DECONSTRUCTING THE MARGINALIZATION OF “UNDERCLASS” STUDENTS: DISCIPLINARY ALTERNATIVE EDUCATION

I. India Geronimo

Available at: https://works.bepress.com/iindia_geronimo/1/
DECONSTRUCTING THE MARGINALIZATION OF “UNDERCLASS” STUDENTS: DISCIPLINARY ALTERNATIVE EDUCATION

I. India Geronimo

ABSTRACT

Disciplinary alternative education programs have the potential to marginalize students by separating and permanently tracking them out of the mainstream school system into an underclass of the educational community. The students who are funneled into alternative education programs are often those students who are perceived to be undesirable and low-achieving. Marginalizing these students is attractive because it: 1) is an immediate method for relieving school administrator fatigue; 2) it is an extension of the zero tolerance and punitive approach that has plagued the criminal justice system and is a politically attractive manner for administrators and politicians to appear “tough on crime”; 3) it reduces students’ competition for resources; 4) rids school officials of the task of educating problem students; and 5) artificially boosts accountability testing scores.

The proliferation of disciplinary alternative education programs is reflective of the manners in which punitive policies may be an effective method for maintaining social control over the underclass. Alternative education students are frequently removed from the mainstream education for minor incidents of misconduct and may find themselves trapped in these programs for years. To ensure that all students are given a fair opportunity at having a decent education, policies that purposefully dis-incentivize exclusion and marginalization must be adopted if traditionally marginalized students are to have a real chance at being educated in respectful learning environments.
DECONSTRUCTING THE MARGINALIZATION OF “UNDERCLASS” STUDENTS: 
THE RISKS POSED BY MISUSE OF DISCIPLINARY ALTERNATIVE EDUCATION

TABLE OF CONTENTS

I. What is Alternative Education? ......................................................... 6

II. Incentives for Sending Children to Disciplinary Alternative Education Programs .. 12
   A. The Segregation and Concentration of Poor, Black Students: Metamarket Stability and 
      Underclass Subordination .................................................................................................. 12
   B. How Segregated Students Are Marginalized Through Expulsion to Alternative Schools: 
      School Administrators’ Decision-making........................................................................ 23

III. Legal Concerns: Holding Alternative Programs Accountable ......................... 29
   A. The Quality of the Education at Alternative Programs .................................................. 30
   B. Referral of Students to Alternative Education ............................................................... 32
   C. Searches and Seizures .................................................................................................... 36

IV. Recommendations ................................................................................................. 40

“Public education is the key civil rights issue of the 21st century. Our nation’s 
knowledge-based economy demands that we provide young people from all backgrounds 
and circumstances with the education and skills necessary to become knowledge workers. 
If we don’t, we run the risk of creating an even larger gap between the middle class and 
the poor. This gap threatens our democracy, our society and the economic future of 
America.” –Eli Broad

Despite the deep-seated American belief that “merit” ultimately determines one’s fate 
and success, structural inequality leading to the creation of an underclass of individuals who
have been marginalized and isolated from mainstream America indicates otherwise.\footnote{See William Julius Wilson, The Truly Disadvantaged: The Inner City, the Underclass, and Public Policy 58 (1987); Michael H. Schill & Susan M. Wachter, The Spatial Bias of Federal Housing Law and Policy: Concentrated Poverty in Urban America, 143 U. Pa. L. Rev. 1285, 1290 (1995) (“Wilson’s concentration effects hypothesis has received almost universal empirical confirmation.”).} Although having an educated workforce will be critical to the new economy in the United States, inequality and inadequacy pervade the American educational establishment. This Article discusses how the use of disciplinary alternative education programs has the potential to marginalize students by separating and permanently tracking them out of the mainstream school system into an underclass of the educational community. The students who are funneled into alternative education programs are often those students who are perceived to be undesirable and low-achieving.

Students in what has been described as “the urban poor”\footnote{The “urban poor” is a term that has been used in exchange for the term “underclass.” See e.g. William Julius Wilson, When the Work Disappears: The World of the New Urban Poor (1996) (discussing the economic challenge of black inner-city poor).} often attend poorly-funded public schools that are unable to meet the demands of educating their large student bodies. In many school districts, disciplinary alternative education serves as a warehouse for poor, disabled, and minority youth.\footnote{See Margaret Hadderman, Alternative Schools, Trends and Issues 1 (2002) (finding that alternative education often serves as a warehouse for poor and minority students).} “[School] districts with high minority enrollments, and districts with high poverty concentrations were more likely than their counterpart districts to have alternative schools and programs” during the 2000-2001 school year.\footnote{See National Center for Education Statistics, U.S. Department of Education, Public Schools and Programs for Students At Risk of Education Failure 2000-01 33 (2002).} These programs were more likely than their counterparts to collaborate with police and sheriff’s departments,\footnote{See id. at 32.} which may increase the likelihood of criminalization for minor schoolyard misconduct. The use of disciplinary
alternative education programs to punish students who are deemed to be undesirable is part of the school-to-prison pipeline – a nationwide trend of funneling poor and minority students out of the education system and into the criminal justice system.

While alternative education programs may have some merits if properly administered, there are always risks involved when students are displaced from mainstream education and segregated from the larger school community. Research has consistently shown that continuous engagement in the classroom environment affects educational outcomes, thus displacement of students from the mainstream classroom should not be taken lightly. However, fatigued by the stress of educating difficult students with few resources, some school officials and policymakers push at-risk students out of the educational system by criminalizing them for minor misbehavior. Marginalizing these students is attractive because it: 1) is an immediate method for relieving school administrator fatigue; 2) it is an extension of the zero tolerance and punitive approach that has plagued the criminal justice system and is a politically attractive manner for administrators and politicians to appear “tough on crime”; 3) it reduces students’ competition for resources; 4) rids school officials of the task of educating problem students; and 5) artificially boosts accountability testing scores.


7 See Dean Hill Rivkin, Legal Advocacy and Education Reform: Litigating School Exclusion, 75 TENN. L. REV. 265, 267-68 (2008). Numerous studies have found that “tracking,” or the practice of assigning students to different tracks of study based on perceived ability, is often racially inequitable and leads to lower educational opportunities for the minority and poor students who are disproportionately placed in lower tracks. See, e.g., Maureen T. Hallinan, 67 SOCIOLOGY OF EDUCATION 79, 80 (1994). Moreover, one of the unintended consequences of tracking is the racial segregation of students and the creation of homogenous school communities. Id. at 81.

Accordingly, policies that purposefully dis-incentivize exclusion and marginalization must be adopted if traditionally marginalized students are to have a real chance at being educated in respectful learning environments. These students should receive a decent education without being subjected to heightened criminalization and punishment. Some commentators may wonder whether creating solutions for what are essentially “problem” children is a waste of resources. Others may speculate that these children should just be happy to be getting an education at an alternative school, never mind quality education.

First, many students are wrongfully placed in alternative education programs and are, in fact, not simply “problem” children. Moreover, when students, even problem students, are not provided a proper education, society bears the costs of their educational exclusion through increased incarceration costs, reduced future employment prospects and reduced productivity. Finally, minority students have been placed in alternative programs at a disproportionate rate, suggesting that placement in alternative education may not merely be a rational method for displacing problem students, but is instead a form of social control over these students who belong to historically marginalized communities.

This Article explores the use of alternative education in four sections. Section I of this Article defines disciplinary alternative education programs. Section II explores some of the incentives for placing students in these programs. Section III addresses the constitutional and civil rights issues raised by student placement in disciplinary alternative education programs. Section IV provides recommendations for ensuring that alternative education programs respect students’ rights while promoting a safe and respectful learning environment.
I. What is Alternative Education?

Alternative education has taken many forms through the years. The term alternative education has been used to describe charter schools designed to provide greater student to teacher interaction, schools designed for students with special needs, and programs designed to discipline students for misconduct or educational failure. These programs have different goals and often serve different populations. This Article focuses on disciplinary alternative schools and/or programs (“alternative education” or “alternative programs”) that discipline students for misconduct or for educational failure.

Starting in the 1980s and continuing through the 1990s, schools throughout the nation adopted punitive policies intended to curb school violence and student misbehavior. Schools began to view the criminal justice system, particularly the juvenile court system, as a means for addressing student misbehavior. Zero tolerance was touted as the solution to addressing school violence, allowing school officials to discipline students without exercising independent

---

9 See Hadderman, supra note 3, at 2-4 (acknowledging that alternative education programs vary greatly depending on the purpose of the program).

