

Interrupting Classroom “Banishment”: How Re-imagining Our Amendments Can Disrupt the School-to-Prison Pipeline

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INTRODUCTION

“[T]he child receives the worst of both worlds . . . he gets neither the protections accorded to adults nor the solicitous care and regenerative treatment postulated for children.”¹ The United States Supreme Court lamented the plight of children in its *Gault* decision, a seminal case that established several juvenile rights in legal proceedings, including the right to notice, the right to counsel, and the right against self-incrimination.² And yet, the underlying justification for *Gault*—a lack of protection of youth in the legal system—remains unaddressed at its core. Black students are four times more likely than white students to be suspended or expelled by the age of nine,³ and queer youth of color are suspended at rates 1.5 times higher than youth who do not share those identities.⁴ In the legacy of *Gault*, the Supreme Court is called upon to expand constitutional protections before children are thrown into the swirling waters of the juvenile detention system.⁵

Imagine: You are back in your fourth-grade classroom, sitting at your desk and talking to your friend. Your teacher yells for you, and only you, to leave the classroom. All eyes are trained on you. You were not given a warning to stop talking and have never been sent out of the classroom before.

¹ In re *Gault*, 387 U.S. 1, 18 n.23 (1967).

² Jay D. Blitzman, *Realizing Gault’s Promise of Due Process*, ARIZ. ATT’Y, May 2017, at 23.

³ Jayanti Owens & Sara S. McLanahan, *Unpacking the Drivers of Racial Disparities in School Suspension and Expulsion*, 98 SOC. FORCES 1548 (2020).

⁴ Shannon D. Snapp, Jack K. Day & Stephen T. Russell, *School Pushout: The Role of Supportive Strategies Versus Punitive Practices for LGBT Youth of Color*, 32 J. RSCH. ON ADOLESCENCE (2022), 1267, 1471 (“For example, suspension rates are 1.5 times higher for LGBTQ youth of color than their heterosexual cisgender White peers, and rates for in- and out-of-school suspension appear to be highest among LGBTQ girls of color.”).

⁵ Jay D. Blitzman, *Shutting Down the School-to-Prison Pipeline*, ABA HUM. RTS. MAG. (Oct. 12, 2021) (describing the school-to-prison pipeline as “a series of practices and policies that funnel children and adolescents from public schools into our juvenile and criminal systems” that “has disproportionately affected our most vulnerable populations—youth of color, youth with mental health issues, youth with educational disabilities, and youth who identify as LGBTQ+.”) [hereinafter Blitzman, *Shutting Down*].

You try to ignore the whispers from your peers as you exit the room and begin the long walk to the principal’s office. You wipe your damp cheeks before anyone can see, refusing to be humiliated further. As you approach the principal’s office, you think to yourself, *I hate it here*. Many children have experienced being singled out in this way, but minoritized⁶ students who experience this initial moment of isolation are at increased risk of future informal classroom removal.⁷

This Note explores how the Fourth and Fourteenth Amendments can be reinterpreted to establish preventative measures that deter school officials from disproportionately punishing minoritized students for subjective offenses.⁸ Specifically, it focuses on minoritized youth—Black, brown, and queer youth in K-12 education.⁹ These groups are among the identity groups that are at the greatest risk of falling victim to the insatiable maw of the school-to-prison pipeline.¹⁰

⁶ The word “minoritized” is used instead of “minority” to call attention to the power imbalance between Black, brown, and queer children compared to the dominant class of children, while also acknowledging the intersectionality of a child identifying with multiple identity groups. Minoritized children are not necessarily in the minority in terms of numbers on a global scale, but being oppressed at a microcosmic level strips them of their agency and confidence. See Erik Wingrove-Haugland & Jillian McLeod, *Not “Minority” but “Minoritized,”* 21 TEACHING ETHICS 1-11 (2021).

⁷ Focusing specifically on students with disabilities, this article examines the overuse of undocumented suspensions, informal removals from the classroom, and overuse of “calm down rooms.” Such informal removal allows instructors to get around documenting the removal and alerting parents. Tyler Cochran, Mallory Legg & Maureen van Stone, *Informal School Removals and How to Respond - Council of Parent Attorneys and Advocates, Inc.*, COUNCIL OF PARENT ATT’YS AND ADVOC. (Aug. 5, 2024), www.copaa.org/blogpost/895540/502884/Informal-School-Removals-and-How-to-Respond [<https://perma.cc/V6GC-HDXX>].

⁸ “Subjective offenses” in this context refers to problematic student behaviors that require school officials to make a judgement call in terms of whether the offense rises to a level warranting disciplinary action, rather than relying on objective criteria or official school policies. For example, objective offenses directly violate school policies, such as smoking or vandalism, whereas subjective offenses are context specific, such as classroom disruption. See Kent McIntosh, Erik J. Girvan, Robert H. Horner & Keith Smolkowski, *Education Not Incarceration: A Conceptual Model for Reducing Racial and Ethnic Disproportionality in School Discipline*, 5 J. APPLIED RSCH. ON CHILD. 1, 3, 7 (2014).

⁹ Once considered a slur, the word “queer” is used intentionally, rather than “LGBTQ+” to highlight the reclamation of the term. The author, who identifies with the term, finds power in its inclusive nature, as well as its political connotations. In the words of bell hooks, “‘Queer’ not as being about who you’re having sex with (that can be a dimension of it); but ‘queer’ as being about the self that is at odds with everything around it and that has to invent and create and find a place to speak and to thrive and to live.” THE NEW SCHOOL, *Bell Hooks - Are You Still a Slave? Liberating the Black Female Body* | Eugene Lang College., YOUTUBE (May 6, 2014), www.youtube.com/watch?v=rJk0hNROvzs&t=5226s [<https://perma.cc/8M9F-JD2N>]. See also What Does “Queer” Mean? Why Are Younger Generations Reclaiming the Word Queer?, THE CENTER (Dec. 12, 2022), thecentercv.org/en/blog/what-does-queer-mean-why-are-younger-generations-reclaiming-the-word-queer/ [<https://perma.cc/SZ5T-R884>].

¹⁰ Blitzman, *Shutting Down*, *supra* note 5. Christina LiCalsi, David Osher & Paul Bailey, *An Empirical Examination of the Effects of Suspension and Suspension Severity on Behavioral and Academic Outcomes*, AM. INST. FOR RSCH. 6 (Aug. 2021) (“[E]xclusionary discipline puts students at greater risk of becoming involved with the juvenile justice system . . . and increases the likelihood that they will experience criminal victimization and incarceration as adults”). These groups are not the only ones at increased risk, as disabled students also face

Part I examines the current landscape of external and internal factors that illustrate how the effects of exclusionary discipline are felt more acutely by minoritized children.¹¹ Part II uses case studies to evaluate the limited Fourth and Fourteenth Amendment legal remedies available to minoritized children. Part III presents the case to reimagine the Fourth and Fourteenth Amendments with the greatest potential to disrupt the school-to-prison pipeline by slowing the rate of exclusionary discipline. First, a student being sent out of the classroom should qualify as a seizure subjected to a reasonableness standard under the Fourth Amendment. By adopting a behavioral realist approach¹²—one that anticipates implicit bias in school decision-making—the Supreme Court can create a higher reasonableness standard that teachers must satisfy before banishing a child from the classroom. Second, proving a claim under the Fourteenth Amendment’s Equal Protection Clause should not require a showing of “intentionality,” as it creates a high bar for student plaintiffs and allows for the unintentional harms of implicit bias to remain unchecked. Alternatively, if intentionality must remain to prevent flooding the legal system, the definition of intent should be revised to reflect modern conceptions. Finally, by drawing on the reasoning behind *Goss v. Lopez*,¹³ the Fourteenth Amendment’s Due Process Clause can encompass any form of exclusionary discipline, even temporary instances, as a deprivation of liberty that grants a student additional and standardized procedural steps.

This Note also examines the barriers to implementing these desired changes, such as precedent that delineates the circumstances under which judicial interference in schools occurs and the judiciary’s lack of incentive to enact these changes.¹⁴ Despite implementation challenges, these considerations remain valuable as a bandage solution to the problem of school-related punishment experienced by minoritized youth every day.

disproportionate rates of punishment. See, e.g., Latoya Clark, *Beyond Bias: Cultural Capital in Anti-Discrimination Law*, 53 HARV. C.R.-C.L. L. REV. 381, 406 (2018) (“Schools discipline children with disabilities far more often than they do students without disabilities.”).

¹¹ See Wingrove-Haugland & McLeod, *supra* note 6.

¹² Megan Quattlebaum, *Let’s Get Real: Behavioral Realism, Implicit Bias, and the Reasonable Police Officer*, 14 STAN. J. C.R. & C.L. 1, 23 (2018) (“Behavioral realism asks courts to ‘pay close attention to the best available evidence about people’s actual behavior’ when ‘formulating and interpreting legal rules.’”).

¹³ *Goss v. Lopez*, 419 U.S. 565 (1975).

¹⁴ *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968) (“Courts do not and cannot intervene in the resolution of conflicts which arise in the daily operation of school systems and which do not directly and sharply implicate basic constitutional values.”). *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 35 (1973) (holding that education is not a fundamental right explicitly protected by the Constitution and that state classifications affecting education are subject only to rational basis review).

I. THE CURRENT ISSUES MINORITIZED YOUTH FACE

Modern Black, brown, and queer youth face several internal and external factors that worsen the impact of exclusionary discipline and classroom banishment. Exclusionary discipline generally includes suspensions, or temporary removals from the classroom environment, and expulsions, or permanent removals.¹⁵ For purposes of this Note, “classroom banishment” is any instance of sending a child out of a classroom for subjective offenses while lacking fair and articulable reasons to single out that student.¹⁶ This Part explores external factors, circumstances that impact students outside of the school context, such as socioeconomic status and involvement in the legal system through foster care, immigration proceedings, and juvenile delinquency. Part I also explores internal factors, circumstances impacting students within school, including mandatory attendance, speech restrictions, and the implicit bias of school officials. This Part touches on these issues, a non-exhaustive list, to illustrate how the fragile circumstances of school-age minoritized Black, brown, and queer youth can be easily upended by exclusionary discipline. In a vacuum, time away from a classroom may seem appropriate in several instances. However, the reality of these circumstances creates a minefield of chain reactions where suspensions, expulsions, and any instance of classroom banishment can harm a student’s reputation, infringing upon their liberty interests.

A. External Factors Outside of School

1. Socioeconomic Status

Children from higher socioeconomic statuses¹⁷ are more likely to attend well-funded schools with experienced teachers and higher rates of graduation and college enrollment.¹⁸ On the other hand, food, housing, and safety insecurities are markers of low socioeconomic status that are often correlated with student misbehavior.¹⁹ Studies indicate that Black and Latinx youth are

¹⁵ See Susanna K. Jain, Nathaniel Beers & Ryan Padrez, *School Suspension and Expulsion: Policy Statement*, 154 PEDIATRICS, 1 (2024).

¹⁶ See *infra* Part III for further discussion of classroom banishment.

¹⁷ While this Note explores the disproportionate punishment faced by Black, brown, and queer children, the intersections of these social identities are intrinsically linked, and this Note does not adequately address the intricate ways the absence or presence of one identity can lead to different results. For instance, the rate of punishment that a Black girl experiences will vary from that of a white, queer boy. Socioeconomic status further complicates these trends and requires in-depth, disaggregated analysis for these groups. For additional discussion on intersectionality, see Kimberlé Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence against Women of Color*, 43 STAN. L. REV. 1241 (1991).

¹⁸ Shervin Assari & Hossein Zare, *High Socioeconomic Status Black Adolescents Attend Worse Schools than Whites*, 5 OPEN J. EDUC. RES. 3 (2025).

¹⁹ Katherine E. Marçal, Rebecca Bosetti & Nicholas Barr, *Housing insecurity and adolescent behavioral outcomes: The mediating role of aggression in parenting*, 137 CHILD ABUSE & NEGLECT 2 (2023) [hereinafter Marçal et al., *Housing Insecurity*].

more likely to reside in socioeconomically disadvantaged areas than white youth.²⁰ Regardless of socioeconomic status, Black children are more likely to grow up in poor households and communities and attend schools with higher poverty rates compared to white children.²¹ Children who experience financial or housing insecurity are at greater risk for adverse emotional and behavioral outcomes than those with their basic needs met.²² These insecurities lead to long-term negative outcomes, such as mental health problems and involvement with the carceral system later in life.²³

The correlation of gun violence in disadvantaged areas is well researched, and the resulting stress from the influx of gun violence makes it a particularly pressing factor in the context of school discipline. Gun violence was the leading cause of death for children aged one to seventeen from 2020 to 2023.²⁴ In a Northwestern Medicine study spanning four states, youth in lower-income neighborhoods were found to be twenty times more likely to be injured or killed by a firearm than those in affluent neighborhoods.²⁵ Beyond low socioeconomic status, a 2022 study suggests that even youth of color living in high-income areas experience more gun violence than white youth in poor households.²⁶ Additionally, in 2023, Black youth were four times more likely than white youth to be killed by a firearm and accounted for 46% of all youth firearm deaths.²⁷ Even when not directly impacted, research suggests that youth who are exposed to gun violence—such as witnessing a mass shooting or the nearly 1,000 officer-involved killings that

²⁰ Nicole Kravitz-Wirtz, Angela Bruns, Amanda J. Aubel, Xiaoya Zhang & Shani A. Buggs, *Inequities in Community Exposure to Deadly Gun Violence by Race/Ethnicity, Poverty, and Neighborhood Disadvantage Among Youth in Large US Cities*, 99 J. URB. HEALTH 610, 619 (2022) [hereinafter Kravitz-Wirtz et al., *Inequities in Community*].

²¹ Marçal et al., *Housing Insecurity*, *supra* note 19, at 2.

²² *Id.*

²³ *Id.*

²⁴ Amanda Watford, *Youth Gun Deaths in the U.S. Have Surged 50% Since 2019*, STATELINE (Mar. 20, 2025), <https://stateline.org/2025/03/20/youth-gun-deaths-in-the-us-have-surged-50-since-2019/> [<https://perma.cc/CT4Z-ENDP>] (showing that firearms remained the leading cause of death among American youth for the fourth consecutive year in 2023). *See also A Year in Review: The Johns Hopkins Center for Gun Violence Solutions*, JOHNS HOPKINS CTR. FOR GUN VIOLENCE SOLS. 4-14 (Apr. 28, 2022) (providing an overview of nationwide gun violence in 2020 and highlighting racial disparities).

