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## DO NOT ATTEMPT RESUSCITATION ORDERS IN OUR SCHOOLS: THE UNTHINKABLE ETHICAL DILEMMA FOR EDUCATORS

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For decades upon decades, we have used the short hand of the three “R”s, “Reading, wRiting, and Rithmetic”, for school. However, as noted by a journalist’s article title, “Reading, Writing, Do Not Resuscitate”,<sup>1</sup> with growing, and disconcerting frequency, a fourth “R” has been added, resuscitation— and with it is entailed the ethical dilemma of whether or not to resuscitate.

As described in that article, eight-year-old Katie, a second grader at Laremont School in Lake, County Illinois, “keenly enjoyed her trips to school.”<sup>2</sup> Before being rolled onto her school bus in the morning, Katie’s mother, Beth, checked to make sure that she had her bright yellow paper stating in bold letters “Do Not Resuscitate.”<sup>3</sup> Katie carried this notice with her everywhere she went, even to school. Katie was deprived of oxygen before birth. She couldn’t walk, talk or do things for herself. She was fed through a tube in her stomach and was susceptible to infections, violent choking, and coughing spasms.<sup>4</sup> Her health was taking a turn for the worse. While Do Not Attempt Resuscitation (DNAR) orders are common in hospitals and nursing homes, they are not common in schools. Katie’s mother obtained a legal DNAR and presented it to the school district. After two-years, school officials agreed to honor the DNAR directives.<sup>5</sup>

One day in November, Katie stopped breathing in class. The teacher picked her up, as allowed by the DNAR, and soon Katie started breathing on her own.<sup>6</sup> No attempt at resuscitation was made. The DNAR allowed Katie to be moved

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<sup>1</sup> See Jeff Long, *Reading, Writing, Do Not Resuscitate*, L.A. TIMES (Mar. 2, 2008), <http://articles.latimes.com/2008/mar/02/news/adna-dnr2>.

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

to the nurse's office, the paramedics would be called, the school nurse could suction Katie's breathing tube, oxygen could be provided via a mask, and she could be positioned so as to make her breathing easier. But cardiopulmonary resuscitation could not be performed without her parents' permission.<sup>7</sup>

This story was written in 2008. Katie died at home on May 23, 2009 from complications from her illness.<sup>8</sup> However, we know that there are more students like Katie, and the numbers are growing, who come to school with chronic and terminal illnesses.<sup>9</sup> For some of these children, their parents have chosen to limit resuscitative efforts.<sup>10</sup> As a result, school officials will be confronted with DNAR orders similar to Katie's.

The National School Board Association recognizes the legal and practical considerations of this highly complex emotional area.<sup>11</sup> They raise the question, given that the law on DNARs in schools is unsettled, "how or if [schools] should honor a student's DNR order."<sup>12</sup>

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<sup>7</sup> See Long, *supra* n.1.

<sup>8</sup> Jessica Adelman, *The School-Based No-Not-Resuscitate-Order*, 13 DEPAUL J. HEALTH CARE L. 197, 197 (2010-11).

<sup>9</sup> American Academy of Pediatrics, Committee on School Health and Committee on Bioethics, *Do Not Resuscitate Orders in Schools*, 105 PEDIATRICS (April 2000) available at <http://pediatrics.aappublications.org/content/105/4/878>.

<sup>10</sup> *Id.*

<sup>11</sup> Jennifer M. Deutch, Lori G. Martin, & Jennifer A. Mueller, *Managing Students with Health Issues: 504 Plans, DNR Orders, and Contagious Diseases*, NAT'L SCH. BRD. ASSOC. 1, 16 (2015) available at [https://www.nsba.org/sites/default/files/file/16\\_FINAL\\_Deutch\\_Martin\\_Managing\\_Students\\_with\\_Health\\_Issues\\_Paper.pdf](https://www.nsba.org/sites/default/files/file/16_FINAL_Deutch_Martin_Managing_Students_with_Health_Issues_Paper.pdf).

<sup>12</sup> *Id.*

Educators cathect their relationship with their students.<sup>13</sup> Education is a helping profession. Nel Noddings asserts that education in its widest sense pursues an ethic of caring in society.<sup>14</sup> Educators take pride in their professional commitment to their students. Their codes of ethics<sup>15</sup> place a student's interests at the core of their professional service with educators acting *in loco parentis*.<sup>16</sup> Educators owe a duty to their students to take reasonable steps to protect them from foreseeable harm.<sup>17</sup> But what happens when educators receive a medical directive that requires that they do not attempt to resuscitate one of their students; do they allow the student to die? How do they reconcile this ethical dilemma of serving the best interests of one of their students who has a legal instrument

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<sup>13</sup> See DAN C. LORTIE, *SCHOOL TEACHER: A SOCIOLOGICAL STUDY* (2 ed., 2002).

<sup>14</sup> NEL NODDINGS, *THE CHALLENGE TO CARE IN SCHOOLS: AN ALTERNATIVE APPROACH TO EDUCATION* (1992).

<sup>15</sup> For examples of educator codes of ethics, see <http://www.nea.org/aboutnea/code.html>; <https://www.schoolcounselor.org/asca/media/asca/Resource%20Center/Legal%20and%20Ethical%20Issues/Sample%20Documents/EthicalStandards2010.pdf>; <http://www.aasa.org/content.aspx?id=1390>.

<sup>16</sup> The *in loco parentis* doctrine was articulated in 1769 by Sir William Blackstone. He asserted that a portion of the parental authority was delegated to the schoolmaster. Through compulsory education laws, state statutes, and court cases, *in loco parentis* requires that the educator act in the place of the parent when the child has been placed into the care and custody of the school. Todd A. DeMitchell, *The Duty to Protect: Blackstone's Doctrine of In Loco Parentis: A Lens for Viewing the Sexual Abuse of Students*, 202 BU EDUC. & L. J. 17, 18-19 (2002).

<sup>17</sup> See TODD A. DEMITCHELL, *NEGLIGENCE: WHAT PRINCIPALS NEED TO KNOW ABOUT AVOIDING LIABILITY* 25 (2006) (writing, "Since teachers stand *in loco parentis* (custodial and tutelary responsibilities), they must take affirmative actions in the face of foreseeable risks to protect students.").

initiated by their parents that requires that we refrain from taking action? Teresa Savage refers to this as a problem with “the moral agency of school personnel in enacting the DNAR order.”<sup>18</sup> This is compounded by the doctrine of *in loco parentis*. The educator and the school do not replace the parents; they act in the place of parents who are not at school. It can be argued that *in loco parentis* requires that the school and its teachers and nurses, acting in the place of the parent must follow the wishes of the parent in this non-curricular aspect of a child’s time at school.<sup>19</sup>

The implementation of a DNAR in a school, which is already complicated, is further compounded by the “general lack of medical committees to weigh in on the process of implementation, which are available in the medical setting.”<sup>20</sup> Essentially, schools, unlike hospitals, are not equipped or staffed to address this issue. Yet, they must respond to a lawful directive.

The stakes are unquestionably high and it is an unimaginably difficult decision for educators, who dedicate themselves to enriching the lives and expanding the future opportunities of their students: a terminally ill child could be saved by emergency care but left physically or mentally impaired — a greater burden for the family and child. And the results are, of course, irrevocable; once the decision is made to honor a DNAR order, you cannot undo the decision not to resuscitate. “The issues are certainly troubling, with no easy answers. This

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<sup>18</sup> Teresa Savage, *DNAR in Schools: Questions and Concerns*, 5 AMER. J. BIOETHICS 72, 72 (2005).

<sup>19</sup> This is not an assertion that parents through *in loco parentis* or under the asserted doctrine of substantive due process, can compel the school to meet their wishes on issues of curriculum offerings and instructional strategies. For a discussion of the tension between parents and the State over the curriculum that students/children receive in public schools, see Todd A. DeMitchell & Joseph J. Onosko, *A Parent’s Child and the state’s Future Citizen: Judicial and Legislative Responses to the Tension Over the Right to Direct an Education*, 22 S. CAL. INTERDIS. L. J. 591 (2013).

<sup>20</sup> See Deutch et al, *supra* note 11, at 17.

literal life and death decision is full of heartbreak for all involved.”<sup>21</sup>

This article explores the dilemma that educators face when confronted with a Do Not Attempt Resuscitation (DNAR) order. Part 1 explores what is a DNAR order and how prevalent it is in schools. The second part discusses medically fragile students who attend school and the relationship of special education to DNARs. Section three explores school responses to DNARs, including state guidelines. The duty that educators owe to their students is the focus of the fourth section. The fifth part follows up with a discussion of the legal responses to a DNAR. The next section addresses the ethical dilemma that confronts educators of students with these orders. The article concludes with a summation of ethical actions.

## I. WHAT IS DNAR?

Closed-chest cardiac massage was first used in 1960 as an effective means of resuscitating victims of cardiac arrest.<sup>22</sup> The practice soon became known as cardiopulmonary resuscitation (CPR). Twenty years later studies showed that the survival rate for patients [defined by the American Heart Association as living to discharge from the hospital,]<sup>23</sup> undergoing CPR was

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<sup>21</sup> Todd A. DeMitchell & Winston Thompson, *When a parent directs a child not be resuscitated, what should educators do?* THE CONVERSATION (May 2, 2016) available at <https://theconversation.com/when-a-parent-directs-a-child-not-be-resuscitated-what-should-educators-do-55556>.

<sup>22</sup> Jacqueline K. Yuen, M. Carrington, Reid, & Michael D. Fetters, *Hospital Do-Not-Resuscitate Orders: Why Have They Failed and How to Fix Them*, 26 J. GEN. INTERN. MED. 791 (2011) available at <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC3138592/>.

<sup>23</sup> *Heart Disease and Stroke Statistics – 2013 Update online on December 12, 2012 Statistical Update*, CPR & FIRST AID: EMERGENCY AND CARDIO. CARE, [http://cpr.heart.org/AHA/ECC/CPRAndECC/General/UCM\\_477263\\_Cardiac-Arrest-Statistics.jsp](http://cpr.heart.org/AHA/ECC/CPRAndECC/General/UCM_477263_Cardiac-Arrest-Statistics.jsp).



only 10-15%.<sup>24</sup> Repeated resuscitations, while prolonging life, have inflicted agony on the terminally ill and offered little improvement to the prospect of recovery. “[P]atients who were successfully resuscitated often undergo aggressive treatment in the intensive care unit and suffer complications including rib fractures, permanent neurological deficits, and impaired functional status.”<sup>25</sup> The recognition that CPR “could cause more harm than benefit for some patients” led to the implementation of DNAR orders.<sup>26</sup>

As medical and technological advances prolong life<sup>27</sup> they also present challenges because “longer lives are not necessarily healthier lives.”<sup>28</sup> The American Heart Association defines survival rate by those individuals who live to discharge from the hospital. A physician writes,

One problem with medicine today, is that it is too good. People live longer than ever before, and many patients are able to recover from deadly illnesses the world knew nothing about when my grandparents were children. Doctors

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<sup>24</sup> Yuen, et al, *supra* note 22. This low survival statistic stands in sharp contrast to the perception of the outcome of CPR on television programs, *Chicago Hope*, *ER*, & *Rescue 911*, in which 67% of the individuals survive. Susan Diem et al., *Cardiopulmonary Resuscitation on Television — Miracles and Misinformation*, 334 N. ENGL. J. MED. 1578 (1996) available at <http://www.nejm.org/doi/full/10.1056/NEJM199606133342406#t=article>.

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> News Release, WHO: Number of People Over 60 Years Set to Trouble by 2050; Major Societal Changes Required (Sept. 15, 2015) <http://www.who.int/mediacentre/news/releases/2015/older-persons-day/en/>.

