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RETURNING "DECISION" TO SCHOOL DISCIPLINE DECISIONS: AN ANALYSIS OF RECENT, ANTI-ZERO TOLERANCE LEGISLATION

INTRODUCTION

Public school districts across America are evaluating the effectiveness of zero tolerance school discipline policies.[1] Initially developed in the 1980s to combat the war on drugs, zero tolerance policies spread to school districts in the wake of congressional legislation addressing concerns for school safety.[2] In addition to expulsions mandated by the Gun-Free Schools Act of 1994,[3] many states required expulsion for other offenses on school property including drug possession, violence, disruptions, and other anti-social behavior.[4]

Although federal and state drug enforcement agencies eventually abandoned zero tolerance because of its rigidity,[5] zero tolerance attitudes remain ingrained in school districts nationwide.[6] Such policies eliminate consideration of student-specific factors. Thus, violations of these policies are effectively strict liability offenses for which a student is disciplined

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1. *See* The Editorial Board, *Zero Tolerance, Reconsidered*, N.Y. TIMES, Jan. 6, 2014, at A18, *available at*: http://www.nytimes.com/2014/01/06/opinion/zero-tolerance-reconsidered.html?hp&rref=opinion; Lizette Alvarez, *Seeing the Toll, Schools Revise Zero Tolerance*, N.Y. TIMES, Dec. 3, 2013, at A1, *available at*: http://www.nytimes.com/2013/12/03/education/seeing-the-toll-schools-revisit-zero-tolerance.html?ref%20=education&_r=1&; Jenny Deam & Howard Blume, *Colorado is Latest to Reconsider Zero-tolerance School Policies*, L.A. TIMES (May 23, 2012), http://www.latimes.com/news/nationworld/nation/la-na-zero-tolerance-20120523,0,61074.story. The American Psychological Association (APA) defines zero tolerance school discipline policies as a "philosophy or policy that mandates the application of predetermined consequences, most often severe and punitive in nature, that are intended to be applied regardless of the gravity of behavior, mitigating circumstances, or situational context." APA Zero Tolerance Task Force, *Are Zero Tolerance Policies Effective in the Schools?: An Evidentiary Review and Recommendations*, 63 AM. PSYCHOLOGIST 852, 852 (2008), *available at*: http://www.apa.org/pubs/info/reports/zero-tolerance.pdf.

2. *See* Sheena Molsbee, Comment, *Zeroing Out Zero Tolerance: Eliminating Zero Tolerance Policies in Texas Schools*, 40 TEX. TECH. L. REV. 325, 331–34 (2008).

3. The Gun-Free Schools Act mandated that a student who possessed a weapon on school grounds be expelled for at least one year. 20 U.S.C. § 8921 (2000) (repealed 2002).

4. *See* Molsbee, *supra* note 2, at 333.

5. *Id.*

6. By 1997, at least seventy-nine percent of schools in America had employed zero tolerance policies focused on discouraging drugs, alcohol, and violence. CHRISTOPHER BOCCANFUSO & MEGAN KUHFIELD, NO. 2011-09, MULTIPLE RESPONSES, PROMOTING RESULTS: EVIDENCE-BASED NONPUNITIVE ALTERNATIVES TO ZERO TOLERANCE, CHILD TRENDS 2 (2011), *available at* http://www.nea.org/assets/docs/alternatives-to-zero-tolerance.pdf.

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regardless of the circumstances or the student's intent. Arguably, this approach results in administrators treating all students the same, thereby eliminating potential liability for discrimination or for allowing dangerous students to remain in school.[7] Proponents maintain that zero tolerance policies deter bad behavior because punishment is "harsh and certain."[8]

In practice, however, failure to consider a student's intent, past disciplinary record, or other mitigating circumstances can lead to expulsions or suspensions for minor and unintentional infractions.[9] Zero tolerance policies prevent administrators from fully considering the circumstances of each student, which can produce overly harsh results.[10] Furthermore, there is no proof that these exclusionary zero tolerance policies actually make schools safer or significantly deter misbehavior.[11] In fact, one study links the consequences of zero tolerance policies—increased numbers of suspensions and expulsions—to a variety of negative consequences: low academic performance and engagement, higher drop out rates, and higher likelihood of additional suspensions or expulsions.[12]

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7. *See* MASS. APPLESEED CTR. FOR LAW AND JUSTICE, KEEP KIDS IN CLASS: NEW APPROACHES TO SCH. DISCIPLINE 5 (2012), *available at* http://www.massappleseed.org/pdfs/kkic_newapproaches.pdf.

8. *See* BOCCANFUSO & KUHFIELD, *supra* note 6, at 1.

9. *See* Donna St. George, *More Schools Rethinking Zero-tolerance Discipline Stand*, WASH. POST (June 1, 2011), http://www.washingtonpost.com/local/education/more-schools-are-rethinking-zero-tolerance/2011/05/26/AGSIKmGH_story.html (citing examples of a high school lacrosse player being suspended for having a pocketknife in his gear bag that he used to repair his lacrosse stick, and a 6-year-old suspended for a having a camping utensil with a knife in his backpack). *See also*, Deam & Blume, *supra* note 1 (reporting on a story of a 6-year-old boy being suspended for singing "I'm sexy and I know it," a line from a pop song, to a girl in his class); Mytheos Holt, *Why are Pop Tarts the New Frontier for Pro-gun Legislators? Find Out Here*, THE BLAZE (Mar. 10, 2013, 9:15 PM), http://www.theblaze.com/stories/2013/03/10/why-are-pop-tarts-the-new-frontier-for-pro-gun-legislators-find-out-here/ (reporting a second grade student who was suspended for two days for eating a Pop Tart into the shape of the gun and reportedly saying "bang, bang").

10. *See* Tim Grant, *Back to School: Zero Tolerance Makes Discipline More Severe, Involves the Courts*, PITTSBURGH POST-GAZETTE (Aug. 21, 2006, 12:00 AM), http://www.post-gazette.com/stories/news/education/back-to-school-zero-tolerance-makes-discipline-more-severe-involves-the-courts-448440/?print=1 (citing the story of a five-year-old suspended from kindergarten for wearing a firefighter costume equipped with a toy ax).

11. *See* APA Zero Tolerance Task Force, *supra* note 1, at 860 ("Ultimately, an examination of the evidence shows that zero tolerance policies as implemented have failed to achieve the goals of an effective system of school discipline."); BOCCANFUSO & KUHFIELD, *supra* note 6, at 1 ("[I]t is not clear that zero tolerance policies are succeeding in improving school safety."). Rigorous comparative studies of zero tolerance policies across the nation are difficult, however, because policies vary greatly between districts and, in some states such as Massachusetts, between individual schools. *Id.*

12. BOCCANFUSO & KUHFIELD, *supra* note 6, at 2.

This Note surveys the harm of zero tolerance policies raised by numerous scholars over the past fifteen years and focuses on recent legislative efforts to discourage and eliminate these policies. Specifically, it will explore two anti-zero tolerance approaches: (1) Texas's mandatory requirement that decision makers consider a student's intent, self-defense, disability, and disciplinary history, and (2) North Carolina, Colorado, and Massachusetts's permissive approaches, which allow but do not mandate consideration of similar factors. This Note analyzes the proven and prospective effectiveness of these two approaches and presents consequences interested lawmakers should consider. It argues that fusing different parts of the two approaches might lead to more thorough anti-zero tolerance laws. Specifically, it concludes that legislation combining mandatory consideration of intent and contextual circumstances with language explicitly acknowledging the harms of zero tolerance school discipline may be the most effective way to eradicate zero tolerance attitudes.

I. BACKGROUND ON ANTI-ZERO TOLERANCE LEGISLATION

Just as zero tolerance education laws were initially passed in response to concerns about increased violence in schools and school safety,[13] scholarly debate and media attention on the harsh results of zero tolerance policies are now swinging the legislative pendulum in the other direction. Over the past fifteen years, scholars have written extensively about the harms of zero tolerance.[14] The primary concerns raised are the prevalence

13. *See* Molsbee, *supra* note 2, at 327–28 (arguing that intense media coverage of the school shootings motivated the wide-spread passage of zero tolerance laws despite the reality that such violent incidents such as the one at Columbine, are, in reality, minimal); Christopher D. Pelliccioni, Note, *Is Intent Required? Zero Tolerance, Scienter, and the Substantive Due Process Rights of Students*, 53 CASE W. RES. L. REV. 977, 977–78 (2003) (noting that the American Federation of Teachers advocated for a national mandate to adopt zero tolerance policies resulting in the Gun-Free Schools Act of 1994).

14. *See generally* RUSSELL J. SKIBA, IND. EDUC. POL'Y CTR., POL'Y RES. REP. NO. SRS2, ZERO TOLERANCE, ZERO EVIDENCE: AN ANALYSIS OF SCH. DISCIPLINARY PRACTICE (2000); Pelliccioni, *supra* note 13, at 977–78; Molsbee, *supra* note 2; Kim Fries & Todd A. DeMitchell, Commentary, *Zero Tolerance and the Paradox of Fairness: Viewpoints from the Classroom*, 36 J.L. & EDUC. 211 (2007); Donald H. Stone & Linda S. Stone, *Dangerous & Disruptive or Simply Cutting Class; When Should Schools Kick Kids to the Curb?: An Empirical Study of School Suspension and Due Process Rights*, 13 J.L. & FAM. STUD. 1 (2011).