²⁵ Ben Schamisso, *Kids in Disadvantaged Areas Face Up to 20 Times Higher Odds of Gun Injuries*, NORTHWESTERN NOW (Aug. 25, 2025), <https://news.northwestern.edu/stories/2025/08/kids-in-disadvantaged-areas-face-up-to-20-times-higher-odds-of-gun-injuries> [<https://perma.cc/LRC9-QEVW>] (citing Gwyneth A. Sullivan, John Sincavage, Yao Tian, Xueqing Zhou, Ying Shan, Joseph T. Shilati, Suhail Zeineddin, Susheel Reddy, Mehul V. Raval & Anne M. Stey, *Pediatric Firearm-Related Hospital Encounters by Child Opportunity Index Level*, PEDIATRICS (Aug. 25, 2025)).

²⁶ Kravitz-Wirtz et al., *Inequities in Community*, *supra* note 20, at 620.

²⁷ Nirmita Panchal & Sasha Zitter, *The Impact of Gun Violence on Children and Adolescents*, KAISER FAM. FOUND. (May 27, 2025), <https://www.kff.org/mental-health/the-impact-of-gun-violence-on-children-and-adolescents/>, [<https://perma.cc/DU4X-9YV2>].

occur in the U.S. each year—can experience decreased grade outcomes, increased emotional turmoil, and lower rates of high school graduation and college enrollment.²⁸

These external pressures affect school performance and often exacerbate behavioral issues in the long run. And yet, this still does not explain the disproportionality in school discipline.²⁹

2. Legal System Involvement

Exclusionary discipline can have devastating impacts on a child who is already within the legal system. A suspended or expelled child in foster care, for example, may be forced to switch to a new home if the foster parent cannot supervise them during the day.³⁰ Such instability contributes to foster children being less likely than their peers to graduate high school or enroll in college.³¹ Adolescents in juvenile probation also experience significant consequences of long-term suspension or expulsion.³² For instance, it is a common condition of probation to keep out of academic trouble.³³ Violating this term, regardless of the underlying severity of the conduct that led to the discipline, can result in returning to juvenile detention.³⁴ Likewise, undocumented immigrant or asylum-seeking children face similar circumstances. Namely, an immigrant child could face deportation or be barred from asylum if they are suspected of using or providing drugs on school grounds, which could be framed as drug trafficking.³⁵

Students without a preexisting relationship with the legal system also have a higher likelihood of becoming involved with the juvenile delinquent system after experiencing exclusionary discipline. Research shows that

²⁸ Desmond Ang, *The Effects of Police Violence on Inner-City Students*, 136 Q.J. ECON. 115, 115 (2021).

²⁹ David Simson, *Exclusion, Punishment, Racism, and Our Schools: A Critical Race Theory Perspective on School Discipline*, 61 UCLA L. REV. 506, 525 (2014) (“Because existing research has made clear that the most obvious explanation for differential rates of punishment—differential rates of misbehavior—is not sufficient to explain racial disproportionality in school discipline, further inquiry must be made into the potential bases of this racial disproportionality.”).

³⁰ Diana Newmark, *The Illusion of Due Process in School Discipline*, 32 WM. & MARY BILL RTS. J. 343, 352 (2023).

³¹ *Id.* (citing U.S. DEP’T EDUC. & DEP’T HEALTH & HUM. SERV., NON-REGULATORY GUIDANCE: ENSURING EDUCATIONAL STABILITY FOR CHILDREN IN FOSTER CARE 3 (2016), <https://www2.ed.gov/policy/elsec/leg/essa/edhhsfostercarenonregulatorguide.pdf> [<https://perma.cc/7CDL-8P3D>]).

³² *Id.* at 353.

³³ *Id.*

³⁴ *Id.* (citing NAT’L COUNCIL JUV. & FAM. CT. JUDGES, THE ROLE OF THE JUDGE IN TRANSFORMING JUVENILE PROBATION 22 at 62 n.80 (2021), https://assets.aecf.org/m/resource-doc/ncjfcj-the_roleofthejudge-2021.pdf#page=19 [<https://perma.cc/HZ2U-ZSCC>]) (categorizing “schoolyard fighting” as a less serious offense that can nonetheless result in removing a child from the home).

³⁵ *Id.* at 354.

exclusionary discipline invites numerous negative outcomes, such as inconsistent attendance, lower rates of graduation, and increased anxiety, dropout, and arrest rates.³⁶ Studies further show that school discipline can lead to future negative outcomes and increase one's risk of arrest.³⁷ These outcomes are largely due to the social effects of this type of discipline, which can negatively impact a student's self-esteem, sever bonds to their family and school community, increase their risk of not graduating, and harm future job prospects.³⁸ These risk factors highlight that early intervention is critical to interrupt this trajectory.

B. Internal Factors Within the School

Internal factors—mandatory attendance, speech restrictions, and implicit biases of school officials—also contribute to increased rates of minoritized students facing exclusionary discipline.

1. Mandatory Attendance and Truancy

Although students are compelled to attend school, they cannot always redress the harms they suffer there. States generally have compulsory school attendance laws.³⁹ Although this does not mandate public school, approximately 83% of American children attend public schools rather than private schools or homeschooling.⁴⁰ Schools function *in loco parentis*, meaning that these institutions take on the responsibility of caring for the child while their parents are not present.⁴¹ This role gives schools a significant degree

³⁶ Paul Hemez, John J. Brent & Thomas J. Mowen, "Exploring the School-To-Prison Pipeline: How School Suspensions Influence Incarceration during Young Adulthood," 18 *YOUTH VIOLENCE & JUV. JUST.* 235, 236 (2020).

³⁷ *Id.*

³⁸ *Id.* See Janel A. George, *Place, Power, and School Pushout: Defensive Localism and School Discipline*, 125 *COLUM. L. REV.* 2145, 2196 (2025) [hereinafter George, *Place, Power, and Pushout*] for additional discussion on exclusionary discipline's impact on family dynamics ("Just like many lower-income, majority-Black families are often locked into low-performing schools, families can become locked into the cycle of exclusionary discipline, with students being affected by the legacies of punitive discipline within their families and communities.").

³⁹ 78A C.J.S. *Schools and School Districts* § 1012.

⁴⁰ Katherine Schaeffer, *U.S. Public, Private and Charter Schools in 5 Charts*, PEW RSCH. CTR. (2024), www.pewresearch.org/short-reads/2024/06/06/us-public-private-and-charter-schools-in-5-charts/ [https://perma.cc/NJS5-NTRX] ("During the 2021-22 school year, the vast majority of the country's roughly 54.6 million public, private and charter school students in pre-K through 12th grade (83%) attended traditional public schools. Another 10% were enrolled in private schools, and 7% went to public charter schools.").

⁴¹ *In loco parentis* translates to "in the place of the parent" and generally "refers to a person who has put himself in the situation of a lawful parent by assuming the obligations incident to the parental relation without going through the formalities necessary to legal adoption." Susan Stuart, *In Loco Parentis in the Public Schools: Abused, Confused, and in Need of Change*, 78 *U. CIN. L. REV.* 969, 970 (2010) [hereinafter Stuart, *In Loco Parentis*]; Jonathan M. Purver, *Loco Parentis Status*, 28 *AM. JUR. PROOF OF FACTS* 2d 545 (1981).

of supervisory responsibility and control over schoolchildren.⁴² A student’s punishment for being excessively absent without a valid excuse can be forcibly missing more school through suspensions or expulsions, but this punishment fails to address the root causes of why that student was absent in the first place. A student could also be deemed truant and may face legal consequences.⁴³ Despite mandatory attendance, a “special relationship” is not formed between public schools and students.⁴⁴ A “special relationship” would establish certain obligations owed by the school to the student. The lack of a relationship that establishes the duty to safeguard a students’ well-being bars student claims to remedy harm caused by a state actor under § 1983 in many contexts.⁴⁵ Students find themselves forced to remain in an environment that is responsible for them, but which they cannot always hold accountable for the harm they experience.

2. Speech Restrictions

The special circumstances of schools restrict other rights that would normally be attributed to adult citizens, such as freedom of speech. School officials may restrict school-sponsored speech if the restriction is reasonably tied to legitimate teaching concerns.⁴⁶ In this way, schools may reasonably limit a student’s right to free speech to protect the goals of the learning environment. Additionally, schools may restrict student speech when it is

⁴² *Vernonia School Dist. 47J v. Acton*, 515 U.S. 646, 654-56 (1995).

⁴³ Julius Menacker, *Legal Policy Affecting School Truancy*, 119 EDUC. LAW REP. 763, 779 (1997) (finding that truancy can result in grade reductions and/or criminal sanctions for students and parents). Mandated school attendance is a common court order for juveniles on probation. Violations can result in extended probation or jail time; *see, e.g.*, In re K.S.Y., 416 N.E.2d 736 (1981) (reversing a twelve-month probation order and sixty-day jail sentence after a juvenile missed one day of class on the grounds of abuse of discretion); *see also* Brandy R. Maynard, Michael G. Vaughn, Erik J. Nelson, Christopher P. Salas-Wright, David A. Heyne & Kristen P. Kremer, *Truancy in the United States: Examining Temporal Trends and Correlates by Race, Age, and Gender*, 81 CHILD. & YOUTH SERVS. REV., 188, 191 (2017) (finding that students of color and students of lower economic status were more likely to be truant).

⁴⁴ 78A C.J.S. Schools and School Districts § 1012 (explaining that states generally issue mandatory school attendance laws, but this does not create a “special relationship” in the context of the Due Process Clause). *See Doe v. Covington Cty. Sch. Dist.*, 675 F.3d 849, 863 (5th Cir. 2012) (finding that compulsory attendance does not create a special relationship between public schools and students under § 1983, and that state actors do not have a constitutional duty to protect students from private actors unless a *Deshaney* relationship has been formed—such as in the context of prisoners, mental health subjects, or other wards of the state—or a state actor created or knew of a dangerous situation).

⁴⁵ 42 U.S.C. § 1983 (providing a cause of action against state officials who, “under color of any [State] statute, ordinance, regulation . . . subject[], or cause[] to be subjected” any person in the state to be deprived “of any rights, privileges, or immunities secured by the Constitution and laws.”); *see infra* Part II (for discussion of the claims that can be brought under § 1983).

⁴⁶ *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 273 (1988) (finding that school officials may restrict school-sponsored speech as long as the restriction is reasonably related to legitimate pedagogical concerns).

lewd or plainly offensive,⁴⁷ could “materially and substantially disrupt the work and discipline of the school,”⁴⁸ or has a reasonable forecast of disruption by promoting violation of school policies.⁴⁹ Such broad authority opens the door for subjective determinations about what constitutes classroom disruption. Research showing that Black youth receive “disproportionately more referrals for subjective and nonviolent offenses, such as disrespect and excessive noise,” reflect the impacts of this discretion.⁵⁰ Not every child is sent out of class for merely talking out of turn, but a teacher can subjectively deem the content of one student’s speech over another’s to be offensive or disruptive to the learning environment.

Placing limitations on student rights is not wholly unjustified to teach adolescents “good citizenship”⁵¹ or as a tool to maintain classroom order. However, stripping students of their autonomy and subjecting them to the demands of authority figures with the threat of punishment for dissenting is not without its negative impacts. The unavoidable power imbalance between students and school officials is fertile ground for abuses of power, regardless of the intention behind the outcome. Specifically, vulnerable students—Black, brown, and queer students, in this context—suffer at the hands of teachers and school officials who make subjective determinations of what speech to restrict and operate from implicit bias miscategorized as intuition.⁵²

3. *Implicit Bias Within School Officials*

In school environments, teachers exercise wide discretion over student discipline. Implicit biases consist of “automatic, instantaneous association

⁴⁷ *Bethel Sch. Dist. v. Fraser*, 478 U.S. 675, 684-85 (1986) (holding that restriction of a high school student’s speech containing lewd and sexual content was justifiably restricted to protect minors from such language).

⁴⁸ *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 513 (1969) (finding that students wearing black armbands to protest the Vietnam war did not justify punishment without a showing that the activity would “materially and substantially disrupt the work and discipline of the school.”).

⁴⁹ *Morse v. Frederick*, 551 U.S. 393, 397 (2007) (finding that schools may take steps to safeguard students from speech reasonably believed to be related to promotion of illegal activities or violation of school policy).

⁵⁰ Pamela Fenning & Jennifer Rose, *Overrepresentation of African American Students in Exclusionary Discipline: The Role of School Policy*, 42 URB. EDUC. 536, 540 (2010) [hereinafter Fenning & Rose, *The Role of School Policy*].

⁵¹ *Pierce v. Soc’y of Sisters*, 268 U.S. 510, 534 (1925).

⁵² THE ADVANCEMENT PROJECT, POWER IN PARTNERSHIPS: BUILDING CONNECTIONS AT THE INTERSECTION OF RACIAL JUSTICE AND LGBTQ MOVEMENTS TO END THE SCHOOL-TO-PRISON PIPELINE 5 (2015), https://advancementproject.org/wp-content/uploads/1970/01/899c2f19d719059027_h3cm6wplt.pdf [<https://perma.cc/Z2MB-HBL2>] (“When students of color and LGBTQ students receive harsh punishments for subjective behaviors like dress code violations, disrespect, and when defending themselves against bullying, implicit bias can be a factor.”)

of stereotypes and attitudes with particular groups of people.”⁵³ They are “often contrary to our personal values and are formed by the social environments around us.”⁵⁴ Legal scholar Megan Quattlebaum argues that implicit bias is “endemic to normal human cognition”⁵⁵ and can lead to “unconscious and automatic” decision-making with the information most readily available to us, including racial stereotypes.⁵⁶ The behavioral realist framework encourages courts to carefully consider evidence of patterns of behavior when creating and interpreting legal rules.⁵⁷ This framework can apply to a school context by recognizing the implicit bias of educators and implementing preventative measures accordingly.

Teachers are not immune from using implicit bias to draw conclusions.⁵⁸ Studies show that teachers are more likely to perceive Black children, particularly Black males, as older than their actual age and more blameworthy for behaviors comparable to those of their white peers.⁵⁹ This careful monitoring of Black boys can begin as early as kindergarten.⁶⁰ Due to this

⁵³ Quattlebaum, *supra* note 12, at 5.