10 Disciplinary alternative programs refer to what has been described as “Type II” alternative programs. See Mary Anne Raywid, Alternative Education: The Definition Problem, CHANGING SCHOOLS (1990) (describing Type II schools as “last chance” schools that often adopt an approach that is punitive in orientation, and are intended to segregate disruptive students from normal education); see also CAMILLA A. LEHR, ET AL., ALTERNATIVE SCHOOLS, POLICY AND LEGISLATION ACROSS THE UNITED STATES, RESEARCH REPORT 1 at 1 (2003) (acknowledging that while “a clear definition of alternative education still does not exist . . . alternative school [is generally] defined by the tendency to serve students at-risk for school failure within the traditional educational system.”).

11 The foundations of the zero tolerance movement can be traced in part to The Gun-Free School Zones Act 1990, which requires states to implement zero tolerance policies when students carry a weapon to school and demands expulsion under certain circumstances. 20 U.S.C. § 7156 (2006). Some states in turn modified this requirement to encompass drug, harassment, and disruptive speech. See Christopher G. Robbins, Zero Tolerance and the Politics of Racial Injustice, 74 J. OF NEGRO EDUCATION 2, 5-6 (2005). Zero tolerance policies underwent several modifications and distortions that made them increasingly punitive in nature. Id.

discretion. As a result of zero tolerance policies and the adoption of a highly punitive approach to school discipline, students were frequently punished for minor acts of misconduct and criminalized for adolescent behavior. School suspensions and expulsions grew at a rapid rate.

The transfer of students to disciplinary alternative programs has become a tool for implementing this punitive approach to school discipline. Students who have been pushed out of mainstream school because of zero tolerance policies often find themselves in disciplinary alternative education programs.

The education provided at alternative education programs is often inferior, and students in alternative education are frequently there because they were unduly criminalized. In one high-profile case, a black Florida child was arrested and referred to alternative education because she wore a tube top to school. A seven-year-old San Antonio student spent several days as the youngest student amongst teenagers, and the only first-grader, in an alternative education

13 See Robbins, supra note 11 (discussing the statements of politicians like Diane Feingold in support of zero tolerance).

14 See, e.g., Paul J. Hirschfield, Preparing for Prison? The Criminalization of School Discipline in the USA, 12 THEORETICAL CRIMINOLOGY 79, 80 (2008) (describing that “problems that once invoked the idea and apparatus of student discipline have increasingly become criminalized”); Daveen Rae Kurutz, School Arrests, Citations Jump by 46 percent, PITTSBURG TRIB-REV. Aug. 23, 2008 (documenting 46 percent increase in number of school-based arrests and citations in Allegheny County, Pennsylvania, in a single year); CHILDREN’S DEFENSE FUND, AMERICA’S CRADLE TO PRISON PIPELINE 125 (2007) (noting tripling in number of school-based arrests in Miami-Dade County, Florida, from 1999 to 2001); ADVANCEMENT PROJECT, EDUCATION ON LOCKDOWN: THE SCHOOLHOUSE TO JAILHOUSE TRACK 15 (2005) (documenting growth in the number of school-based arrests in select jurisdictions).

15 See Robbins, supra note 11, at 9 (highlighting the increase in suspensions in several jurisdictions following the adoption of zero tolerance policies). “In the 2000-2001 school year, 90,559 children were suspended from Connecticut schools, up from 56,626 two years earlier.” Id.

16 NAACP LEGAL DEFENSE AND EDUCATION EDUCATIONAL FUND, DISMANTLING THE SCHOOL TO PRISON PIPELINE 4 (noting that overreliance on zero tolerance policies and classroom exclusion has resulted in many students being placed in alternative education programs).

17 Don Jordan  Christina Denardo, District Denies Gardens High Student Choked, Palm Beach Post, January 12, 2007.
A sixteen-year-old honor student was expelled from high school and sent to alternative education for five days after school officials discovered a butter knife on his person.19

School districts in urban areas, with high minority populations or with a high number of poor students, are more likely to have alternative programs than other school districts,20 and minority students are more likely to be referred to alternative education than white students for similar conduct. For example, in Mississippi, black schoolchildren were referred to alternative education at more than double the rate of their white peers.21 In Madison County, Mississippi, black students were more than seven times likely to be sent to alternative education than white students.22

Frequently, alternative education programs are used as “dumping grounds” and “warehouses” for difficult students, teachers, or administrators, creating “second-class citizens” in the education community.23 In Texas, alternative education programs have a drop-out rate that is five times that of mainstream education programs and a recidivism rate that approaches 30 percent.24 The vast majority of student referred to these programs are referred pursuant to

---

18 Phyllis Schlafly, Zero Tolerance or zero common sense, April 22, 2003.
20 J\ANINE M. Z\WEIG, VULNERABLE YOUTH: IDENTIFYING THEIR NEED FOR ALTERNATIVE EDUCATIONAL SETTINGS 12 (2003).
21 AM. CIVIL LIBERTIES UNION, supra note 6, at 27-28 (finding that in Mississippi for the past four years: blacks were 2 to 3 times as likely as whites to be referred to alternative education).
22 Id. at 29.
23 See Hadderman, supra note 3, at 1.
24 TEXAS APPLESEED, TEXAS’ SCHOOL-TO-PRISON PIPELINE: DROPOUT TO INCARCERATION 3 (2007).
discretionary referrals. This fact is significant because while blacks are disciplined at a rate proportionate to their representation in the population for mandatory referrals, they are disproportionately represented for offenses that are deemed “discretionary.” Such referrals may include conduct such as being disrespectful in class.

Contributing to their second-class status, alternative education students ordinarily do not have the same privileges as their peers in mainstream education. While at these schools, students may be subjected to heightened security measures including intrusive search procedures. Students at alternative education programs frequently drop out because of the lack of education and overcriminalization. Students who are members of the underclass are vulnerable to placement in disciplinary alternative education programs because “[w]hen minority and non-minority students engage in an identical discipline infraction, minority students receive harsher punishments by school officials.” They also are at greater risks of entering the criminal justice system.

Ideally, after a fair referral process, alternative education rescues students who may otherwise be unable to succeed in mainstream programs by providing individualized

25 Id.

26 TEXAS APPLESEED, TEXAS’ SCHOOL-TO-PRISON PIPELINE: SCHOOL EXPULSION 21 (2010).

27 ADVANCEMENT PROJECT & CIVIL RIGHTS PROJECT, OPPORTUNITIES SUSPENDED: THE DEVASTATING CONSEQUENCES OF ZERO TOLERANCE AND SCHOOL DISCIPLINE POLICIES 5 (2006) (documenting the use of zero tolerance to exclude students for minor forms of misconduct not originally contemplated when zero tolerance policies were implemented); see also Augustina H. Reyes, Alternative Education: The Criminalization of Student Behavior, 29 FORDHAM URB. L. J. 539, 545 (2001) (noting that lack of standards in the Texas disciplinary alternative education program suggest that the education provided is inadequate).

28 Reyes, supra note 27, at 545.

29 Augustina H. Reyes, The Criminalization of Student Programs, 21 ST. JOHN’S J. OF LEGAL COMMENTARY 73, 77 (noting that alternative education programs have become sites of criminalization of black, Native American, and Latino students).
programming, lower student to teacher ratios, and additional social services.\textsuperscript{30} Instead, many alternative programs fail to provide a quality education\textsuperscript{31} and serve to exacerbate those very issues that led to student placement in alternative education in the first place.

As a Karpatkin Fellow with the Racial Justice Program of the American Civil Liberties Union, I litigated an alternative school lawsuit involving an alternative school that was administered by a for-profit corporation, which illuminates the problems that inadequate alternative education may create.\textsuperscript{32} The school’s motto, “Be Here, Behave, Be Learning,” indicates the troubling order of the priorities for the school. The school was essentially a warehouse for poor, urban black students. In the 2007-2008 school year, one hundred percent of the student population was black, and 93 percent qualified for free or reduced lunch.\textsuperscript{33}

We learned of disturbing details about the education that was being provided at the school:\textsuperscript{34} students were not allowed to bring textbooks home to study; no homework was given; students spent much of their day being taught by computers rather than teachers; teachers would gamble with students and instigate fights between students; students were not provided appropriate resources for transitioning back into mainstream schools and were frequently prevented from

\textsuperscript{30}See AM. INSTITUTES FOR RESEARCH, STUDY OF EFFECTIVE ALTERNATIVE EDUCATION PROGRAMS: FINAL GRANT REPORT 16 (2006) (summarizing the characteristics of successful alternative programs as described by policymakers, experts, administrators, and practitioners in the field).