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of absurd results[15] (often latched onto by the media)[16] and the danger that a student's exclusion from school can lead to a higher likelihood of exclusion in the future, poor grades, and greater probability of interaction with the juvenile justice system.[17] The discourse over the harms of zero tolerance exploded in the 1990s and 2000s, catching the attention of scholars, legislatures and even the American Bar Association.[18]

Criticism of zero tolerance has not come only from scholars and the media. Teachers participating in a 2007 empirical study also found zero tolerance policies stifling.[19] Despite the fact that zero tolerance was intended to improve disciplinary fairness and uniformity by treating students equally,[20] teachers have voiced concerns about the resulting elimination of discretion in disciplinary decisions and the reality of subjective enforcement of such policies.[21]

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15. *See* John J. Garman & Ray Walker, *The Zero-Tolerance Discipline Plan and Due Process: Elements of a Model Resolving Conflicts Between Discipline and Fairness*, 1 FAULKNER L. REV. 289, 289–90 (2010) (citing an example of a ten-year-old student expelled from school for turning over a knife, her mother included in her lunch box to cut an apple, to school administrators); J. Kevin Jenkins & John Dayton, Commentary, *Students, Weapons, and Due Process: An Analysis of Zero Tolerance Policies in Public Schools*, 171 EDUC. L. REP. 13, 13 (2003) (citing several examples from the 1990s including a fifteen-year-old student expelled for bringing an knife to cut an orange, a second grade student who brought a one-inch imitation Swiss Army knife, and a five-year-old kindergartner who was suspended for bringing in a nail file).

16. *See, e.g.*, St. George, *supra* note 9 and Grant, *supra* note 10.

17. *See* BOCCANFUSO & KUHFIELD, *supra* note 6; David Osher et al., *How Can We Improve School Discipline?*, 39 EDUC. RESEARCHER 48–58 (2010).

18. *ABA Opposes School "Zero Tolerance" Policies*, 61 OR. ST. B. BULL., April, 2001, at 53, 53. For more detail about instances that caught the national eye see Pellicionni, *supra* note 13, at 977 (citing a protest in Decatur, Illinois in 1999 protesting against the expulsion of high school football players for fighting) and Jenkins & Dayton, *supra* note 15, at 13–14 (citing examples of disproportionately harsh punishments occurring in schools across the nation throughout the 1990s and early 2000s, including: a student expelled in 1995 for most of the year when a knife he used to peel an orange fell out of his backpack, a kindergarten student suspended in 1995 for bringing a nail file to school, and four kindergarten students suspended in 2000 for making threats when playing cops and robbers and pretending their fingers were guns).

19. *See* Fries & DeMitchell, *supra* note 14, at 222 (finding that both experienced and preservice teachers interviewed in focus groups agreed that zero tolerance is "unreasonable" and that "factors such as context, intent, history, and teacher judgment were absent from zero tolerance policies").

20. *See* Cherry Henault, *Zero Tolerance in Schools*, 30 J.L. & EDUC. 547 (2001) (defining zero tolerance policies as those which dole out severe punishment for all offenses, no matter how minor, ostensibly in an effort to treat all offenders equally in the spirit of fairness and intolerance of rule-breaking). *See also* MASS. APPLESEED CTR. FOR LAW AND JUSTICE, *supra* note 7, at 5.

21. *See* Fries & DeMitchell, *supra* note 14, at 223. In response to a student facing zero tolerance discipline, a teacher stated, "I think you always need to look at the circumstances when it comes to discipline . . . you have to look at what happened around the situation . . . I also want to know the student's motivation—why did they do this?" *Id.* Fries and DeMitchell also note realistically that decision-making flexibility happens under zero tolerance laws. Although technically this flexibility breaks the law, teachers often have discretion when deciding whether to report a student to the administration. *Id.* at 221 (describing a situation in which a child brought a knife to school to help cut her orange and the teacher held it at her desk for the entire day rather than report it to school

Attention to drawbacks of zero tolerance policies resulted in the introduction of anti-zero tolerance bills in several states, including Mississippi, Pennsylvania, and Indiana, focused on discouraging zero tolerance and studying the effects of such policies.[22] Additionally, in 2001 the ABA's policy-making House of Delegates officially opposed zero tolerance policies by encouraging school administrators to exercise discretion when making disciplinary decisions and to develop alternatives to expulsion.[23] In response to rigorous debate about the effectiveness and harms of zero tolerance, many states, including Texas, North Carolina, Colorado, and Massachusetts,[24] adopted legislation mandating or encouraging administrators to look at student intent and mitigating circumstances before suspending or expelling a student.[25]

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administration). Discretion exists and is exercised in deciding when to report the incident, although this discretion may only occur in schools that do not do routine weapons checks or have metal detectors. The fact that discretion may exist in reporting violations to administrators contradicts the argument that zero tolerance is fair because it is consistent. *See also infra* note 83.

22. *See* Kris Axtman, *Why Tolerance is Fading for Zero Tolerance in Schools*, CHRISTIAN SCI. MONITOR (Mar. 31, 2005), http://www.csmonitor.com/2005/0331/p01s03-ussc.html. *See also* Kavan Peterson, *Schools Re-think Post Columbine Discipline*, STATELINE (Mar. 14 2005), http://www.pewstates.org/projects/stateline/headlines/schools-rethink-post-columbine-discipline-85899389891 (the Indiana bill introduced was to study why African American and Hispanic students were suspended at higher rates). *See also* Molsbee, *supra* note 2, at 351 (citing Indiana, Mississippi and Pennsylvania bills). The reformation bill in Mississippi did not pass, and Mississippi still employs zero tolerance school discipline policies. MISS. CODE ANN. § 37-7-301(e) (West 2012). *See* Jeffrey Jackson & Mary Miller, *Authority to Discipline Students—Expulsion under "Zero-tolerance" Policies*, ENCYCLOPEDIA OF MISS. LAW, § 65:212 (2012).

23. The ABA supported three principles concerning school discipline:

> (1) Schools should have strong policies against gun possession and be safe places for students to learn and develop; (2) In cases involving alleged student misbehavior, school officials should exercise sound discretion that is consistent with principles of due process and considers the individual student and the particular circumstances of misconduct; (3) Alternatives to expulsion or referral for prosecution should be developed that will improve student behavior and school climate without making schools dangerous.

ABA Opposes School , *supra* note 18, at 53.

24. The governor of Massachusetts signed a bill in August of 2012 that briefly addresses administrator discretion in decision-making. Described as "a key step towards our work to mitigate the effects of zero tolerance and to remove barriers to access to public education," this law focuses primarily on improving student access to alternative education and does not go into effect until 2014. *See* Press Release, Mass. Appleseed Ctr. for Law and Justice, Governor Signs School Discipline Bill, 1 (Aug. 7, 2012), *available at*: http://www.massappleseed.org/pdfs/12_0807pr_h_4332.pdf.

25. In August 2013, Oregon passed anti-zero tolerance legislation that will go into effect in July 2014. Press Release, Youth, Rights & Justice, Or. Legislature Passes Bill to Reform Sch. Discipline and Roll Back "Zero Tolerance" Policies: HB 2192-B Promotes Safe and Productive Learning Env'ts, (May 21, 2013), *available at*: http://www.youth rightsjustice.org/media/2393/Press%20release%20on %20HB%202192.pdf. Oregon's H.B. 2192-B states that "[t]he age of a student and the past pattern of behavior of a student shall be considered prior to a suspension or expulsion of a student." 2013 Or. Laws Ch. 267 (to be codified at OR. REV. STAT. § 339.250(2)(c)). Colorado's bill, "which underwent some 50 revisions over two years before finally winning passage, marks an effort to curb the so-called School to Jail Track that critics say resulted from the adoption of zero-tolerance discipline policies a

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II. RECENT STATE CHANGES

The laws in Texas, North Carolina, Colorado, and Massachusetts exemplify two general approaches: the mandatory approach, which requires consideration of a student's intent and other mitigating factors, and the permissive approach, which encourages but does not require administrators to consider similar factors before excluding students.

A. The Mandatory Approach

1. Texas

The current section of the Texas Education Code addressing mitigating factors in disciplinary decisions was created in a 2003 statutory amendment.[26] Three changes to Section 37.001(a)(4) of the Texas Education Code between 2003 and 2009 illustrate a shift away from, and ultimately a statutory rejection of, zero tolerance. Through these three

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decade ago." Rebecca Jones, *Zeroing Out School Zero-tolerance Policies*, EDNEWS COLO. (Aug. 30, 2012), http://www.ednewscolorado.org/2012/08/30/45887-zeroing-out-school-zero-tolerance-policies.

Additionally in June 2012, the Michigan Board of Education adopted a resolution urging Michigan school districts to (1) "[r]eview existing zero-tolerance policies that are above and beyond those required in law, and limit the number of offenses mandating suspension and referral to law enforcement to those directly related to the safety of students and school personnel," (2) make sure that educators are aware of exceptions to zero tolerance in Michigan law, and (3) "[i]mplement or expand the use of proven alternative behavior management strategies." MICH. DEP'T OF EDUC., RESOLUTION TO ADDRESS SCH. DISCIPLINE ISSUES IMPACTING STUDENT OUTCOMES (June 12, 2012), *available at*: http://www.michigan.gov/documents/mde/Final_Resolution_School_Discipline_Issues_Impacting_Student_Outcomes_389055_7.pdf. Michigan has even had legislative measures in place since 1999 to attempt to counteract unintentional violations of the weapons possession resulting in suspension or expulsion. Michigan law states that a school board "is not required to expel a pupil for possessing a weapon" if the student "establishes in a clear and convincing manner at least 1 of the following": (a) that the student did not possess the instrument "for use as a weapon" or to deliver to someone else to use as a weapon, (b) the student did not "knowingly" possess the instrument, (c) the student "did not know or have reason to know" that the instrument "constituted a dangerous weapon," or (d) the weapon was possessed by the student with "express permission of [] school or police authorities." MICH. COMP. LAWS ANN. § 380.1311(2) (West 2012). However, the recent Michigan Board of Education resolution urging schools to educate their administrators and staff about the exceptions to exclusion in § 380.1311(2) suggests that these legislative exceptions have not been particularly effective in encouraging decision-makers to consider a student's intent before expulsion.