<sup>28</sup> *Id.*

can keep people alive in ways once thought impossible.<sup>29</sup>

In response to the tension of extending lives and securing a quality of life, advance directives were developed. An advance directive informs a physician of the kind of care you would like to have if you become unable to make decisions regarding your medical treatment, as in the case of coma or severe brain damage. An example of an advance directive is a living will, which comes into effect when you are terminally ill. A durable power of attorney is an advance directive that states whom you have directed to make health care decisions for you. It is activated when you are unable to make such decisions.<sup>30</sup> The third type of advanced directive is a do not attempt resuscitate order. A DNAR order directs that cardiopulmonary resuscitation (CPR) not be performed if your heart stops or you stop breathing.<sup>31</sup> A DNAR order does not mean the abandonment of all medical treatment or a decrease in the

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<sup>29</sup> Jacquelyn Corley, *Why Doctors Choose to Die Differently* (Feb. 17, 2016), <http://www.cnn.com/2016/02/17/opinions/doctors-choose-quality-of-life-over-length-corley/index.html>.

<sup>30</sup> American Academy of Family Physicians, *Advance Directive and Do Not Resuscitate Order* (Jan. 2012), available at <http://familydoctor.org/familydoctor/en/healthcare-management/end-of-life-issues/advance-directives-and-do-not-resuscitate-orders.html>.

<sup>31</sup> A DNAR order has also been called a DNR, Do Not Resuscitate order. “The terminology eventually changed to “do not attempt resuscitation” (DNAR), acknowledging that resuscitation is not always successful.” American Academy of Pediatrics, *supra* note 8. “The American Heart Association in 2005 moved from the traditional do not resuscitate (DNR) terminology to do not attempt resuscitation (DNAR). DNAR reduces the implication that resuscitation is likely and creates a better emotional environmental to explain what the order means.” Joseph L. Breault, *DNR, DNAR, or AND? Is Language Important*, 11 OCHSNER. J. 302, 302 (2011). For purposes of clarity, we use the term DNAR throughout the paper.

quality or intensity of care<sup>32</sup>, i.e., it does not “of itself, rescind the obligations of the health care team to provide quality care, such as suction, oxygen, and pain medication.”<sup>33</sup>

They are implemented within the context of palliative care.<sup>34</sup> A DNAR resides in the junction of taking every effort to prolong a life and attempting to safeguard the quality of the life preserved. As indicated above, repeated resuscitations, while prolonging life, often inflicted agony on the terminally ill and offered little improvement to the prospect of recovery; as Daniel Goldberg notes, DNAR orders arose out of the need to address such suffering.”<sup>35</sup> The American Academy of Pediatrics (AAP) believes that it is ethically acceptable to forego CPR for children and adolescents when it is unlikely to be successful or when the risks outweigh the benefits.<sup>36</sup>

Since minor children typically do not have the judgment to make decisions regarding their medical procedures, parents use a “best interests” argument to sign a DNR order.<sup>37</sup> This is

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<sup>32</sup> American Academy of Family Physicians, *supra* note 30. *See, also* Clarence H. Braddock III & Joanna Derbenwick, *Do Not Resuscitate (DNAR) Orders*, ETHICS IN MED. (UNIV. OF WASH. SCH. OF MED.) (2014) available at <https://depts.washington.edu/bioethx/topics/dnr.html>. “In the 1960s, CPR was initially performed by anesthesiologists on adults and children who suffered from *witnessed* cardiac arrest following *reversible* illnesses and injuries.” *Id.*

<sup>33</sup> *Id.*

<sup>34</sup> Committee on School Health and Committee on Bioethics, *supra* note 9.

<sup>35</sup> Daniel S. Goldberg, *The Ethics of DNR Orders as to Neonatal & Pediatric Patients: The Ethical Dimension of Communication*, 27 HOUSTON J. OF HEALTH L. AND POL’Y 57,60 (2006).

<sup>36</sup> Committee on School Health and Committee on Bioethics, *supra* note 9.

<sup>37</sup> For a discussion of what standard should be applied to enter an order to terminate life support measures and enter a DNR order on the medical chart of a dependent child in Delaware Family Service’s

“grounded on traditional parental values and responsibilities. Every parent has a ‘fundamental right’ to rear his or her own child.”<sup>38</sup> The United States Supreme Court in *Wisconsin v. Yoder* noted the long history of Western Civilization reflecting a strong tradition of parental concern for the nurture and upbringing of their children. “This primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition.”<sup>39</sup> New York’s Public Health Law, like many state laws, gives parents the right, although not an absolute right, to give consent for selecting medical treatments.<sup>40</sup> Consequently, parents may sign a DNR order for their minor children.

DNAR orders are difficult enough for medical professionals who practice at hospitals where immediate medical care is available and ethics boards provide direct supervision. Practices such as “slow codes,” “light blue codes,” or “Hollywood codes,” in which CPR efforts do not involve aggressive attempts to bring the patient back to life, have also developed in these contexts.<sup>41</sup> “A ‘slow code’ is an act performed by the health care providers that resembles CPR yet is not the full effort of resuscitation while a ‘show code’ is a short and vigorous resuscitation performed to benefit the family while

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custody, *see*, *Division of Family Services v. Trueslo*, 846 A.2d 256 (2000).

<sup>38</sup> *In the Matter of AB*, 768 N.Y. S.2d 256, 269 (S. Ct. 2003) (internal citations omitted).

<sup>39</sup> *Wis. v. Yoder*, 406 U.S. 205, 232 (1972).

<sup>40</sup> PUBLIC HEALTH L. § 2504(2).

<sup>41</sup> Goldberg, *supra* note 35 at 62. *See also Speak Up and Stay Alive: The Voice for Patient Safety, Slow Codes, Show Codes, & Hollywood Codes* (Aug. 10, 2015) available at <http://patientsafetyradio.com/slow-codes-show-codes-hollywood-codes/>.

minimizing harm to the patient.”<sup>42</sup> As such, it is a form of symbolic resuscitation that is ethically fraught.<sup>43</sup>

However, school personnel are generally not prepared or equipped to make these incremental decisions or to develop processes that guide responses to crises of this kind. For educators, there are no “slow codes,” light blue codes,” or “Hollywood codes” in which CPR efforts do not involve aggressive attempts to bring the student back to life. There is only one shade of Code Blue in the schools. They either perform CPR or they do not. When CPR could be performed, even the act of waiting for medical personnel carries important consequences.

## II. CHILDREN WITH SPECIAL HEALTHCARE NEEDS IN THE SCHOOLS

This challenge constitutes an emerging issue in our schools. Some children, who might otherwise have died at an earlier age, not only survive but also attend schools. There has been an increase in numbers of children with special health care needs (CSHCN) attending school.<sup>44</sup> In 2008, it was estimated by the U.S. Department of Health and Human Services that 60% of the 10.2 million under age 18 had their daily activities affected by their health conditions, impacting their education for those school aged children.<sup>45</sup> “Consequently, some children with chronic and terminal conditions are at risk of dying while attending school.”<sup>46</sup>

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<sup>42</sup> Braddock III & Derbenwick, *supra* note 32.

<sup>43</sup> *Id.*

<sup>44</sup> Lori S. Anderson, *Mothers of Children with Special Health Care Needs: Documenting the Experience of Their Children's Care in the School Setting*, 25 J. SCH. NURS. 342, 342 (Oct. 2009) available at <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC2764271/>.

<sup>45</sup> *Id.*

<sup>46</sup> American Academy of Pediatrics, *supra* note 9, at 878.

A medically fragile child has been defined as a child who is at “increased risk for a chronic physical, developmental, behavioral, or emotional condition and who also require[s] health and related services of a type or amount beyond that required by children generally.”<sup>47</sup> These medically fragile students, also referred to as children with medical complexity (CMC)<sup>48</sup>, with a terminal diagnosis often wish to live a “normal” and/or minimally encumbered life for as long as they can; this may include attending school with their friends. These students most often experience several functional difficulties such breathing, swallowing, and repeated or chronic pain. Almost 36% of schools have at least one medically fragile student,<sup>49</sup> receiving such services as catheterization, IV medications, stoma, tracheostomy and ventilator care.<sup>50</sup>

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<sup>47</sup> Katherine H. Burns, Patrick H. Casey, Robert E. Lyle, T.M. Lyle, T. Mac Bird, Jill J. Fussell, & James M. Robbins, *Increasing Prevalence of Medically Complex Children in US Hospitals*, 126 PEDIATRICS 638, 639 (Oct. 2010) available at <http://pediatrics.aappublications.org/content/126/4/638#ref-1>.

<sup>48</sup> Eyal Cohen, Dennis Z. Kuo, Rishi Agrawal, Jay G. Berry, Santi K.M. Bhagat, Tamar D. Simon, & Rajendu Srivastava, *Children With Medical Complexity: An Emerging Population for Clinical and Research Initiatives*, 127 PEDIATRICS 529 (Mar. 2011) available at <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC3387912/> (writing, children with special health care needs includes “children who are the most medically fragile and have the most intensive health care needs.”). *Id.*

<sup>49</sup> Board of Education, Independent School District, 271, Bloomington, Minn., Policy 518 § I *Do Not Resuscitate (DNR) Orders*, Adopted Nov. 26, 2001, available at [https://www.bloomington.k12.mn.us/sites/default/files/content\\_file\\_attachments/Pol%20518%20.pdf](https://www.bloomington.k12.mn.us/sites/default/files/content_file_attachments/Pol%20518%20.pdf).

<sup>50</sup> School Health Policies and Practices Study, *Results from the School Health Policies and Practices Study 2014*. U.S. DEP’T. OF HEALTH AND HUMAN SERV. & CENTERS FOR DISEASE CONTROL AND PREVENTION 89 (2015) available at

Some children come to school with severe medical conditions that require a heightened duty of care. For example, in *Cedar Rapids Community School District v. Garret F.*<sup>51</sup> the United States Supreme Court held that the Cedar Rapids Community School District must provide Garret with assistance with urinary bladder catheterization once a day, suctioning of his tracheostomy tube as needed, but at least once every six hours, and ambu bagging. He also needs someone who is familiar with his ventilator in the event there is a malfunction or electrical problem and someone who can perform emergency procedures in the event that he experiences autonomic hyperreflexia. A delay of ten minutes in suctioning the tracheostomy could result in death or further brain damage. The Court provided a clear statement, endorsing the rights of students with complex health needs to attend school. Justice Stevens wrote:

This case is about whether meaningful access to the public schools will be assured [i]t is undisputed that the services at issue must be provided if Garret is to remain in school. Under the statute, our precedent, and the purposes of the IDEA [Individuals with Disabilities Education Act], the District must fund such 'related services' in order to help guarantee that students like Garret are integrated into the public schools.<sup>52</sup>

Sewall and Balkman note that the confluence of special education rights of inclusion for identified students and medical technological advancements have placed students in schools

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[http://www.cdc.gov/healthyyouth/data/shpps/pdf/shpps-508-final\\_101315.pdf](http://www.cdc.gov/healthyyouth/data/shpps/pdf/shpps-508-final_101315.pdf).

<sup>51</sup> 526 U.S. 66 (1999).