\textsuperscript{31}See ELIZABETH G. HILL, LEGISLATIVE ANALYST’S OFFICE, IMPROVING ALTERNATIVE EDUCATION IN CALIFORNIA 30 (2007) (finding that alternative education students are frequently provided with fewer services than students in mainstream education).


returning to normal school although they served their assigned term at the alternative program; there was an overreliance on repeated out of school suspensions, rather than in school remedies including offering support, that contributed to truancy and drop out; most of the teachers were inexperienced and many were not qualified to teach in their subject areas; and 67.12% of students did not achieve proficiency in English Language Arts, 93.06% did not meet standards in mathematics, 100% did not meet standards in science, 51.39% did not meet standards in reading, and 97.06% did not meet standards in social studies according to the 2007-2008 GAOSA report for grades 6-11. The failure to provide an adequate education contributed to the push-out of many students who did not attend school because of the school’s failure to educate them.  

Consequently, several of these students resorted to truancy.

The criminalization of students at the school further contributed to the push-out process. Students at the school were treated like prisoners. Every day, children at the school were subjected to invasive suspicionless searches that involved “bra-popping,” physical examinations of the interior waistbands of their pants, and full-body pat-downs. Some students were subjected to strip searches for being suspected of petty school violations like possession of a cellular phone or wearing jewelry. Several students reported that they often did not want to attend school because of the criminalization they faced at the school. They often described these searches as prison-like.

35 For example, some students stated that they did not like attending classes because they had already learned much of the material being taught. They stated that they were concerned about their ability to graduate from high school on time given the schools’s failure to provide a curriculum that was analogous to that at their home schools.

36 Id.
37 Id.
38 Id.
Many students were sent to the school without due process or for administrative reasons, such as moving into the school district in the middle of the school year. The for-profit corporation that administered the school eventually lost its contract with the school district as a result of the lawsuit, and the school district entered a settlement agreement to ensure that the school’s failures would be remedied. This case highlights the horrors that may occur when inadequate care is taken to ensure that a proper education is provided at alternative education programs. While the rights of the students in this school were eventually vindicated, thousands of students remain in alternative programs that are administered in the same troubling manner that this program was administered. Safeguards should be adopted to ensure that students are not unfairly funneled into alternative education programs and then not subjected to unconstitutional practices while they are there.

II. Incentives for Sending Children to Disciplinary Alternative Education Programs

A. The Segregation and Concentration of Poor, Black Students: Metamarket Stability and Underclass Subordination

While many communities have endured the harsh penalties that may result from zero tolerance policies that result in student placement in alternative education, poor minority schools

\[39\] Id.

\[40\] Id.
are disproportionately affected.41 Minorities and poor students are generally disciplined at a disproportionate rate, resulting in a positive correlation between the proportion of minorities in a state and that state’s repressive policies toward the underclass.42 One explanation for this discrepancy is school discipline is being used as method of social control over this population, contributing to the stability of what have been described as “metamarkets” in richer communities.43

“Metamarkets” are created in more affluent, typically suburban, communities in part by the isolation of poor, black and brown urban communities into what has been described as “antimarkets.”44 Metamarkets are communities with desirable services and culture that have been created largely at the expense of the antimarkets.45 Metamarkets are created by rational actors that act on “several normative assumptions about lifestyle and economic well-being: the mobility to choose suitable residential communities; knowledge of different revenue and expenditure patterns, as well as the supply of adequate public services; and freedom from strict


42 See Andrew Lucas Balize Davies & Allisa Pollitz Worden, State Politics and the Right to Counsel: A Comparative Analysis, 43 LAW & SOC’Y REV. 187, 195 (2009) (noting that “racial threat hypothesis” posits that “up to a majoritarian tipping point, there is a positive correlation between proportions of racial minorities and repressive policies.”).

43 See Robert J. Sampson & John H. Laub, Structural Variations in Juvenile Court Processing: Inequality, the Underclass, and Social Control, 27 LAW & SOC’Y REV. 285, 293 (1993) (“[C]ounties characterized by racial inequality and a large concentration of the “underclass” (i.e., minorities, poverty, female-headed families, welfare) are more likely than other counties to be perceived as containing offensive and threatening populations and, as a result, are subject to increased social control by the juvenile justice system.”)

44 David D. Troutt, Ghettoes Made Easy: The Metamarket/Antimarket Dichotomy and Legal Challenges of Inner-City Economic Development, 25 HARV. C.R.-C.L. L. REV. 427, 433 (2000). Troutt describes the communities of the underclass “as antimarkets to express the powerlessness of these marginalized communities to play by the same rules of the metropolitical game that are available in middle-class metamarkets.” Id at 429.

45 Id.
constraints on employment.”

Metamarks are family-oriented, middle and upper-middle income areas. They are guided by principles of “family orientation, uncluttered streets, or practical convenience.”

By contrast, antimarks have fewer resources, or located in less than ideal locations, and are not designed to maximize convenience and family-friendliness. They are “the antinorm[s] of the metamarket[s], the urban place never designed to hold stability. The antimarket encompasses the economic, political, and psychic marginalization of inner-city consumers through the subversion of middle-class rules.” The creation of metamarks is dependent on the ability to isolate undesirable individuals into distant antimarks that do not upset the way of life in the metamarks. “African American ghetto poverty remains the quintessential form of inner-city or ‘underclass’ poverty because exclusion of, and discrimination against, African Americans have been the most essential means to sustaining middle-class metamarks.”

The dichotomy between antimarks and metamarks “demonstrates that the institutionalized ideals of American middle-class life have produced stable communities through the interaction of sound social ordering devices and powerful racial and economic oppression.” As one scholar recognized, “[t]here is no disadvantage without a corresponding advantage, no

46 Id.
47 Id.
48 Id.
49 Id.
50 Id. at 430.
51 Id.
52 Id. at 432.
53 Id. at 476.
marginalized group without the powerful elite, no subordinate identity without a dominant identity. Power and privilege are relational . . .” The advantages enjoyed by stable, affluent communities stem, in part, from the marginalization of poor, underclass communities into isolated antimarkets.

The creation of metamarkets at the expense of anti-markets is illustrated by recent housing segregation litigation involving Westchester County, New York. Westchester County was sued for making false claims to the federal government by claiming that it would take meaningful steps to ensure that its municipalities would provide fair housing. Despite, representations to the federal government to the contrary, Westchester failed to take steps to ensure that its municipalities provided affordable housing that would promote fair housing and decrease housing segregation. It conducted no analysis on the racial and ethnic segregation of its municipalities. Consequently, 40% of its municipalities had populations of one percent black or less, and more than 60% had populations which were three percent black or less in 2000. By contrast, minorities were concentrated in a few of its municipalities: Mount Vernon had a 68% minority population, Peekskill a 56%, New Rochelle a 39%, and Yonkers a 41%. Westchester’s richer suburbs benefitted from the concentration of minorities into a few of its localities by receiving federal funds designated for the promotion of fair housing and housing


56 *Id.*

57 *Id.*

integration without taking actual steps to actually integrate their communities. Anyone who is familiar with Westchester is aware of the stark contrast between downtown Scarsdale and downtown Yonkers. While Scarsdale has one the best high schools in the nation and is community lined with tony restaurants and gourmet bakeries, one can find many of the signs of urban decay in many of the rougher neighborhoods of Yonkers. The effects of economic and racial isolation in these neighborhoods are visceral. Scarsdale is able to maintain racial segregation in its schools, in part, by maintaining residential segregation, which has concentrated poor and minority students into school district outside its borders.

Federal housing policies that contributed to the redlining of inner city, black communities contributed to segregation and the isolation of antimarkets. Black homeowners were unable to obtain financing despite credit worthiness and restricted from purchasing in suburban communities due to restrictive racial covenants.\(^{59}\) This contributed to their concentration in inner cities.\(^{60}\) Meanwhile, homeowners in metamarkets disproportionately benefited from government programs intended to promote home ownership because these programs favored members of these communities for mortgage approval.\(^{61}\) Similarly, insurance redlining places additional costs on the antimarket community by creating disparities in insurance rates, even after differences in crime between antimarket and metamarket communities are accounted for. These

\(^{59}\) See Myron Orfield, Racial Integration and Community Revitalization: Applying the Fair Housing Act to Low Income Housing Tax Credit, 58 VANDERBILT L. REV. 1747, 1754-57 (2005), for discussion of the federal housing policies that contributed to development of inner cities with concentrated poverty. Additionally, zoning laws were frequently a tool for isolating communities and ensuring that the underclass would not interfere with suburban life. See generally David Ray Papke, Keeping the Underclass in its Place: Zoning, the Poor, and Residential Segregation, 41 URB. LAW. 787 (2009). Restrictions on the numbers of units that a building may house or on building size are an effective method of ensuring that lower-income individuals are unable to enter a community. Id.

\(^{60}\) Id.