26. The Texas legislature amended its education code in 2003 to specify what offenses students could be expelled and suspended for and also to allow schools to specify whether they would consider mitigating factors. TEX. EDUC. CODE ANN. § 37.001 (West 2003). While this 2003 formulation laid the foundation for the later amendments that ultimately led to a requirement of consideration of mitigating factors, the 2003 version of the act was passed primarily to stipulate the actions that led to suspension and expulsion. One scholar argues that although the 2003 amendment allows schools to adopt consideration of mitigating circumstances, the 2003 amendment was actually an adoption of a zero tolerance approach to discipline although "zero tolerance" is never used in the legislation. *See* Molsbee, *supra* note 2, at 352.

changes, Section 37.001(a)(4) evolved from allowing consideration of mitigating circumstances to requiring such consideration before disciplinary action. Now, Texas law requires school districts to consider a student's self-defense, intent, disciplinary history, and disability prior to exclusion from school.[27] Despite the mandatory language of the statute, however, it is doubtful that such statutory amendments have effectively eliminated zero tolerance attitudes.[28]

The first change in 2003 permitted school districts to consider whether a student acted in self-defense before exercising exclusionary punishment. The amended Section 37.001(a)(4) read: "the student code of conduct must . . . specify whether consideration is given to self-defense as a factor in a decision to order suspension, removal to a disciplinary alternative education program, or expulsion."[29] The district had to specify whether or not to put such consideration into their code of conduct, but there was no requirement to include consideration of intent.

Two years later, the legislature amended the section a second time, expanding Section 37.001(a)(4) to include more factors. Whether to consider these additional mitigating circumstances in school exclusions remained optional.[30] The 2005 amendment read:

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27. TEX. EDUC. CODE ANN. § 37.001(a)(4) (West 2013). Although decision-makers must consider these four mitigating circumstances before suspension, expulsion, or removal to a disciplinary alternative education program, the reasons for removing students from the classroom are still fairly subjective. Texas teachers can remove students to a disciplinary alternative education program if the teacher deems the student's behavior "so unruly, disruptive, or abusive that it seriously interferes with the teacher's ability to communicate effectively with the students in the class or with the ability of the student's classmates to learn." § 37.002(b)(2). *See* Patrick S. Metze, *Plugging the School to Prison Pipeline by Addressing Cultural Racism in Public Education Discipline*, 16 U.C. DAVIS J. JUV. L. & POL'Y 203, 228 (2012) (discussing the effect of removing students from the classroom and arguing that the isolation resulting from being removed "retards the student's otherwise normal educational and social development, and in turn encourages withdrawal and continued negative disciplinary problems leading to the likelihood of involvement with crime and the juvenile justice system").

28. *See infra* text accompanying notes 94–103.

29. EDUC. § 37.001(a)(4) (West 2003).

30. One commentator argues that this 2005 amendment was inspired by situations such as an eighth grader who was suspended for possessing a pencil sharpener with a two-inch folding blade and a seventh grader expelled for accidentally leaving his boy scout knife in his jacket pocket. Marc Levin, *A New Texas Pipeline: Zero Tolerance for Texas Kids*, TEX. PUB. POL'Y FOUND. (July 6, 2006), http://www.texaspolicy.com/center/effective-justice/opinions/new-texas-pipeline. The Texas Public Policy Foundation reported after the amendment that:

> [i]n response to such outrages, legislators in 2005 passed House Bill 603 clarifying that, before expelling a student, schools may consider [mitigating factors]. However, at the behest of school lobbyists, the legislation was watered down from its original wording, which would have required these factors to be considered. State Rep. Rob Eissler (R-The Woodlands) and other lawmakers have vowed to strengthen this legislation next session.

Id.

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> the student code of conduct must . . . specify whether consideration is given, as a factor in a decision to order suspension, removal to a disciplinary alternative education program, or expulsion, to: *(A) self-defense; (B) intent or lack of intent at the time the student engaged in the conduct; (C) a student's disciplinary history; or (D) a disability that substantially impairs the student's capacity to appreciate the wrongfulness of the student's conduct*.[31]

The third and most recent amendment in 2009 alters the language from permissive consideration of intent, where a school district chooses whether to weigh mitigating circumstances, to mandatory consideration, where a district must consider such factors.[32]

Two key changes are especially significant. First, the amendment shifts from requiring districts to "specify *whether*" schools will consider mitigating circumstances to requiring all districts to "specify *that*" consideration be given to such factors.[33] Rather than simply encouraging school districts to consider incident-specific circumstances, this amendment seems to require it. Second, the requirement that consideration of mitigating circumstances be given in "each decision" ensures examination of misbehavior within each case's individual context. Together, these two requirements mandate that administrators exercise judgment given the unique circumstances of each case.[34]

Additionally, in interpreting Texas's school discipline laws, Texas courts have affirmed the proposition that zero tolerance policies may violate substantive due process rights.[35] The most recent case interpreting

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31. EDUC. § 37.001(a)(4) (West 2005) (emphasis added) (italicized text indicates additions to the 2005 statute from the 2003 statute).

32. Texas lawmakers held hearings beginning in 2007 to require school districts to factor intent into disciplinary decisions, but the measures did not pass until the recent amendments in 2009. *See* TEX. APPLESEED, TEXAS' SCHOOL-TO-PRISON PIPELINE DROPOUT TO INCARCERATION: THE IMPACT OF SCH. DISCIPLINE & ZERO TOLERANCE 17 & n.6 (2007), *available at*: http://www.texasappleseed.net/pdf/Pipeline%20 Report.pdf.

33. EDUC. § 37.001(a)(4) (emphasis added).

34. EDUC. § 37.001(a)(4) now reads:

> the student code of conduct must . . . specify *that* consideration will be given, as a factor in *each* decision *concerning* suspension, removal to a disciplinary alternative education program, expulsion, *or placement in a juvenile justice alternative education program, regardless of whether the decision concerns a mandatory or discretionary action* to (A) self-defense; (B) intent or lack of intent at the time the student engaged in the conduct; (C) a student's disciplinary history; or (D) a disability that substantially impairs the student's capacity to appreciate the wrongfulness of the student's conduct.

EDUC. § 37.001(a)(4) (West 2013) (emphasis added) (italicized text indicates changes from the 2005 statute to the current statute).

35. Federal Circuit Courts are split as to whether zero tolerance policies are constitutional. The Fourth Circuit, in Ratner v. Loudoun Cnty. Pub. Sch., held that it was not the court's place to question

the constitutionality of an exclusion under a Texas school's zero tolerance policy is *Hinterlong v. Arlington Independent School District* in 2010.[36] In its opinion, the Texas Court of Appeals acknowledges that consideration of intent by school administrators is necessary to avoid substantive due process violations.[37]

As discussed in Part III, however, despite the mandatory language of the Texas statute and judicial affirmation that examination of intent in school disciplinary decisions is necessary to satisfy due process, the effectiveness of Texas's mandatory legislative language in eliminating zero tolerance is questionable at best.[38] Texas continues to be cited for high rates of school exclusion which casts doubt on the efficacy of mandatory language absent an explicit statutory disavowal of zero tolerance.[39]

B. The Permissive Approach

1. North Carolina

In June 2011, motivated by concerns about the rigidity of zero tolerance, North Carolina legislators amended their school discipline laws

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zero tolerance policies and that the school's zero tolerance policy was constitutional. 16 F. App'x 140, 142 (2001). The Texas Court of Appeals affirmed that "strict adherence to zero tolerance policies without consideration of the student's mens rea would appear to run afoul of substantive due process notions." Hinterlong v. Arlington Indep. Sch. Dist., No. 2-09-050-CV, 2010 WL 522641, at *2 (Tex. Ct. App. Feb. 11, 2010) (referencing the Sixth Circuit's holding in Seal v. Morgan, 229 F.3d 567 (6th Cir. 2000)). However, in contrast to the Fourth Circuit, the Sixth Circuit found that "suspending or expelling a student for weapons possession, even if the student did not knowingly possess any weapon, would not be rationally related to any legitimate state interest" and thus would be in violation of the student's substantive due process rights. *Seal*, 229 F.3d at 575.

36. No. 2-09-050-CV, 2010 WL 522641. The original trial court date was in 2008, and the Texas Court of Appeals acknowledged that the school discipline laws had been amended since the outset of the case. *Id.* at *1 n.2.

37. *Id.* at *2. School officials removed Matthew Hinterlong to an alternative high school after finding an allegedly alcoholic substance in his car. *Id.* at *1. Hinterlong challenged the school's zero tolerance policy both facially and as applied. *Id.* at *2. Ultimately, the court in *Hinterlong* held however, that "Hinterlong has not demonstrated that [the school's] zero tolerance policy operated unconstitutionally as applied to him." *Id.* The school district had offered Hinterlong a chance to prove his lack of intent, but he had produced no exculpatory evidence. *Id.* Thus, because the school examined Hinterlong's intent, the court found no due process violations. *Id.* at *3.

38. *See infra* text accompanying notes 96–106. Oregon is the most recent state to have re-examined its school discipline legislation, and its new anti-zero tolerance legislation is mandatory, requiring school districts to consider student age and past patterns of behavior before suspension or expulsion. *See supra* text accompanying note 25. Oregon's recent legislation appears to be a direct result of advocacy from organizations attempting to dismantle zero tolerance policies. *See* Press Release, *supra* note 25.