⁵⁴ Rachel Godsil, *Educating All of Our Children: Understanding and Addressing Implicit Bias*, PERCEPTION INSTITUTE, 2020. See also Anthony G. Greenwald & Linda Hamilton Krieger, *Implicit Bias: Scientific Foundations*, 94 CAL. L. REV. 945, 951 (2006).

⁵⁵ Quattlebaum, *supra* note 12, at 5.

⁵⁶ *Id.* at 15–17. See also Jason P. Nance, *Over-Disciplining Students, Racial Bias, and the School-to-Prison Pipeline*, 50 U. RICH. L. REV. 1063, 1069 (2016) (describing how “we unconsciously rely on racial stereotypes and attitudes to help us make quick decisions, those stereotypes and attitudes bias our perceptions, judgments, and ultimately our decisions without our awareness or intent.”).

⁵⁷ Quattlebaum, *supra* note 12, at 23.

⁵⁸ Glen M. Vogel & Robert Costello, *Implicit Bias Is Not a Fairytale: From the Classroom to the Courtroom: The Connection Between Racial Bias in Early Education and Its Impact on Stereotypes and Interactions with the Criminal Justice System*, 20 SEATTLE J. FOR SOC. JUST. 695, 698 (2022) (“Gaps in educational attainment based on race are well documented and these can often occur because of incorrect beliefs or biased expectations by educators.”); see also Seth Gershenson, Stephen B. Holt & Nicholas W. Papageorge, *Who Believes in Me? The Effect of Student-Teacher Demographic Match on Teacher Expectations*, 52 ECON. EDUC. 209, 210 (2016).

⁵⁹ THE ADVANCEMENT PROJECT, *supra* note 52, at 5; Aimee Levitt, *Teachers See Misbehavior from Black Students as More Blameworthy*, YALE INSIGHTS, Dec. 14, 2023, <https://insights.som.yale.edu/insights/teachers-see-misbehavior-from-black-students-as-more-blameworthy> [<https://perma.cc/SH2E-6G4B>] (In a case study prompting 1,339 teachers from 295 high schools to observe a video of a child texting during a test after being told to put the phone away, reports showed that “Black boys were perceived as being more blameworthy than their White counterparts for the exact same misbehavior in school.”).

⁶⁰ Tracy DeStazio, *‘I’m Watching You’ Behavior Produces Racial Disparities in School Discipline*, NOTRE DAME NEWS, Feb. 12, 2024, <https://news.nd.edu/news/im-watching-you-behavior-produces-racial-disparities-in-school-discipline/> [<https://perma.cc/6Y2K-NBJ6>] (citing Calvin Rashad Zimmermann, *Looking for Trouble: How Teachers’ Racialized Practices Perpetuate Discipline Inequities in Early Childhood*, 97 SOCIO. OF EDUC. 219 (2024)) (noting that in a two-year observational study following boys from kindergarten through first grade, teachers, regardless of their race, were more likely to use an “authoritarian approach” with Black boys and a “permissive approach” with white boys, and went so far as to tell the Black boys “I’m watching you”). See also Sarah J. Brislin, Maia Choi, Emily R. Perkins, Lia Ahonen, Henrika McCoy, Paul Boxer, Duncan B. Clark, Dylan B. Jackson & Brian M. Hicks, *Racial Bias in School Discipline and Police Contact: Evidence from the Adolescent Brain Cognitive*

hypervigilant eye, teachers are more likely to view Black children with suspicion rather than care, leading to more disciplinary referrals,⁶¹ suspensions and expulsions, and overall disruptions in the educational process.⁶² Other factors, such as cultural differences, also play a role in these subjective disciplinary calls. For example, Black girls are often seen as loud, disruptive, or noncompliant and punished for not conforming with traditional notions of white femininity and passivity.⁶³ Thus, such unconscious bias can lead teachers to send children of color out of the classroom more often than their white counterparts.⁶⁴

The prevalence of police officers readily available in schools also provides teachers with an easily accessible mode of inflicting violence on Black students.⁶⁵ School Resource Officers (“SROs”)⁶⁶ have a higher likelihood of being in schools with greater economic disadvantages and a higher number of students of color.⁶⁷ Unsurprisingly, SROs also subject students of color

Development Social Development (ABCD-SD) Study, 63 J. AM. ACAD. CHILD & ADOLESCENT PSYCHIATRY 1, 11 (Dec. 2024) (“Youth who experienced [detention, suspension, and being sent home] before age 10 were at the highest risk for experiencing other forms of exclusionary discipline, even after controlling for overall level of delinquency, neighborhood enrichment, race, and sex.”).

⁶¹ Tony Fabelo, Michael D. Thompson, Martha Plotkin, Dottie Carmichael, Miner P. Marchbanks III, Eric A. Booth, & Justice Ctr. & Pub. Policy Research Inst., *Breaking Schools’ Rules: A Statewide Study of How School Discipline Relates to Students’ Success and Juvenile Justice Involvement*, COUNCIL OF STATE GOV’TS JUST. CTR., 37, 45-46 (2011), https://csgjustice-center.org/wp-content/uploads/2012/08/Breaking_Schools_Rules_Report_Final.pdf [<https://perma.cc/2QKV-N7EQ>] (finding that race was often a predictive factor in disciplinary data, especially when punishment was left to teacher discretion); *see also* McIntosh et al., *supra* note 8, at 5 (finding that Black children are disciplined more often for subjective infractions that require a judgement call, whereas white children are more often disciplined for objective, more easily classified behaviors); Daniel J. Losen, *Discipline Policies, Successful Schools, Racial Justice, and the Law*, 51 FAM. CT. REV. 388, 391 (2013) (noting that discretionary punishment was a vehicle for racialized disparate treatment and finding that Black student suspensions and expulsions were more likely for minor subjective offenses, such as cell phone use, disruption, or disrespect) [hereinafter Losen, *Discipline Policies*].

⁶² Losen, *Discipline Policies*, *supra* note 61, at 388-400, (noting that discretionary punishment was a vehicle for racialized disparate treatment and finding that Black student suspensions and expulsions were more likely for minor offenses).

⁶³ George, *Place, Power, and Pushout*, *supra* note 38, at 2177; *see* Janel A. George, *Stereotype and School Pushout: Race, Gender, and Discipline Disparities*, 68 ARK. L. REV. 101, 108 (2015).

⁶⁴ Fenning & Rose, *The Role of School Policy*, *supra* note 50, at 537 (finding that teachers discipline students of color more frequently due to anxiety over losing control of the classroom, not for fear of danger posed by the student).

⁶⁵ U.S. DEPARTMENT OF EDUCATION OFFICE FOR CIVIL RIGHTS, *REFERRALS TO LAW ENFORCEMENT AND SCHOOL-RELATED ARRESTS IN U.S. PUBLIC SCHOOLS* (2023) (In the 2017-2018 school year, 31.6% of Black students experienced a school related arrest despite only making up 15.1% of school attendance nationwide).

⁶⁶ School Resource Officers (SROs) are typically police officers that work at a local law enforcement agency who are stationed to work within a school. Matthew T. Theriot, *School Resource Officers and the Criminalization of Student Behavior*, 37 J. OF CRIM. JUST. 289, 291 (2009). Since the late 1990s, the popularity of SROs as a method of school violence prevention has skyrocketed. *Id.*

⁶⁷ *Id.* at 284 (finding that “a larger percentage of students at schools with an SRO had economic disadvantage compared to schools without an SRO. These schools also had a larger percentage of ethnic minority students.”).

to more surveillance for age-appropriate behavior.⁶⁸ In South Carolina, one police officer grabbed a Black fifteen-year-old girl by the neck, flipped her backward, and dragged her across the floor for refusing to hand her cell phone to her teacher.⁶⁹ Not listening to a teacher, though disruptive, cannot justify this level of violence.

Beyond the accessibility of SROs, teachers are more likely to call the police on Black and brown children. In 1967, the Commission on Law Enforcement and Administration of Justice issued a racist report asserting that Black youth made up a disproportionate amount of arrests and that youth “were the largest threat to public safety.”⁷⁰ This report justified increased funding to police Black and brown students in schools.⁷¹ Direct results of over-policing are reflected in the case of seventh-grader TreVon Swan. In 2021, TreVon brought a racial discrimination complaint against Merrill Middle School under Title VI of the Civil Rights Act of 1964.⁷² At the time of this complaint, Merrill Middle School had disproportionate suspension rates of 76.8% for Black students and 26.4% for white students.⁷³ He alleged that the school did not adequately respond after multiple instances of racial harassment, such as being called the n-word, physically attacked, and threatened to be slapped so hard he would “go to Africa.”⁷⁴

These events culminated in an incident where students threw water on TreVon’s friends and threw a full water bottle at TreVon’s head at a school dance.⁷⁵ When TreVon threw the water bottle back into the crowd, a school official grabbed TreVon from behind, dragged him out of the cafeteria, and forcibly locked him in the teacher’s lounge.⁷⁶ The situation escalated when

⁶⁸ See George, *Place, Power, and Pushout*, *supra* note 38, at 2192.

⁶⁹ Alexis Karteron, *Arrested Development: Rethinking Fourth Amendment Standards for Seizures and Uses of Force in Schools*, 18 NEV. L.J. 863, 864 (2018) (citing Christine Hauser, *Video of Student Arrest in South Carolina Puts Focus on School Officers*, N.Y. TIMES, Oct. 27, 2015, <https://www.nytimes.com/2015/10/28/us/video-of-student-arrest-n-south-carolina-puts-focus-on-school-officers.html> [<https://perma.cc/8YGG3-JBE5>]; Richard Pérez-Peña, Christine Hauser & Sheryl Gay Stolberg, *Rough Student Arrest Puts Spotlight on Police*, N.Y. TIMES, Oct. 28, 2015, <https://www.nytimes.com/2015/10/29/us/police-officers-in-schools.html> [<https://perma.cc/MJ27-K4VY>]).

⁷⁰ Jasmine Richardson-Rushin, Angelica Jimenez, Gwendolyn Walker & Hannah Benton Eidsath, *Targeted and Ticketed: Student Ticketing and the Perpetuation of the School-to-Prison Pipeline*, 22 UC L.J. RACE & ECON. JUST. 3, 7 (2025) [hereinafter Richardson-Rushin et al., *Targeted and Ticketed*].

⁷¹ *Id.*; see George, *Place, Power, and Pushout*, *supra* note 38, at 2191 (“Unlike SROs in majority-white schools, who perceive their roles more as protectors than punishers, SROs in majority-Black schools are focused on discipline and punishment.”).

⁷² Letter from Elizabeth Lambert, ACLU of Wisconsin, to U.S. Department of Education Office of Civil Rights (April 24, 2021), *Re: Complaint of Racial Discrimination by Oshkosh Area School District, Wisconsin*, www.aclu-wi.org/app/uploads/2022/04/final_swan_v_oshkosh_ocr_complaint_redacted_1.pdf [<https://perma.cc/F469-4MVS>].

⁷³ *Id.* at 3.

⁷⁴ *Id.* at 3-4.

⁷⁵ *Id.* at 5.

⁷⁶ *Id.* at 5-6.

another student broke a window, and the police were called.⁷⁷ In reviewing the video footage, a school administrator referred to a student of color as a “monster,” and seven students of color—including TreVon and his sister—were referred for juvenile charges and expulsion.⁷⁸ The student who had verbally harassed TreVon and his sister with racial slurs and initiated the water-throwing incident—who had not been disciplined for this prior conduct—was not given this same punishment.⁷⁹ This serves as an example of a Black, male child who was presumed to be the aggressor and forcibly removed while non-Black children were not subjected to same treatment. These occurrences highlight how implicit bias can fuel the decision to involve the police, rather than traditional methods of classroom management, with Black children.⁸⁰

Beyond the criminalization of Black children, queer children of all races are at a greater risk of disproportionate punishment as well. Many queer children are made the targets of homophobic and transphobic bullying.⁸¹ If bullied children push back against their tormentors, their likelihood of getting in trouble themselves increases.⁸² In the case of *Nabozny v. Podlesny*, high school student Jamie Nabozny was bullied for years for

⁷⁷ *Id.*

⁷⁸ *Id.* at 7.

⁷⁹ *Id.*

⁸⁰ See Richardson-Rushin et al., *Targeted and Ticketed*, *supra* note 70, at 6 (finding that “presence of Student Resource Officers (SROs) increases the school’s likelihood that school-based behaviors will be reported to law enforcement agencies.”).

⁸¹ The 2021 Trevor Project showed that 52% of queer youth in middle or high school reported being bullied electronically or in person in the past year. *Bullying and Suicide Risk among LGBTQ Youth*, THE TREVOR PROJECT, <https://www.thetrevorproject.org/research-briefs/bullying-and-suicide-risk-among-lgbtq-youth/> [<https://perma.cc/6TX6-L26Q>] (Oct. 14, 2021). The middle school students were bullied more (65%) compared to the high school students (49%). *Id.* Transgender students were bullied the most at 61%, compared to 45% of cisgender LGBQ students. *Id.* The rates of bullying by race are as follows: Native/Indigenous (70%); White (54%); Multiracial (54%); Latinx (47%); Asian American/Pacific Islander (41%); and Black (41%). *Id.* See also Kevin M. Barry, Brian Ferrell, Jennifer Levi & Neelima Vanguri, *A Bare Desire to Harm: Transgender People and the Equal Protection Clause*, 57 B.C. L. REV. 507, 553 (2016) (citing Jaime M. Grant, Lisa Mottet & Justin Tanis, *Injustice at Every Turn: A Report of the National Transgender Discrimination Survey*, NAT’L CTR. FOR TRANSGENDER EQUAL. & NAT’L GAY & LESBIAN TASKFORCE 3-8 (2011)), http://www.thetaskforce.org/static_html/downloads/reports/reports/ntds_full.pdf [<https://perma.cc/5EHB-RTEM>] (finding that transgender students in grades K-12 experience significant discrimination. 78% reported experiencing harassment, 35% reported physical assault, and 12% reported sexual assault from students and school staff).