\(^{61}\) Id.
policies demonstrate how the development of metamarkets is often at the expense of antimarkets.\textsuperscript{62} As a consequence of the historical ramifications of many of these policies and the actions of communities like Westchester County that take steps to prevent racial integration, schools in this country are more segregated than ever.\textsuperscript{63}

The underclass hypothesis provides a further framework for understanding how individuals who reside in antimarkets are subjected to increased subordination. The underclass pertains to the existence of an “identifiable group facing powerful barriers to upward mobility.”\textsuperscript{64} The underclass is marginalized and isolated from mainstream society and thereby contains the elements of “perpetual decline.”\textsuperscript{65} William Julius Wilson has described the underclass as:

[T]hat heterogeneous grouping of families and individuals who are outside the mainstream of the American occupational system. Included . . . are individuals who lack training and skills and either experience long-term unemployment or are not members of the labor force, individuals who are engaged in street crime and other forms of aberrant behavior, and families that experience long-term spells of poverty and/or welfare dependency.\textsuperscript{66}

\textsuperscript{62} Even within suburban cities where there is a significant minority populations, concentration of these populations in low-resources communities persists. For example, while according to the 2000 Census Yonkers had a black and Latino population of 52.54% compared with Scarsdale’s of 4.1%, Yonkers has been guilty of adopting policies that create racial residential and educational segregation within its borders. See Lena Williams, \textit{Judge Finds Yonkers Has Segregation Policy}, N.Y. TIMES (Nov. 21, 1985) (“A Federal judge ruled yesterday that city and school officials in Yonkers had ‘illegally and intentionally’ segregated the city's public schools and public housing along racial lines. . . . The four high schools were also said to be easily identifiable by race.”) Anecdotally, having grown up in Yonkers, I am well aware of the practice of identifying the various high schools by their racial composition, such that a certain high school would be commonly called “the black school,” “the Spanish school,” or “the white school.”

\textsuperscript{63} \textsc{Gary Orfield & John T. Yun, Civil Rights Project, Harvard University, Re Segregation in American Schools} (1999); Tim Lockette, \textit{The New Racial Segregation at Public Schools}, available at http://www.alternet.org/rights/145553/the_new_racial_segregation_at_public_schools (“[O]ne-third of black students attend school in places where the black population is more than 90 percent. A little less than half of white students attend schools that are more than 90 percent white. One-third of all black and Latino students attend high-poverty schools (where more than 75 percent of students receive free or reduced lunch); only 4 percent of white children do.”).


\textsuperscript{65} Troutt, \textit{supra} note 44, at 468.

\textsuperscript{66} See, \textit{e.g.}, \textsc{Wilson, supra} note 1, at 58.
In the United States, this underclass is disproportionately black and brown, and overwhelming poor.  

Unsurprisingly, school districts that serve members of the underclass often have fewer resources than their richer counterparts – their monetary, social, and political capital is simply inferior.

The underclass hypothesis predicts that when majority interests are threatened, a subclass of individuals is relegated to an underclass and subjected to heightened social control for social and political reasons. “[A]s the underclass grows so do prisons as a means to protect the dominant position of those at the top of the social hierarchy.”

According to this hypothesis, in states where there is a large minority population, minorities are subjected to increased scrutiny, punishment, and social control. This hypothesis presumes that majority populations generally fear minority encroachment. Consequently, as the minority population increases, fears of the minority manifest themselves in punitive approaches to relating with the minority.

---

67 The very use of the term “underclass” has been hotly contested as being politically charged and loaded with negative connotations. See Anthony Giddens, Sociology 5th Ed., 317-18 (2006).

68 See, e.g., Raegen T. Miller, Center for American Progress, Comparable, Schmomprable: Evidence of Inequity in the Allocation of Funds for Teacher Salary within California’s Public School Districts (2010) (noting that as the concentration of poverty within a school increases, teacher salary decreases). Resources within school district are distributed in an inequitable manner—two Los Angeles high schools in the same school district had a disparity of about $1 million. Id.


70 Id. See also Marc Mauer, Race to Incarcerate (1999) (discussing mass incarceration generally).

71 Id.

72 See Smith, supra note 69, at 926 (“[T]hose who control the coercive power of the state use that power to impose their values on others or to advance one constituency’s interests by damning the interests of another.”). In relation to mass incarceration, Smith notes that “as the underclass grows, so does the use of prisons as means to protect the dominant positions of those at the top of the social hierarchy.” Id. 927. The “proportion of population that is black is consistency reported to be a positive predictor of imprisonment levels.” Id.

73 See Davies & Worden, supra note 42, at 195.
extent that significant nonwhite populations pose a threat to the securities and sensibilities of whites, researchers predict that legislators (state as well as local) who allocate funding for programs largely associated with minority populations will do so in a manner that is detrimental to the minority population.\textsuperscript{74} The Westchester County litigation described above is a clear example of how the fear of an increase in minority presence may lead to efforts to maintain racial segregation (in that case, by reducing access to affordable housing or otherwise promoting racial integration), even where the decision to oppose integration appears irrational due to potential litigation costs. The consequent residential segregation that results contributes to educational segregation because schools ordinarily follow a neighborhood school model.\textsuperscript{75} Accordingly, not only are the neighborhoods saved from minority encroachment, the schools are as well.

The underclass hypothesis is particularly supported in the education context.\textsuperscript{76} Numerous studies have tested the underclass hypothesis and found disparities in the dispersal of educational resources. Studies of both interdistrict and intradistrict school funding tend to confirm the underclass hypothesis.\textsuperscript{77} High minority and high poverty schools tend to have teachers who are lower-paid, less qualified, and more likely to be assigned to teach topics that have not majored.\textsuperscript{78}

\textsuperscript{74} Id. at 194-95.
\textsuperscript{75} Sherry Cable & Tamara L. Mix, \textit{Economic Imperatives and Race Relations: The Rise and Fall of the American Apartheid}, 34 J. OF BLACK STUDIES 183, 192 (2003).
\textsuperscript{76} Field research on the distribution of public services, such as libraries, parks, police protection, sewers, and fire protection tend to indicate that the underclass hypothesis does not hold for many municipal services although it does with regard to the distribution of educational resources. See H. GEORGE FREDICKSON, \textit{SOCIAL EQUITY AND PUBLIC ADMINISTRATION: ORIGINS, DEVELOPMENTS, AND APPLICATIONS} 110 (2010).
\textsuperscript{77} Id. ("Both interdistrict and intradistrict school funding variation have tended . . . to confirm the underclass hypothesis.")
Poor, black and brown communities consequently receive inadequate educational services compared to those of other communities. Even when controlled for socioeconomic status, black students receive poorer educational services than whites.\textsuperscript{79}

In addition to inequity in educational resources, where there is a perceived threat of minority encroachment, particularly a threat of black males to middle class life,\textsuperscript{80} there are more restrictive policies and increased social control of the marginalized group, which includes increased use of alternative education programs.\textsuperscript{81} Many of the same zero tolerance and “tough on crime” policies that have led the United States to have the highest incarceration rates in the world have trickled down to the school system and contributed to the creation of the school-to-prison pipeline.\textsuperscript{82} Mass incarceration, which is an effective tool for ensuring that a segment of the population is permanently excluded from full citizenry, is aided and abetted by the school-to-prison pipeline, which becomes a pipeline program for ensuring that there is a consistent pool of candidates subjected to permanent exclusion from proper society.\textsuperscript{83} Both forms of oppression take on what has been described as a “conveyor belt” model of justice -- poor, blacks are

\textsuperscript{79} Richard D. Kahlenberg, \textit{All Together Now: Creating Middle-Class School through Public School Choice} 43 (2001).


\textsuperscript{81} Kelly Welch & Allison A. Payne, \textit{Racial Threat and Punitive School Discipline}, 57 SOCIAL PROBLEMS 25 (2010) (multivariate analysis finding that racial threat hypothesis is supported in explaining disparities in school discipline between blacks and whites).

\textsuperscript{82} Eric Blumenson & Eva S. Nielson, \textit{How to Construct and Underclass, or How the War on Drugs Became a War on Education}, 6 J. GENDER RACE \& JUST. 61, 61 (recognizing that “the drug war has combined with public school zero-tolerance policies to remove tens of thousands of adolescents from their public schools”).

\textsuperscript{83} Id. (recognizing that “the drug war has combined with public school zero-tolerance policies to remove tens of thousands of adolescents from their public schools” and that “[t]he war on drugs has spawned a second front – a war on education.”).
Alternative education students’ status in the underclass is concretized as they are processed through the school-to-prison pipeline, stopping by the disciplinary alternative program, in transit to the juvenile justice system.