39. *See infra* text accompanying notes 96–106.

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to encourage greater flexibility in student exclusion decisions.[40] Section 390.1(a) explicitly acknowledges the harms in removing kids from school, calling for school discipline measures that balance the need for safety against the potentially detrimental consequences of exclusion.[41]

Sections 390.2(a)–(k) provide the details of the new discipline policy. Section 390.2(f) attempts to "minimize the use of long-term suspension and expulsion" by restricting the use of such disciplinary measures to "serious violations" that "threaten the safety of students, staff, or school visitors or threaten to substantially disrupt the educational environment."[42] Infractions such as disrespectful language, dress code violations and minor physical altercations are specifically listed as instances that do not justify long-term disciplinary action.[43] If aggravating circumstances escalate a minor infraction to a serious one, however, the law still allows administrators disciplinary flexibility.[44]

North Carolina's approach to considering mitigating circumstances does not require administrators to look at mitigating or aggravating factors.[45] But school boards may consider student intent, disciplinary and

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40. N.C. GEN. STAT. ANN. §§ 115C-390.1, 390.2 (West 2011). *See NC Lawmakers Revisit School Zero-tolerance Rules*, WINSTON-SALEM J. (May 12, 2011, 1:00 AM), http://www2.journalnow.com/news/2011/may/12/WSMAIN01-nc-lawmakers-revisit-school-zero-toleranc-ar-1025736/ (quoting a former school teacher as saying the change "gives us a little more common sense in determining what is serious and needs (a child) to be expelled").

41. § 115C-390.1(a) states in part:

> the General Assembly also recognizes that removal of students from school, while sometimes necessary, can exacerbate behavioral problems, diminish academic achievement, and hasten school dropout. School discipline must balance these interests to provide a safe and productive learning environment, to continually teach students to respect themselves, others, and property, and to conduct themselves in a manner that fosters their own learning and the learning of those around them.

42. § 115C-390.2(f).

43. *Id.*

44. *Id.* ("The principal may, however, in his or her discretion, determine that aggravating circumstances justify treating a minor violation as a serious violation).

45. *See* § 115C-390.2(g). The full section reads:

> Board policies shall not prohibit the superintendent and principals from considering the student's intent, disciplinary and academic history, the potential benefits to the student of alternatives to suspension, and other mitigating or aggravating factors when deciding whether to recommend or impose long-term suspensions.

Id. While policies cannot prevent administrators from considering intent and other mitigating factors, this law does not require decision-makers to consider these factors before making exclusionary decisions. Arguably, this section could be seen as preventing the adoption of blanket zero-tolerance policies because those would require a certain punishment based on a certain action. The language in this section of North Carolina's school discipline law, however, is still permissive because it allows for the possibility that school board policies could be silent on the subject of considering student intent. A policy that neither prohibited consideration of intent and mitigating factors nor encouraged it would be valid under this law.

academic history, benefits of alternatives to suspension, and other mitigating or aggravating factors.[46] With this permissive approach, administrators have the option, but not the obligation, to make decisions based on the unique circumstances of each case. Thus, as is the case with all permissive anti-zero tolerance legislation, decision makers could legally still choose a zero tolerance approach to discipline.

2. Colorado

Colorado recently amended its school discipline policies in May of 2012.[47] On May 19, 2012, the governor signed into law H.B. 12-1345**,** which allows consideration of the particular circumstances behind each disciplinary infraction.[48] In addition to addressing zero tolerance, H.B. 12-1345 emphasizes the need to limit student interaction with the juvenile justice system.[49]

Three sections of HB12-1345 discourage zero tolerance. First, the legislative declaration found in Section 21 of H.B. 12-1345 acknowledges that "inflexible" zero tolerance policies have led to "unnecessary" exclusionary discipline.[50] Although the declaration does not have the effect of law and in fact was never codified, it indicates a legislative intent to urge administrators to avoid involvement of students in the criminal or juvenile justice system "when addressing minor misbehavior that is typical for a student based on his or her developmental stage."[51] Additionally, it encourages state laws to allow administrators "to use their discretion to determine the appropriate disciplinary response to each incident of student misconduct."[52]

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46. *See* § 115C-390.2(g).

47. *See* Deam & Blume, *supra* note 1. *See also* Jones, *supra* note 25 (the passage of the new legislation, "[s]chool officials around the state returned to their classrooms this fall with far greater discretion about when to involve police in [school] discipline issues").

48. 2012 CO H.B. 1345 § 26(1.2)(a)-(f) (codified at COLO. REV. STAT. § 22-33-106(1.2)) (West 2012).

49. *See* Kevin Simpson, *Reforms Pitched for Colorado Schools' Zero-tolerance Rules*, DENVER POST (Jan. 17, 2012, 1:00 AM), http://www.denverpost.com/news/ci_19756112. (describing advocacy groups pushing the reforms as being concerned "about racial disparity in school referrals to law enforcement").

50. "The use of inflexible 'zero tolerance' policies as a means of addressing disciplinary problems in schools has resulted in unnecessary expulsions, out-of-school suspensions, and referrals to law enforcement agencies." § 21(1)(a).

Although this legislative declaration is in Section 21 of H.B. 12-1345, it was not codified with the rest of the amendments in H.B. 12-1345.

51. § 21(1)(b).

52. § 21(1)(c).

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Second, Section 22 of H.B. 12-1345 mandates that school districts impose "proportionate disciplinary interventions and consequences" and include plans for "prevention, intervention, restorative justice, [and] peer mediation."[53] The purpose of the section is to "minimize student exposure to the criminal and juvenile justice system."[54] Section 22 also requires school principals to report annual statistics on enrollment, attendance, dropout rates, and the most serious discipline code violations.[55] Additionally, and perhaps most significant in discouraging zero tolerance, Section 26 of HB 12-1345 amended Colorado Statute Section 22-33-106 to eliminate mandatory suspension and expulsion for willful disobedience, willful destruction of school property, behavior on or off school property that threatens physical harm to students or school personnel, possession of a dangerous weapon, use or possession of drugs, robbery, using a facsimile firearm, and others.[56] The amendment changed Section 22-33-106(1) from "the following shall be grounds for suspension or expulsion" to "the following *may* be grounds for suspension or expulsion."[57] The shift in language from "shall" to "may" is a movement away from mandatory expulsion for certain offenses, demonstrating a rejection of the automatic discipline characteristic of the zero tolerance mindset.

Third, Section 26 of H.B. 12-1345 enumerates the grounds for suspension and expulsion and encourages school districts to consider various factors before expelling or suspending a student.[58] The factors include age, disciplinary history, disability, severity of the violation, whether the violation threatened the safety of students or staff members, and whether a lesser punishment would properly address the student's behavior.[59] The legislation does not, however, require administrators or school officials to consider these factors before making disciplinary decisions.

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53. § 22(2)(a)(II)(A) (codified at COLO. REV. STAT. § 22-32-109.1(2)(a)(II)(A) (West 2012)).

54. § 22(2)(a)(II)(B) (codified at COLO. REV. STAT. § 22-32-109.1(2)(a)(II)(B) (West 2012)).

55. §§ 22(2)(b)(I)-(IV) (codified at COLO. REV. STAT. §§ 22-32-109.1(2)(b)(I)–(IV) (West 2012)).

56. § 26(1) (codified at COLO. REV. STAT. § 22-33-106(1) (West 2012)).

57. *Id.* The list of activities constituting grounds for possible suspension or expulsion is codified at COLO. REV. STAT. §§ 22-33-106(1)(a)–(g) (West 2012).

58. "Each school district is encouraged to consider each of the following factors before suspending or expelling a student". § 26(1.2) (codified at COLO. REV. STAT. § 22-33-106(1.2) (West 2012).

59. §§ 26(1.2)(a) –(f) (codified at COLO. REV. STAT. §§ 22-33-106(1.2)(a)–(f)).

Colorado lawmakers and news articles praise the legislation as eliminating zero tolerance.[60] The legislative language, however, while eliminating automatic expulsions for some behavior, does not mandate the consideration of intent or other mitigating factors in making exclusionary decisions. Rather, like the permissive approach taken in North Carolina, Colorado encourages, rather than requires, administrators to examine mitigating factors.[61] There is no doubt that H.B. 12-1345 took steps toward eliminating zero tolerance. In fact, the un-codified legislative declaration and the proponents of the bill proclaimed this as the end to zero tolerance.[62] But the new law arguably still leaves room for zero tolerance exclusion because it does not mandate the consideration of context-specific factors.

3. Massachusetts

School discipline in Massachusetts is governed by Massachusetts General Laws Chapter 71 Sections 37H and 37H1/2.[63] Section 37H lists three behaviors that merit expulsion: possession of a dangerous weapon, possession of a controlled substance, or assault of an educational staff member.[64] Expulsion for such behavior is not mandatory. After a hearing, "a principal may, in his discretion, decide to suspend rather than expel a student" who has been found guilty of one of these three offenses.[65] Section 37H1/2 provides that a student may also be suspended upon the issuance of a felony complaint or conviction.[66] The school may choose to suspend the student if the principal determines that the student's presence in the school "would have a substantial detrimental effect on the general

60. Senator Evie Hudak, a sponsor of the bill, said "[w]e need to figure out the least destructive method of punishment. I think that eliminating the crazy zero-tolerance policies will put us on the right track." Jones, *supra* note 25. Jones writes that "[t]he new law requires school districts to rewrite their disciplinary codes to eliminate automatic expulsion except for carrying firearms on campus, and to avoid referring students to law enforcement for minor infractions." *Id.*

61. Colorado's statute addresses its desire to discourage zero tolerance most explicitly of the three permissive approach states explored in this Part. How Colorado's passage of this statute actually affects student exclusion and referral to police officers will be interesting to monitor.

