or from the juvenile justice system, face often insurmountable challenges in succeeding academically. See Feierman, Levick & Mody, *supra* note 135, for a thorough discussion of these challenges and their possible solutions.
184. *See* Blomberg, *supra* note 176, at 4 (noting that, as a percentage of enrollment, 12.9% of black students were subjected to suspensions, compared to only 5.5% of white students); Smith, *supra* note 8, at 1011 ("In some states, more than thirty percent of the black student population is suspended each year."); Solari & Balshaw, *supra* note 150, at 150 ("African-American children represent 17% of public school enrollment nationwide, but 33% of all out-of-school suspensions. White students, on the other hand, represent 63% of public school enrolment, but only 50% of out-of-school suspensions.").

referral to adult criminal court.[185] Such referrals, even if they do not result in a conviction, may create a paper trail that is difficult to expunge and easily discovered by potential employers or institutions of higher education.[186]

Additionally, students with learning disabilities are frequently subjected to removal from the educational environment.[187] This should not be surprising given that the most common cause for removal is not violent offenses, but disruptive behavior.[188] Students with certain learning disabilities and behavioral disorders are obviously more likely to display such behavior than their unafflicted peers; however these students have found little redress for their exclusion, even where the school's own failure to accommodate the disabled child may be partially responsible.[189] The end result of these exclusionary policies is that students who may already be at an academic disadvantage, through no fault of their own, find their challenges compounded as they fall further behind their peers academically and become further isolated from their support socially.

C. Discipline Without a Purpose

Given the apparent ineffectiveness of the retributive trends in school discipline at reforming student behavior,[190] ascertaining the actual purpose of these policies becomes a critical task. These policies can be examined from two purposive perspectives: their purpose as to the student sanctioned or as to the educational environment as a whole.[191]

Given that mounting empirical evidence indicates these policies do not effectively reform the conduct of the sanctioned student,[192] the

185. *See* JUSZKIEWICZ, *supra* note 65, at 5 (finding that in nine out of ten jurisdictions studied, African-American juveniles were disproportionately charged in adult criminal court compared to their white peers).

186. *See* Emschwiller & Fields, *supra* note 157 ("Arrest records, even when charges are dropped, often trail youngsters into adulthood. Records, especially for teenagers tried as adults, have become more accessible on the Internet, but are often incomplete or inaccurate. Employers, banks, college admissions officers and landlords, among others, routinely check records online.").

187. *See generally* Rivkin, *supra* note 8 (describing specific cases representative of the myriad of ways that typical conduct by students with behavioral disorders can get these students excluded from the learning environment).

188. Smith, *supra* note 8, at 1013.

189. Rivkin, *supra* note 8, at 944 ("[C]ourts have yet to find a significant obstacle to the exclusion of children with disabilities . . . even where . . . the school's own failures caused the behavior being reported, and even where the school's subjective intention was to exclude the child.").

190. *See supra* notes 174–83.

191. This bifurcation corresponds to the Supreme Court's identification in *Ingraham* of the states' power to educate their citizens and maintain the educational environment in order to do so. *See* Ingraham v. Wright, 430 U.S. 651, 662 (1976).

192. *See supra* notes 174–83 and accompanying text.

logical conclusion is that the policies are implemented and expanded because they effectively preserve the educational environment.[193] The implication as to state education priorities is concerning.

To the extent these policies are effected to preserve the educational environment, they essentially sacrifice one student's educational interest for the preservation of another's, i.e., one student is removed so that the education of other students may continue.[194] Continued implementation and augmentation[195] of these policies represent a conscious decision by state officials to prioritize the education of certain groups of students over others. Considering that students removed from the education environment are disproportionately minority and learning-disabled,[196] this prioritization is particularly troubling for America's democratic vitality.

With serious doubts as to their effectiveness at reforming student conduct and maintaining the educational environment, the exclusionary policies discussed in this Note appear increasingly unmoored from any articulated purpose. In this sense, these exclusionary policies hearken back to the punitive framework articulated in subsection II.A.2.[197] School exclusionary discipline practices have always borne certain qualities enumerated in the framework,[198] but given their ostensible purpose,[199] such a comparison may have seemed absurd in the past.[200] However, assuming further empirical evidence corresponds to the current body of work, showing these exclusionary practices ineffective for their ostensible purpose,[201] such practices will appear increasingly "arbitrary and purposeless"[202] and, thus, poten-

193. Empirical evidence casts doubt on whether exclusionary sanctions even accomplish the task of maintaining the educational environment for the benefit of better-behaving students, who remain in school. *See* LOSEN & GILLESPIE, *supra* note 177, at 8 ("[R]esearchers find that the frequent use of suspension brings no benefits in terms of test scores or graduation rates [for the student body as a whole].").

194. *See supra* note 193.