⁸² See Elizabeth Nassem, *The Application of a Foucauldian Approach to Analyse School Bullying: A Critique*, 43 PASTORAL CARE IN EDUC., 88, 92 (2025) (applying Foucault’s teachings to interrogate the power dynamics between teachers and students. “Frequent punishment can contribute to children responding with anger, but they are usually perceived as ‘bullies’ rather than ‘victims’.”). See also THE ADVANCEMENT PROJECT, *supra* note 52, at 5. (“[S]tudies reveal that LGBTQ and gender-nonconforming youth are often the victims, rather than the aggressors in school conflicts, which stem from bullying and harassment.”).

being gay.⁸³ At one point, he was “mock raped” in a classroom while twenty onlookers laughed.⁸⁴ The principal refrained from intervening because of her own personal beliefs regarding the student’s identity, allegedly stating that Nabozny should “expect” this behavior if he was going to be openly gay.⁸⁵ Responses like this from school officials allow childhood bullying to spiral into blatant torture for queer students. Additionally, transgender students are targeted with discriminatory bathroom policies and exclusions from team sports.⁸⁶ The normalization of exclusionary policies increases the likelihood that queer children will be met with disproportionate levels of discipline when they dare to do the mundane: use the bathroom and play sports.⁸⁷ Non-trans students are not similarly burdened. This targeting of queer youth has dire consequences, as reflected in the high suicide rates of queer children.⁸⁸

Teachers are not the only parties at fault. In fact, while they remain the easiest party to point the finger at, they are only the enforcers of problematic policies and systemic forces they have little control over. This Note focuses on a tangible starting point to slow the use of exclusionary discipline, rather than unpack the policies that have normalized this punishment tool. Addressing implicit biases creates a more preventative approach to the problems students face, as it is the subconscious, implicit bias that often fuels targeted decision-making, rather than conscious decisions of bad actors.

II. THE CURRENT LEGAL REMEDIES TO ADDRESS THESE ISSUES

This Part addresses how zero-tolerance policies, implicit bias in selecting which students to search, and the lack of clear standards defining what qualifies as a seizure outside of police involvement all undermine the Fourth Amendment’s protections against unreasonable bodily searches and seizures. Furthermore, this Part introduces how *Goss v. Lopez* identified a liberty interest in missing class and provided a starting point for procedural protections against suspensions, but students facing discrimination in schools still have an arduous journey attempting to prove the requisite

⁸³ 92 F.3d 446, 454 (7th Cir. 1996) (finding no due process liability where there is no special relationship or state created danger).

⁸⁴ *Id.* at 451.

⁸⁵ *Id.*

⁸⁶ Angie Martell, *Legal Issues Facing Transgender and Gender-Expansive Youth*, 96 MICH. B.J. 30, 32-33 (Dec. 2017) (finding that 60% of transgender students have been denied access to restrooms affirming their gender identity and that “[s]ome are denied opportunities to participate in sports and face bullying and victim-blaming, which can lead to disproportionate discipline and involvement with the juvenile justice system, creating a path toward criminalization and incarceration.”).

⁸⁷ *Id.*

⁸⁸ See THE TREVOR PROJECT, *supra* note 81, at 161 (finding that queer children who reported being bullied were three times more likely to attempt suicide).

“special relationship” or state-created danger that triggers liability under the Due Process Clause. This Part then explores the development of the “intentionality” component of the Equal Protection Clause and highlights its limiting nature.⁸⁹

⁸⁹ This is a non-exhaustive list of the legal avenues afforded to students. This Note does not address the statutory claims available to students for instances of discrimination in schools. For example, the Office of Civil Rights (OCR) can investigate a claim under Title VI of the Civil Rights Act of 1964 for discriminatory action regarding race, color, or national origin, but this requires the difficult showing of intentional discrimination. *Education and Title VI*, U.S. DEP’T OF EDUC. (Apr. 11, 2025), www.ed.gov/laws-and-policy/civil-rights-laws/race-color-and-national-origin-discrimination/education-and-title-vi [https://perma.cc/UEL8-66N6]. This means that even policies that have an inadvertent yet disparate impact on a group of students based on a protected identity cannot be successfully challenged without a difficult showing of intent. Simson, *supra* note 29, at 512-13 (quoting Adiran Siman, *Challenging Zero Tolerance: Federal and State Legal Remedies for Students of Color*, 14 CORN. J.L. & PUB. POL’Y 327, 348 (2005)) (noting that the Office of Civil Rights “‘does not appear to regularly apply the adverse impact doctrine in complaint investigations and determinations’ but rather seems to ‘process[] complaints under the more rigid intentional discrimination standard’”).

Additionally, students could file under Title IX of the Education Amendments of 1972, which prohibits educational institutions that receive federal funding from discriminating against a student on the basis of sex. 20 U.S.C. §§ 1681–1688. A school is liable under Title IX for misconduct on the basis of sex when the school (1) had actual notice of the circumstances and (2) acted with “deliberate indifference” to harassment that is “so severe, pervasive, and objectively offensive that it can be said to deprive the victims of access to the educational opportunities or benefits provided by the school.” *Davis ex rel. LaShonda D. v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 650 (1999) (finding a school liable when a female student endured repeated sexual advances from a male student and was pushed to the point of contemplating suicide). But proving “deliberate indifference” is difficult when it is unclear whether the school had “actual notice.” In other words, a school cannot be held liable for being purposefully indifferent towards conduct of which they are unaware about, even if a layperson may see the notice as sufficient. *See Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 292-93 (1998) (holding that school liability for a teacher’s sexual misconduct towards a ninth-grade student requires a showing that the school district had (1) actual notice of the harassment and (2) acted with deliberate indifference; finding no actual notice, despite parent complaints to the principal about inappropriate comments, the school could not be found to be deliberately indifferent; thus, no liability was found).

Student-plaintiffs have gotten more creative with their claims in their quest for legal recourse. Such was the case in *P.P. v. Compton Unified School District*, where student-plaintiffs claimed that their numerous hardships as a result of systemic racism posed a barrier to success in school, warranting a remedy under Title II of the Americans with Disabilities Act (ADA). 135 F. Supp. 3d 1126, 1133 (C.D. Cal. 2015). The ADA prohibits discrimination against individuals with disabilities in public accommodations. 42 U.S.C. § 12132. To establish a *prima facie* ADA claim, plaintiffs must show (1) they have a disability; (2) they were excluded from or denied the benefits of a public service; and (3) this exclusion or denial of benefits was due to their disability. *P.P. v. Compton Unified Sch. Dist.*, 135 F. Supp. 3d 1098, 1107 (C.D. Cal. 2015).

The disability at issue was racial trauma so severe that that it affected the students’ ability to process information and pay attention in class, but their proposed mandatory injunctive relief of a district-wide training program could not be issued where compensatory damages could be issued instead. *Id.* at 1112. The court also had reservations that the alleged trauma-induced disability denied them access to educational facilities, and were similarly skeptical that district-wide training was a reasonable accommodation that would grant them access to such facilities. *Id.* at 1117. This example calls attention to how even when students attempted a creative solution to mitigate the disproportionate disciplinary actions they experienced through sensitivity training, this attempt was unsuccessful.

A. *Fourth Amendment Protection Against Unreasonable Searches and Seizures*

Students have a certain degree of protection against searches and seizures in relation to school discipline, but even these protections are diminished in the school environment. The Fourth Amendment, a starting point for protecting student liberty interests, provides that searches and seizures of students must be “reasonable.”⁹⁰ To be reasonable, any search of a person and personal property must be both “justified at its inception” and “reasonably related in scope to the circumstances which justified the interference in the first place.”⁹¹ The pivotal case, *New Jersey v. T.L.O.*, established the standard for what is “reasonable” when a high school teacher caught two students smoking in the bathroom and brought them to the assistant vice principal.⁹² One student admitted to the conduct, but the other student denied smoking.⁹³ The assistant vice principal then searched her purse and found cigarette rolling papers.⁹⁴ The Court held the search was justified because he had “reasonable grounds” to suspect that it would lead to evidence that the student was violating or had violated the law or school policies.⁹⁵ The search of the purse was reasonably related to the initial objective—finding evidence of drugs—because he searched where evidence would presumably be and did in fact find evidence of drugs.⁹⁶ The search was also “not excessively intrusive in light of the age and sex of the student and the nature of the infraction.”⁹⁷ This reasonableness standard aims to balance an individual’s privacy interest against the government’s public safety interest and the school’s interest in maintaining “custodial and tutelary responsibility for children.”⁹⁸ However, the scale tips slightly in favor of the school, as a “reasonable” search is not a high bar.

⁹⁰ *New Jersey v. T.L.O.*, 469 U.S. 325, 341 (1985) (“[T]he legality of a search of a student should depend simply on the reasonableness, under all the circumstances, of the search.”).

⁹¹ *Id.* at 341–42 (1985) (finding that a high school official did not need probable cause to search the bag of a student caught smoking in a bathroom as this search was justified at its inception and reasonably related in scope).

⁹² *Id.* at 328.

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ Compare *id.* at 341–42, with *S.V.J. v. State*, 891 So. 2d 1221, 1223 (Fla. Dist. Ct. App. 2005) (finding that a hunch or “gut feeling” following physical misconduct is insufficient grounds that do not rise to the level of reasonable suspicion to justify a search of a student).

⁹⁶ Compare *T.L.O.*, 469 U.S. at 342, with *Klump v. Nazareth Area Sch. Dist.*, 425 F. Supp. 2d 622, 640 (E.D. Pa. 2006) (finding that a school principal properly confiscated a phone but was not justified in calling other students with the cell phone and accessing text messages from other students to obtain information related to suspected drug use of other students).

⁹⁷ *T.L.O.*, 469 U.S. at 342. See also *Safford Unified Sch. Dist. No. 1 v. Redding*, 557 U.S. 364, 375 (2009) (holding that the strip search of a thirteen-year-old girl for prescription strength pain relievers was an unjustified intrusion).

⁹⁸ *Karteron*, *supra* note 69, at 906 (quoting *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 656 (1995)).

In a modern age of mass shootings and over policing, many schools bypass an individualized reasonableness standard. These schools have resorted to hyper-surveillance of students coupled with zero-tolerance policies that automatically suspend, expel, or turn over students to law enforcement regardless of extenuating circumstances.⁹⁹ Schools with higher levels of surveillance have higher student suspension rates, which negatively impacts Black students who are at higher suspension risk than white students.¹⁰⁰ Such was the case in *In re Expulsion of A.D.*, in which a student was expelled for the rest of the year for accidentally bringing to school a three-inch pocket knife she had forgotten to remove from her purse.¹⁰¹ Officials found the pocket knife during a random, suspicionless search of all students for drugs.¹⁰² Although officials believed her explanation that she only used the knife for tasks on a family farm, they still expelled her in accordance with the school's zero-tolerance policy.¹⁰³ While ample scholarship explores the role that implicit bias plays in selecting which students are searched,¹⁰⁴ this Note focuses on the less developed area of a seizure in the school context.

Precedent for what constitutes a seizure, specifically in the classroom context, is limited.¹⁰⁵ While the Supreme Court has not explicitly addressed the proper standard for seizures and uses of force in schools,¹⁰⁶ it applied the

⁹⁹ Nance, *supra* note 56, at 76.

¹⁰⁰ *Id.* at 77.

¹⁰¹ *In re Expulsion of A.D.*, 883 N.W.2d 251, 253-254 (Minn. 2016).

¹⁰² *Id.* at 254. See Jason P. Nance, *Random, Suspicionless Searches of Students' Belongings: A Legal, Empirical, and Normative Analysis*, 84 U. COLO. L. REV. 367, 430-31 (2013) (arguing that the intrusive nature of random, suspicionless searches of students' belongings are not justified under the Fourth Amendment and disproportionately impact minority students).

¹⁰³ *In re Expulsion of A.D.*, 883 N.W.2d at 254. For more information on how zero-tolerance policies contribute to the over-policing of Black children, see Sydney Ford, *Learning While Black: How "Zero Tolerance" Policies Disproportionately Affect Black Students*, 32 U. FLA. J.L. & PUB. POL'Y 49 (2021) [hereinafter Ford, *Learning While Black*].

¹⁰⁴ See, e.g., Sarah Jane Forman, *Countering Criminalization: Toward A Youth Development Approach to School Searches*, 14 SCHOLAR 301, 320 (2011) ("If anyone and anything can be viewed as suspicious, the exercise of discretion becomes particularly susceptible to all kinds of bias, including racial bias because determining what constitutes a reasonable suspicion is based on a subjective interpretation of behavior."); Michael Pinard, *From the Classroom to the Courtroom: Reassessing Fourth Amendment Standards in Public School Searches Involving Law Enforcement Authorities*, 45 ARIZ. L. REV. 1067, 1120 (2003) (proposing that the probable cause standard should replace the *T.L.O.* standard "when school officials conduct searches [to uncover evidence of criminal activity] in the presence of officers employed by law enforcement agencies."); see generally Richard Jenkins, *An Historical Approach to Search and Seizure in Public Education*, 30 W. ST. U. L. REV. 105 (2003) (providing a comprehensive summary of student search and seizure cases pre-*T.L.O.*); L. Song Richardson, *Arrest Efficiency and the Fourth Amendment*, 95 MINN. L. REV. 2035, 2040, 2075-77 (2011) (applying a behavioral realist framework to stop-and-frisk encounters and proposing that a probable cause standard should replace the reasonable suspicion standard under *Terry v. Ohio*).

¹⁰⁵ Karteron, *supra* note 69, at 868 (describing analysis of seizures as the "'neglected sibling' of the Fourth Amendment world," and exploring seizures of students by police officers).

¹⁰⁶ *Id.* at 883.

reasonableness inquiry of *T.L.O* in *Vernonia School District 47J v. Acton*, in which it found that the privacy interest of students is diminished in the context of the "special needs" of the school.¹⁰⁷ The Court reasoned that although students do not "'shed their constitutional rights . . . at the schoolhouse gate,' the nature of those rights is what is appropriate for children in school."¹⁰⁸ Notably, the Court asserted that "Fourth Amendment rights . . . are different in public schools than elsewhere; the 'reasonableness' inquiry cannot disregard the schools' custodial and tutelary responsibility for children."¹⁰⁹ This standard seemingly establishes broad discretion for searches and seizures within schools so long as they are "reasonable."