62. "The passage of SB 46 bill represents a landmark victory for the State of Colorado and Padres & Jóvenes Unidos, whose members have organized for over two years for a legislative solution to end zero-tolerance policies and racial disparities in school discipline practices." *Jovenes Unidos Win Landmark Discipline Reform*, PADRES & JOVENES UNIDOS (May 9, 2012), http://www.padresunidos.org/jovenes-unidos-win-landmark-discipline-reform (last updated May 11, 2012).

63. MASS. GEN. LAWS ch. 71, §§ 37H–37H1/2 (2012).

64. §§ 37H (a)–(b) (2012).

65. § 37H(c).

66. *See* MASS. GEN. LAWS § 37H1/2(1)–(2).

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welfare of the school."[67] An allegation of a felony is sufficient for suspension; the student need not actually have committed the crime.[68]

In Massachusetts, individual schools have the ability to determine their own disciplinary policies, as long as the policies comply with Sections 37H and 37H1/2. Neither Section 37H nor Section 37H1/2 require school administrators to exercise zero tolerance. But no written safeguards exist to prevent school districts from adopting zero tolerance policies. Thus, Massachusetts' schools can choose to adopt zero tolerance policies, and many have.[69] This school-specific choice of disciplinary policy results in a lack of uniformity throughout the Commonwealth—schools within the same district could theoretically have vastly different approaches to school discipline.

Before August 2012, nothing in Massachusetts's school discipline law encouraged or required school administrators to look at the context behind a code of conduct violation.[70] Schools were not prevented by law from adopting resolutions that examined student intent and other mitigating factors in the school discipline context, nor did the legislative language encourage them to do so.

A recent amendment, signed by Governor Deval Patrick in August 2012, ventures to attack the zero tolerance attitudes that pervade Massachusetts school discipline codes. While primarily a bill to ensure that excluded students have access to alternative education programs, Section 37H3/4(b) says that "a decision-maker at a student meeting or hearing, when deciding the consequences for the student, *shall* exercise discretion; consider ways to re-engage the student in the learning process; and avoid using exclusion as a consequence until other remedies and

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67. § 37H1/2(1).

68. *Id.*

69. In 1993, the Massachusetts Legislature enacted the Education Reform Act . . . which

> expanded a school principal's authority to exclude students for conduct that threatens the safety of students and staff. The change meant that long-term and permanent exclusion decisions are made at the school level, rather than at the district level. The act's language gives school administrators unfettered discretion to exclude students.

Subsequently, many school districts adopted zero tolerance policies. Isabel Raskin et al., *Long and Winding Road: The Role of Courts, Zero Tolerance and School Exclusion in Mass.*, 18 MASS. LAW. J., No. 9, May 2011, at 22 (footnotes omitted).

70. Rather, because Massachusetts has:

> broad disciplinary power at the school level . . . school administrators have a free hand to mete out discipline based on their own professional judgment. Unfortunately, many school administrators across Massachusetts employ zero tolerance as a punitive and exclusionary approach towards school discipline.

MASS. APPLESEED CTR. FOR LAW AND JUSTICE, *supra* note 7, at 5.

consequences have been employed."[71] Requiring decision-makers to exercise discretion is a small but significant step toward preventing individual schools from adopting zero tolerance policies.

III. IMPLICATIONS ANALYSIS

The consequences of zero tolerance policies have prompted change in the form of the anti-zero tolerance legislation discussed in the previous section. In addition to examining the unintended consequences of zero tolerance, this section also illuminates consequences and complications that may accompany the new wave of anti-zero tolerance policies (both the mandatory and permissive approaches). Despite some of the uncertainty about the effects of anti-zero tolerance legislation, this Note argues that this new legislation is a positive step toward fair school discipline.

A. Unintended Consequences of Zero Tolerance

The anti-zero tolerance legislation in Texas, North Carolina, Colorado, and Massachusetts seeks to address and remedy the negative effects of zero tolerance legislation.[72] Many critics have raised the negative effects of zero tolerance laws, including: (1) greater numbers of school exclusions without a corresponding increase in school safety;[73] (2) increased delinquency, drop-out, and repeat offender rates;[74] (3) disproportionate

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71. 2012 Mass. Acts. ch. 222 (emphasis added).

72. The legislative declarations of both Colorado and North Carolina acknowledge that the amendments are responses to the negative effects of zero tolerance. *See supra* text accompanying note 50; *see also infra* text accompanying note 79.

73. *See* DANIEL J. LOSEN & RUSSELL J. SKIBA, SUSPENDED EDUCATION: URBAN MIDDLE SCHOOLS IN CRISIS 2–3 (2006). This could be the result, as school officials and critics point out, of harsh punishments such as expulsion and suspension for relatively minor infractions. For example, being excluded from school for defiance as opposed to bringing a weapon to school. Amy P. Meek, Note, *School Discipline "As Part of the Teaching Process": Alternative and Compensatory Education Required by the State's Interest in Keeping Children in School*, 28 YALE L. & POL'Y REV. 155, 159 (2009) ("School suspensions and expulsions have skyrocketed as a result of zero-tolerance policies."). *See also* BOCCANFUSO & KUHFIELD, *supra* note 6; APA Zero Tolerance Task Force, *supra* note 1, at 853–54 (evaluating whether zero tolerance policies have helped make schools safer and more effective in dealing with school discipline issues); Miriam Rokeach & John Denvir, *Front-Loading Due Process: A Dignity-Based Approach to School Discipline*, 67 OHIO ST. L.J. 277, 284 (2006) (citing a study that indicated use of zero tolerance policies led to greater levels of disciplinary problems than schools who did not employ zero tolerance).

74. Meek, *supra* note 73, at 155, 159–60 ("[E]xcluding students from school actually can reinforce their negative behaviors."). *See also* BOCCANFUSO & KUHFIELD, *supra* note 6. Rokeach and Denvir describe the downward spiral that can lead to additional misbehaviors and the general mindset of students after being disciplined:

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effects on minority students despite purporting to treat students equally;[75] and (4) a general increased focus on exclusion and dismissal of misbehaving students rather than trying to understand the underlying reasons for misbehavior or trying to use misbehavior as a teachable moment.[76]

Despite many of the negative consequences arising as a result of zero tolerance policies, legislatures did not implement zero tolerance policies to adversely affect students' educational experiences.[77] In fact, both zero tolerance policies and anti-zero tolerance policies try to address issues of school safety and disciplinary fairness: zero tolerance policies through harsh and indiscriminate punishment for violations,[78] and anti-zero tolerance policies through encouragement of administrator discretion and examination of incident-specific factors when making disciplinary decisions.[79]

> [a] student would commit a minor infraction . . . to which a teacher or school security person would respond harshly. The student would then get upset; react with worse behavior, such as cursing and belligerence; and be in big trouble. The original precipitating event along with the adult's inappropriate and exacerbating behavior would be forgotten.

Rokeach & Denvir, *supra* note 73, at 281. After the suspension, "[t]he student would return . . . academically behind, aggrieved, and in the wrong frame of mind for getting back to work." *Id*. Rokeach and Denvir acknowledge emotional responses that students can have to suspension or expulsion: "While almost no information has been collected regarding students' emotional responses to suspension or expulsion, interviews . . . have revealed increased apathy, lowered self-esteem, loneliness, boredom, feeling marginalized and unwanted, distrust of school officials, and family turmoil." *Id.* at 285.

75. *See infra* note 83 and accompanying text.

76. *See* APA Zero Tolerance Task Force, *supra* note 1, at 854 (noting that "it becomes difficult to argue that zero tolerance creates more positive school climates when its use is associated with more negative achievement outcomes"). "By changing the relationship between education and juvenile justice, zero tolerance may shift the locus of discipline from relatively inexpensive actions in the school setting to the highly costly processes of arrest and incarceration." *Id.* at 860. *See also* Rokeach & Denvir, *supra* note 73, at 282 ("Treatment of children's emotional and behavioral difficulties is a very challenging endeavor, and prevention has received little attention. Rather, many school officials look for something decisive and simple that will quickly get the problem under control. They are less interested in understanding problematic kids than they are in getting them out.") (footnote omitted).

77. Jenkins & Dayton, *supra* note 15, at 13 (citing zero tolerance policies as "generally well–intentioned"); *see also* Fries & DeMitchell, *supra* note 14, at 212–13 (noting that "[s]upporters of zero tolerance policies also emphasize that many forms of violence prevention and intervention are needed in a school and that zero tolerance was never meant to be the sole means of discipline" but rather was meant to "establish a standard of behavior"; and "zero tolerance policies were formulated with the best of intentions").

78. *See* Fries & DeMitchell, *supra* note 14, at 213 (citing several scholars who argue in favor of zero tolerance policies as ways to address school violence and set standards of behavior).