<sup>52</sup> *Id.* at 79.

where DNR orders are brought to schools for implementation.<sup>53</sup> For example, some children with medically fragile conditions such as Duchenne muscular dystrophy, are at risk for heart failure and sudden death. However, the incidents of successful CPR outcomes is limited, exposing the patient to the risk of brain damage.<sup>54</sup>

### III. THE DNAR AND SCHOOL POLICIES

The American Association of Pediatrics (AAP) estimates that on any given day, 2,500 adolescents and 1,400 preadolescent children in the US are within six months of dying.<sup>55</sup> Furthermore, the AAP cited a Centers for Disease Control Prevention study that DNAR orders in schools increased from 29.7% in 2000, to 46.2% in 2006.<sup>56</sup> Increasingly, these children and adolescents with life-limiting conditions are attending schools in the communities where they live. This has raised issues of accommodating students' and families' health care preferences.<sup>57</sup>

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<sup>53</sup> Angela Maynard Sewall & Kathy Balkman, *DNR Orders and School Responsibility: New Legal Concerns and Questions*, 23 REMEDIAL AND SPECIAL EDU. 7 (2002).

<sup>54</sup> Garey Noritz & David J. Birnkrant, *Incidence and Outcomes of Cardiopulmonary Resuscitation in Patients with End-Stage Duchenne Muscular Dystrophy* (Oct. 2007) available at <http://journal.publications.chestnet.org/article.aspx?articleid=1093919>.

<sup>55</sup> AMERICAN ACADEMY OF PEDIATRICS, COUNCIL ON SCHOOL HEALTH AND COMMITTEE ON BIOETHICS, *Honoring Do-Not-Attempt-Resuscitation Request in Schools*, 125 PEDIATRICS (May 2010) available at <http://pediatrics.aappublications.org/content/125/5/1073>.

<sup>56</sup> *Id.*

<sup>57</sup> *Id.*



The Individuals with Disabilities Education Act of 1997 (IDEA) requires a “zero reject” of students<sup>58</sup> with a disability, including students within the category of Other Health Impairment.<sup>59</sup> Similarly, IDEA<sup>60</sup> and section 504 of the Rehabilitation Act of 1973<sup>61</sup> requires that schools educate students with a disability alongside their peers who do not have a recognized disability. While, schools under IDEA are not required to provide medical services<sup>62</sup> to special education students, they must provide supplementary and school health services and school nurse services.<sup>63</sup> Consequently, children

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<sup>58</sup> The Act assures in pertinent part, “that all children with disabilities have available to them ... a free appropriate public education which emphasizes special education and related services designed to meet their unique needs.” 20 U.S.C. § 1400(c). *See Timothy W. v. Rochester School District*, 875 F.2d 954 (1st Cir. 1989) for the articulation of the concept of “zero reject” of students with a disability from receiving an appropriate education.

<sup>59</sup> Center for Parent Information and Resources, Other Health Impaired (July 2015). Available at <http://www.parentcenterhub.org/repository/ohi/#idea>. *See also, Detsel v. Sullivan*, 895 F.2d 58 (2nd Cir. 1990).

<sup>60</sup> “To the maximum extent appropriate, children with disabilities, . . . are educated with children who are not disabled . . . 20 U.S.C. § 1412(a)(5)(A).

<sup>61</sup> For the regulations stipulating the least restrictive environment requirements for academic setting, non-academic setting, and comparable facilities, *see* 34 C.F.R. § 104.34.

<sup>62</sup> Medical services can only be provided for diagnostic and evaluative purposes. 34 CFR § 300.34(c)(5).

<sup>63</sup> 34 CFR § 300.34(c)(13). For a discussion of the difference between medical services and school health services, *see Cedar Rapids Comm. Sch. Dist. v. Garret F.*, 526 U.S. 66 (1999); Leslie S. Margolis, Leslie S. Margolis, *Provision of School Health Services to Students with Disabilities: e Intersection of Health Care Policy, Education and the Law in the Post-Garret F. Era*, 5 J. HEALTH CARE L. & POL’Y 99 (2002).

with complex chronic conditions attend school and their needs must be adequately addressed. This is typically done through IEPs (Individualized Education Program) under IDEA or under a section 504 accommodation plan. The IEP or 504 plans are often augmented by an individualized health care plan.

While it is rare for students with a DNAR to die at school, it does not alleviate the need to plan for the possibility.<sup>64</sup> Children who are terminally ill typically do not attend school during the last several days of their life. It is the “anticipated decline or death occurring at an unanticipated time, in a school setting before the arrival of trained medical personnel”<sup>65</sup> that necessitates the need for planning. For example, the Board of Education in Bloomington, Minnesota regulations implementing Board Policy 518, requires an Individual Health Plan (IHP)<sup>66</sup> to be developed in response to a DNR order. The regulations state a duty to follow the medical orders for the DNR.<sup>67</sup> The Individual Health Plan includes:

- Specific medical interventions that are allowed and disallowed by the DNR order.
- Procedures to be followed for emergencies.

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<sup>64</sup> Kathryn L. Weise, *Do-Not-Attempt-Resuscitation Orders in Public Schools*, 12 AMA J. OF ETHICS, 569, 571 (July 2010), available at <http://journalofethics.ama-assn.org/2010/07/pdf/pfor1-1007.pdf>.

<sup>65</sup> *Id.*

<sup>66</sup> For a discussion of individual health plans, see Bernadett Moran McDowell, et al., *Individualized Healthcare Plans: The Role of the School Nurse* (2015), available at <https://www.nasn.org/PolicyAdvocacy/PositionPapersandReports/NA-SNPositionStatementsFullView/tabid/462/ArticleId/32/Individualized-Healthcare-Plans-IHP-Revised-2008>; Perry A. Zirkel, *Section 504 Eligibility and Students on Individual Health Plans*, 276 ED. L. R. 577 (2012).

<sup>67</sup> Board of Education, Independent School District, 271, Bloomington, M.N., Policy 518 § II (4) *Do Not Resuscitate (DNR) Orders* (adopted, Nov. 26, 2001) available at [https://www.bloomington.k12.mn.us/sites/default/files/content\\_file\\_attachments/Pol%20518%20.pdf](https://www.bloomington.k12.mn.us/sites/default/files/content_file_attachments/Pol%20518%20.pdf).

- Plans for interaction with local emergency personnel.
- Plans for ongoing assessment of the student's health status.
- Guidelines for removal of the student from class activities.
- Guidelines for dealing with other students in the classroom.
- Palliative care (comfort measures to be administered).
  - Protocol for handling an emergency on the school bus or during school related activities.
  - Training and support for school staff.
  - Plan for ongoing communication with the family.
  - Plan for response to an emergency situation in the event that the School's Health Associate is not available.<sup>68</sup>

A school policy adopted (2012) by the Massachusetts' Franklin School Committee acknowledged that "some students with health impairments, parents/guardians may request school personnel withhold emergency care of their child in the event of a life-threatening situation" requires that all students with a DN[A]R and a Do Not Intubate (DNI) must wear a bracelet identifying the DN[A]R or DNI order.<sup>69</sup> The individual health care plan (IHP) must be reviewed annually.

Several states offer guidance for schools which have been presented with a DNAR order. For example, in New Hampshire, the state Department of Education notes that a DNAR "can be a

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<sup>68</sup> *Id.*

<sup>69</sup> Franklin Massachusetts School Committee, Do Not Resuscitate Order (DNR)/Do Not Intubate, (Sept. 27, 2012), available at [http://franklinschool.vt-s.net/Pages/FranklinCom\\_Emanual/j/Jdocs/JLCE](http://franklinschool.vt-s.net/Pages/FranklinCom_Emanual/j/Jdocs/JLCE).

Intubation is defined as, "The insertion of a tube into the mouth or nose to help with breathing." Brigham and Women's Faulkner Hospital, Understanding Do Not Resuscitate (DNR) Orders (n.d.) available at [http://www.brighamandwomensfaulkner.org/about-us/patient-visitor-information/advance-care-directives/dnr-orders.aspx#.V\\_GIzDJ-Jo4](http://www.brighamandwomensfaulkner.org/about-us/patient-visitor-information/advance-care-directives/dnr-orders.aspx#.V_GIzDJ-Jo4).

contentious issue and are always a challenge.”<sup>70</sup> Furthermore, it states the importance of developing an IHP for the student who has a DNAR. It also states that schools should develop a policy to address DNARs. The policy should balance the interests of the parents and their child with the interests of the school personnel.<sup>71</sup> The guidance recommends the following components should be part of the policy.

- Verifying the DNR order with the physician
- Ensuring the student's IHP addresses mortuary arrangements and transport
- Ensuring the student's IHP specifically outlines what actions may and may not be performed
- Ensuring the student's IHP addresses protocol for notifying family of the death
- Notification of EMS and Medical Examiner that student has a DNR order when they enroll (requires written consent from parents)
- Plan of support for staff and students after the death
- Plans for where the body will be kept
- Pronouncing the death

For more related information see the Massachusetts Department of Elementary & Secondary Education guidelines Students with Comfort Care/Do Not Resuscitate Orders.<sup>72</sup> Their guidelines reflect the importance of a broad based consulting approach to this health/educational issue. The Massachusetts Department of Public Health (MDPH) Office of Emergency Medicine and the MDPH Legal Office collaborated with education department.<sup>73</sup>

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<sup>70</sup> N.H. DEPT. OF EDU., *Do Not Resuscitate (DNR) Reference Sheet*, available at [http://www.education.nh.gov/instruction/school\\_health/faq\\_dnr.htm](http://www.education.nh.gov/instruction/school_health/faq_dnr.htm).

<sup>71</sup> *Id.* “The policy should be drafted to limit the trauma to staff and other students as well as to respect the wishes of the families impacted.” *Id.*

<sup>72</sup> Anne H. Sheetz, *Students with Comfort Care/Do Not Resuscitate Orders*, MASS. DEP’T OF ELEM. & SECONDARY EDU. (Nov. 30, 2004), available at <http://www.doe.mass.edu/news/news.aspx?id=2154>.

<sup>73</sup> *Id.*

#### IV. THE DUTY OWED AND A DNAR

DNAR orders at school raise a host of challenges. One question associated with this challenge is, what duty is owed to those students with foreseeable risk of injury? For example, in *Cedar Rapids Community School District v. Garret F.*<sup>74</sup> the United States Supreme Court held that the Cedar Rapids Community School District must provide Garret with assistance with urinary bladder catheterization once a day, suctioning of his tracheostomy tube as needed, but at least once every six hours, ambu. bagging.<sup>75</sup> He also needs someone who is familiar with his ventilator in the event there is a malfunction or electrical problem and someone who can perform emergency procedures in the event that he experiences autonomic hyperreflexia. “Tracheostomy complications may have catastrophic consequences.”<sup>76</sup> While this case was the subject of a lawsuit as to whether the required intensive nursing services were part of a medical exclusion under IDEA’s related services,<sup>77</sup> it does underscore that the duty owed for foreseeable harm, once defined, must be discharged in an appropriate manner. It also strengthened the position that students may need more services, including continuous care.<sup>78</sup>

As this case indicates, the issues facing educators are not simple. To appropriately address the complex ethical terrain of

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<sup>74</sup> *Cedar Rapids Community Sch. Dist. v. Garrett F.*, 526 U.S. 66 (1999).

<sup>75</sup> *Id.* at 83.

<sup>76</sup> CENTER FOR INFANTS AND CHILDREN WITH SPECIAL NEEDS, CARE OF THE CHILD WITH A TRACHEOSTOMY 25 (Nov. 2009).

<sup>77</sup> See 20 U.S.C. § 1400 *et seq.*

<sup>78</sup> Julie F. Mead & Mark A. Paige, *Parents as Advocates: Examining the History and Evolution of Parents’ Rights to Advocate for Children with Disabilities under IDEA*, 34 J. OF LEGIS. 123, 139 (2008).

DNAR orders in schools, it may be wise to consider the very essence of educator's ethical conduct in their professional roles and the degree to which they are equipped to make ad hoc judgments about how best to discharge their ethical obligations.