The proliferation of disciplinary alternative education programs is reflective of the manners in which punitive policies may be an effective method for maintaining social control over the underclass. Alternative education students are frequently removed from the mainstream education for minor incidents of misconduct and may find themselves trapped in these programs for years. Overplacement in alternative education program can contribute to racial segregation in racially diverse school districts. One may ask how can minority threat be a primary factor in the marginalization (and criminalization) of students when the enforcers in many black schools districts are black themselves. One explanation is that these actors may also benefit from the creation of metamarkets and can be affirmative agents in maintaining these markets by contributing to the marginalization of society’s undesirables. Further, many of the policies that result in marginalization are not created at the school-level and are the result of federal and state-level policies that follow the trend toward zero tolerance approach to education.

Poorly-administered disciplinary education programs consequently serve as gateway programs that support the mass incarceration of poor, black youth. Punitive policies are

---

84 Carol Camp Yeakey, America’s Disposable Children: Setting the Stage, J. Of Negro Education, Vol. 71, No. 3 (2002) (noting that the profound increase in the criminalization of the underclass has been described as “conveyor belt” justice and the “McDonaldization of punishment”).

85 In Texas, the number of transfers to disciplinary alternative programs increased from 99,400 in 1996 to 123,000 in 2000.

86 See, e.g., Don Jordan & Christina Denardo, District Denies Gardens High Student Choked, PALM BEACH POST, January 12, 2007. See also Am. Compl., M.H. v. Atlanta Independent School System, Case No. 08-cv-1435 (N.D. Ga. 2009), available at http://www.aclu.org/racial-justice/harris-et-al-v-atlanta-independent-school-system, (describing how an alternative education student was trapped in the program for three years and received inadequate education during his term at the program).

87 Blumenson & Nielson, supra note 82.
disproportionately enforced against the poor and minority students and are effective mechanisms for maintaining social control over them and isolating them from mainstream society. While in these programs, alternative school students often receive inadequate education and consequently drop out of the school system altogether. As drop-outs, the likelihood that they will become arrested greatly increases as well as the likelihood that they will remain in the criminal justice system. These students essentially become the lost children of society – they have effectively been pushed out of the school system.

The racial threat hypothesis suggests that states with large minority populations have the most repressive policies toward minority alternative education students. While additional empirical analysis is necessary given the general dearth of data on alternative education in general, a review of states with reported incidents of student repression in alternative schools are among those with high minority populations: Georgia, Florida, Texas, Pennsylvania, New York, North Carolina, South Carolina, and California.

88 For example, in Texas while whites comprised 46% of Texas’s population for the 1996-1996 school year, whites comprised only 28% of referrals to disciplinary alternative education programs.

89 Id. ("[S]tudents who already have negative attitudes toward schools are removed from their regular instructional environment to inferior environments with teachers who are un-certified outside the areas of bilingual and special education.").


91 See Davies & Worden, supra note 42, at 195.

92 See, e.g., Ernie Suggs, Zero tolerance in schools to be challenges under new Senate bill, ATLANTA JOURNAL-CONSTITUTION (Feb. 13, 2010) (Georgia 14-year-old arrested and sent to alternative school after mother accidentally placed a fishing knife in his school bag); Rich Phillips, Toy gun leads to Florida boy’s expulsion, CNN News Online (Oct. 6, 2010) (Florida 7-year-old expelled and recommended to alternative school after bringing a toy gun to school); Forrest Wilder, Too Black for School, TEXAS OBSERVER (May 5, 2010) (Texas 12-year-old placed on one-year juvenile court probation and alternative school for prank calling 911).
Additional data collection and research is needed to fully test this hypothesis and to understand whether it explains the proliferation of disciplinary alternative programs and the prominence school-to-prison pipeline in poor black communities. There have already been empirical studies that support a finding that in counties with a large black population, “black males are viewed as a threatening group to middle-class populations and thus will be subjected to increased formal social control by the juvenile justice system,” suggesting that the use of alternative schools and other punitive programs in schools may follow the same pattern. Another study found that harsh school disciplinary policies were imposed in reaction to perceived racial threat.

B. How Segregated Students Are Marginalized Through Expulsion to Alternative Schools: School Administrators’ Decision-making

While understanding the larger structural processes, such as the creation of isolated urban communities, that promote student exclusion is necessary, there are also processes at the school-level that are significant contributors to student push-out. Rational choice theory presumes that people are rational actors who consider all relevant information when making decisions, adopting utility-maximizing options. Utility is a metric of relative satisfaction in the

---


95 While there is an increase in the number of middle-class and upper-class whites moving into urban communities, see BROOKINGS INSTITUTE, STATE OF METROPOLITAN AMERICA (2010), they are still overwhelming located in suburban communities, David Ray Papke, *Keeping the Underclass in its Place: Zoning, the Poor, and Residential Segregation*, 41 URB. LAW. 787-88 (2009) (“[W]hile some degree of gentrification has taken place in most downtown areas, the great majority of middle and upper-class Americans continue to live on the outskirts of the center-cities and even more so in the surrounding suburbs. In larger metropolitan areas the fastest population growth has occurred in the second and third rings of suburbs, in new communities that not long ago were farmers’ fields. Even more strikingly, the poor and working classes continue to live in the older, postindustrial center-cities.”)

consumption of services. A choice that maximizes utility ensures a result is described as providing the “greatest good” for the largest amount of individuals.

Applying these principles to the school setting, it is not difficult to understand why transferring low-performing and disruptive students out of mainstream schools has become attractive. Competition within the school district for the distribution of limited resources has created an incentive for students who perform poorly to be siphoned out of mainstream education into disciplinary alternative education programs. Even within the same school district, it is clear that schools that serve underclass students receive fewer resources. Placing students in disciplinary alternative education programs is an effective method for getting rid of students who are difficult to teach. This structure allows school officials to claim that they have not given up on at-risk students without committing to the task of educating these students effectively. Alternative education provides a utility-maximizing option for the school administrators because

97 Robert S. Pindyck & Daniel L. Rubinfeld, Microeconomics 73 (5th ed. 2001) (defining the concept of “utility” as a means of assigning an objective score to the relative level of satisfaction that a person gets from consuming a good or undertaking an activity).


99 Reyes, supra note 27, at 541. Rational choice theory also helps explain why the criminalization of students in general is an attractive option. As one commentator has noted, “schools districts have criminalized low student achievement by sending students with academic programs” to disciplinary alternative education programs. Id. At times, frustrated educators opt to have a law enforcement agency discipline students for school misbehavior because they are overwhelmed with other responsibilities. The frequent narrative of the school-to-prison pipeline is that of overly aggressive police officers co-opting the roles of educators. However, it is important to note that in many circumstances, the criminalization of students is an attractive option for educators themselves. Criminalizing these students and displacing them out of the educational environment allows educators to be freed of the task of disciplining students. It allows them to focus their energy on other students and is in line with the general political sentiment of “do the crime, do the time.” The very same principles that are the foundation of zero tolerance promote an educational approach that values criminalization.

100 Jacqueline Irvine, Black Students and School Failure: Policies, Practices, and Prescriptions 19 (1990) (explaining the disproportionate exclusion of black students from the classroom lead to feelings of alienation and ultimately contribute to their permanently displacement from the educational system).
undesirable students are no longer competing for resources with other students. The relative satisfaction of “good” students is improved by the absence of the undesirable students, and in the short-term, the decision to displace these students appears to bring about the most efficient outcome.

The minimal transaction costs involved in transfer to an alternative education program provide further clarification concerning the institutional variables that influence school officials’ decision-making. “[T]he question is not how an ideal market functions, but which institutional governance structure is most advantageous in a given situation.”

The transaction costs involved in transferring a student out of mainstream education are relatively low, making student displacement attractive – the school simply has to expel the student, which is a low-cost transaction. Even if the school does not benefit from an increase in funds as a result of the displacement of these students from the educational system, it benefits from space, time, and other resources due to the transferred students’ exclusion from mainstream education. By removing these students from mainstream education and placing them in inferior educational facilities, the competition for resources within the student body is reduced. Teachers have fewer students demanding their time, fewer students require textbooks, and the students who

---

101 Reyes, supra note 27, at 541.


103 As one scholar has noted, “Some legislators supported this concept [of disciplinary alternative schools] because it gave those students [who remained in mainstream education] more individual attention by greatly reducing teacher-to-pupil ratios.” Reyes, supra note 27, at 541.

104 Id. (noting that disciplinary alternative education programs “save money while removing low-achieving students from home school rolls”).
remain in mainstream education, arguably, receive a better education because of the resulting lower student-to-teacher ratio.105

Additionally, federal and local policies that overemphasize accountability testing create perverse incentives for school administrators to manipulate test scores by segregating poorly-performing students out of the accountability paradigm.106 Disciplinary education programs often are exempted from many of the standards required in mainstream schools.107 They are largely unaccountable and difficult to monitor.108 By placing undesirable students outside of the accountability realm, school administrators reap the financial benefits of meeting various local and federal standards for education.109 Remove poorly performing students from your student body, and you are certain to increase the average performance of your student body.110 Administrators’ own jobs may depend upon meeting these standards, and a curriculum that is overly-depending on testing and accountability may lead to the creation of a culture where test success becomes paramount to educating students.111 Pushing low-performing students out may ensure that the school will receive increased funding and/or administrators’ will have increased job security. Further, accountability testing results may be the basis for firing a principal,

105 Reyes, supra note 39, at 541 (“Instructional segregation reduces a student’s ability to pass a course and discourages the student from returning to school with indirect savings to the state school finance system.”).