79. *Id.* at 214 ("[I]n a desire to be tough, no-nonsense, and scrupulously equal in punishment, schools have sacrificed measured and proportional responses for mechanical, non-discretionary decision-making."). Anti-zero tolerance policies still aim to create safe school environments. Garman and Walker write, "[i]n proposing a common-sense relaxation of the rigorous zero-tolerance approach to school discipline, it seems necessary to rebut the obvious counter-argument that reinforcing due

While zero tolerance policies may have been instituted as a well-intentioned way to discipline students equally, such blanket policies do not necessarily treat students fairly. The question whether to treat students equally based on their actions or to treat them fairly according to their intent creates a "paradox of fairness."[80] According to zero tolerance proponents, such policies are fair because they are consistent—treating every student who commits a certain violation the same.[81] But "sameness is not always fair."[82] Nor, in reality, is zero tolerance treatment of students actually the same. Even under zero tolerance policies, subjectivity in the disciplinary process is inevitable. For example, teachers often make a subjective choice in which code of conduct violations they report to administrators.[83] On the other hand, anti-zero tolerance policies, which

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process protection presents a weakening of the post-Columbine resolution to deal with school violence. Nothing could be further from the truth." Garman & Walker, *supra* note 15, at 319. The legislative declaration in Section 21 of Colorado's H.B. 12-1345 emphasizes safety: "[e]ach school district of the state is encouraged, in creating and enforcing a school conduct and discipline code, to protect students and staff from harm." But it also stresses that the manner in which to approach school discipline should be to "provide opportunities for students to learn from their mistakes, foster a positive learning community, keep students in school, and show mindful consideration of negative impacts that can occur as a result of involvement with the criminal justice system." 2012 CO H.B. 1345 § 21(1)(d) (West 2012). *See also* N.C. GEN. STAT. ANN. §§ 115C-390.1 (West 2011) ("School discipline must balance these interests to provide a safe and productive learning environment, to continually teach students to respect themselves, others, and property, and to conduct themselves in a manner that fosters their own learning and the learning of those around them.").

80. Fries & DeMitchell, *supra* note 14, at 216 ("Rigid adherence to equality does not always result in a fair outcome."). *See also* Garman & Walker, *supra* note 15, at 290 ("This phenomenon is the genesis of the zero-tolerance movement: the fear of seeming to treat students differently. But doesn't this go to the essence of due process? Events are not always exactly alike . . . ."). Treating students the same does not mean that they are being treated fairly according to the severity of the violation and the level of intent involved.

81. *See* MASS. APPLESEED CTR. FOR LAW AND JUSTICE, *supra* note 7, at 5 ("Zero tolerance policies also create the appearance of fairness in that all students are supposed to be treated equally under the policy."). Although the punishment may be consistent, the punishments for certain offense are often "harsh and certain" in order to deter violence or illegal behavior. BOCCANFUSO & KUHFIELD, *supra* note 6 and accompanying text. Whether students are really treated equally under zero tolerance policies is debatable. At least one scholar has found that zero tolerance policies can actually be discriminatory in their enforcement. *See* SKIBA, *supra* note 14, at 12. Additionally, teachers are often on the front lines in reporting such instances. Fries and DeMitchell write, "[a]n interesting notion to consider here is that while school administrators have been legally empowered and required to implement zero tolerance policies, it is often the teacher who is on the front line of identifying, intervening, and deciding whether or not to refer rule-breakers to an administrator for 'sentencing.'" Fries & DeMitchell, *supra* note 14, at 216.

82. Fries & DeMitchell, *supra* note 14, at 216

83. *Id.* at 217. Zero tolerance policies are not always enforced equally across the board. After interviewing teachers about their experiences with zero tolerance policies, Fries and DeMitchell note "that it is a teacher's sense of fairness to the individual student and the class as a whole that often defines the situation; deciding which problems are best handled in the classroom, which to refer to the administration, and which to ignore." *Id.* at 217. Thus, the subjectivity lies in which incidents get reported up to administrators who are then bound by zero tolerance rules. The stories of students who

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allow for subjectivity in disciplinary decisions, may not be inherently unfair because of this subjectivity. Looking at mitigating circumstances and considering certain actions within the context of individual students may not result in equal treatment of students, but ultimately it may be a more just approach.[84] This paradox of fairness is important to acknowledge when determining which legislative approach is most fair to students and most effective for administrators trying to maintain order in schools.

B. Potential Unintended Consequences of Anti-zero Tolerance

Especially as the scholarship and legislative pendulums begin to swing away from zero tolerance, it is important to remember that the extent of the negative effects of zero tolerance were not foreseen at the time the legislation was passed. Zero tolerance policies have not been effective ways of improving the school learning environment.[85] In fact, such policies have arguably aggravated the problems they were trying to fix.[86] Increased media attention to zero tolerance exclusions, however, while critical in bringing some absurdities of zero tolerance to light, has the

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are given second chances under zero tolerance because teachers have chosen not to report incidents to administrators are not the types of sensational stories latched onto by the media. But through interviews with individual teachers, Fries and DeMitchell demonstrate that subjectivity, and thus inequality of enforcement, is still present under zero tolerance policies. *See id.*

Another criticism of the argument that zero tolerance policies affect all students equally is that of disparate impact. Subjective enforcement of zero tolerance policies can arguably be seen in the disparate impact of zero tolerance consequences on minority students. *See* SKIBA, *supra* note 14, at 12. For example, "[w]ith the advent of zero tolerance, Black children experienced a 9-point increase in suspension rates, from 6% in 1973 to 15% in 2006." LOSEN & SKIBA, *supra* note 73, at 2–3. *See also* MICH. DEP'T OF EDUC., *supra* note 25, (noting that "certain groups of students, including African-American children, Latino children, and children with disabilities, are suspended and expelled in rates disproportionate to their population. Zero-tolerance policies are significant contributors to these disparities, primarily because of subjective enforcement").

84. Consider, for example, the following hypothetical concerning two students who committed the same violation: bringing a knife to school. Student A is a model student, has never had any disciplinary violations, and claims that she forgot to take the knife out of her bag after a girl scout camping trip over the past weekend. Student B has been disciplined for bullying younger students, and several students report that she threatened to physically harm them at dismissal. Student B acknowledges that she intended to bring the knife to school, although she never intended to actually use it. Given the choice to consider student intent and other relevant background of the student, a reasonable administrator might punish student B harsher than student A because of the difference in each student's intent. Given the opportunity, an administrator would probably not treat the two equally, and this unequal treatment may in fact be fair under the circumstances.

85. *See* APA Zero Tolerance Task Force, *supra* note 1, at 860 ("Zero tolerance has not been shown to improve school climate or school safety. Its application in suspension and expulsion has not proven an effective means of improving student behavior.").

86. Zero tolerance "has not resolved, and indeed may have exacerbated, minority overrepresentation in school punishments." *Id.*

potential to create demand for legislative change that is not fully informed. Deciding how to discipline a student who misbehaves is a complex decision dependent on the individual student's personality, behavior, and background. Disciplinary decisions should strike a fine balance between teaching the student acceptable standards of behavior without eliminating the student's desire to conform to these standards.[87]

Because effective discipline that does not completely disengage a student can require creativity and individually tailored solutions, anti-zero tolerance policies are an important step toward changing the educational environment and allowing decision-makers the flexibility to handle student misbehavior. Anti-zero tolerance policies, however, should not solely be reactive to the criticisms of zero tolerance. Rather, legislators should acknowledge the policies' impact on schools and in the classroom, instead of merely countering criticisms of zero tolerance.

Generally, anti-zero tolerance legislation seeks to remedy zero tolerance school discipline by returning discretion to disciplinary decision makers.[88] This can be done through mandatory consideration of intent and other mitigating circumstances as required by Texas law, or through permissive consideration of context-specific factors as indicated in the legislation in North Carolina, Colorado, and Massachusetts. Overall, this new wave of legislation passed in Texas, North Carolina, Colorado, and Massachusetts is a positive step toward keeping schools safe from students intending to do harm while ensuring that students are not needlessly expelled for unintentional violations.

Both mandatory and permissive anti-zero tolerance legislation are positive steps in addressing misbehavior and teaching students the consequences of their actions while maintaining discipline "as part of the teaching process."[89] Anti-zero tolerance legislation, however, is not

87. Rokeach and Denvir argue that "[t]he disciplinary system must work to support the educational mission of the school. Student misconduct that calls for a disciplinary response should also be seen as an opportunity to intervene to confront the learning problem that often prompts the misconduct." Rokeach & Denvir, *supra* note 73, at 288. Because discipline requires a great deal of creativity and flexibility on the part of teachers and administrators, policies that allow this flexibility and discretion are helpful in achieving discipline that also serves as a learning opportunity.

88. Discretion in this sense means the discretion to consider the individual circumstances of the student in question, not the discretion whether to create a zero tolerance school discipline policy. For example, schools in Massachusetts currently have the discretion to adopt codes of conduct in compliance with state law, but often, those codes of conduct chosen at the administrator's discretion are zero tolerance policies that restrict administrators' disciplinary decisions to the punishment proscribed for the offense, no matter the circumstances. *See supra* note 69 and accompanying text.

89. Meek, *supra* note 73, at 156 (noting Justice White's majority opinion in *Goss v. Lopez* that recognized school discipline as both "preserv[ing] school order" and a way to "develop a dialogue" with students to have discipline be a part of the learning process). Meek argues that "the state's legal

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necessarily an end to zero tolerance attitudes. While discretion may be written into the legislation, the practical application of the new legislation may still be difficult to enforce effectively.

The mandatory approach seems most likely to be uniformly enforced and thus most effective in eradicating zero tolerance. By requiring administrators to consider certain factors, the legislature can ensure that individual schools do not adopt policies in which punishment applies regardless of intent or mitigating circumstances.[90] The permissive approach only encourages administrators to consider intent and other circumstances, and such approach arguably still leaves open the option to exercise zero tolerance discipline.

Two considerations in adopting anti-zero tolerance legislation, through either a mandatory or a permissive approach, are the feasibility of enforcing consideration of intent, and the effect consideration of intent may have on student recourse should a student want to challenge a disciplinary decision.

1. Feasibility of Enforcement

While mandatory anti-zero tolerance policies are most likely to create uniform school discipline, requiring administrators to consider student intent and mitigating circumstances raises several questions about how such consideration of intent and contextual circumstances are enforced. Legislative language may support anti-zero tolerance by requiring discretion from the decision-maker, but who is to be accountable and what processes should be implemented to ensure that administrators consider an incident's contextual circumstances? If enforcement mechanisms are implemented, how can schools ensure that documentation, which is often time-consuming, does not compromise effectiveness? Other than careful documentation of intent and contextual factors, how can an administrator justify a disciplinary decision if a student challenges an administrator's compliance with a law requiring consideration of intent?