Generally, in line with the ethical duties of their profession (see below), educators know how to protect students from the worst forms of harm, but with terminally ill students who have a do not attempt resuscitate order (DNAR), do they know whether and how to let them die in school? A school does not and cannot ensure the absolute safety of its pupils.<sup>79</sup> However, in the case of a DNAR order in a school, one could argue that the school promises almost the opposite outcome of safety while under the school's supervision.

Educators have an ethical duty to exercise their professional judgment in the best interests of their students. The National Education Association Code of Ethics, reads in pertinent part, teachers must make reasonable efforts to protect students "from conditions harmful to learning or to health and safety."<sup>80</sup> Educators also have a legal duty to act in their students' interests by taking reasonable steps to reduce the likelihood of foreseeable harm.<sup>81</sup>

Confounding the ethical dilemma is an argument against accepting a DNAR orders that is often advanced regarding the harm on the bystanders, students and adults who witness the withholding of CPR. A cardiac arrest, especially on the part of a child, "is a startling event to witness and potentially traumatic

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<sup>79</sup> See *Diaz v. Brentwood Union Free Sch. Dist.*, 36 N.Y.S. 3d 161, 162 (A.D. 2 Dept. 2016) ("A school is not an insurer of the safety of its students . . .") (internal citations omitted). For a discussion of the limits of the duty owed, see DeMitchell, *supra* note 16, at 27.

<sup>80</sup> National Education Association, *Code of Ethics of the Education Profession* (n.d.) available at <http://www.nea.org/aboutnea/code.html>.

<sup>81</sup> W. PAGE KEETON, PROSSER AND KEETON OF TORTS 164 (5 ed. 1984) ("A duty or obligation recognized by the law requiring the person to conform to certain standard of conduct, for the protection of others against unreasonable risks.").

for bystanders.”<sup>82</sup> However, witnessing an unsuccessful CPR attempt may be equally traumatizing.<sup>83</sup>

These duties present difficulties for educators who wish to act ethically in their professional role relative to their students and DNAR orders. A responsible analysis of these issues may require educators to pursue clarity on the limits of their professional judgments, carefulness in defining students’ interests, and appropriate attention to what is or is not characterized as harm.

## V. LEGAL RESPONSES TO A DNAR IN THE SCHOOLS

As stated above, DNARs in schools legal as well ethical challenges. While there is dearth of cases on these advanced directives in schools, one case does add to the discussion — *ABC School v. Mr. Mrs. M.*<sup>84</sup> In this case, a Massachusetts Superior Court of Barnstable addressed the issue of whether a public school could refuse to honor a DNR.<sup>85</sup> The school sought declaratory and injunctive relief on the basis that honoring the DNR is contrary to their professional ethics. The defendant parents also requested (Minor M) constitutional right to refuse medical treatment.

Minor M was a four-year old girl who was severely disabled both mentally and physically. At the time of the trial she weighed only twenty pounds.<sup>86</sup> In the year before the proceeding her medical condition deteriorated. In March of 1997 Minor M stopped breathing while at school. The school nurse administered care to her until she was transported to the

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<sup>82</sup> American Academy of Pediatrics, *supra* note 8, at 1075.

<sup>83</sup> *Id.*

<sup>84</sup> *ABC Sch. v. Mr. Mrs. M.*, 97518 (Mass. CMMW., July 30, 1997), available at <https://casetext.com/case/abc-school-v-mr-mrs-m>.

<sup>85</sup> *Id.* at para. 1.

<sup>86</sup> *Id.* at para. 4.

hospital. After consultation with Minor M's physician, a DNR Order was developed. The Order states in relevant part:

Should Minor M have a cardiorespiratory arrest, she may receive oxygen, suction and stimulation. She should receive rectal valium if she appears to be having a prolonged seizure. Minor M should not receive cardiopulmonary resuscitation, intubation, defibrillation, or cardiac medications. Invasive procedures such as arterial or venous puncture should only be done after approval of her parents.

Should Minor M have an apneic spell at school, she should receive oxygen, suction and stimulation. If she responds to this, her parents should be contacted and she can be transported home. If she does not respond, she should be transported by ambulance to the local hospital.<sup>87</sup>

The DNR order was submitted to the School. The ABC School refused to honor it arguing that it was at odds with their "Preservation of Life Policy" requiring: "Teachers of the ABC School classes [to] provide whatever means are available to them to preserve and protect a child's life in the event of a crisis."<sup>88</sup> Several of the faculty members stated that honoring the DNR Order "is contrary to their professional ethics."<sup>89</sup> The school brought suit seeking relief from having to implement the DNR order.

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<sup>87</sup> *Id.* at para 5.

<sup>88</sup> *Id.* at para. 6.

<sup>89</sup> *Id.* at para 7.



The court noted that the issue was one of first impression in Massachusetts. The court found that the parents had a right to establish the directive in the best interests of their daughter and the court would not provide the declaratory or injunctive relief the school district requested.<sup>90</sup>

The court also declined to grant immunity to any of the educators who did not follow the DNAR as acting in good faith. The court held that to issue a declaratory judgment in which the educators at ABC School could act under the protection of “good faith immunity” “would vitiate the DNR Order and essentially constitute an end-run around the court’s denial of the request for injunctive relief.”<sup>91</sup> Consequently, the court ordered that, “[The] ABC School and its personnel shall honor the terms of the DNR Order for Minor M.”<sup>92</sup> Deciding whether to allow a loved one to die does not reside within the professional expertise or obligations of educators; it belongs to the parents the court affirmed.

Another legal consideration raises the potential issue of harm if the educator with knowledge of the DNAR rejects its requirements and attempts CPR with disastrous results, that educator may have supplied harm and could possibly be legally liable. For example, if the educator was told not to administer the chest compressions and the mouth to mouth breathing, he/she could be liable for battery, as an intentional, unauthorized harmful or offensive touching of another. It is not a negligent act; an intentional act is a purposeful act.

While the action of the educator is not intended to cause harm to the student, in fact the intent is just the opposite, it is

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<sup>90</sup> *Id.* at para. 8.

<sup>91</sup> *Id.* at para. 13

<sup>92</sup> *Id.* at para. 14. However, *see* Lewiston, Maine Pub. Sch., 21 IDELR 83 (OCR) 1994 in which the Office for Civil Rights held that a student with a disability was not discriminated against by a general school policy that prohibited school personnel from complying with a DNAR order. This order only addressed whether the special education was discriminated against on the basis of disability in the general policy that applied equally to all students and did not address whether the DNAR order was binding on the school district.

not central to the battery. The issue is consent; did the student consent to the chest compression touching? For example, a Mississippi court in a case of a medical procedure opined, “Concisely stated in one sentence, no physician may perform any procedure on a patient no matter how slight or well intentioned without that patient’s informed consent, and violation of this rule constitutes a battery.”<sup>93</sup> Most likely the good intentions of the educator in administering CPR in violation of a DNAR Order would constitute a battery. An Arizona surgeon was not saved by his good intentions for exceeding the consent that was given by a patient.<sup>94</sup>

What happens if the CPR causes suffering or worsens the medical condition of the medically fragile child? What damages can be assessed against that educator for pain and suffering? An act of good faith in defiance of a legal order will not likely serve as a safe harbor, even if the educator was motivated by assessment of harmful circumstances.

## VI. PROFESSIONAL ETHICS AND A DNAR ORDER

Parents’ submission to a school of their advance directive requiring that CPR not be attempted on their child “creates ethically sensitive repercussions” for school personnel.<sup>95</sup> First, do the ethics of the profession serve as a bar for following a DNAR or do they require an affirmative action to implement the legal wishes of the parents? While educators can surely exercise professional judgment in explicitly educational matters of curriculum (sometimes doing so even when that judgment is at odds with parents’ stated preferences<sup>96</sup>), to what degree should

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<sup>93</sup> *Fox v. Smith*, 594 So. 2d 596, 604 (Miss. 1992).

<sup>94</sup> *Cathemer v. Hunter*, 558 P.2d 975, 979 (Ariz. Ct. App. 1976).

<sup>95</sup> See Weise, *supra* note 67 at 1.

<sup>96</sup> See, e.g., Kathie Forster, *Parents Rights and Educational Policy*, 21 *EDU. PHIL. AND THEORY* 47 (1989); Nava Maslovaty, *Teachers’ Choice of Teaching Strategies for Dealing with Socio-Moral Dilemmas in the Elementary School*, 29 *J. OF MORAL EDU.* 429 (2000); RICHARDS, SHEILA, WHAT CAN TEACHERS DO ABOUT BADLY BEHAVED PARENTS? 36 (2001).

educators be guided by the duties of their profession in making what amounts to medical judgments? If medical professionals are guided by their professional ethics to follow DNARs, could the educator's professional obligations result in legitimate resistance in that medical domain?

Secondly, without making reference to professional ethics (or under circumstances in which the above claim regarding the limits of those ethical obligations is challenged), could an educator's understanding of student interests guide action against the content of DNARs? This is a complicated issue for instances of medically fragile children. One view of student interest might prioritize the students' interest as a right to life, arguing that the promotion of that right requires educators to act in attempts to extend student life. Another view might prioritize the students' interest as a right to bodily integrity, arguing that the promotion of that right requires educators to respect the explicit statements (likely articulated by the guardians on behalf of the child) of what is and is not appropriate for a student's body.<sup>97</sup> No matter which view an educator personally holds, that educator may do well to consider the student's view (likely articulated by the guardians on behalf of the child) of which right ought to be prioritized in defining the student's interest. Failure to be careful in this activity may result in educators extending their personal vision and values in potentially offensive, oppressive, and/or unethical ways. Educators have no reason to support the claim that their own sense of a student's interest ought to guide action against the explicit views expressed via the content of a DNAR.

Furthermore, without reference to professional ethics or an overbearing account of student interests (or under circumstances in which the above conclusions regarding these issues is contested), might the educator resist DNARs on the

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<sup>97</sup> Both sets of views are well captured in the philosophical literature. See J.O. Famakinwa, *Interpreting the Right to Life* 22 (Sept. 1, 2011); Caroline Harnacke, *The Ashley Treatment: Improving Quality of Life or Infringing Dignity and Rights?* 30 *BIOETHICS* 141 (2016); Lisa Campo-Engelstein, Jane Jankowski, and Marcy Mullen, *Should Health Care Providers Uphold the DNR of a Terminally Ill Patient Who Attempts Suicide?* 28 (2016).

grounds that a student is experiencing harm? While this issue is surely related to the previous plea for carefulness in defining goals, this consideration sees educators attending to the student's present circumstances (instead of pursuing a more general aim). Attention to harm might compel an educator to resist a DNAR in instances when the educator recognizes that a student's DNAR represents parental mistreatment, neglect, or some other illegal or unethical practice or circumstance.<sup>98</sup> Such circumstances might be rare and would surely require attentive appraisal, but the ethical refusal of a DNAR might be justified.

Of course, this third consideration raises another potential issue of harm. If the educator with knowledge of the DNAR rejects its requirements and attempts CPR with disastrous results, that educator may have enacted harm and could possibly be legally liable and ethically blameworthy. For example, if the educator was told not to administer the chest compressions and the mouth to mouth breathing, he/she could be liable for battery, as an unauthorized harmful or offensive touching of another. What happens if the CPR causes suffering or worsens the medical condition of the medically fragile child? What damages can be assessed against that educator for pain and suffering? An act of good faith in defiance of a legal order will not likely serve as a safe harbor, even if the educator was motivated by assessment of harmful circumstances. It would seem that educators have little reason to risk the potential harm that might be caused by disregarding the dictates of a DNAR.