Another guiding case on whether seizures are reasonable under the Fourth Amendment is *Graham v. Connor*. In *Graham*, a diabetic Black man attempted to purchase orange juice, but instead was handcuffed and pinned to the ground by a police officer due to his erratic behavior precipitated by declining blood sugar levels.¹¹⁰ The Court looked at what was "objectively reasonable" behavior from the officers in light of the circumstances "without regard to their underlying intent or motivation."¹¹¹ Teachers are not held to the same reasonableness standards as police officers, but I argue that a comparable standard should be adopted.¹¹²

B. Due Process Protection Under the Fourteenth Amendment

Due process protection is a mixed bag for students. Although a student's education is not a fundamental right ensured by the Constitution,¹¹³ it is a liberty interest that cannot be taken away without due process.¹¹⁴ At a minimum, students facing suspension of ten days or less must be given oral or written notice of the charges, an explanation of the evidence against them, and an opportunity to present their side of the story.¹¹⁵ The *Goss* Court did not go as far as to require hearings that afforded a student an opportunity to

¹⁰⁷ *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 658, 665-66 (finding the privacy interest implicated in obtaining a student urine sample in this context to be "negligible," and that random suspicion-less drug tests of student athletes do not violate a student's privacy interests).

¹⁰⁸ *Id.* at 655-56 (internal citation removed) (quoting *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969)).

¹⁰⁹ *Id.* at 656; see *Karteron*, *supra* note 69, at 884, for further analysis of the Court's reasoning.

¹¹⁰ *Graham v. Connor*, 490 U.S. 386, 389 (1989).

¹¹¹ *Id.* at 397.

¹¹² See *infra* Part III for a discussion on the proposed reasonableness standard for school officials.

¹¹³ *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 35 (1973). See also *Plyler v. Doe*, 457 U.S. 202, 221, 226-30 (1982) (reaffirming that "[p]ublic education is not a 'right' granted to individuals by the Constitution" but finding that a state could not deny undocumented schoolchildren access to free public education without a substantial state interest to do so).

¹¹⁴ *Goss v. Lopez*, 419 U.S. 565, 576 (1975) (finding that a ten-day suspension is not a *de minimis* deprivation and that the protections of the Due Process Clause are implicated).

¹¹⁵ *Id.* at 581.

secure counsel, confront and cross-examine witnesses, or call witnesses for short suspensions, though the Court did acknowledge that such additional procedures may be effective against erroneous decisions.¹¹⁶ The Court then acknowledged that students facing ten or more days of suspension may be entitled to additional due process proceedings, but did not definitively outline what process is due.¹¹⁷

Despite this starting point, due process claims in response to harms suffered by minoritized students have been generally unsuccessful. Under § 1983 of Title 42 of the United States Code, students can bring a claim for deprivation of constitutional or statutory rights by a state actor.¹¹⁸ However, there is no affirmative duty on the government to protect individuals from other private actors.¹¹⁹ In *DeShaney v. Winnebago County Department of Social Services*, the Court explained that a duty to protect generally only exists in two circumstances: (1) when a person is taken into state custody, establishing a “special relationship;” and (2) when the state creates the danger.¹²⁰ A “special relationship” is only formed in the limited circumstances where a ward of the state has been deprived of the liberty to take care of themselves, such as an incarcerated individual or an involuntarily committed mental health patient.¹²¹ With this limited scope, schools rarely, if ever, form a “special relationship” with their students that creates an affirmative duty of care.¹²²

If students cannot establish a “special relationship,” they must make the difficult showing that the school created the danger. Recall the Seventh Circuit case, *Nabozny v. Podlesny*, in which a student was unsuccessful in his due process claim when he was bullied for being gay.¹²³ Despite evidence

¹¹⁶ *Id.* at 583-84 (reasoning that such a mandated and formal process would be too costly and would destroy the effectiveness of this common disciplinary procedure).

¹¹⁷ *Id.* at 584; see Newmark, *supra* note 30, at 372-73 (2023) (proposing that sufficient due process should include: (1) sufficient notice at least three days prior to the hearing, (2) meaningful access to counsel, (3) review of the evidence with non-redacted witness names unless compelling reasons not to provide the names are present, (4) preponderance of the evidence evidentiary burden, (5) requirement of non-hearsay evidence, and (6) an independent hearing officer).

¹¹⁸ 42 U.S.C. § 1983 (providing a cause of action against state officials who, “under color of any [State] statute, ordinance, regulation . . . subject[,], or caused to be subjected” any person in the state to be deprived “of any rights, privileges, or immunities secured by the Constitution and laws”).

¹¹⁹ *DeShaney v. Winnebago Cnty. Dept. of Soc. Servs.*, 489 U.S. 189, 197-198 (1989) (finding that the Department of Social Services did not owe a duty to the DeShaney family to stop the father from beating his son until he was severely brain damaged).

¹²⁰ *Id.* at 199-202.

¹²¹ *Id.* at 198-99. The Court acknowledged in footnote 9 that children in foster care may also fit the criteria of having a “special relationship.”

¹²² *Doe ex rel. Magee v. Covington Cnty. Sch. Dist. ex rel. Keys*, 675 F.3d 849, 856 (5th Cir. 2012) (finding that a special relationship was not formed between a school and its nine-year old student who was released to an unauthorized adult who later raped her; without such a relationship, the school was not liable).

¹²³ 92 F.3d 446, 454-59 (7th Cir. 1996) (finding no due process liability where there is no special relationship or state created danger).

that (1) teachers knew about the harassment and the mock rape he endured, and (2) school officials told him he deserved the abuse because of his sexual orientation, the court found that no “special relationship” had been formed between the student and the school, nor did the school create the danger, despite failing to respond to it.¹²⁴ The Eighth Circuit held similarly when it rejected the claim of a student who was sexually assaulted by another student.¹²⁵ The United States District Court for the District of Minnesota relied on these holdings when it dismissed a physically and verbally harassed gay student’s due process claim.¹²⁶ These examples contextualize how minoritized students struggle to show school liability for due process violations within school walls. If such extreme cases are not sufficient, due process claims surrounding exclusionary punishment would fare worse.

On one hand, *Goss* created a baseline of administrative procedures to safeguard a student’s liberty interest to not be removed from school without due process. On the other hand, establishing liability for due process claims remains an almost insurmountable bar when students cannot claim a special relationship with their schools despite mandatory attendance. Even in extreme circumstances, where school officials release a student to a child molester posing as a guardian¹²⁷ or are aware of peer-to-peer sexual harassment,¹²⁸ students cannot prove the school created the danger by failing to stop it. When applying this rigid standard to school discipline, there is a need for proactive measures to slow the stream of students who seek a legal remedy for due process harms.

C. Equal Protection Claims Under the Fourteenth Amendment “Intentionally” Hindered

Surprisingly, students bringing a § 1983 equal protection claim have had marginally more success. An equal protection claim requires two elements: (1) the school discriminated against a student on the basis of an identifiable class, and (2) the school “intentionally” discriminated or “acted with deliberate indifference.”¹²⁹ In that same Seventh Circuit case, despite rejecting Nabozny’s due process claim, the court held that a reasonable fact-finder could conclude that his rights had been infringed under the Equal Protection Clause.¹³⁰ Nabozny provided enough evidence to show that: (1) he was treated differently on the basis of gender and sexuality, and (2) the school was deliberately indifferent by responding contrarily to its anti-bullying

¹²⁴ *Id.* at 451-52, 459-60.

¹²⁵ *Dorothy J. v. Little Rock Sch. Dist.*, 7 F.3d 729, 732 (8th Cir. 1993).

¹²⁶ *Montgomery v. Indep. Sch. Dist. No. 709*, 109 F. Supp. 2d 1081, 1096 (D. Minn. 2000).

¹²⁷ *Covington Cnty. Sch. Dist.*, 675 F.3d at 870.

¹²⁸ *Nabozny*, 92 F.3d at 451-53.

¹²⁹ *Id.* at 454.

¹³⁰ *Id.* at 460.

policies in his case but not for others.¹³¹ Ultimately, no rational basis existed to warrant the student plaintiff's discriminatory treatment.¹³² A key aspect of the viability of his claim was the school's anti-bullying policy coupled with a record showing contrary actions to their own policy.¹³³ Despite this rare success, the intentionality requirement poses a high bar, and many minoritized students suffering within school walls lack a smoking gun, like an explicit school policy, to show intentional discriminatory treatment.

The evidentiary burdens of proving "intentionality" or "deliberate indifference" are critical limiting factors for equal protection claims. The first hurdle students face is developing a record that illustrates the issue. Schoolchildren often endure abuse that is not well documented, or that occurs too infrequently to establish a pattern. Student stories alone fail to compel in a system that only accepts evidence satisfying evidentiary burdens.¹³⁴ Legal advocates may prefer a well-established record that details clear violations of student rights,¹³⁵ but this means that the student had to suffer a great deal of trauma, only to have it dragged out for years in the public sphere for a chance at justice.¹³⁶

Nowhere in the text of the Fourteenth Amendment does the word "intentionally" appear,¹³⁷ and yet, that is the crux of whether our legal system will hold actors liable for discrimination. The Supreme Court read an intent requirement into the Fourteenth Amendment in *Washington v. Davis* when it explicitly stated that plaintiffs must show not only a disparate impact but a discriminatory purpose.¹³⁸ In *Davis*, several Black police officers alleged

¹³¹ *Id.* at 454-55, 460 (stating that a reasonable fact-finder could conclude that a student tormented for being gay and mock raped—to which a school official responded, "boys will be boys"—and took no further action, but would have plausibly responded differently for a student of a different sex or sexual orientation—may support a finding that Nabozny's Fourteenth Amendment right to equal protection was violated).

¹³² *Id.* at 454.

¹³³ *Id.*

¹³⁴ *See, e.g., Haywood v. Fitchburg Pub. Schs.*, 801 F. Supp. 3d 5, 15 (D. Mass. 2025) (finding that a single objectively offensive incident of a teacher ridiculing a Black kindergartner's hair during class does not rise to the level of a 'severe and pervasive' harm as required under Title VI). *See also* *HB v. Monroe Woodbury Cent. Sch. Dist.*, No. 11-CV-5881 CS, 2012 WL 4477552, at *15 (S.D.N.Y. Sept. 27, 2012) (finding that a Puerto Rican student experiencing a single instance of derogatory name calling did not rise to the level of severity and pervasiveness required to support a claim under Title VI).

¹³⁵ Rebecca Orel, *Making It Better Now: How Advocates Can and Should Use A Critical Period for LGBT Youth to Create Sustainable Change*, 44 COLUM. HUM. RTS. L. REV. 577, 586 (2013).

¹³⁶ *See, e.g., Wadsworth v. Nguyen*, 129 F.4th 38, 57 (1st Cir. 2025) (finding that the sheer volume of sexual messages sent at all hours of the day and night from a principal to a student was sufficiently severe or pervasive).

¹³⁷ U.S. CONST. amend. XIV, § 1 ("No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws").

¹³⁸ *Washington v. Davis*, 426 U.S. 229, 239 (1976). *See, e.g., Crawford v. Bd. of Educ. of City of Los Angeles*, 458 U.S. 527, 537-38 (1982) (finding that a class action suit brought by

that the verbal and reading comprehension test that failed four times as many Black applicants than white applicants violated the Equal Protection Clause.¹³⁹ In light of evidence to recruit Black applicants and the legitimate interest in improving communication skills, the resulting adverse impact was not enough to prove a discriminatory purpose.¹⁴⁰

Although not enough by itself, discriminatory impact can be used to support a finding that an intentional, discriminatory purpose was a motivating factor in creating the exclusionary policy.¹⁴¹ Some students have found success proving intent based on the impact and working backward,¹⁴² but this is not always a workable approach.¹⁴³ Proving a knowledge component—that the actions were intentional or deliberately indifferent—inherently limits the types of harms the legal system will formally recognize.

minority students challenging a state amendment that halted desegregation efforts could not be shown to have a discriminatory purpose).

¹³⁹ *Davis*, 426 U.S. at 237.

¹⁴⁰ *Id.* at 245-46.

¹⁴¹ *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 255-56 (1977); see also Daniel R. Ortiz, *The Myth of Intent in Equal Protection*, 41 STAN. L. REV. 1105, 1113 (1989) (providing more in-depth analysis of the development of the intent standard).

¹⁴² See, e.g., *Doe v. Horne*, 115 F.4th 1083, 1103-04 (9th Cir. 2024) (finding that a policy that banned only transgender girls from female sports sufficiently showed discriminatory purpose due to its exclusive impact on transgender women and girls). It is notable that claims challenging policies that target students in the sexual minority may be limited in success in light of *United States v. Skrametti*, 605 U.S. 495 (2025). In finding that a state statute prohibiting healthcare providers from administering gender affirming care and puberty blockers based on gender dysphoria was not discriminatory against transgender individuals, *Skrametti*, 605 U.S. at 518-19, the Supreme Court has created a potential avenue for laws targeting transgender youth. While no distinction based on sex was made—as this law turned on age and medical use, and applied to all youth regardless of sex, *Skrametti*, 605 U.S. at 511—the reality remains that non-transgender children will not be as affected by a law that allows for gender blockers and hormones for certain medical reasons, yet prohibits that same healthcare to combat gender dysphoria. The presence of such other factors—age and medical use—knocks the high burden of heightened scrutiny that a sex distinction would invite down to mere rational basis review. *Id.* The rational basis of legitimate medical concerns warranting what results in discrimination almost exclusively impacting transgender youth can easily translate to the school context if such state laws become commonplace.

¹⁴³ See, e.g., *Ayala v. Houston Indep. Sch. Dist.*, 305 F. Supp. 3d 726, 731 (S.D. Tex. 2018), *aff'd sub nom.*, 776 F. App'x 839 (5th Cir. 2019) (finding that a high school student failed to provide sufficient evidence showing intent to discriminate against her on the basis of sex in the slow handling of her sexual assault claim where the only evidence of intent were allegations of inadequate processing speed). See also *Haywood*, 801 F. Supp. 3d at 12 (Black student required to remove beads and braids as a condition to attend school failed to adequately show differential treatment in violation of equal protection clause by merely reciting the legal standard without a developed record); *Thompson v. Ohio State Univ.*, 92 F. Supp. 3d 719, 729-32 (S.D. Ohio 2015), *aff'd*, 639 F. App'x 333 (6th Cir. 2016) (finding that college plaintiff could not prove that professor (1) treated similarly situated non-Black students differently than her and (2) knew that similarly situated non-Black students engaged in the same conduct and still treated the plaintiff differently. The plaintiff could not prove that white students had used the same incorrect citation format, which formed the basis of the plagiarism disciplinary referral against the plaintiff. The statistical evidence of the professor disproportionately referring three students for plagiarism discipline, all of whom were Black, despite teaching ten times as many white students, was not sufficient evidence to show intent to discriminate).