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interest is to ensure that every student gets an education rather than to exclude misbehaving students." *Id.* Meek focuses more on the importance of having alternative education programs in place for students who are disciplined in their regular school environment rather than anti-zero tolerance legislation that pushes for consideration of intent and other mitigating factors. This idea that zero tolerance has shifted the focus away from education, both in the sense of learning information and learning the consequences of one's actions, to an overemphasis on a disruption-free learning environment is one of the driving forces behind reform of zero tolerance laws.

90. *See supra* note 69 and accompanying text discussing Massachusetts legislation, which does not mention anything about zero tolerance, but does not prevent school districts from adopt such policies.

In addition to concerns about time-consuming or ineffective documentation when considering student intent, increased scrutiny of how administrators address misbehavior may put pressure on teachers not to report incidents.[91] In enforcing consideration of intent, legislators who pass the law and administrators who implement the law on the ground must do so in a way that does not garner fear to report incidents. A desire to reduce the number of suspensions and expulsions should not encourage administrators to underreport legitimate safety concerns.[92]

Discretion to consider intent behind disciplinary infractions should not mean reporting fewer violations. Rather, discretion to consider intent and context-specific circumstances should allow administrative flexibility to weed out unintentional violations from those that pose serious safety concerns. If reform is focused solely on countering rising exclusion rates resulting from zero tolerance legislation, schools may try to focus on reducing the number of infractions reported to administrators rather than using discretion to exclude only those students intending to cause harm. In enforcing anti-zero tolerance policies at the school level, it will be important for officials to stress the policies underlying the legislation rather than to pressure schools solely to improve their statistics.

Another concern with mandatory consideration of intent is determining when in the disciplinary process school officials should examine student intent and other mitigating factors. Many of the stories attracting media attention focus on instances in which students were excluded for unintentionally bringing weapons to school.[93] However, critics of zero tolerance policies also critique the practice of removing disruptive students from the classroom.[94] It may be more difficult to apply anti-zero tolerance

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91. A newspaper in Macon, Georgia, reported that discipline problems had reached a point where "teachers feel victimized twice—once by disruptive students who go unpunished, and again by the administrators who blame teachers." S. Heather Duncan, *Teachers: Frustration Over Student Discipline Widespread*, MACON TELEGRAPH (Sept. 6, 2012), http://www.macon.com/2012/09/06/2165876/teachers-frustrations-over-student.html.

92. *See id*. The teachers in Bibb County, Georgia, reported feeling pressure not to report student misbehavior to the administrative office for fear of "being targeted for a 'personal development plan,'" which can mean a step toward losing their job. *Id.* Georgia's school discipline law gives teachers "the authority, consistent with local board policy, to manage his or her classroom, discipline students, and refer a student to the principal or the principal's designee to maintain discipline in the classroom." GA. CODE ANN. § 20-2-738(a) (West 2012). The reaction of the administrators and subsequent pressure on classroom teachers not to report incidents to the principal's office reflects a desire to reduce numbers of disciplinary occurrences without changing the causes underlying the source of the numbers. This pressure to decrease school exclusion statistics is a trap that anti-zero tolerance policies must try to avoid.

93. *See supra* notes 15, 18 & 21.

94. Massachusetts Appleseed Center for Law and Justice notes critically the expansion of zero tolerance from weapons and drugs to disruptive and defiant behavior. *See, e.g.*, MASS. APPLESEED

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consideration of intent to students who exhibit disruptive oppositional behavior as opposed to a child who commits a discrete violation by bringing an illicit object or substance to school. When disciplining a disruptively defiant student, intent may be difficult to parse out, especially if such behavior is a result of a learning or emotional disability. Thus, if discretionary factors are made explicit in the statute (rather than just generally allowing administrators to use their discretion), it is important to include other circumstantial factors such as the student's disability in addition to consideration of intent.[95]

In looking at when in the disciplinary process intent and other mitigating factors should be considered, it may not make practical sense to require a teacher to consider student intent simply to send a disruptive student to the principal's office. To do so would hinder the teacher's ability to manage his or her classroom. Thus, legislative language requiring or encouraging consideration of intent is most effectively applied to disciplinary proceedings conducted at the administrative level rather than at the classroom level.

Texas is an example of a state that has failed to effectively enforce the mandatory language in its anti-zero tolerance legislation. Although Texas's statutory language mandates the consideration of intent and other mitigating circumstances before excluding students from the classroom, Texas is still being cited as a state that struggles with high dropout and school discipline rates.[96] Reports and articles continuing to evaluate school discipline in Texas show that zero tolerance attitudes are still present.[97] The method by which students are sent to alternative schools as well as the common practice of ticketing misbehaving students are two examples of the continued presence of zero tolerance attitudes.

CTR. FOR LAW AND JUSTICE, *supra* note 7, at 5 (arguing that zero tolerance policies "serve only as a mechanism for schools to expand the list of offenses for which a student can be suspended or expelled to include drugs, fights, and destruction of school property as well as vague terms such as 'disturbing school assembly' and thereby escalate the consequences for student behavior that would otherwise be considered fairly common at certain ages").

95. *See* TEX. EDUC. CODE ANN. § 37.001(a)(4)(D) (West 2011).

96. *See* Mike Fritz & Kelly Chen, *Early Punishments Can Have Lasting Impact for Some Students*, PBS NEWSHOUR (June 26, 2012, 11:47 AM), http://www.pbs.org/newshour/updates/ American -graduate/jan-june12/tx-ticketing_06-21.html (interview and transcript *available at*: http://www.pbs .org/newshour/bb/education/jan-june12/americangrad_06-26.html).

97. "It is conservatively estimated that more than 275,000 non-traffic tickets are issued to juveniles in Texas each year based on information from the Texas Office of Court Administration (TOCA)." These tickets are issued for behaviors such as disrupting class, using profanity, misbehaving on a school bus, student fights, and truancy. TEX. APPLESEED, TEXAS' SCHOOL-TO-PRISON PIPELINE: TICKETING, ARREST, & USE OF FORCE IN SCH. 1 (2010) (emphasis omitted).

The grounds for removal to a Texas Disciplinary Alternative Education Program ("DAEP") are governed by Section 37.006 of the Texas Education Code. Teachers may remove students to DAEPs for a variety of misbehavior including false alarms or reports, terroristic threats, felonies, assaults, drug or alcohol crimes, public lewdness, or if the continued presence of the student in the classroom "threatens the safety of other students or teachers or will be detrimental to the educational process."[98]

Even after the 2009 amendments to Section 37.001(a)(4) requiring all schools to consider mitigating factors before removing students from the classroom, Texas still struggles with high discipline rates.[99] One of the primary criticisms that Texas Appleseed listed in an April 2010 report was that students were being expelled from DAEPs for nebulous reasons.[100] Before a recent amendment to Section 37.007, students could be expelled from DAEPs for "engag[ing] in serious or persistent misbehavior."[101] However, "serious or persistent misbehavior" was left undefined.[102] The statute was recently amended on June 17, 2011, and now defines what type of behavior constitutes "serious misbehavior."[103]

Ticketing practices are another example of zero tolerance attitudes that still persist in Texas. The existence of this practice also calls into question the effectiveness of the state's anti-zero tolerance policy in eliminating zero tolerance attitudes.[104] Police officers frequently determine the consequences rather than administrators, and the tickets administered do not result in exclusion, which is what is required to apply scrutiny of intent under Texas's statute. Thus, ticketing may fall outside of the legislative domain of Section 37.001 and that section's requirements to examine student intent. Under Texas Education Code Section 25.094, students can receive Class C misdemeanor tickets for truancy or for other disruptive

98. TEX. EDUC. CODE ANN. §§ 37.006(d)(2) (West 2011).

99. TEX. APPLESEED, TEXAS' SCHOOL-TO-PRISON PIPELINE: SCH. EXPULSION—THE PATH FROM LOCKOUT TO DROPOUT 1 (2010) (citing U.S. Department of Education Office of Civil Rights statistic that Texas educates about nine percent of the nation's children but is also responsible for twelve percent of all students expelled from the nation's public schools).

100. *See* TEX. APPLESEED, *supra* note 99 at 3.

101. § 37.007(c) (West 2009) (effective June 19, 2009 to June 16, 2011).

102. "[I]nstead [what constitutes serious or persistent misbehavior] is left to local school districts' interpretation." *See* TEX. APPLESEED, *supra* note 99, at 3.

103. § 37.007(c) (West 2011). The new amendment changed "serious or persistent misbehavior" to just "serious misbehavior." Serious misbehavior is defined as "deliberate violent behavior," extortion, coercion, public lewdness, indecent exposure, criminal mischief, personal hazing and harrassment. § 37.007(c)(1)–(4).

104. "Zero tolerance attitudes" here mean not just policy found in state legislative codes dealing with exclusion, but also a general attitude toward discipline which seeks to impose harsh consequences for minor infractions regardless of the underlying situation to try to act as a deterrent.

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behavior.[105] The issuance of these tickets results in fines, blotches on a student's record, and sometimes even jail time.[106]

To create anti-zero tolerance policies that effectively eliminate zero tolerance attitudes, legislators must consider what type of documentation and administrative work is required as well as when in the disciplinary process student intent will be considered. Texas, a state where the legislative language requires administrators to consider intent, is an example of mandatory legislation that looks universally effective on paper but still allows zero tolerance attitudes to be present through removal to DAEPs and ticketing procedures. The persistence of zero tolerance attitudes in Texas despite legislative language that appears to eliminate zero tolerance is perplexing. And the reasons for these zero tolerance attitudes have been much debated.[107] Though perhaps not currently politically feasible, legislative language explicitly disavowing zero tolerance in school discipline may eliminate the loopholes that still allow zero tolerance school exclusion for minor misbehavior.