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<sup>98</sup> Unfortunately, instances in which parents or legal guardians have medical desires for children that constitute egregious harm are far too common. *See, e.g.,* <http://www.foxnews.com/health/2017/02/01/pennsylvania-parents-charged-in-connection-with-toddlers-pneumonia-death.html>. While it is unlikely that such standards might find purchase through a DNAR, that situation is not impossible.

## VII. ETHICAL ACTION EVEN WHEN INACTION IS AN ACTION

Writing a DNAR for a child is difficult and gut wrenching for parents as well as for physicians. Carrying out the directive raises the emotional toll. When that order is followed at school it can be a horrendous and deeply emotional event. Education is a helping profession; how do its educators help when served with a lawful advance directive not to attempt CPR? Do they disregard the order and substitute their judgment for that of the parents, thus acting not *in the place of* the parent but *instead of* the parent? Do they reject the order thus rejecting the admission of the child who likely has a legal right to a free appropriate public education though IDEA?<sup>99</sup> Or does the educator plan and provide the care at the end of life that was provided during life, for as peaceful a setting as possibly should the unthinkable happen at school? The way we respond to and help to shape the end of life of one of our students and may help us and our students to understand and affirm the dignity of life, even at its end; “Care is never futile.”<sup>100</sup>

The choices are not easy. But one thing that we know is that as professionals we are dedicated to serving the best interests of our students even when the path is hard and we prefer not to trod upon it. Our ethical choices define not only us, but our profession as well.

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<sup>99</sup> See *Timothy W. v. Rochester*, 875 F.2d 954 (1<sup>st</sup> Cir. 1989), holding there was “zero reject” of students eligible under special education law.

<sup>100</sup> ANONYMOUS AUTHOR, ETHICAL ISSUES: DO NOT ATTEMPT RESUSCITATION 1, 2 (April 2007), available at <http://ethics.missouri.edu/docs/DNAR%204-07.pdf>



## SPACE WARS: DUAL-USE SATELLITES

ABDUL REHMAN KHAN\*

*“Ships and sails proper for the heavenly air should be fashioned.  
Then there will also be people who do not shrink from the dreary  
vastness of space.”*

- Johannes Kepler, letter to Galileo Galilei, 1609

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## I. OVERVIEW

The idea of war taking place in outer space<sup>1</sup> is the premise of more than one science-fiction film.<sup>2</sup> It fascinates the mind. Such a fascination, however, might not be so far off from reality. In fact, as this piece will highlight, militarized conflict in outer space is not implausible.

In 1978, a satellite from the Soviet Union crashed on Canadian soil, spreading nuclear debris and forcing a confusing flurry of tort claims and debates over who would be held liable.<sup>3</sup> One year later, pieces of the American Skylab Space Station came flying back to Earth, landing in parts of Western Australia.<sup>4</sup> Hysteria resulted from the widespread belief that the space station itself would plummet to Earth.<sup>5</sup> NASA worked frantically to limit damage.<sup>6</sup> Newspapers offered cash for debris; some communities prepared for destruction while others celebrated the chaos.<sup>7</sup>

A year after this pandemonium, an American named Dennis Hope filed ownership over the moon, sending documentation of his declaration to the United States, the Soviet Union, and the United

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<sup>1</sup> Outer space is “the void that lies beyond the uppermost reaches of the atmosphere of Earth and between all other objects in the universe.” *Suited For Spacewalking: A Teacher's Guide with Activities for Technology Education, Mathematics, and Science*, NAT'L AERONAUTICS & SPACE ADMIN. (last visited Mar. 3, 2016), [https://www.nasa.gov/pdf/143159main\\_Suited\\_for\\_Spacewalking.pdf](https://www.nasa.gov/pdf/143159main_Suited_for_Spacewalking.pdf).

<sup>2</sup> See, e.g., *STAR WARS* (Lucasfilm Ltd. 1977).

<sup>3</sup> See Brian Beck, *The Next, Small Step for Mankind: Fixing the Inadequacies of the International Space Law Treaty Regime to Accommodate the Modern Space Flight Industry*, 19 ALB. L.J. SCI. & TECH. 1, 15 (2009) (Canada and the Soviet Union ultimately split the \$6 million tab).

<sup>4</sup> Rob Verger, *Newsweek Rewind: When Skylab Crashed Into Australia*, NEWSWEEK (July 11, 2014, 2:15 PM), <http://www.newsweek.com/newsweek-rewind-when-sky-fell-258432>.

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> *Id.* (Skylab parties became popular around the United States.)

Nations.<sup>8</sup> He claimed that there was a loophole in the Outer Space Treaty, and has since sold property interests to other individuals.<sup>9</sup> Others claiming private property in outer space have followed suit. In 2001, Gregory Nemitz of Orbital Development, claimed ownership over Eros, and then filed a parking ticket against NASA after they sent a satellite to investigate the asteroid.<sup>10</sup> In 2012, Sylvio Langevin filed ownership over all the planets in the solar system as well as four of Jupiter's moons.<sup>11</sup>

Conflict in outer space is developing into a hot topic.<sup>12</sup> The creation of military-space think tanks<sup>13</sup>, for example, in conjunction with a growth of scholarly work<sup>14</sup> and new policy initiatives<sup>15</sup>, are all

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<sup>8</sup> See, e.g., Jason Koebler, *Meet the Man Who Owns the Moon*, U.S. NEWS (Mar. 25, 2013, 4:20 PM), <http://www.usnews.com/news/articles/2013/03/25/meet-the-man-who-owns-the-moon>.

<sup>9</sup> *Id.*

<sup>10</sup> See Keay Davidson, *Final Frontier For Lawyers – Property Rights in Space / Land Claims, Commercial Schemes and Dreams Have Legal Eagles Hovering*, SFGATE (Oct. 16, 2005, 4:00 AM), <http://www.sfgate.com/news/article/final-frontier-for-lawyers-property-rights-in-2564610.php>.

<sup>11</sup> See Drew Hasselback, *The Most-Read Canadian Court Decision of 2012 is Out of This World*, FIN. POST (Dec. 14, 2012, 2:10 PM), <http://business.financialpost.com/legal-post/the-most-read-canadian-court-decision-of-2012-is-out-of-this-world>.

<sup>12</sup> A Google Trend search of 'Militarisation of space' yields no results prior to September 2010, but sees a sudden peak in 2011, with steady and continued interest since. GOOGLE TRENDS, <http://google.com/trends> (search field for "Militarisation of space").

<sup>13</sup> See, e.g., *Who We Are*, SECURE WORLD FOUND., <http://swfound.org/about-us/who-we-are> (last visited Mar. 3, 2016); see also SPACE L. & POL'Y SOLUTIONS, <http://www.spacelawsolutions.com> (last visited Mar. 3, 2016).

<sup>14</sup> See, e.g., P.J. Blount, *Targeting in Outer Space: Legal Aspects of Operational Military Actions in Space*, HARV. NAT'L SEC. J. (Nov. 25, 2012, 9:56 AM), <http://harvardnsj.org/2012/11/targeting-in-outer-space-legal-aspects-of-operational-military-actions-in-space/>.



dedicated towards an accurate exploration of the militarization of space.

Space militarization has relatedly seen a surge in U.S. foreign policy discussions.<sup>16</sup> In November 2015, the United States rejected a Russian-led proposal to ban deployment of weapons into space, citing it as a weak attempt in limiting ground and air-based anti-satellite weapons.<sup>17</sup> To date, however, the United States<sup>18</sup>, China<sup>19</sup>, and Russia<sup>20</sup>, in that order<sup>21</sup>, have invested heavily into anti-satellite

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<sup>15</sup> See, e.g., NAT'L SPACE STUD. CTR., <http://space.au.af.mil/doctrine.htm> (last visited Mar. 3, 2016); SPACE POL'Y & L., [http://fas.org/spp/military/docops/army/ref\\_text/chap3im.htm](http://fas.org/spp/military/docops/army/ref_text/chap3im.htm) (last visited Mar. 3, 2016).

<sup>16</sup> Notably in 2008, the U.S. successfully destroyed its own spy satellite, roughly 150 miles above the Pacific Ocean. *Navy Succeeds in Intercepting Non-Functioning Satellite*, AM.'S NAVY (Feb. 20, 2008, 11:23 PM), [http://www.navy.mil/submit/display.asp?story\\_id=35114](http://www.navy.mil/submit/display.asp?story_id=35114).

<sup>17</sup> Matthew Bodner, *U.S. Rejects Russia-Led UN Proposal to Limit Militarization of Space*, MOSCOW TIMES (Nov. 5, 2015, 4:27 AM), <http://www.themoscowtimes.com/business/article/u-s-rejects-russia-led-un-proposal-to-limit-militarization-of-space/541925.html>.

<sup>18</sup> Laura Grego, *A History of Anti-Satellite Programs*, UNION CONCERNED SCIENTISTS, (Jan. 2012), [http://www.ucsusa.org/sites/default/files/legacy/assets/documents/nwgs/a-history-of-ASAT-programs\\_lo-res.pdf](http://www.ucsusa.org/sites/default/files/legacy/assets/documents/nwgs/a-history-of-ASAT-programs_lo-res.pdf); see also Brian Weeden, *Through a Glass Darkly*, SECURE WORLD FOUND. (Mar. 17, 2014), [http://swfound.org/media/167224/through\\_a\\_glass\\_darkly\\_march2014.pdf](http://swfound.org/media/167224/through_a_glass_darkly_march2014.pdf).

<sup>19</sup> Brian Weeden, *Anti-Satellite Tests in Space—The Case of China*, SECURE WORLD FOUND., [http://swfound.org/media/115643/china\\_asat\\_testing\\_fact\\_sheet\\_aug\\_2013.pdf](http://swfound.org/media/115643/china_asat_testing_fact_sheet_aug_2013.pdf) (last updated Aug. 16, 2013); Michelle Florcruz, *China's Space Program: 2016 Satellite Launch to Support Manned Missions, Researchers Say*, INT'L BUS. TIMES (Jul. 23, 2015, 3:28 PM), <http://www.ibtimes.com/chinas-space-program-2016-satellite-launch-support-manned-missions-researchers-say-2022192>.

<sup>20</sup> *Russian Officer Says Developing New Weapon For Space Defense*, SPUTNIK NEWS (May. 15, 2010, 3:11 PM), <http://sputniknews.com/russia/20100515/159029349.html>.

<sup>21</sup> David Axe, *When it comes to war in space, U.S. has the edge*, REUTERS: U.S. (Aug. 10, 2015), (citation omitted),

technology (ASAT), with India<sup>22</sup> and Israel (as Occupied Palestinian Territory<sup>23</sup>) also making deep investments into infrastructural development of ASAT. Some commentators feel that tensions “could soon be embroiled in a fully-fledged war with Russia and China in outer space.”<sup>24</sup> 60 Minutes, in its special on Command Satellite Defense, reports one top U.S. military intelligence leader being fearful that “anti-satellite weapons [] could, in effect, knock out America’s eyes and ears.”<sup>25</sup> After budgeting \$5 billion to enhance the U.S. military space program, the U.S. government’s stance is clear – that “[it] will defend [its] space assets if attacked.”<sup>26</sup>

Today, the US depends on space more than any other nation.

In a nightmare scenario, as adversaries launch a massive cyber attack

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<http://blogs.reuters.com/great-debate/2015/08/09/the-u-s-military-is-preparing-for-the-real-star-wars/> (“[Though] Moscow possesses ‘a relatively complete catalog of space objects.’ . . . Russia is still far behind the United States and China as far as space weaponry is concerned.”).