For instance, a class action suit filed by Black students failed in the Third Circuit for lack of evidence showing a discriminatory purpose, or deliberate indifference, towards the overrepresentation of Black, disabled students in special education classes.¹⁴⁴ Although the plaintiffs provided statistical proof of the overrepresentation, this did not prove that the overrepresentation was done intentionally.¹⁴⁵ Precedent such as this inherently chalks up inadvertent discrimination to mere coincidence for which courts cannot and will not provide a remedy.

III. THE CASE FOR CONSTITUTIONAL INTERPRETATION THROUGH A RADICAL LENS

The Constitution has been used as a sword against young people, but prioritizing their interests can transform it into a shield. This Part argues that to protect a class of people who lack autonomy, are beholden to the state, and are guaranteed only a modified version of the civil rights and civil liberties to which they are entitled, we must shift our constitutional interpretation to one that is textualist yet informed by contemporary and progressive societal values.

This lens of interpretation mirrors that of Elie Mystal's take in *Allow Me to Retort: A Black Guy's Guide to the Constitution*. In his book, Mystal critiques a stagnant interpretation of the Constitution, and argues that we can no longer be tied to the vision of politically powerful, slave owning white men if we are going to truly embrace our modern, multicultural society that sees women as autonomous beings and Black Americans as full people.¹⁴⁶ He acknowledges that this is considered a more radical view, but this analysis holds value to prioritize the civil rights of disenfranchised people.¹⁴⁷ Mystal's interpretation is an effective avenue to protect minoritized youth, and two amendments in particular—the Fourteenth and Fourth—are ripe for the picking.

In Mystal's manifesto, he provides an example of reinterpretation precedent by assessing the evolving interpretation of the Second Amendment to illustrate how constitutional protections can reflect the values of an evolving society without changing a word of the text.¹⁴⁸ He provides a brief

¹⁴⁴ *Blunt v. Lower Merion Sch. Dist.*, 767 F.3d 247, 294 (3d Cir. 2014).

¹⁴⁵ *Id.*

¹⁴⁶ See ELIE MYSTAL, *ALLOW ME TO RETORT: A BLACK GUY'S GUIDE TO THE CONSTITUTION* 3-4 (2022) ("My goal is to expose what the Constitution looks like from the vantage of a person it was designed to ignore. My goal is to illustrate how the interpretation of the Constitution that conservatives want people to accept is little more than an intellectual front for continued white male hegemony. And my goal is to help people understand the key role the courts play in interpreting the Constitution and to arm additional people with the knowledge, information, and resolve to fight conservatives for control over the third branch of government in every election, and over every nomination.").

¹⁴⁷ Brandon Hasbrouck, *Allow Me to Transform: A Black Guy's Guide to a New Constitution*, 121 MICH. L. REV. 883, 907 (2023).

¹⁴⁸ MYSTAL, *supra* note 146, at 37.

history of gun regulation¹⁴⁹ and calls attention to how the “well regulated Militia” of the Second Amendment originally intended to preserve the rights of southern enslavers to maintain a militia in response to revolting slaves.¹⁵⁰ Despite its original purpose, our courts now interpret this amendment to grant the average citizen the right to protect themselves in self-defense against one’s neighbors. By spotlighting the “right to bear arms” and pushing its ugly, “well regulated Militia” sister to the back, the amendment was refitted to align with conservative ideals.¹⁵¹ Mystal’s framework relies on the notion that the pendulum can swing in the opposite, progressive direction, to accommodate the needs of modern society. Using this framework, the Fourteenth and Fourth Amendments can be broadened to accommodate the needs of modern schoolchildren.

A. *Reimagining the Fourth Amendment: Considering Banishment From Classrooms as a Form of “Seizure”*

1. *Applying the Behavioral Realist Framework to the Fourth Amendment*

To understand the role of the Fourth Amendment in schools, consider its general application. The Fourth Amendment protects against “unreasonable searches and seizures.”¹⁵² A seizure occurs when “by means of physical

¹⁴⁹ Prior to the 1980s, gun control and reform was not the political war ground it is today. In 1939, the Supreme Court, in *United States v. Miller*, held that registration and taxation of firearms, which made certain types of guns more difficult to acquire, did not infringe on gun ownership rights. 307 U.S. 174, 178 (1939). “In the absence of any evidence tending to show that possession or use of a ‘shotgun having a barrel of less than eighteen inches in length’ at this time has some reasonable relationship to the preservation or efficiency of a well-regulated militia, we cannot say that the Second Amendment guarantees the right to keep and bear such an instrument.” *Id.* In other words, whether or not one could own this type of shotgun did not impact the right to a well-regulated militia. *See id.* Subsequently, the 1967 Mulford Act passed in California, which prohibited carrying loaded firearms without a permit, largely in response to the Black Panther Party’s gun ownership. Maria Mortenson, *Scattershot: Guns, Gun Control, and American Politics*, HARV. J. ON LEGIS. (May 23, 2022), <https://journals.law.harvard.edu/jol/2022/05/23/scattershot-guns-gun-control-and-american-politics/> [<https://perma.cc/JK56-HFSH>].

This was soon followed by the federal Gun Control Act of 1968, which regulated firearm sales across states. *Gun Control Act*, ATF (Jan. 28, 2026), <https://www.atf.gov/rules-and-regulations/laws-alcohol-tobacco-firearms-and-explosives/gun-control-act> [<https://perma.cc/GA24-PGBQ>]. It was not until the National Rifle Association (NRA) spearheaded the Firearm Owners Protection Act of 1986 that solidified the idea in every American that they had an inalienable right to own an assault rifle. MYSTAL, *supra* note 146, at 37-39. In 2008, a very different Supreme Court from the *Miller* Court affirmed the right to own a gun for self-defense in the Constitution. *Id.* “[W]e find that they guarantee the individual right to possess and carry weapons in case of confrontation.” *D.C. v. Heller*, 554 U.S. 570, 592 (2008).

¹⁵⁰ *See generally* Carl T. Bogus, Opinion, *Was Slavery a Factor in the Second Amendment?*, N.Y. TIMES (May 24, 2018), www.nytimes.com/2018/05/24/opinion/second-amendment-slavery-james-madison.html [<https://perma.cc/Z2AP-5WHJ>].

¹⁵¹ *See* MYSTAL, *supra* note 146, at 37-40.

¹⁵² U.S. CONST. amend. IV.

force or a show of authority, [a person's] freedom of movement is restrained" and "in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave."¹⁵³ Before a police officer can initiate a stop, he must identify "specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant [an] intrusion."¹⁵⁴ Though this standard is sensible on paper, in reality, it opens the door for police to interpret objectively reasonable behavior as suspicious or stop anyone they simply do not like.¹⁵⁵

My proposed starting point for a preventative solution for classroom banishment applies the behavioral realist framework to Fourth Amendment protections in a school setting. The behavioral realist theory rests on the premise that all humans can operate from a place of implicit bias.¹⁵⁶ Applying the behavioral realist framework, legal scholar Megan Quattlebaum proposes that the Fourth Amendment is an underutilized resource for reducing implicit bias in modern policing.¹⁵⁷ Once an officer has stopped someone on foot or in a car, the officer may ask consent to search their property or person.¹⁵⁸ Many people, believing that cooperation will prove their innocence, or feeling too intimidated to decline an authority figure, will acquiesce.¹⁵⁹ If they do not consent, the world is the officer's oyster to retroactively identify a reason justifying a search without consent. Perhaps the person tried to run away,¹⁶⁰

¹⁵³ *United States v. Mendenhall*, 446 U.S. 544, 553-54 (1980).

¹⁵⁴ *Terry v. Ohio*, 392 U.S. 1, 27 (1968).

¹⁵⁵ See Louis Stokes, *Representing John W. Terry*, 72 ST. JOHN'S L. REV. 727, 730 (1998) (noting that when asked what first directed his attention to the defendants, the arresting officer of *Terry v. Ohio* testified, "Well, to tell the truth, I just didn't like 'em.'"); Quattlebaum, *supra* note 12, at 29-30 (noting that implicit bias may have been at play when the officer in *Hein v. North Carolina*, 547 U.S. 54 (2014), pulled a Latino man over because he looked "very stiff and nervous" and cited his behavior of "gripping the steering wheel at a 10 and 2 position, and looking straight ahead" as the reason for following the driver until he pulled him over for what he mistakenly believed to be a traffic violation); see also *Whren v. United States*, 517 U.S. 806, 814 (1996) (finding that "the Fourth Amendment's concern with 'reasonableness' allows certain actions to be taken in certain circumstances, whatever the subjective intent.").

¹⁵⁶ Quattlebaum, *supra* note 12, at 23.

¹⁵⁷ *Id.* at 2-3.

¹⁵⁸ *Id.* at 32.

¹⁵⁹ Megan Dias, Derek A. Epp, Marcel Roman & Hannah L. Walker, *Consent Searches: Evaluating the Usefulness of a Common and Highly Discretionary Police Practice*, 21 J. EMPIRICAL LEGAL STUD. 21 (2023) (a study of 900,662 observations of police searches conducted by 25 agencies across five states, finding that consent searches are common despite a 30% decreased success rate of finding contraband, and that Black individuals were more likely to be subject to a consent search, despite these searches being less efficient compared to searches of white individuals).

¹⁶⁰ See *Illinois v. Wardlow*, 528 U.S. 119, 124-25 holding that unprovoked, headlong flight upon seeing police viewed in the totality of the circumstances could provide reasonable suspicion to justify a *Terry* stop and frisk). But see *United States v. Lowe*, 791 F.3d 424, 434 (3d Cir. 2015) (finding that a few startled steps backwards is not considered "flight"); *United States v. Navedo*, 694 F.3d 463, 474 (3d Cir. 2012) ("unprovoked flight, without more, can not elevate reasonable suspicion to detain and investigate into the probable cause required for an arrest."). I argue that what might look like unprovoked flight can stem from general fear of police.

or acted nervously,¹⁶¹ or reached into their pocket;¹⁶² these behaviors in light of the totality of the circumstances could “reasonably” open the door for a search. And yet, any of these reactions could be explained by the unease a Black person may feel around a police officer in a reality where so many Black lives have been taken by police officers.¹⁶³

Quattlebaum proposes a simple fix: the police officer must have reasonable, articulable suspicion to believe that something related to a serious crime or threat to public safety will be found on their person or in their car before an officer can even *ask* for a search.¹⁶⁴ By adding this standard—and accepting the behavioral realist theory that all humans can operate from a place of implicit bias—the number of interactions between Black people and the police could decline,¹⁶⁵ which could eventually lead to fewer murders at the hands of police officers. The following section applies the behavioral realist framework to the context of school officials, hinging on the premise that implicit bias will inevitably result in disproportionate discipline towards minoritized students, thus necessitating that school officials be held to a reasonableness standard before exercising exclusionary discipline.

The standard of what is considered “reasonable” grants an absurd amount of discretion to authority figures. Such “reasonable” behavior is exemplified in *Graham v. Connor*. Graham had filed a § 1983 due process claim after being met with unnecessary police force while in need of medical attention related to his diabetes.¹⁶⁶ The District Court, affirmed by the Court of Appeals, considered four factors for the claim:

(1) the need for the application of force; (2) the relationship between that need and the amount of force that was used; (3) the extent of the injury inflicted; and (4) [w]hether the force was applied in a good faith effort to maintain and restore discipline or maliciously and sadistically for the very purpose of causing harm.¹⁶⁷

¹⁶¹ While not enough on its own, “nervous, evasive behavior is a pertinent factor in determining reasonable suspicion.” *Wardlow*, 528 U.S. at 124.

¹⁶² See *United States v. Black*, 525 F.3d 359, 365 (4th Cir. 2008) (finding reasonable suspicion within the totality of the circumstances to justify a pat down search for weapons where a defendant in a high-crime area hesitated to remove his hand awkwardly cupped halfway in his pocket, as if grabbing something). But see *United States v. Casado*, 303 F.3d 440, 449 (2d Cir. 2002) (finding that an officer reaching into the pockets of a defendant who refused to remove his hands from his pockets was unreasonable without first conducting an outer clothing pat down search).

¹⁶³ *Number of People Shot to Death by the Police in the United States from 2017 to 2024, By Race*, STATISTA, www.statista.com/statistics/585152/people-shot-to-death-by-us-police-by-race/ [https://perma.cc/P2YT-8JQ3] (last visited Jan. 21, 2026).

¹⁶⁴ Quattlebaum, *supra* note 12, at 33.

¹⁶⁵ *Id.* at 28 (finding that in 2011, 42% of face-to-face contact between police and civilians were due to traffic stops).

¹⁶⁶ *Graham v. Connor*, 490 U.S. 386, 390 (1989).

¹⁶⁷ *Id.* (quoting *Graham v. City of Charlotte*, 644 F. Supp. 246, 248 (W.D.N.C. 1986), *vacated*, 490 U.S. 386 (1989)).

Despite Graham's pleas, the officers refused to check the diabetic decal in his wallet to prove his story.¹⁶⁸ Instead, the officers slammed his face onto the hood of a car, threw him headfirst into the vehicle, and refused to let him drink any orange juice to help his blood sugar levels. Graham's medical emergency was met with excessive force, but the lower courts reasoned said force had not been applied "maliciously or sadistically for the very purpose of causing harm."¹⁶⁹ Despite the police conduct resulting in Graham's broken foot, cut wrists, bruised forehead, and injured shoulder, the lower courts found that the officer's use of force was "appropriate under the circumstances" and inflicted "no discernable injury."¹⁷⁰

Instead of considering the question of the deprivation of substantive due process rights under the Fourteenth Amendment, as the lower courts had, the Supreme Court determined the inquiry to be whether a reasonable police officer would have taken the same actions, and whether those actions were reasonable under the Fourth Amendment.¹⁷¹ The Court answered both of these questions affirmatively, forever changing what is considered reasonable conduct for a police officer's treatment of Black people. Although this is worthy of additional critique, this context illustrates the broad interpretation of what is considered a reasonable search and seizure for police officers. School officials, however, are not subject to the same standards.