2. *Effects on Student Recourse*

The second important consideration to address when drafting anti-zero tolerance legislation is the resulting recourse available for students who believe they have been disciplined unfairly. Would increased scrutiny into student intent on the level of school administrators in disciplinary decisions make it more difficult to challenge suspension and expulsion decisions? Does allowing for subjectivity and discretion really solve the problem noted by scholars of the disparate impact of zero tolerance in suspension and expulsion of minority students?

At least two scholars have argued that moving away from zero tolerance and toward a process that factors intent and other mitigating circumstances into the disciplinary decision is more consistent with notions of due process.[108] However, could the practical effects of

105. TEX. EDUC. CODE ANN. § 25.094(e) (West 2011).

106. *See* TEX. APPLESEED, *supra* note 97. For the implications further down the line for students who are issued tickets and unable to pay them, see De Luna v. Hidalgo Cnty., Tex., 853 F. Supp. 2d 623 (2012). *See also* Elizabeth A. Angelone, Comment, *The Texas Two-Step: The Criminalization of Truancy Under the Texas "Failure to Attend" Statute*, 13 SCHOLAR 433 (2010).

107. Much has been written specifically criticizing the school discipline problems in Texas over the past decade, but to little avail. *See supra* text accompanying notes 96–106.

108. "Therein, however, lies the civil liberties question inherent in the application of the zero-tolerance concept: Can such a plan purporting to remove subjectivity from the attaching of guilt to punishment really be consistent with the constitutional guarantee of due process?" Garman & Walker, *supra* note 15, at 290.

introducing examination of intent as part of the disciplinary process actually increase the deference level given to school administrators by the courts? Could examination of intent on the front end make it more difficult to overturn a disciplinary decision a student thinks is unfairly enforced? While it may not change the standard of review that courts use to review disciplinary decisions, mandating consideration of intent requires that more discretion be applied at the level of behavioral review most closely removed from the incident, thus "front-loading due process."[109]

This "front-loading" may, in fact, be better for the student since it would give the student more opportunity to explain the circumstances directly to his or her disciplinarians.[110] However, it is important to keep the investigation of intent and mitigating circumstances meaningful for anti-zero tolerance policies to be effective. This depends in part on the procedures adopted to enforce consideration of intent and mitigating circumstances. Since administrators and other school decision makers are often very busy, even if due process is front-loaded in the investigation of a behavioral violation, it will still be necessary to maintain good records to ensure the student's intent is meaningfully considered and to prevent rubber-stamping of procedural steps.

Another factor to consider with a student's ability to attain recourse for unfair decisions is the subjectivity involved in granting discretion to decision-makers. Subjectivity is inevitable when using discretion and is not inherently negative. An administrator using his or her judgment to consider a student's intent and other mitigating factors has to make a decision based on what the administrator believes happened. This subjectivity, though perhaps unequal since it allows proportional punishments based on the extent of the misbehavior, is ultimately fairer, despite the potential for concerns of discriminatory impact.[111]

Advocates for eliminating zero tolerance policies because of the disparate impact on minority students may not find a panacea in anti-zero tolerance legislation because of anti-zero tolerance policies' emphasis on

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109. *See* Rokeach & Denvir, *supra* note 73, at 287–88 (illustrating the due process dilemma experienced by courts reviewing school disciplinary decisions of wanting to "articulate principles of fair treatment" while showing deference to school administrators). Rokeach and Denvir present a plan that "front-loads" due process through implementing due process principles in the school environment thereby creating a more clear, fair and inclusive disciplinary process. *Id.*

110. Although this may give administrators reason to hesitate because of concern that students may not tell the truth in a certain situation, Rokeach and Denvir argue that "[w]hen one allows students to tell their side of the story, it not only gives the administration access to information important for reaching a correct decision, but it also demonstrates respect for the students." *Id.* at 289.

111. *See supra* notes 80–84 and accompanying text.

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discretion and judgment.[112] Anti-zero tolerance policies are designed to eliminate blanket disciplinary decisions by giving administrators more subjective decision-making power. Thus, to assuage concerns about discriminatory enforcement, it will be increasingly important to monitor the results of discretionary decision-making to ensure the discretion is used to examine circumstances surrounding behavioral incidents and not as a pretext for discriminating against certain classes of students.

CONCLUSION

One of the greatest harms of zero tolerance is that it punishes potentially innocent conduct.[113] The victims of inadvertent violations of zero tolerance polices are those students who are the subject of the news pieces highlighting the absurdities of zero tolerance. Thus, it is increasingly important to emphasize consideration of intent and other context-specific factors in school disciplinary decisions. While legislative changes, such as the ones in Colorado, that eliminate mandatory expulsions for certain behaviors are instrumental in eliminating indiscriminate punishment, these policies may not be enough on their own. Permissive anti-zero tolerance laws may eliminate mandatory expulsion or suspension for certain offenses, but they still allow the possibility of expulsion without consideration of intent or the context-specific factors. On the other hand, as the school discipline atmosphere in Texas indicates, without effective and uniform enforcement, mandatory consideration of intent may not fully eliminate zero tolerance attitudes.

Theoretically, the mandatory approach to eliminating zero tolerance would seem to be most effective because it uniformly requires all school districts to consider intent and other mitigating factors.[114] However, the effectiveness of this approach may be limited by how it is monitored and enforced.[115] Texas's continued struggles with school exclusions and ticketing practices indicate that more than mandatory statutory language may be necessary for effective dissolution of zero tolerance policies.

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112. *See supra* note 83.

113. Pellicionni notes that because "zero tolerance policies . . . do not consider the intent of the student," the policies "encompass a great deal of innocent conduct." Pellicionni, *supra* note 13, at 995.

114. By requiring school codes of conduct to "specify that consideration will be given" to mitigating circumstances and intent before excluding a student from class, Texas theoretically ensures that all schools in the state will give such consideration. TEX. EDUC. CODE ANN. § 37.001(a)(4) (West 2011).

115. *See supra* text accompanying *supra* notes 96–106 (discussing Texas's continued problems even after adopting a mandatory approach (according to the statutory language)).

The permissive approach seen in North Carolina and Colorado is a good first step to eliminating zero tolerance attitudes because both statutes acknowledge the negative impact of zero tolerance policies.[116] However, while commendable that both states' legislatures specifically mention the negative effects of zero tolerance, this approach may not fully eradicate the possibility of schools adopting zero tolerance policies. Legislative declarations do not have the force of law.[117] Simply encouraging administrators to consider certain factors when making disciplinary decisions does not mandate compliance and leaves room for zero tolerance attitudes to persist.

A third avenue, combining the mandatory language of the Texas legislation (to ensure uniformity in enforcement) with the specific acknowledgment of an intent to discourage zero tolerance (to clarify the intent of the legislature), may be the most effective way to eradicate zero tolerance policies and attitudes.[118] When returning discretion to administrators, it is important to memorialize in law the reasons for doing so to avoid unanticipated paths through which students could be excluded from the learning environment.[119] Texas, a state with mandatory consideration of intent and other factors, lacks explicit disavowal of zero tolerance. Colorado and North Carolina, whose legislation explicitly critiques zero tolerance and the effects of exclusion on students, lack mandatory consideration of intent. Ideally, legislation would minimize the opportunity to indiscriminately exclude students without consideration of contextual factors while explicitly disavowing zero tolerance in the language of the statute itself.

Although approaching the elimination of zero tolerance policies differently and to different degrees, the legislation passed in Texas, North Carolina, Colorado, and Massachusetts enables decision-makers to use

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116. *See supra* text accompanying notes 41 & 50 (discussing North Carolina and Colorado's bills that acknowledge the harms of zero tolerance).

117. "Under the general rule that a legislative resolution does not have force or effect as a law, a legislative resolution as to the proper construction of a statute is not binding on the courts although it is entitled to the most respectful consideration." 73 AM. JUR. 2D STATUTES § 90 (2014) (footnote omitted), *available at*: WESTLAW.

118. Because "the cardinal rule of statutory construction is to effectuate legislative intent," a legislative declaration indicating that a school discipline law is intended to eliminate zero tolerance would go a long way toward ensuring that students are kept in class. 73 AM. JUR. 2D STATUTES § 60 (2014), *available at*: WESTLAW.

119. This is one of the biggest criticisms of Texas's school discipline laws. *See supra* text accompanying notes 99, 101 & 103 (discussing Texas's ticketing and alternative education). While mandatory for student codes of conduct to require administrators to look at intent and mitigating circumstances before excluding students from class, this has not had the desired result of reduction in exclusions.

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discretion when making disciplinary decisions. Returning judgment to decision-makers is a positive change from strict zero tolerance policies because of the harmful effects that exclusion has on students' futures.[120] Moreover, by relieving administrators of the obligation to exclude students who violate zero tolerance policies, no matter how small or inadvertent the violation, these new legislative changes will allow administrators the flexibility to use their judgment. Through giving administrators discretion, these anti-zero tolerance laws return "decision" to school discipline decisions.

Rebecca Morton[*]

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120. *See* BOCCANFUSO & KUHFIELD, *supra* note 6 (describing the negative future consequences facing students excluded from school). *See also* LOSEN & SKIBA, *supra* note 73 (citing several other studies showing that students who experience difficulty in school can lead to a host of more serious consequences such as involvement in the criminal justice system).

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