106 Reyes, supra note 27, at 545.

107 Id.

108 Id.

109 Id.

110 See generally ADVANCEMENT PROJECT, supra note 41.

111 Id.
providing cash incentives for superior performance to principals, and the labeling of a school status as either unacceptable or exemplary.\footnote{112}{Id.}

For example, in Texas all students must be assessed on reading, social studies, writing, science, and mathematics.\footnote{113}{Id. at 545.} Disciplinary alternative education programs are not subject to the state accountability testing; alternative performance indicators have been adopted for these programs.\footnote{114}{Id.} Student performance at alternative programs is not attributed to the home schools.\footnote{115}{Id.} “[W]here high stakes testing can determine whether school performance is rated as exemplary or academically unacceptable, removing potentially low-scoring students from campus accountability data may be seen by some administrators as an opportunity to boost their school's performance ratings.”\footnote{116}{Id. at 546.} As the Advancement Project recently recognized, “Despite substantial evidence of damage caused by zero tolerance and high-stakes testing and overwhelming body of research supporting alternative approaches, these policies have spread like wildfire due to their easy political appeal.”\footnote{117}{See ADVANCEMENT PROJECT, \textit{supra} note 41., at 4.}

While marginalizing low-performing students may, in the immediate future, seem like the rational, utility-maximizing choice, criminalizing students and placing them in inadequate disciplinary alternative education programs ultimately proves to be inefficient for society at large. Students who are placed in inferior educational programs are more likely to be arrested

\begin{footnotes}
\item Id.
\item Id. at 545.
\item Id.
\item Id.
\item Id. at 546.
\item See ADVANCEMENT PROJECT, \textit{supra} note 41., at 4.
\end{footnotes}
and to have future criminal involvement.\textsuperscript{118} The costs associated with investing in education are cheaper than the costs associated with incarceration.\textsuperscript{119} While the initial transaction costs of student exclusion appear to be minimal, the future costs are greater. Marginalization is efficient for the school, it is inefficient for society; policymakers should ensure that policies are in place to address this market failure.

One study found that there was a significant social return in investing in schooling and promoting policies that ensure educational attainment.\textsuperscript{120} It found that by increasing the high school graduation rate by one percent, this country would save as much as $1.4 billion per year in reduced costs stemming from crime.\textsuperscript{121} This externality amounts to $1,170-2100 per additional high school graduate and equals a 14-26 private return in schooling.\textsuperscript{122}

Although rational choice theory presumes that individuals act rationally, their decision-making is “limited by the information they receive and by their own ability to process and communicate this information.”\textsuperscript{123} The future costs of incarcerating that student eventually will outweigh the savings from displacement. The benefits of a proper education are not immediately realized, hampering efforts to improve the education of underclass students. While the benefits of an educated population are appreciated, in principle, those benefits are not fully realized until

\textsuperscript{118} See ADVANCEMENT PROJECT, \textit{supra} note 27, at 5 (explaining that classroom exclusion contribute to student drop-out).


\textsuperscript{120} Lochner & Moretti, \textit{supra} note 119, at 180-82.

\textsuperscript{121} \textit{Id.} at 157.

\textsuperscript{122} \textit{Id.} at 182.

the minority population reaches the age where they can enter the work force. In contrast, the benefits of criminalization and ostracization are immediately realized – the student is immediately displaced from the school and the costs of educating them student are deferred. Policymakers and the public should be aware of the long-term costs of marginalization and overly punitive approaches to ensure that effective policies are being adopted.

By understanding some of these incentives, policymakers can be conscious of their own decision-making biases, and advocates can gain a deeper appreciation of the complexity of student push-out. The focus should remain on the long-term costs of criminalization, which include the economic costs of incarceration as well as the social costs in having a less educated population. When viewing criminalization from this perspective, investing in education, and discouraging undue criminalization, creates the most efficient outcome. There are also moral and value based arguments that support providing a proper education for all students.124

III. Legal Concerns: Holding Alternative Programs Accountable

While the proliferation of alternative education programs is a manifestation of the structural issues discussed above, several legal issues are relevant in understanding alternative education. These issues include the quality of the education provided in alternative education, the referral of students to alternative education, protection of the right to be free from

---

124 One can turn to Kant for support that there is a human rights-based argument for providing adequate education to all students. Additionally, one scholar has proposed that Judeo-Christian principles, as articulated in Genesis of the Bible, require that the “community’s laws ensure that each individual enjoys a reasonable opportunity to reach his or her potential . . . [which includes] adequate education and job training.” Susan Pace Hamill, A Moral Perspective on the Role of Education in Sustaining the Middle Class, 24 NOTRE DAME J.L. ETHICS & PUB. POL’Y 309 (2010).
unreasonable searches and seizures, and the right to due process prior to the meting out of
discipline.125

A. The Quality of the Education at Alternative Programs

Providing access to quality education has been a priority for state governments in the
United States, yet the quality of education at many alternative programs is seriously lacking. In
alternative programs in Mississippi, school staffers engaged in inappropriate behavior with
students, punishment was overemphasized, and there was very little accountable for alternative
programs.126 The teachers at alternative programs are often less qualified than those in
mainstream schools. Alternative programs frequently serve as a “dumping ground for tired or
ineffective teachers.”127 Alternative programs often do not provide quality education and
frequently have dismal graduation rates.128

Nonetheless, forty state constitutions mandate that children be provided with a K-12
grade education.129 The state constitutions of Florida, Texas, and Virginia provide detailed

125 This is not a comprehensive list of the types of legal issues that may arise in the alternative education context. There may legal issues pertaining to the provision of special education services, equal protection claims concerning racially discriminatory practices, and substantive due process claims that are not addressed in this article.

126 See AM. CIVIL LIBERTIES UNION, supra note 6, at 27-28.


128 See, e.g., Dave Murray, Alternative school graduation rates cited by Grand Rapids Public Schools appear out of date, The Grand Rapids Press, June 10, 2009 (noting that the average graduation rate for alternative programs is 33 percent, compared to 76 percent for the four mainstream high schools in Grand Rapids); Julie Hubbard, Bibb to Start New High School disciplinary Program, Macon Telegraph (GA), May 15, 2009 (recognizing that there was a 34 percent graduation rate at the alternative education program for the 2009 school year, and that nearly half of program’s students have been through the program at least twice); Joe Smydo, High School for Problem Students Get Mixed Reviews, Pittsburgh Post-Gazette, March 23, 2009 (noting that of the ‘thousands’ of students who had attended private for-profit alternative program in Pittsburgh, only a fraction “successfully completed [the] program, went back to their home school, and proceeded to graduation.”).

requirements concerning the adequacy of the education provided.  

Forty-eight states have some form of legislation relating to the provision of alternative education: twenty-six require the provision of alternative education for students who are expelled from mainstream schools; eighteen states permit discretionary assignment to alternative education; twenty-eight states have policies stating that the curriculum should consist of the core curriculum or standards adopted by the state; and twelve states requires that social services be provided to students in alternative schools. State constitutional provisions may be an avenue for challenging the adequacy of the education in alternative education programs.

Policymakers should ensure that alternative programs comply with state constitutional and statutory obligations. Students in alternative programs often require additional attention and additional social services. Alternative schools should provide “small class sizes, personalized attention, [and] support services [to] create environments in which. . .youth may be more comfortable and may mean that youth pursue their education further as a result.”

Thus, when assessing the adequacy of the education at alternative programs, the particular needs of the student body should be considered.

130 See Fla. Const. art. IX, § 1(a); Tex. Const. art. VII, § 3(b); Va. Const. art. VIII, § 3.


132 Id.

133 Id. at 11.

134 Id.

B. Referral of Students to Alternative Education

The process for referring students to alternative education should comport with procedural due process requirements.\(^{136}\) While seventy-four percent of school districts allow alternative education students to return to mainstream schools, twenty-four percent allow only some students to return, and one percent allow none to return.\(^{137}\) Consequently, ensuring that students receive a fair process prior to what may become a permanent assignment to alternative education is critical.