<sup>22</sup> *India Contemplates Anti-Satellite Vehicle Integration with Agni-III Ballistic Missile*, DEFENCE NOW, <http://www.defencenow.com/news/343/india-contemplates-anti-satellite-vehicle-integration-with-agni-iii-ballistic-missile.html> (last visited Mar. 3, 2016).

<sup>23</sup> *Occupied Palestinian Territory*, U.N. Human Rights Office of the High Commissioner, <http://www.ohchr.org/EN/countries/MENARRegion/Pages/PSIndex.aspx> (last visited Mar. 2, 2016).

<sup>24</sup> See, e.g., Rebecca Perring, *World War Three in Space? Fears Over Rise in anti-satellite weapons created by Russia*, EXPRESS (Aug. 12, 2015, 11:33 AM), <http://www.express.co.uk/news/world/597809/Anti-satellite-weapons-space-war-Earth-Russia-China-United-States>.

<sup>25</sup> See, e.g., David Martin, *The War Above – U.S. and China are locked in a high stakes contest over satellites that are critical to national security and everyday life*, CBS NEWS (Apr. 26, 2015), <http://www.cbsnews.com/news/rare-look-at-space-command-satellite-defense-60-minutes/>.

<sup>26</sup> See Lee Billings, *War in Space May Be Closer Than Ever*, SCI. AM. (Aug. 10, 2015), <http://www.scientificamerican.com/article/war-in-space-may-be-closer-than-ever/>.

on key infrastructure and disable and destroy our satellites in space, televisions would go blank, mobile networks silent, and the Internet would slow and then stop. Dependent on time stamps from GPS satellites, everything from stock markets to bank transactions to traffic lights and railroad switches would freeze. Airline pilots would lose contact with the ground, unsure of their position and without weather data to steer around storms. World leaders couldn't communicate across continents. In the US military, pilots would lose contact with armed drones over the Middle East. Smart bombs would become dumb. Missiles would sit immobile in their silos. The US could lose early warning of nuclear attacks for parts of the Earth.<sup>27</sup>

In short, rising tensions between technologically headstrong powerhouses could lead to a Cold War.<sup>28</sup> It is critical, therefore, to consider the grave, irremediable consequences of this conflict when developing frameworks for sensible wartime prevention. Deeply woven into space militarization, alongside social<sup>29</sup>, economic<sup>30</sup>,

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<sup>27</sup> Jim Sciutto, *US military prepares for next frontier: Space war*, CNN (last updated Nov. 29, 2016), <http://www.cnn.com/2016/11/28/politics/space-war-us-military-preparations/index.html>.

<sup>28</sup> *See id.*; see also David Axe, *When it Comes to War in Space, U.S. Has the Edge*, REUTERS: U.S. (Aug. 10, 2015), <http://blogs.reuters.com/great-debate/2015/08/09/the-u-s-military-is-preparing-for-the-real-star-wars/>.

<sup>29</sup> *See, e.g., Outer Space Benefits Must Not Be Allowed to Widen Global Gap between Economic, Social Inequality, Fourth Committee Told, Concluding Debate on Item*, UNITED NATIONS

(Oct. 17, 2014), <https://www.un.org/press/en/2014/gaspd.doc.htm-0>.

<sup>30</sup> *See, e.g., Kevin Pollpeter, China Dream, Space Dream – China's Progress in Space Technologies and Implications for the United States*, U.S.-CHINA ECON. & SEC. REV. COMMISSION (Mar. 2, 2015), <http://origin.www.uscc.gov/sites/default/files/Research/China%20Dream%2>

cultural<sup>31</sup>, political<sup>32</sup> and other forces that maneuver the development of space militarization, is a legal apparatus that has so far been very significant in helping decide the limits of this expansion. This piece will focus on military information derived from dual-use satellites, which are orbiting objects that serve more than one informational purpose.<sup>33</sup> Why? Because dual-use satellites are especially vulnerable to military attacks because of their information-bearing capacity. Certain principles of traditional war theory beg reconsideration when applied to dual-use satellites.

First, proportionality analysis in traditional war theory aims at balancing civilian harm against military benefit. It is distorted when a satellite can serve military purposes while at the same time keeping intact all its civilian purposes. Compare this to a school building on earth, for example, that is taken over by hostile forces. It is generally

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0Space%20Dream\_Report.pdf; see also Daniel Honan, *The First Trillionaires Will Make Their Fortunes in Space*, BIG THINK (last modified Dec. 12, 2016), <http://bigthink.com/think-tank/the-first-trillionaires-will-make-their-fortunes-in-space> (“As Peter Diamandis [Co-founder of Space Adventurers Ltd. and co-founder International Space University] told the International Space Development Conference ‘There are twenty-trillion-dollar checks up there, waiting to be cashed!’”).

<sup>31</sup> See, e.g., Stan Cox, *Real Life Star Wars: The Militarization of Space*, ALTERNET (Nov. 14, 2007), [http://www.alternet.org/story/67699/real-life\\_star\\_wars%3A\\_the\\_militarization\\_of\\_space](http://www.alternet.org/story/67699/real-life_star_wars%3A_the_militarization_of_space); see also David Wescott, *NASA Marketing Video to Run Before New ‘Star Trek’ Film*, BLOOMBERG (Apr. 2, 2013, 5:41 PM), <http://www.bloomberg.com/bw/articles/2013-04-02/nasa-to-run-marketing-video-before-new-star-trek-film>.

<sup>32</sup> See, e.g., *US and Russia bicker over satellite positioning in Earth’s orbit*, SPUTNICK INT’L (Oct. 21, 2015), [http://www.spacedaily.com/reports/US\\_and\\_Russia\\_bicker\\_over\\_satellite\\_positioning\\_in\\_Earths\\_orbit\\_999.html](http://www.spacedaily.com/reports/US_and_Russia_bicker_over_satellite_positioning_in_Earths_orbit_999.html).

<sup>33</sup> Jane C. Hu, *The Battle for Space*, SLATE (Dec. 23, 2014, 12:37 PM), [http://www.slate.com/articles/health\\_and\\_science/space\\_20/2014/12/space\\_weapon\\_law\\_u\\_s\\_china\\_and\\_russia\\_developing\\_dangerous\\_dual\\_use\\_spacecraft.html](http://www.slate.com/articles/health_and_science/space_20/2014/12/space_weapon_law_u_s_china_and_russia_developing_dangerous_dual_use_spacecraft.html).

"Almost everything we put in space is dual-use—you can use it for a good or malignant purpose," says Michael Listner, founder of the consulting group Space Law and Policy Solutions. *Id.*

presumed that the school no longer has any civilian function.<sup>34</sup> Proportionality analysis would then kick in to protect against excessive civilian casualties and injuries, but the distortion resulting from dual-use satellites makes the calculation far more speculative and nuanced.

Second, if the school building in the example above is targeted, traditional war theory naturally presumes that gravity will force the collapse downwards. This presumption cannot hold in outer space. Dual-use satellites that are attacked continue in free-orbit at 17,000 miles/hour, creating the potential for a domino effect as they collide against objects, including other satellite that provide civilian use.<sup>35</sup> The difficulty in quantifying foreseeable harm that results from attacks on dual-use satellites makes the proportionality analysis even trickier.<sup>36</sup>

Third, many dual-use satellites are owned and operated by multiple state-actors.<sup>37</sup> Traditional immunity that protects international spaces, like a U.N. building, works on the presumption that the U.N. building is neutral, especially against a military takeover. But when a dual-use satellite is used by one state-actor for military purposes, but continues to serve civilian purposes for the other state-actors, how will traditional immunity operate? Attacks intended against one state-actor can therefore create unintended tertiary global impact.

This paper will endeavor to first provide a brief overview of space law and war theory, and will then illustrate the tension and holes between these bodies of law by exploring a few wrinkles that dual-use satellites create. The paper will also briefly explore some

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<sup>34</sup> See, e.g., Gaby Rado, *Legitimate Military Targets*, CRIMES OF WAR, <http://www.crimesofwar.org/a-z-guide/legitimate-military-targets> (last visited Mar. 25, 2016).

<sup>35</sup> Brian Dunbar, *What Is An Orbit?*, NASA (July 7, 2010), <http://www.nasa.gov/audience/forstudents/5-8/features/nasa-knows/what-is-orbit-58.html>.

<sup>36</sup> See, e.g., Col. Charles J. Dunlap, *Taming Shiva: Applying International Law to Nuclear Operations*, 1997 DUKE L. – AIR FORCE L. REV. 157.

<sup>37</sup> See, e.g., David Yanofsky & Tim Fernholz, *This Is Every Active Satellite Orbiting Earth* (Dec. 21, 2015), <http://qz.com/296941/interactive-graphic-every-active-satellite-orbiting-earth/>.

public policy implications of war in space. It may beckon interest in re-exploring traditional laws of war to better encompass spacetime conflict. Or at the very least it may invite reconsideration, because proactivity may be the best control against potentially detrimental space conflict.

## II. THE CURRENT STATUS OF SPACE AND WAR

### A. SPACE COMBAT UNDER CORPUS JURIS SPATIALIS

Space law is defined as “all international and legal rules and principles which govern the exploration and use of outer space by States, international organizations, private persons and companies.”<sup>38</sup> While there has been a recent surge of interest in space law,<sup>39</sup> the subject has been mulled over for many years leading up to 1957, when humans began their physical quest into outer space. The discipline is established upon five multilateral treaties<sup>40</sup>, which together comprise the “corpus juris spatialis.” Corpus juris spatialis is half of space law. The other half is customary international law.<sup>41</sup>

Two additional points that will help with the ensuing analysis. First, due to the permissive nature of international law,<sup>42</sup> states have

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<sup>38</sup> P. Malanczuk, *Space Law as a Branch of International Law*, 1994 NETH. Y.B. INT’L L. 143, 147 (1995).

<sup>39</sup> V. Kopal, *Evolution of the Doctrine of Space Law*, in *Space Law: Development & Scope* 17 (N. Jasentuliyana, ed., 1992). (“thousands of articles, studies, and books have been published on the subject of space law.”).

<sup>40</sup> Outer Space Treaty (1967), Rescue and Return Agreement (1968), Liability Convention (1972), Registration Convention (1975), Moon Agreement (1979).

<sup>41</sup> See, e.g., *The Law of War in Space*, SPACE4PEACE (Mar. 13, 2001), <http://www.space4peace.org/sl原因/lawofwar.htm#sixa> (last visited Mar 25, 2016).

([With] Corpus juris spatialis, space law “includes prescriptive norms from other treaties as well.”).

<sup>42</sup> Michael N. Schmitt, *Law on the Battlefield*, 8 A.F. ACAD. J. L. STUD. 255, 257 (1997-1998) (reviewing A.P.V. ROGERS, *LAW ON THE BATTLEFIELD* (1996)) (“To exist as a principle of law, military necessity

the option of orbiting weapons of a slightly lesser magnitude than weapons of mass destruction (WMD), which are prohibited in space. Second, space law is distinct from astrolaw which “focuses not upon space as a legal regime, but upon space as a place.”<sup>43</sup> Therefore, its “subjects” are not “natural and legal persons in space,” as is the case with astrolaw, but instead with “sovereign nations.”<sup>44</sup>

### **Customary Law:**

Customary law, built on tradition and legal convention, is helpful in filling the gaps where treaty law is missing or ambiguous.<sup>45</sup> It is particularly helpful in international law and can serve as a strong source in deciphering obscurity within space law.