195. For evidence of the increasing number of students punished under these policies, see OPPORTUNITIES SUSPENDED, *supra* note 151, at 48.

196. *See supra* notes 184–85 and accompanying text.

197. See *supra* notes 24–29 and accompanying text.

198. Certainly, various school exclusionary discipline policies, such as suspension, fit some of the criteria in the framework—such a sanction is determinate and imposed because of an offense. *See supra* note 27 (enumerating two of the punitive characteristics as whether the sanction's duration is known at imposition and whether it is imposed because of an offense). For a discussion of whether school exclusionary policies may be considered retributive in their purpose, see *infra* note 203.

199. *See supra* note 191.

200. See *supra* note 112 for a discussion of the Court's treatment of the idea of school discipline as criminal punishment.

201. *See supra* notes 174–89 and accompanying text.

202. Bell v. Wolfish, 441 U.S. 520, 539 (1979); *see supra* notes 28–29 and accompanying text.

tially more retributive in character.[203] Even if these sanctions are recognized as more punitive in character, students, especially those of particular minority groups and those suffering from certain disabilities,[204] will continue to enjoy virtually no constitutional protection from the imposition of these policies.[205]

V. CONCLUSION

Students in public school today may be sanctioned through three distinct theoretical models: the Criminal Punishment Model, the Juvenile Justice Model, or the School Discipline Model. Depending upon the applicable model, the student will be entitled to a particular set of constitutional protections. While those adjudicated under the Criminal Punishment Model enjoy the full panoply of constitutional protections,[206] the rights attendant to the Juvenile Justice and School Discipline Models are more limited. Though the Supreme Court has extended a number of constitutional protections to juveniles adjudicated through the Juvenile Justice Model,[207] it has struggled to define its role in regulating the authority of public school officials to discipline students for conduct occurring within school.[208] The end result is that while public school students enjoy limited constitutional rights while in school, school officials have near total discretion in disciplining students.[209]

Though only the Criminal Punishment Model's foundational purpose is characterized as primarily retributive,[210] both the Juvenile Justice Model and the School Discipline Model have grown increas-

203. As discussed *supra* note 112, the Court in *Ingraham* saw the idea of school discipline as wholly incomparable to retributive criminal sanctions. However, the image the Court painted was a far cry from newer, more severe forms of exclusionary discipline, such as the zero-tolerance policies discussed *supra* section III.A. These policies, in mandating removal for a specific offense, allow no consideration for the needs or particular circumstances of the accused. *See* Peden, *supra* note 1, at 371 ("[Zero-tolerance] carries with it a connotation of absolutism and inflexibility which implies that once parameters of conduct have been established for any particular institution, no activity which occurs outside those parameters will be allowed."). Certainly, zero-tolerance and other exclusionary policies for offenses, such as gun possession, may be viewed as regulations to maintain the safety of schools. However, the expansion of zero-tolerance policies to include non-violent offenses, *see supra* notes 147–52 and accompanying text, casts doubt that safety is the sole underlying purpose of such sanctions. Though other motivations may be plausibly argued, retribution appears as an increasingly plausible underlying motivation.

204. *See supra* notes 184–89 and accompanying text.

205. *See supra* section II.C.

206. *See supra* subsection II.A.1.

207. *See supra* subsection II.B.2.

208. *See supra* subsection II.C.2.

209. *See supra* subsection II.C.3.

210. *See supra* text accompanying note 27.

ingly retributive over the past fifty years.[211] The Juvenile Justice Model's retributive transmogrification from its rehabilitative beginnings has primarily been caused by state policies that impose determinate sentencing and increase ease of waiver for juveniles from juvenile to criminal court.[212] The School Discipline Model has grown more retributive through its use of zero-tolerance policies, its referral of students to the Juvenile Justice Model, and its increased use of law enforcement officials in maintaining school discipline.[213] These trends have become colloquially labeled the school-to-prison pipeline.[214]

A growing body of empirical evidence indicates that these polices do not improve the subject student's conduct.[215] Rather, they tend to exacerbate the disruptive conduct that incurred the exclusionary sanction initially and substantially hinder the student's academic progress.[216] Additionally, research suggests these policies, which remove the purportedly disruptive element, may not even improve the school environment for the remaining students.[217] Consequently, these exclusionary discipline policies can be seen as partially, or even primarily, retributive in their purpose.[218] This leaves public school students in the worst of both worlds, as they are subjected to primarily punitive sanctions with only a modicum of the constitutional protections mandated for such punishment under the Juvenile and Criminal Models.

211. *See supra* subsection II.B.3 and Part III.
212. *See supra* subsection II.B.3
213. *See supra* Part III.
214. *See supra* note 8 and accompanying text.
215. *See supra* section IV.A.
216. *See supra* notes 175–78 and accompanying text.
217. *See supra* note 193.
218. *See supra* section IV.C.