2. Room for "Banishment" in the Context of a "Seizure"

While scholarship focuses on seizures at the hands of police officers, a seizure must be reimagined to involve any instance of sending a student out of the classroom to be disciplined. The circumstance of sending a student out of the classroom for punishment falls under the definition of a seizure as restraint of movement or believing that one is not free to have liberty of movement. The Supreme Court has acknowledged that in "some circumstances, a child's age 'would have affected how a reasonable person' in the suspect's position 'would perceive his or her freedom to leave.'"¹⁷² A child, upon being told in front of the class to go to the principal's office, would not reasonably believe that they are at liberty to disobey that request. Therefore,

¹⁶⁸ *Id.* at 389.

¹⁶⁹ *Id.* at 390-91.

¹⁷⁰ *Id.* (quoting *Graham*, 644 F. Supp. at 248-49).

¹⁷¹ *Id.* at 395 ("Today we make explicit . . . that *all* claims that law enforcement officers have used excessive force—deadly or not—in the course of an arrest, investigatory stop, or other 'seizure' of a free citizen should be analyzed under the Fourth Amendment and its 'reasonableness' standard, rather than under a 'substantive due process' approach." (emphasis in original)). *MYSTAL*, *supra* note 146, at 54-55.

¹⁷² *J.D.B. v. North Carolina*, 564 U.S. 261, 271-72 (2011) (quoting *Stansbury v. California*, 511 U.S. 318, 325 (1994)). Although this case found that consideration of a suspect's age is appropriate for determining if a reasonable adolescent considers themselves to be in "custody" to necessitate an officer to give *Miranda* warnings, *id.*, I argue that considering age in this way is relevant for determining a seizure in the school context.

this banishment from the classroom falls within the category of a seizure and implicates all the necessary Fourth Amendment protections against an unreasonable one.

As established in earlier sections, teachers receive an incredible amount of discretion when it comes to deciding who is and who is not a "disruption."¹⁷³ Far too often teachers refer students to the principal for doing age-appropriate things such as talking during class or chewing gum, yet referrals for such subjective offenses are most often directed at children of color despite white children engaging in the same behavior.¹⁷⁴ For these reasons, before a teacher may send a student out of the classroom, they must have reasonable, articulable reasons for why they removed that student. If only one child is removed from the classroom, despite multiple students engaging in the disruptive behavior, there must be specific reasons provided for singling out that child. Under this proposal, a child's past history of disruptive behaviors is not specific enough, lest this change not apply to students like Horace.¹⁷⁵ This small procedural change could effectively slow down the process for student ostracization, and may encourage school officials to invest in the child to find the root of the behavioral issues, instead of so quickly throwing them away. Recall your earlier walk of shame to the principal's office;¹⁷⁶ with this additional procedure, the teacher would need specific, articulable reasons to discipline just you with no previous warnings given.

Under this proposal, teachers still have the option of immediately removing students who pose an immediate danger to themselves or others, so long as they provide notice and a hearing as soon as practicable.¹⁷⁷ And yet, by acknowledging the systemic disparate treatment that occurs when minoritized children are made out to be the problem, an additional administrative measure that slows down the process of student punishment could serve as an effective starting point.

An anticipated implementation problem stems from the judiciary's refusal to interpret the Constitution in this way. Critical race theory posits that the dominating group does not make concessions to the subjugated group unless there are overlapping interests from both sides. Derrick Bell, in his article, *Brown v. Board of Education and the Interest Convergence*

¹⁷³ See *supra* Section I.B.

¹⁷⁴ Ford, *Learning While Black*, *supra* note 103, at 55.

¹⁷⁵ See *infra* Section III.B.2. Horace was known as the standard for troublemakers—for example, one school official referred to another child by saying "That child's a problem, but he's not a Horace,"—at his school despite being a helpful research assistant, described by the author as "obedient" and "deeply focused." ANN ARNETT FERGUSON, *BAD BOYS: PUBLIC SCHOOLS IN THE MAKING OF BLACK MASCULINITY* 14-15 (2010) [hereinafter FERGUSON, *BAD BOYS*].

¹⁷⁶ See *supra* Introduction.

¹⁷⁷ *Goss v. Lopez*, 419 U.S. 565, 582-83 (1975) ("Students whose presence poses a continuing danger to persons or property or an ongoing threat of disrupting the academic process may be immediately removed from school. In such cases, the necessary notice and rudimentary hearing should follow as soon as practicable . . .").

Dilemma, labels this phenomenon “interest-convergence.”¹⁷⁸ He uses *Brown v. Board* as a case study and argues that the Supreme Court did not overturn the “separate but equal” doctrine of *Plessy v. Ferguson* out of an overwhelming sense of sudden morality, but rather to advance the goals of the nation.¹⁷⁹ Namely, to boost the credibility of the United States with third world countries to disrupt the influence of communist countries, to reassure Black World War II veterans of ideals of equality, and to pave the way for industrialization of the South, of which segregation stood in the way.¹⁸⁰ He summarizes the limits of constitutional interpretation, concluding that the Fourteenth Amendment “standing alone, will not authorize a judicial remedy providing effective racial equality for blacks where the remedy sought threatens the superior societal status of middle and upper class whites.”¹⁸¹ If morality alone was not enough for the *Brown* Court, it will certainly not be enough for a Supreme Court that delegitimizes abortion rights,¹⁸² allows parents to opt their children out from learning about their queer peers,¹⁸³ and greenlights ICE agents using explicit racial profiling tactics.¹⁸⁴

And yet, there is potential for interest-convergence in the overlap between granting increased protections for minoritized children to signal to allies how this country prioritizes the well-being of youth. These overlapping interests would be especially timely if the United States were implicated in assisting war crimes resulting in thousands of starved and dying children, mirroring the impeccable timing of *Brown* declaring that segregation was uncouth.

B. Reimagining the Fourteenth Amendment: A Functioning Equal Protection Clause and a Protective Due Process Clause

1. Cutting “Intentionality” Out of the Equal Protection Clause

The intentionality requirement of the Equal Protection Clause creates a consistent barrier for minoritized student-plaintiffs and its utility must be reconsidered. Recall that the mandatory showing of intent under an equal protection claim is traced back to *Washington v. Davis*. There, the Court held that an application test that disproportionately prevented Black applicants from becoming police officers was neutral on its face and not

¹⁷⁸ Derrick A. Bell, *Brown v. Board of Education and the Interest Convergence Dilemma*, 93 HARV. L. REV. 518, 523 (1980).

¹⁷⁹ *Id.* at 524.

¹⁸⁰ *Id.* at 524-25.

¹⁸¹ *Id.* at 523.

¹⁸² *Dobbs v. Jackson Women’s Health Org.*, 597 U.S. 215 (2022).

¹⁸³ *Mahmoud v. Taylor*, 145 S. Ct. 2332 (2025).

¹⁸⁴ *Noem v. Vasquez Perdomo*, 146 S. Ct. 1 (2025).

unconstitutional despite the disproportionate outcome of those who failed the test being mainly Black applicants.¹⁸⁵

Precedent remains unclear whether one must prove an actual or inferred showing of discriminatory intent.¹⁸⁶ On one hand, the Court clarified that a showing of discriminatory intent is satisfied only when “the decision-maker . . . selected or reaffirmed a particular course of action at least in part ‘because of,’ not merely ‘in spite of,’ its adverse effects upon an identifiable group,”¹⁸⁷ suggesting that an actual showing of mental state of intent is required.¹⁸⁸ On the other hand, courts often consider other factors—such as discriminatory impact so large that the only explicative factor is race, historic background of a decision, departures from standard procedures leading up to a discriminatory event, or relevant legislative history¹⁸⁹—suggesting that circumstantial evidence can prove this intent requirement.¹⁹⁰

However, this type of evidence has proven either difficult to produce in a school discipline context, or relatively unpersuasive in alleging a violation of the Equal Protection Clause.¹⁹¹ As summarized by David Simson, “[c]ourts typically require some evidence that similarly situated whites were treated differently from minority students and are very stringent about what kind of evidence they will accept to fulfill this requirement. All of this makes a successful claim under the Equal Protection Clause highly unlikely.”¹⁹²

The notion of intentionality must be reconsidered.¹⁹³ One method to consider is adopting the “Knobe Effect.”¹⁹⁴ The “Knobe Effect” is a philosophical framework which suggests that the foreseeability of negative side effects can lead to the conclusion that said side effect was intentional.¹⁹⁵ Knobe states “[a]n outcome can be considered a ‘side effect’ when (1) the agent was not specifically trying to bring it about but (2) the agent chose to do something that she foresaw would involve bringing it about.”¹⁹⁶

¹⁸⁵ *Washington v. Davis*, 426 U.S. 229, 246-48 (1976).

¹⁸⁶ Julia Kobick, *Discriminatory Intent Reconsidered: Folk Concepts of Intentionality and Equal Protection Jurisprudence*, 45 HARV. C.R.-C.L. L. REV. 517, 518 (2010).

¹⁸⁷ *Pers. Adm’r of Massachusetts v. Feeney*, 442 U.S. 256, 279 (1979).

¹⁸⁸ Kobick, *supra* note 186, at 518.

¹⁸⁹ *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266-68 (1977); Simson, *supra* note 29, at 511.

¹⁹⁰ Kobick, *supra* note 186, at 518.

¹⁹¹ Simson, *supra* note 29, at 511-12.

¹⁹² *Id.* at 512.

¹⁹³ *See id.*

¹⁹⁴ The “Knobe Effect” refers to Joshua Knobe’s philosophical framework that a society can conclude intentionality to an individual who can reasonably “foresee morally bad consequences before acting.” Kobick, *supra* note 186, at 519-20; *see* Joshua Knobe, *The Concept of Intentional Action: A Case Study in the Uses of Folk Psychology*, 130 PHIL. STUD. 203, 211 (2006) [hereinafter Knobe, *The Concept*]; Joshua Knobe, *Intentional Action and Side Effects in Ordinary Language*, 63 ANALYSIS 190, 192-93 (2003) [hereinafter Knobe, *Intentional Action*].

¹⁹⁵ Kobick, *supra* note 186, at 519-20.

¹⁹⁶ Knobe, *The Concept*, *supra* note 194, at 208.

When such a side effect is foreseeable, or the outcome can be expected, perceived intentionality turns on whether the side effect is morally good or morally bad.¹⁹⁷ In applying the “Knobe Effect” in the context of a school setting, consider this scenario: A vice principal suggests to the principal, “Let’s implement a new afterschool program. It will make the students feel included in the school community, but it will also overwork some school staff.” The principal replies, “I don’t care at all about overworking school staff. I just want to make the school as inclusive as possible to students. Let’s start the program.” Here, despite the intended positive outcome, the vice principal’s warning of overworking the teachers made this negative side effect foreseeable. When asked whether the principal intentionally overworked teachers, Joshua Knobe found in a comparable scenario that 82% of experimental subjects answered “yes.”¹⁹⁸ This result shows that although unintended, this negative outcome was perceived to be intentional.

Consider a different conversation. The vice principal instead says to the principal, “Let’s implement a new afterschool program. It will make the students feel included in the school community, but it will also help unburden some school staff.” The principal replies, “I don’t care at all about unburdening school staff. I just want to make the school as inclusive as possible for students. Let’s start the program.” When asked whether the principal intentionally unburdened teachers, only 23% of experimental subjects answered “yes.” Interestingly, the unintended yet foreseeable positive side effect of unburdening teachers was seen as coincidental.

In both scenarios, the principal expresses her focus on fostering community for the students and does not express interest in the side effect of helping or harming the teachers, and yet Knobe’s experiment suggests that our intuitions about the morality of an action influence whether we perceive the individual as acting intentionally.¹⁹⁹ The results of this experiment suggests that people are more likely to see a foreseeable negative side effect (overworking teachers) as intentionally caused, whereas a foreseeable positive side effect (unburdening teachers) as unintentional.²⁰⁰

Due to our evolving understanding of intentionality, this consideration should inform future jurisprudence. Of course, this presents a new problem of identifying what is “foreseeable.”²⁰¹ For instance, a school with a tardiness policy may not foresee its disparate impact on students who live farther from the school and may have reasonably implemented the policy to ensure classes start on time. And yet, applying Knobe’s understanding of intent to a hypothetical scenario, a school with a record of exclusively marking students of the same identity group tardy, and making the punishment as harsh

¹⁹⁷ *Id.*

¹⁹⁸ Kobick, *supra* note 186, at 546-47; see Knobe, *The Concept*, *supra* note 194, at 206.

¹⁹⁹ Kobick, *supra* note 186, at 547.

²⁰⁰ *Id.* at 547-48.

²⁰¹ *Id.* at 554-55.

as suspension after the first instance, could be seen as intentional. Although determining foreseeability is not straightforward, there is still merit in incorporating this different understanding of intentionality, as it may give pause to adopting potentially discriminatory policies, and other methods may be considered first.²⁰²

2. Expanding the Scope of the Due Process Clause

The common use of exclusionary discipline and its negative impact on a child’s self-esteem justifies an expanded interpretation of the protections of *Goss*. Parallels between school punishment and the carceral system are blatantly exposed in the illuminating case study by Dr. Ann Arnett Ferguson.²⁰³ In her book, *Bad Boys: Public Schools In The Making Of Black Masculinity*, she recounts her interviews with primarily Black boys over the course of three years at Rosa Parks Elementary School in California.²⁰⁴ During her research, she identified ten “Schoolboys,” who rarely got into trouble, and ten “Troublemakers,” who were often sent to a room for disciplinary measures, coined the “Punishing Room.”²⁰⁵ This room was the first stop in a child’s sentencing. If the school found him guilty of the crime of classroom disruption, the school banished him to the tiny, isolated “Jailhouse” room for in-school suspension of up to three days.²⁰⁶ The students sent there, the vast majority of whom are Black boys, were completely isolated from their peers: They had a separate lunch hour, a separate, shortened recess, and had to help clean the cafeteria as part of their punishment.²⁰⁷ Such isolation and surveillance establish an unsettling familiarity with the carceral system in the minds of impressionable, Black children at an early age.