### **Treaty Law:**

Treaty laws are agreements between multiple state-actors for governing their conduct<sup>46</sup> and are sometimes passed by international organizations, like the United Nations; other times, they are passed by a conglomeration of different countries and not through formal and institutionalized bodies.<sup>47</sup> Alongside several non-binding

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must have independent legal valence. That can, by definition, only occur when it is characterized as a limitation, for, as a general rule, all that is no prohibited in international law is permitted.”).

<sup>43</sup> G.S. Robinson & H.M. White, Jr., *Envoys of Mankind: A Declaration of First Principles for the Governance of Space Societies* (Washington, D.C.: Smithsonian Institution Press, 1986) at 147.

<sup>44</sup> *Id.* Others, however, see Astrolaw as a supplement to space law, and not as a distinct doctrinal law. See, e.g., D. O'Donnell & N.C. Goldman, *Astro Law as Lex Communis Spatialis*, in *Proceedings of the Fourth Colloquium on the Law of Outer Space* 322 (1998).

<sup>45</sup> See *Customary Law*, INT'L COMMITTEE OF THE RED CROSS, <https://www.icrc.org/en/war-and-law/treaties-customary-law/customary-law> (last visited Mar. 25, 2016).

<sup>46</sup> James G Apple, *General Principles of International Law*, 2 AM. SOC'Y INT'L L. & INT'L JUD. ACAD. (2007), available at [http://www.judicialmonitor.org/archive\\_0707/generalprinciples.html](http://www.judicialmonitor.org/archive_0707/generalprinciples.html) (last visited Mar. 25, 2016).

<sup>47</sup> *Id.*

resolutions adopted by the U.N. General Assembly<sup>48</sup> and supplementary laws implemented by various countries<sup>49</sup>, the following five treaty laws serve as the backbone of space law:

**a. Outer Space Treaty (1967): Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies**

The Outer Space Treaty, the foundation of the five treaties, establishes that space will remain a peaceful, non-militaristic area.<sup>50</sup> Over one hundred countries, including the United States and Russia, have signed onto it, agreeing to never send nuclear weapons around Earth nor to “establish[] . . . military bases” on any celestial body.<sup>51</sup>

**b. Rescue and Return Agreement (1968): Agreement on the Rescue of Astronauts, the Return of Astronauts and the Return of Objects Launched into Outer Space**

The Rescue and Return Agreement elaborates on the Outer Space Treaty, requiring all parties to aid and assist distressed astronauts safely back to their launch location.<sup>52</sup> Additionally, it extends this protection to

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<sup>48</sup> See, e.g., Office for Outer Space Affairs, SPACE L.: RESOLUTIONS (2016), <http://www.unoosa.org/oosa/en/ourwork/spacelaw/resolutions.html> (last visited Mar. 25, 2016).

<sup>49</sup> Office for Outer Space Affairs, SPACE L.: NAT'L SPACE L. DATABASE, <http://www.unoosa.org/oosa/en/ourwork/spacelaw/nationalspacelaw/index.html> (last visited Mar. 25, 2016).

<sup>50</sup> See Vladimír Kopal, *Treaty on Principles Governing the Activities of States in the Exploration and Use of Outerspace, Including the Moon and Other Bodies*, U.N. AUDIOVISUAL LIBR. INT'L L., <http://legal.un.org/avl/ha/tos/tos.html> (last visited Mar. 25, 2016).

<sup>51</sup> *Id.*

<sup>52</sup> See, e.g., THE AVALON PROJECT: AGREEMENT ON THE RESCUE OF ASTRONAUTS, THE RETURN OF ASTRONAUTS AND THE RETURN OF OBJECTS LAUNCHED INTO OUTER SPACE, APRIL 22, 1968, [http://avalon.law.yale.edu/20th\\_century/usmu014.asp](http://avalon.law.yale.edu/20th_century/usmu014.asp) (last visited Mar. 25, 2016).



objects that have returned to Earth outside the territory of the launching party.<sup>53</sup>

**c. Liability Convention (1972): Convention on the International Liability for Damage Caused by Space Objects**

The Liability Convention further expands the Outer Space Treaty, establishing that a party is “absolutely liable” for damage done by its objects in space either done to Earth’s surface or to aircrafts, including but not limited to loss of life, property, and personal injury.<sup>54</sup> At the least, this translates into protection against agencies launching objects into space without an exhaustive and serious balancing of reasonable risks.<sup>55</sup> Furthermore, the Convention sets forth that when multiple parties launch an object, each party can be independently held liable for the full amount.<sup>56</sup>

**d. Registration Convention (1975): Convention on Registration of Objects Launched into Outer Space**

This Convention deals with the registration of all spacecraft, including its name, purpose, orbital parameters and appropriate designator.<sup>57</sup> It assists with organization and cohesion of current and future space objects.<sup>58</sup>

**e. Moon Agreement (1979): Agreement Governing the Activities of States on the Moon and other Celestial Bodies**

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<sup>53</sup> *Id.*

<sup>54</sup> Michael Listner, *Revisiting the Liability Convention: Reflections on ROSAT, Orbital Space Debris, and the Future of Space Law*, THE SPACE L., <http://www.thespacereview.com/article/1948/1> (last visited Mar 25, 2016).

<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

<sup>57</sup> See, e.g., James Martin Center for Nonproliferation Studies at the Middlebury Institute of International Studies, *Convention on the Registration of Objects Launched in Outer Space* (last updated Oct. 26, 2011), <http://www.nti.org/learn/treaties-and-regimes/convention-on-the-registration-of-objects-launched-in-outer-space/>.

<sup>58</sup> *Id.*

The Moon Agreement develops a practical apparatus for how the Outer Space Treaty would be applied to celestial bodies, requiring that all exploration be for peaceful purposes.<sup>59</sup> All contracting parties agree not to establish any military bases, nuclear weapons, test weapons, or other weapons of mass destruction on the moon or in its orbit.<sup>60</sup> Furthermore, the Moon Agreement stipulates that the moon is exempt from becoming the property of any state, organization, or person.<sup>61</sup>

## B. AN EXPLORATION OF THE LAW AND WAR

In conjunction with the law of space, a brief introduction to the law of war is necessary to understand possible space conflict. This legal apparatus is sourced from two ever-evolving but foundational doctrines: the law of war and the law space. Our current laws of war are premised upon four foundational ideas:

- **1) Distinction:**
  - Distinction is the idea that military combatants must take care to distinguish between combatants and civilians, including their objects. Civilians may never be the sole target of any attack.<sup>62</sup>
- **2) Proportionality:**
  - Proportionality is the idea that all attacks must be reasonably proportional to the civilian damage that will occur alongside the attack. Civilian damages may never exceed the expected military advantage. Here, the

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<sup>59</sup> See Timothy G Nelson, *The Moon Agreement and Private Enterprise: Lessons From Investment Law*, 17 ILSA J. INT'L & COMP. L. 394 (2011).

<sup>60</sup> *Id.*

<sup>61</sup> *Id.*

<sup>62</sup> See, e.g., *Practice Relating to Rule 1. The Principle of Distinction between Civilians and Combatants.*, INT'L COMMITTEE RED CROSS, [https://www.icrc.org/customary-ihl/eng/docs/v2\\_cha\\_chapter1\\_rule1](https://www.icrc.org/customary-ihl/eng/docs/v2_cha_chapter1_rule1) (last visited Mar. 25, 2016).

necessity of the military objective is weighed against civilian injury.<sup>63</sup>

- **3) Necessity:**

- Every military objective must have military necessity; anything beyond necessity is criminal because it inflicts undue damage on the enemy. <sup>64</sup> Torture, wounding, and other activities can never be a legitimate military objective, including when to extract confessions.<sup>65</sup>

- **4) Suffering:**

- Related to proportionality, this idea is intended to protect combatants from weaponry, projectiles, and other materials/methods of warfare that cause superfluous, unnecessary injury or suffering.<sup>66</sup>

Understanding how these doctrinal laws interact with one another will aid us in applying it to possible sources of conflict in outer space. The law of war in space is “reasoned legal argumentation.”<sup>67</sup> It is frequently analogized to the laws of war on land, sea, and air. In other words, the law of war is just as pertinent to space as it is to other environments by which to engage warfare. This is helpful in understanding *jus in bello* (limits on the means of war)<sup>68</sup> governing warfare in space. The overlapping principles that apply to land, sea, and air, so too will apply to the law of space, accommodated of course to the distinct features that make outer space unique. Thus, the fundamental principle of self-defense

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<sup>63</sup> See *Rule 14. Proportionality in Attack*, INT'L COMMITTEE RED CROSS, [https://www.icrc.org/customary-ihl/eng/docs/v1\\_cha\\_chapter4\\_rule14](https://www.icrc.org/customary-ihl/eng/docs/v1_cha_chapter4_rule14) (last visited Mar. 25, 2016).

<sup>64</sup> See, e.g., *Military Necessity*, INT'L COMMITTEE RED CROSS, <https://www.icrc.org/casebook/doc/glossary/military-necessity-glossary.htm> (last visited Mar. 25, 2016).

<sup>65</sup> *Id.*

<sup>66</sup> See, e.g., *PRACTICE RELATING TO RULE 70. WEAPONS OF A NATURE TO CAUSE SUPERFLUOUS INJURY OR UNNECESSARY SUFFERING*, INT'L COMMITTEE RED CROSS, [https://www.icrc.org/customary-ihl/eng/docs/v2\\_cha\\_chapter20\\_rule70](https://www.icrc.org/customary-ihl/eng/docs/v2_cha_chapter20_rule70) (last visited Mar. 25, 2016).

<sup>67</sup> See Major Robert A. Ramey, *The Law of War in Space*, SPACE4PEACE (Mar. 13, 2001), <http://www.space4peace.org/sl原因ofwar.htm#sixa>.

<sup>68</sup> See, e.g., What are *jus ad bellum* and *jus in bello*?, INT'L COMMITTEE RED CROSS (Jan. 22, 2015), <https://www.icrc.org/en/document/what-are-jus-ad-bellum-and-jus-bello-0>.

remains steadfast too – a tenet that any sovereign has the right to protect its sanctity from siege or threat.<sup>69</sup> As had happened with the development of aerial warfare, it is expected that international restrictions on outer space warfare will grow with the field.<sup>70</sup>

First, Article III of the Outer Space Treaty reads:

States Parties to the Treaty shall carry on activities in the exploration and use of outer space, including the moon and other celestial bodies, *in accordance with international law*, including the Charter of the United Nations, in the interest of maintaining international peace and security and promoting international co-operation and understanding.<sup>71</sup>

The phrase “in accordance with international law,” along with the specific reference to the U.N. Charter, are strong indications that the framers of this treaty meant for military space operations to be premised upon essential limitations of the law of war, including both *jus ad bellum* (conditions to resort to war) and *jus in bello*. Further, the clause, “in the interest of maintaining international peace and security,” is an idea rooted in the U.N. Charter,<sup>72</sup> and it presupposes that military force will be employed.<sup>73</sup> Presumably, the framers of space law intended to ensure that the law of war would naturally

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<sup>69</sup> *Id.*

<sup>70</sup> *Id.* (“[I]t is reasonable to predict that the *jus in bello* in outer space will evolve as did the *jus in bello* for airspace: incrementally, by analogy to former means and methods of warfare, and in the absence of a comprehensive treaty-based system of prohibitions.”).

<sup>71</sup> U.N. Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies, art. 3, Jan. 27, 1967, 18 U.S.T. 2410, 610 U.N.T.S. 205.

<sup>72</sup> U.N. Charter, at art.1(1) (“[T]o unite our strength to maintain international peace and security”); also has appeared Covenant of the League of Nations. Covenant of the League of Nations, June 28, 1919, 225 Consol. T.S. 188. *See, e.g., Military Necessity*, INT’L COMMITTEE RED CROSS, <https://www.icrc.org/casebook/doc/glossary/military-necessity-glossary.htm> (last visited Mar. 25, 2016).