The Due Process Clause of the Fourteenth Amendment to the Constitution prohibits deprivations of “life, liberty, or property” without due process of the law. Procedural due process provides that there must be notice and an opportunity to be heard prior to a deprivation of a constitutionally-protected life, liberty, or property right.\(^{138}\) There are arguably two constitutionally-protected interests at stake when students are referred to alternative education programs: (1) a property interest in one’s education, and (2) a liberty interest in one’s reputation. Thus, prior to referral to alternative education programs, school officials should provide students with adequate notice and a meaningful opportunity to be heard.\(^{139}\)

Because forty constitutions provide an entitlement to education, most students have a strong claim to a constitutionally-protected property interest in the education that they receive. If

---

\(^{136}\) In *Goss v. Lopez*, the Supreme Court made it clear that students who are disciplined must be afforded due process. 419 U.S. 565, 574-75 (1975).


\(^{139}\) Although the school environment may require some limitations on students’ rights, the Supreme Court has made it clear that students do retain their constitutional rights at school. See, e.g., *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969) (“It can hardly be argued that … students … shed their constitutional rights . . . at the schoolhouse gate.”).
they are deprived of the right to an education, they must receive due process. However, there are several difficulties with this theory in the alternative school context. Several courts have held that there is no right to choose one’s school and that referral to alternative education in and of itself does not amount to a deprivation of the property right to education – it is merely an issue of school choice. Other courts have suggested that litigants must prove that the alternative education is so inferior as to be tantamount to expulsion from the school system before there is a constitutionally-protected property interest at stake.

However, students are also entitled to pre-referral due process prior to referral to alternative education because they have a liberty interest in their reputations, and referral to alternative programs compromises this interest. In *Goss v. Lopez*, the United States Supreme Court stated disciplinary expulsions and suspensions for up to 10 days deprive students of a liberty interest in their reputation because “those charges could seriously damage the students’ standing with their fellow pupils and their teachers as well as interfere with later opportunities for higher education and employment.” Referrals to alternative education programs are disciplinary suspensions and expulsions from mainstream schools that frequently last for more than 10 days. Alternative education students are entitled to due process upon referral to alternative education because their reputations are affected by their placement in alternative programs.

---


141 See C.B. v. Driscoll, 82 F.3d 383, 389 n.5 (11th Cir. 1996) (acknowledging that there is an open question concerning whether there is a deprivation of a constitutionally protected property right upon referral to alternative education when students argue that the “alternative school was ‘so inferior [to previous school as] to amount to an expulsion from the educational system.’”).

After establishing that students are owed due process, the next inquiry is whether the placement in the alternative programs amounts to a deprivation of due process. Although the Supreme Court held that short term suspensions require, “that the student be given oral or written notice of the charges against him and, if he denies them, an explanation of the evidence the authorities have and an opportunity to present his side of the story,” it acknowledged that “longer suspensions or expulsions for the remainder of the school term, or permanently, may require more formal procedures.” Because referrals to alternative education are often long term suspensions or permanent expulsions, proceedings prior to referral to alternative education should be more formalized.

Pre-referral procedural process is important because minority children and students with disabilities are overrepresented in alternative programs around the nation. School districts should adopt safeguards for ensuring that vulnerable students are not funneled into alternative programs in a “conveyor belt” fashion. Pre-referral process measures should attempt to eliminate disparities in the referral process, ensure that referrals are meted out in a fair manner, and guarantee that students have their educational needs met at the alternative program. There should also be particular attention to the re-segregative effects of referring minority student to alternative programs and measures for ensuring that alternative education is not used as a vehicle

143 Id.
144 Id.
for segregating school districts. 146 Too often, alternative programs are considered, when more appropriate approached can be adopted. 147

Alternative school students are also at risk of being deprived of their procedural due process rights when being disciplined by school administrators. Harsh zero tolerance policies, coupled with an alternative program that takes a firmly punitive approach, may lead to unnecessary classroom exclusion, and students of color are typically the students who bear the brunt of these punitive policies. 148

Students are completely deprived of their education when they are suspended from classroom instruction and thus suffer a deprivation of the right to education. To ensure that students’ due process rights are protected, there should be a formal protocol for the meting out of discipline that gives students and parents a meaningful opportunity to be heard and notice prior to discipline, especially when long-term disciplinary measures are at issue. Research has shown that non-punitive approaches to discipline, which do not involve classroom exclusion, often are more effective than punitive approaches like suspensions. 149 School administrators should encourage a school environment that adopts these non-punitive approaches. There has been

---

146 See Reyes, supra note 27, at 539 (arguing that alternative education can “defeat public education's goal of exposing students to a diverse student body . . . because AEPs segregate at-risk students-- usually Latinos, African Americans, Native Americans, and poor Whites--from the rest of the student population”).

147 One school district considered placing a five-year-old Native American student in alternative education because his parents would not cut his hair because of their religious beliefs, but did not adopt this course because he was too young for the alternative education programs. http://www.houstonpress.com/2008-07-10/news/a-native-american-family-fights-against-hair-length-rules/. The consideration of alternative education as an option is itself problematic.

148 ADVANCEMENT PROJECT, DERAILED: THE SCHOOLHOUSE TO JAILHOUSE TRACK 18-20, 23 (2003) (documenting disparities by race and special education status in school-based arrests in select jurisdictions)

widespread support for positive behavior supports and interventions as an alternative to zero tolerance policies and other exclusionary practices.

C. Searches and Seizures

Because disciplinary alternative programs often serve at-risk populations, school administrators frequently adopt aggressive search protocols. At some disciplinary alternative schools, administrators have gone a step further and adopted invasive search procedures that infringe upon students’ privacy and dignity.

While maintaining a safe environment is critical and important in preserving the educational climate of alternative programs, school officials should not do so in a manner that infringes upon students’ dignity. The Supreme Court recently acknowledged that, “[w]hen the categorically extreme intrusiveness of a search down to the body of an adolescent requires some justification in suspected facts, general background possibilities fall short; a reasonable search that extensive call for suspicion that it will pay off.”150 Consequently, “general background possibilities” should not be used to justify unjustified physically invasive upon the student body at alternative programs.151 Searches at alternative schools should not require students to be subjected to unwarranted daily intrusions into their personal space.152 Although students at alternative education programs may have disciplinary histories, they are still afforded basic constitutional protections and should be treated like students, not criminals. At the very least, the searches at these programs should comport with constitutional requirements.


151 Id.

152 For a detailed discussion on the impact of the Supreme Court’s decision in this case on school discipline and the harmful effects of invasive searches on students, see Dennis D. Parker, Discipline in Schools After Safford Unified School District #1 v. Redding, 54 N.Y. L. Rev. 1023.
The Fourth Amendment secures “[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures. . .” by federal government officials. The Fourteenth Amendment extends this constitutional guarantee to searches and seizures by state officers,153 which include public school officials.154 The constitutionality of a search is measured by its “reasonableness.” The reasonableness test is “judged by balancing [the search’s] intrusion on the individual’s Fourth Amendment interests against [the search’s] promotion of legitimate governmental interests.”155 To comply with reasonableness, a warrant supported with probable is generally required. However, “when special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable,” a search that is not supported by probable cause may nonetheless be reasonable. “Special needs” exist in the school context.156

Two factors determine the reasonableness of a search in the school setting: 1) whether the search was justified at its inception; and 2) whether the search “was reasonably related in scope to the circumstance which justified the interference in the first place.”157 A search is “justified at its inception” when there are grounds for suspecting that the search will yield evidence that the student is violating school rules or violating the law.158 For example, when a school official receives a direct tip that a student is in possession of contraband, there may be

157 See T.L.O., 468 U.S. at 341 (citing Terry v. Ohio, 392 U.S. 1, 20 (1968)).
reasonable grounds for a search.\textsuperscript{159} The requirement that schools have reasonable grounds for suspicion is subject to a “very limited exception.”\textsuperscript{160} A search of public school students “may be conducted without individualized suspicion when ‘the privacy interests implicated by the search are minimal, and . . . an important governmental interest furthered by the intrusion would be placed in jeopardy by a requirement of individualized suspicion.’”\textsuperscript{161}

The first factor when determining the reasonableness of a suspicionless search is “the nature of the privacy interest upon which the search . . . intrudes.”\textsuperscript{162} The teachers and administrators at public schools stand in \textit{loco parentis} over the schoolchildren entrusted to them.\textsuperscript{163} “A student’s privacy interest is limited in a public school environment where the State is responsible for maintaining discipline, health, and safety.”\textsuperscript{164} The nature of the privacy interests of schoolchildren is reduced because of the school’s custodial role. “However, there is no question that schoolchildren retain a legitimate expectation of privacy in their persons, including an expectation that one should be able to avoid the unwanted exposure of one’s body, especially one’s ‘private parts.’”\textsuperscript{165}

The next factor in determining the reasonableness of suspicionless searches in the school setting is “the intrusion that is complained of.”\textsuperscript{166} The Supreme Court has held that suspicionless

\textsuperscript{159} See C.B. v. Driscoll, 82 F.3d 383, 388 (11th Cir.1996).