The school staff referred to one boy, Horace, as the worst of the worst. Horace was labeled as lazy and belligerent by school officials, but Dr. Ferguson found him to be a bright, respectful young man and quickly made him her research assistant.²⁰⁸ Students like Horace, who are removed from the classroom for even a short amount of time, can experience immediate ostracization. A scarlet “P” is placed on them for all to see, marking them as the “Problem” and the reason the class had to stop.²⁰⁹ The overlooked

²⁰² *Id.* at 556.

²⁰³ Dr. Ann Arnett Ferguson received her PhD in Sociology from the University of California, Berkeley and is a retired Associate Professor of Black Studies at Smith College. *Ann Arnett Ferguson*, UNIV. MICH. PRESS, <https://press.umich.edu/Contributors/F/Ferguson-Ann-Arnett> [<https://perma.cc/L42D-K79H>] (last visited Jan. 21, 2026).

²⁰⁴ FERGUSON, *BAD BOYS*, *supra* note 175, at 3-4.

²⁰⁵ *Id.* at 8-10.

²⁰⁶ *Id.* at 34.

²⁰⁷ *Id.* at 37.

²⁰⁸ *Id.* at 15.

²⁰⁹ See Jason P. Nance, *Implicit Racial Bias and Students’ Fourth Amendment Rights*, 94 IND. L.J. 47, 62-63 (2019) (noting that “after the second infraction by the African American student, teachers were more likely to label him as a ‘troublemaker,’ believe that the misbehavior was indicative of a negative pattern, and imagine suspending this student in the future.”).

punishment of being ousted from the classroom can trigger emotional isolation and damage to a student's sense of self, and the shame that ostracized students experience can cause them to exhibit worse behavior after being singled out.²¹⁰ At the time of this study, students could only be suspended for up to five days at a time, and California law imposed a twenty-day suspension limit before a hearing was mandated.²¹¹ By the time a student has been suspended for twenty days, it is often too late to recover academically.²¹² This procedure illustrates how the imprecise requirements of *Goss* lead to state variance in discipline proceedings that fail to protect these students.

Additionally, addressing the disparity between the high rates of Black and brown student suspension compared to white students can come in the form of standardizing the holding of *Goss v. Lopez*. Recall that in *Goss*, nine named students were suspended yet denied a hearing to give their testimony of events.²¹³ The Court established basic required procedures in *Goss*—notice of the charges, an explanation of the evidence, and an opportunity to be heard—that were “less than a fair-minded school principal would impose upon himself in order to avoid unfair suspensions.”²¹⁴ In light of behavioral realism, which presumes that implicit bias can lead to disproportionate identity-based targeting,²¹⁵ additional protections are appropriate.

The disparate rates of punishment underscore the need for such additional protections. Studies from 2019 show that Black youth are four times more likely to be suspended than white youth and approximately two times more likely to be expelled.²¹⁶ Black students are more likely to be subjected to disciplinary referrals for subjective offenses, such as disrespect or loitering, and are shown to be punished 20% more severely for their first offense compared to white students.²¹⁷

With these disproportionate rates in mind, *Goss* should be extended to trigger additional procedural protections, including a written explanation provided to the student and a formal hearing upon request for any amount of exclusionary discipline that removes a child from a classroom for any

²¹⁰ LiCalsi et al., *supra* note 10, at 6 (“Students who are suspended once are at greater risk of being suspended again in the future . . . receive poorer grades, and are at greater risk of dropping out.”).

²¹¹ FERGUSON, *BAD BOYS*, *supra* note 175, at 38.

²¹² *Id.* at 33-35 (finding that in a study tracking suspended middle and high school students over the course of four years, more severe exclusionary discipline—an out-of-school suspension over an in-school-suspension, or an out-of-school suspension of 21 days or more—led to worse behavioral and academic outcomes).

²¹³ *Goss v. Lopez*, 419 U.S. 565, 568 (1975).

²¹⁴ *Id.* at 581-83.

²¹⁵ Quattlebaum, *supra* note 12, at 23.

²¹⁶ Ford, *Learning While Black*, *supra* note 103, at 54.

²¹⁷ *Id.*; see also Jason A. Okonofua & Jennifer L. Eberhardt, *Two Strikes: Race and the Disciplining of Young Students*, 26 PSYCH. SCI. 617, 619 (2015) (finding that educators were “significantly more troubled” by second rule violation by a Black student as opposed to a white student).

amount of time. While *Goss* focuses on students on the verge of suspension, I propose additional procedures before students arrive at that point.

For purposes of this Note, exclusionary discipline is used broadly to reference suspensions and expulsions. Here, classroom banishment is used narrowly to describe the act of sending a child out of a classroom for subjective offenses while lacking reasonable, articulable reasons for the ousting that justify singling out one student as opposed to others of comparable behavior. A child who is forced to remain in the hallway or visit the principal’s office misses precious class time. This lost time adds up when considering how often minoritized students are sent out the room for behaviors that do not violate formal school policies. To require a written explanation to a child in that position is well within the rationale behind the *Goss* decision, that students retain a property interest in attending class and a liberty interest in their reputation.²¹⁸ However, a student must not merely receive this explanation without an opportunity to challenge the school official’s reasoning, which warrants the opportunity for a hearing at the student’s request. In examining the temporary nature of the exclusion, the Court noted “the length and consequent severity of a deprivation, while another factor to weigh in determining the appropriate form of hearing, ‘is not decisive of the basic right’ to a hearing of some kind.”²¹⁹ When considering the disproportionate rate at which minoritized students, particularly Black students, are sent out of the classroom, this temporary exclusion is no longer *de minimis* and warrants some level of protection.²²⁰

While requiring schools to use this procedure—a written explanation for every subjective disciplinary referral with an opportunity to challenge that explanation—would not solve the issue of disproportionate punishment, such a policy may mitigate implicit biases that factor in creating the problem.²²¹ This would not stop teachers from sending students out of the classroom for violations of written school policies, but it would create a record of any patterns where instructors use their discretion to send out minoritized students over others. It would also force the teacher to reconsider their classroom management style. If they are constantly sending students out of the

²¹⁸ *Goss*, 419 U.S. at 574-75. The Court, identifying a liberty interest, found that when suspensions are “sustained and recorded, those charges 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.” *Id.*

²¹⁹ *Id.* at 576.

²²⁰ *Id.* at 576 (“The Court’s view has been that as long as a property deprivation is not *de minimis*, its gravity is irrelevant to the question whether account must be taken of the Due Process Clause.”).

²²¹ In the context of bias leading to exclusionary punishment, experiments monitoring the reaction of teachers in response to additional procedures (such as reading articles about student growth or answering questions from the student’s perspective) suggest that interrupting the process of bias can disrupt it. “The findings show how targeting the process of bias, as opposed to bias itself, may serve as an effective way to mitigate societal disparities.” Jason A. Okonofua, Amanda D. Perez & Sean Darling-Hammond, *When Policy and Psychology Meet: Mitigating the Consequences of Bias in Schools*, 6 SCI. ADVANCES 1 (Oct. 16, 2020).

classroom and writing explanations for each one, sending every student who speaks out of turn or becomes distracted with their phone quickly becomes unappealing.

Not only is there room to expand where these protections apply, the standards set by *Goss* must be standardized. Legal scholar Diana Newmark proposes that sufficient procedural due process for long-term suspensions includes (1) sufficient notice at least three days prior to the hearing, (2) meaningful access to counsel, (3) review of the evidence with non-redacted witness names, (4) preponderance of the evidence evidentiary burden, (5) requirement of non-hearsay evidence, and (6) an independent hearing officer.²²² These protections should be read into *Goss* to apply to suspensions of any length. The Court's reasoning in *Goss* that the charges that warrant a 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"²²³ applies in full force to minoritized students at even the first instance of suspension, regardless of its length, given the disproportionate rates in which this group is suspended and expelled.

It is a fair criticism that these additional proceedings may be impractical for public schools to implement.²²⁴ And yet, schools in some states have displayed that additional administrative procedures beyond what *Goss* calls for have not been impractical in certain circumstances.²²⁵ Even if impractical, mandated procedures could force the hand of some schools to implement remedies alternative to exclusionary discipline, such as restorative practices.²²⁶ But it is a salient point, that this Note does not adequately address, that teachers are mere enforcers of problematic policies, and that public schools are in dire need of increased funding and support, such as teacher's aides, to quell classroom disruption.²²⁷

²²² Newmark, *supra* note 30, at 372-73.

²²³ *Goss*, 419 U.S. at 575.

²²⁴ Perry A. Zirkel & Youssef Chouhoud, *The Goss Progeny: A Follow-Up Outcomes Analysis*, 13 U.C. DAVIS J. JUV. L. & POL'Y 333, 336 (2009) (finding that the protections of *Goss* in its current iteration are "crippling" the ability of school officials to maintain order).

²²⁵ See, e.g., KAN. STAT. ANN. § 72-6116 (West 1994) (Kansas law that grants students facing long-term suspensions the right to be represented by counsel, have their parents present, review testimony, cross-examine witness, and provide witnesses and evidence); Newmark, *supra* note 30, at 371-72 (using examples such as New York City students being given a list of potential witnesses, the ability to subpoena witnesses, and contact information for legal services to show why increased due process procedures are both achievable and necessary).

²²⁶ It is my personal hope that additional, mandated proceedings push schools in a less punitive direction such as restorative practices. Restorative practices can include "proactive practices to inculcate conflict resolution skills and strengthen community bonds (for example, through community-building circles) and responsive practices to resolve conflicts and repair relationships (for example, through mediation and harm-repair circles)." Such tactics have the potential to combat racial disparities and the ostracization of exclusionary discipline. Sean Darling-Hammond, *Fostering Belonging, Transforming Schools: The Impact of Restorative Practices*, LEARNING POL'Y INST. (May 24, 2023), <https://learningpolicyinstitute.org/product/impact-restorative-practices-brief> [https://perma.cc/NJ3R-8RXF].

²²⁷ See Bruce D. Baker, *How Money Matters for Schools*, LEARNING POL'Y INST. (Dec. 13, 2017), <https://learningpolicyinstitute.org/product/how-money-matters-report> [https://perma.cc/].

Additionally, there is still the question of whether the Supreme Court can impose such stringent procedures within school. The Court has historically taken a hands-off approach to classroom management, preferring that school disciplinary procedures be ruled by local government and school district communities.²²⁸ Although the Court has set a precedent of caution pertaining to school affairs, seemingly lacking the “specialized knowledge and experience” to fully resolve “persistent and difficult questions of educational policy,”²²⁹ it is also true that a significant amount of minoritized students are suffering at the hands of subjective disciplinary calls and unstandardized procedures in schools. Many school boards, despite being democratically elected by the community, do not reflect the community’s actual diversity.²³⁰ This lack of representation creates a gap in understanding the problem and a barrier for those directly affected to have power in implementing a solution. Further, local governments have had ample time to address the prevalent issues of implicit bias resulting in intentional and unintentional harms. Yet problems persist.

The concentrated rates of exclusionary discipline on minoritized children rise to the level of implicating their liberty interests, which opens the door to increased standardization under *Goss* and grants authority to impose a reasonableness standard in regard to classroom banishment.²³¹ If the Court is unpersuaded by its authority already existing in this regard, then the Court can revisit *San Antonio Independent School District v. Rodriguez*.²³² By revisiting the *Rodriguez* decision—which denied that education is a constitutional right—the Court can frame education as an implicit right owed to all children. Thus, any local policy encroaching on the right to an educated citizenry, as the excessive use of exclusionary discipline does, would “directly and sharply implicate basic constitutional values,”²³³ calling for the federal judiciary to intervene.

cc/2A4L-F4RT] (finding that increased school funding and strategic spending on additional instructional supports, smaller class sizes, early childhood development programs, and increased teacher compensation leads to better academic outcomes); see generally Fern M. Loos, Karen P. Williams & Jon S. Bailey, *A Multi-Element Analysis of the Effect of Teacher Aides in an “Open”-Style Classroom*, 10 J. APPLIED BEHAV. ANALYSIS 437, 442 (1977) (finding that a classroom with an adult teacher’s aide produced higher academic outputs than a classroom with no aide).

²²⁸ See *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968).

²²⁹ See Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist., Westchester Cnty. v. Rowley, 458 U.S. 176, 208 (1982) (quoting *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 42 (1973)).

²³⁰ Mike Bland, *School Boards’ Diversity Problem Goes Deeper than You Realize*, EDUCATION WEEK (Apr. 29, 2022), www.edweek.org/leadership/opinion-school-boards-diversity-problem-goes-deeper-than-you-realize/2022/04 [https://perma.cc/3HJ5-XAJ5] (finding that in 2022, Black and brown students made up approximately 50% of public school enrollment, but only 14% of school board members were people of color).

²³¹ See *supra* Part III.

²³² 411 U.S. 1, 35 (1973).

²³³ *Epperson*, 393 U.S. at 104.

CONCLUSION

“The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools,”²³⁴ yet students do not enjoy the full benefits of constitutional protections. Although precedent establishes that students do not “shed their constitutional rights ... at the schoolhouse gate,”²³⁵ they shed enough of those rights to leave them with limited recourse to remedy injustice. Cases such as *Gault* have granted children protections in the juvenile legal system, while cases such as *Goss* and *T.L.O.* have provided necessary protections within schools. However, the harms that sparked these cases remain largely unaddressed, requiring reinterpretations of constitutional rights to provide preventative measures and student-plaintiff-friendly standards. Relying solely on the interpretations of the Founders—who believed that children were subservient to them, that women’s rights should be limited, and that Black people were not citizens²³⁶—has stifled our progress as a society. The interests of large swaths of people living in this country were not considered during the country’s creation,²³⁷ and it is in our collective best interest to use the founding documents as tools that incorporate the realities of our current multicultural landscape.

Now is the time to explore a new frontier of youth justice that focuses on our most vulnerable youth and interrupts the cycle before the child is placed on the precipice of the pipeline. These reinterpretations can open the door to a future where the founding documents of this country work for all its citizens, if only we are brave enough to turn the handle.

²³⁴ *Shelton v. Tucker*, 364 U.S. 479, 487 (1960).

²³⁵ *Tinker*, 393 U.S. at 506.

²³⁶ *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 404-05 (1857) (enslaved party), *superse-
ded by constitutional amendment*, U.S. CONST. amend. XIV (holding that “[a] free negro of the
African race, whose ancestors were brought to this country and sold as slaves, is not a ‘citizen’
within the meaning of the Constitution of the United States”).

²³⁷ Hasbrouck, *supra* note 147, at 884.