\textsuperscript{160} Thomas v. Roberts, 261 F.3d 1160, 1167 (11th Cir.2001), vacated, 536 U.S. 953 (2002), reinstated, 323 F.3d 950 (11th Cir.2003) (Thomas I).

\textsuperscript{161} Id. (quoting Skinner v. Ry. Labor Executives’ Ass’n., 489 U.S. 602, 624 (1989)).


\textsuperscript{163} See id.


\textsuperscript{165} See Thomas I, 261 F.3d at 1168 (citing Justice v. City of Peachtree City, 961 F.2d 188, 191 (11th Cir.1992)).

drug testing through urinalysis is not invasive because: it is not physically intrusive; it does not disclose information concerning the state of the subject’s body; and the results are disclosed only to a limited class of school personnel.\textsuperscript{167} The physical invasiveness of some alternative school searches distinguish them from this class of searches.

The final factor in determining the reasonableness of a suspicionless search in the school context is “the nature and immediacy of the governmental concern at issue. . . .”\textsuperscript{168} The Supreme Court has recognized, “Deterring drug use by our Nation's schoolchildren is at least as important as enhancing efficient enforcement of the Nation's laws against the importation of drugs. . . .”

\textit{Id.} at 661.

These legal precedents provide limits on the types of searches that occur in alternative education programs and suggest that school officials should avoid physically intrusive, suspicionless searches. General searches are frequently ineffective, delay the school day, and are inefficient.\textsuperscript{169} They affect school climate and create an atmosphere of criminalization. Students cannot be expected to be enthusiastic members of an educational community when they are treated like criminals the minute they walk through the school gate doors. Building trust with students and encouraging a cooperative school community is a better method for promoting student safety.\textsuperscript{170} Where students feel like they can trust school officials, they may be more

\textsuperscript{167} \textit{See id.} at 663-65; \textit{Earls}, 535 U.S. at 830. The searches in \textit{Veronia} and \textit{Earls} were limited to students who voluntarily subjected themselves to additional privacy invasion by engaging in athletic and extracurricular activities. Justice Breyer’s concurring opinion in \textit{Earls} noted, “the testing program avoids subjecting the entire school to testing.” \textit{Board of Education of Independent School District No. 92 v. Earls}, 535 U.S. 822, 841 (2002) (concurring).

\textsuperscript{168} \textit{Id.} at 660.


willing to cooperate with school officials to prevent violent incidents. Instead of investing in more metal detectors for school, there should be more money invested in restoring students’ confidence in their faculty and adopting positive supports that improve school climate. While alternative students are an at-risk population, they should be able to begin their school days with their dignity intact.

IV. Recommendations

Although a punitive approach may be a politically attractive option, policymakers should adopt an approach that promotes true efficiency and fights against the retrenchment of a permanent underclass in American society while violating the rights of schoolchildren. The long-term costs of grooming students for prison outweigh the perceived benefits of marginalization. Parents, advocates, policymakers, and politicians should be committed to disincentivizing the marginalization of underclass students.

Punitive approaches should be rejected because research has shown that positive behavior supports are an effective method for disciplining student misbehavior. Positive behavior supports is a model of school discipline rooted in the creation of positive interactions between administrators and students. It requires the school to make a commitment to educating its staff about promoting positive interactions with students. It has been shown to reduce student


misconduct and promote positive relationships. There should be a greater awareness of the negative externalities associated with increased emphasis on high stakes tests, coupled with efforts to encourage student engagement in the classroom. Federal programs should provide encouragement schools to maintain their students bodies instead creating incentives for displacing low-performing students. While accountability is a noble aim, it should not incentivize the marginalization low-performing students.

Further, there must be safeguards to ensure that students’ constitutional rights are protected while they are at school. When students have interactions with figures of authority that they view as illegitimate, their future interactions with law enforcement, employers, and other figures of authority may be negatively impacted.173 “Legal socialization is the internalization of law, rules, and agreements among members of society, and the legitimacy of authority to deal fairly with citizens who violate society’s rules. What adolescents see and experience through interactions with police, courts, and other legal actors shapes their perceptions of the relation between individuals and society. The effects of legal sanctions and punishments contribute to trajectories of legal socialization.”174 Illegitimate actions foster negative attitudes about law and society in general.175 These attitudes are brought back to their communities and shape their future conduct. Ensuring that these students have positive interactions provides benefits for their communities and the students themselves. If these students feel like their rights are insignificant, or that society has turned their backs on them, they will turn in turn their backs on society.

173 See Jeffrey Fagan & Alex R. Piquero, Rational Choice and Developmental Influences on Recidivism Among Adolescent Felony Offenders, 4 J. OF EMPIRICAL LEGAL STUDIES, 715, 719 (2007) (“An important factor influencing the development of adults’ views about legitimacy are their judgments about the fairness of the manner in which the police and courts exercise their authority. Such procedural justice judgments are founds to both shape reactions to personal experiences with legal authorities.”).

174 Id. at 718.

175 Id. at 719 (noting that “experiences with law and legal actors will shape trajectories of legal socialization”).
Lack of accountability and transparency is also a problem in many alternative programs in the country.\textsuperscript{176} The need to ensure that disciplinary alternative programs are accountable and respect students’ rights is critical in light of their increasing presence across the country.\textsuperscript{177} Thirty-nine percent of school districts report having alternative programs for “at-risk” students during the 2000-2001 school year.\textsuperscript{178} In total, 1.3 percent\textsuperscript{179} of all public school students, or 612,900\textsuperscript{180} students were enrolled in alternative programs during that school year. Without proper data collection, the effectiveness of alternative programs cannot be measured, leading to confusion as to whether changes should be made to the program and the general efficacy of alternative programs.\textsuperscript{181} Alternative programs cannot be held accountable without appropriate reporting requirements and transparency.

School districts should maintain detailed information on how students are being sent to alternative programs and the students who are being sent. It is nearly impossible to hold a program accountable when there is no relevant data on its administration. For example, details on the race, age, and sex of students who are being referred to alternative programs may alert

\begin{itemize}
\item \textsuperscript{176} See UNIVERSITY OF MINNESOTA, supra note 41 at 6 (noting that in response to a survey of state directors of special education, many respondents stated that alternative programs often lacked appropriate accountability measures and noted that there is a “need for clearly documented measures of effectiveness and student success”);
\item \textsuperscript{177} see also ELIZABETH G. HILL, LEGISLATIVE ANALYST’S OFFICE, IMPROVING ALTERNATIVE EDUCATION IN CALIFORNIA 13 (2007) (recognizing the need for increased data collection on California’s alternative education programs).
\item \textsuperscript{178} AMERICAN INSTITUTES FOR RESEARCH, STUDY OF EFFECTIVE ALTERNATIVE EDUCATION PROGRAMS: FINAL GRANT REPORT 1 (2006) (noting that there is an increasing demand for alternative education programs).
\item \textsuperscript{179} Id. at 34.
\item \textsuperscript{180} Id. at 33.
\item \textsuperscript{181} See AMERICAN INSTITUTES FOR RESEARCH, STUDY OF EFFECTIVE ALTERNATIVE EDUCATION PROGRAMS: FINAL GRANT REPORT 3 (2006) (noting that without information about program effectiveness “we too often make a bad situation worse by pushing students with disabilities or those who do not ‘fit’ in traditional systems our of schools without a diploma or the necessary skills to lead productive, fulfilling lives”)
\end{itemize}
school administrators and advocates to the disproportionate treatment of certain segments of the student population. Community members cannot hold local boards accountable, and school administrators cannot remedy disparities without appropriate accountability and transparency measures. Additionally, there should be legislation requiring public access to the curriculum in alternative programs. More than a third of states have no statutory language concerning what curriculum should be adopted in alternative programs, creating confusion about what curriculum should be administered.  

Advocacy by community groups, the formation of parent coalitions, the launching of administrative complaints with the school board, public education, and litigation are all options in improving the conditions in alternative programs. Local support for the provision of quality alternative education is critical. When litigation appears to be the appropriate course of action, litigators should not only consider whether state court or federal court should be venue for the lawsuit, but also pursue administrative forms of relief with local boards of education or local review boards. Filing public records requests is also a method for holding alternative programs accountable. Policymakers should resist the temptation to foster student push-out and become educated in the inefficiencies of overcriminalization. There must also be greater public education and awareness that student marginalization and inadequate alternative schooling bears costs on everyone in society. If the United States is to become a true meritocracy, it is critical that structural barriers to educational quality be eliminated.