<sup>73</sup> *Peace and Security*, U.N. INFORMATION SERVICE <http://www.unis.unvienna.org/unis/en/topics/peace-and-security.html> (last visited Mar. 25, 2016); It necessitates the “activity which is necessary for maintain the conditions of peace.” R. Rolfrum, art. 1, in *The Charter of the United Nations: A Commendation* 50 (B. Simma, et al., eds., 1994).

extend to possible conflict that might arise in outer space, while not necessarily setting forth the parameters for how such a war would be limited. In short, the law of space encompasses aspects of the law of war in a nondescript way. Second, the “Martens Clause” of the original 1899 Hague Convention II reads:

Until a more complete code of the laws of war is issued, the High Contracting Parties think it right to declare that in cases not included in the Regulations adopted by them, populations and belligerents remain under the protection and empire of the principles of international law, as they result from the usages established between civilized nations, from the laws of humanity and the requirements of the public conscience.<sup>74</sup>

The clause anticipates technological innovation that will question the legitimacy of international law’s governance over it.<sup>75</sup> The distinction between these two sources of law was later drawn more deeply.<sup>76</sup> Nonetheless, the principle’s incorporation into various documents like the four 1949 Geneva Conventions<sup>77</sup>, the 1977 Protocol (I) to the Geneva Conventions, and the 1980 Convention of Conventional Weapons suggests the Martens Clause itself has become part of customary law. Therefore, the clause’s dynamical nature continues to play an important role and will ensure that space law remains adherent the fundamental principles of the law of war.

### C. PROBLEMS WITH LEGAL DEFINITIONS

Although the undercurrent between the law of war and the law of space remains the same, there are problems, as expected, with the

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<sup>74</sup> See, e.g., Rupert Ticehurst, *The Martens Clause and the Laws of Armed Conflict*, ICRC <https://www.icrc.org/eng/resources/documents/article/other/57jnhy.htm> (last visited Mar. 25, 2016).

<sup>75</sup> H. Strebel, Martens’ Clause, in 3 *Encyclopedia of Public International Law* 252 (Bernhardt, ed., 1982).

<sup>76</sup> See Stat. of the I.C.J. *supra* note 261, at art. 38.

<sup>77</sup> See e.g., Geneva Convention I, at art. 63 P4; Geneva Convention II, at art. 62 P4; Geneva Convention III, at art. 142, Geneva Convention IV, at art. 158 P4.

parameters of application from theory to practice.<sup>78</sup> One such difficulty arises from differentiating space militarization from space weaponization - two commonly-rooted concepts that yield disparate legal results. Space militarization does not necessarily mean space weaponization, but space weaponization is always a form of militarization. The former refers to “the use of outer space by a significant number of military spacecraft,” but does not necessitate aggressive or hostile action.<sup>79</sup> Space weaponization, on the other hand, “refers to the placing in outer space for any length of time any device design to attack man-made targets in outer space and/or in the terrestrial environment.”<sup>80</sup> The lack of legal definitions for many concepts in space law make it even more difficult to apply international law.<sup>81</sup>

The United States has historically avoided the possibility of placing weapons into space, and even as the topic becomes relevant again since the 1950s<sup>82</sup>, many military officers still advocate for a space sanctuary policy.<sup>83</sup> Others, like the former Chief of Staff of the U.S. Air Force, see space weaponization as “inevitable.”<sup>84</sup> Regardless, the question remains – what is considered a weapon? As

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<sup>78</sup> See, e.g., Joyeeta Chatterjee, *Legal Issues Relating To Unauthorized Space Debris Remediation*, McGill Univ. – Inst. AIR & SPACE L. 1–18 (2014).

<sup>79</sup> I.A. Vlastic, *Space Law and the Military Applications of Space Technology*, in *PERSPECTIVES ON INT'L L.* 386 n.6 (N. Jasentuliyana, ed., 1995).

<sup>80</sup> *Id.*

<sup>81</sup> Even when defining a basic concept like “space object,” there is difficulty. Again, like space militarization and weaponization, no formal definition exists. As it is commonly understood, “space object” refers to any artifact launched into orbit, but this definition has proved to be nothing more than a generality.

<sup>82</sup> Editorial Board, *Public Interest in Space is Surging*, THE FRESNO BEE (Sept. 29, 2015), <http://www.fresnobee.com/opinion/editorials/article36968073.html>.

<sup>83</sup> See J.E. Justin, *Space: A Sanctuary, the High Ground, or a Military Theater?*, INT'L SECURITY DIMENSIONS OF SPACE (U. Ra'anan & R.L. Pfaltzgraff, Jr., eds., 1984) 102-09.

<sup>84</sup> David A. Fulgham, *USAF Chief Signals Key Funding Priorities*, AVIATION WEEK & SPACE TECH. 153: 1, 56 (July 3, 2000).

noted earlier, there is no formal definition of “space weapon,” and therefore it becomes even more difficult to develop working definitions for terms like “nuclear weapons” that are then employed in space.<sup>85</sup> While “nuclear weapons” might be easier classified, there are many artifacts that beckon for authoritative guidance.<sup>86</sup> The United Nations Institute for Disarmament Research suggested the following definition:

A space weapon is a device stationed in outer space (including the Moon and other celestial bodies) or in the earth environment designed to destroy, damage, or otherwise interfere with the normal functioning of an object or being in outer space, or a device stationed in outer space designed to destroy, damage, or otherwise interfere with the normal functioning of an object or being in the earth environment. Any other device with the inherent capacity to be used as defined above will be considered a space weapon.<sup>87</sup>

This, evidently, is a very broad category, particularly with the addition of the second sentence which “arguably leaves the definition so broad as to include just about any object at all.”<sup>88</sup> When objects orbit at 17,000 miles per hour, do they have an “inherent capacity” to “destroy . . . or interfere” with other objects, thus making them space weapons?<sup>89</sup> The particular difficulty, therefore, lies in categorizing objects that were not “designed as weapons”<sup>90</sup> or with certain

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<sup>85</sup> To make matters more complicated, the “industry” continues to produce technology that they deem as “space weapons,” which will likely converge into a working definition under customary law. *See, e.g., The Most Dangerous Space Weapons*, SPACE.COM, (Dec. 21, 2016, 3:25 PM) <http://www.space.com/19-top-10-space-weapons.html>.

<sup>86</sup> *See* Paul B. Stares, *The Problem of Non-Dedicated Space Weapon Systems, Peaceful and Non-Peaceful Uses of Space: Problems of Definition for the Prevention of An Arms Race* (B. Jasani ed., 1991) 147.

<sup>87</sup> Patrick M. Cronin, *Global Strategic Assessment 2009: America's Security Role in a Changing World* 79 (2009).

<sup>88</sup> *See, e.g.,* Robert A. Ramey, *Armed Conflict on the Final Frontier: The Law of War in Space*, 48 A.F. L. REV. 1, 132 (2000).

<sup>89</sup> *Id.*

<sup>90</sup> *Id.* Although there has been some scholarship dedicated towards elucidating this category of systems that were not designed as weapons but in theory can operate as them.

machine's subparts. In summation, aside from the stigma attached by a large segment of the international community with respect to space combat, there currently exists no restrictions on the means and methods of combat which might violate international law.<sup>91</sup> Therefore, the reigning principles of international law remain intact – that, for example, an attack in outer space shall not be disproportionate or indiscriminate relative to its military objective.<sup>92</sup>

### III. A CASE STUDY ON DUAL-USE SATELLITES

The capturing of spacecraft also raises questions of force. Because any spacecraft sent in by a state is considered property of that state for purposes of jurisdiction and control, an intentional capture or disablement of a satellite, for example, may amount to an armed attack sufficient to warrant self-defense.<sup>93</sup> The effect is trickier, however, when a satellite is shared by multiple states.<sup>94</sup> The bottom line remains, however, that states rely on compliance with international law in outer space not just to inform their decisions but to identify a preventative safeguard to ensure the protection of their

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<sup>91</sup> The Liability Convention, a U.S. ratified attempt at creating a system for liability based on damage to space objects, further implies that intentional destruction of spacecraft might occur. B.M. HURWITZ, *THE LEGALITY OF SPACE MILITARIZATION* 29, 30 (1986) (This suggests that the international community recognizes the realistic probability of situations amounting to the intentional destruction of spacecraft. At minimum, the U.S. recognizes these outcomes.)

<sup>92</sup> See, e.g., Customary IHL Database, *Rule 14. Proportionality in Attack*, INT'L COMMITTEE RED CROSS, [https://www.icrc.org/customary-ihl/eng/docs/v1\\_cha\\_chapter4\\_rule14](https://www.icrc.org/customary-ihl/eng/docs/v1_cha_chapter4_rule14) (last visited Mar. 25, 2016).

<sup>93</sup> Ramey, *supra* note 89.

<sup>94</sup> See, e.g., P.J. Blount, *Targeting in Outer Space: Legal Aspects of Operational Military Actions in Space*, HARV. NAT'L SECURITY J. (2012), <http://harvardnsj.org/wp-content/uploads/2012/11/targeting-in-outer-space-blount-final.pdf> (“While there is strong support for the concept that that these services do not violate the peaceful purposes principle found in international law, these actions may still ‘make an effective contribution to military action.’ One must then question whether a satellite's multinational nature would have an effect on its status as a legitimate military objective . . . . The multinational character becomes more complex when it is taken into account that member States of a multinational organization may also be neutral states.”).



assets. Although the conception of war plays a role in many aspects of outer space, analyzing, as a narrow issue, the role of satellites employed by multiple states will enlighten a broader conception of spacetime war. At its core, the issue of satellites raises at least three wrinkles that warrant reconsideration for how traditional laws of war will play out in space.

#### A. PROPORTIONALITY ANALYSIS – MILITARY AND CIVILIAN BALANCING

In traditional warfare, it is necessary to balance any attack against civilian harm.<sup>95</sup> If the benefit of militarism outweighs the civilian injury, then that attack is appropriate.<sup>96</sup> If an attack projects greater civilian injury than military benefit, then within traditional war theory, this attack is illegal and subject to the jurisdiction of international criminal court.<sup>97</sup> If a satellite, employed for 1,000 uses by five state actors, is used by one of those states for one military purpose, then does a sixth state actor who is the subject of the militarism have the right to attack the satellite, even when it is used by four other states for many other civilian purposes? What if the state actor subject to these military advances is part of the four other state actors who use the satellite for civilian purposes – how does that change the assessment?

Traditionally, a school under the Geneva Convention of 1949 is immune from attack, but the treatise allow for exceptions.<sup>98</sup> If a school has been taken over by hostile forces, then it becomes a legitimate military target.<sup>99</sup> In other words, harm to the school

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<sup>95</sup> Customary IHL Database, *supra* note 93.

<sup>96</sup> See Janina Dill, *Applying the Principle of Proportionality in Combat Operations*, OXFORD INST. FOR ETHICS L. & ARMED CONFLICT (2010), [http://www.elac.ox.ac.uk/downloads/proportionality\\_policybrief\\_dec\\_2010.pdf](http://www.elac.ox.ac.uk/downloads/proportionality_policybrief_dec_2010.pdf).

<sup>97</sup> Gaby Rado, *Legitimate Military Targets*, CRIMES OF WAR, <http://www.crimesofwar.org/a-z-guide/legitimate-military-targets>.

<sup>98</sup> See, e.g., Int'l Comm. of the Red Cross, *Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War*, 6 U.S.T. 3516, (Aug. 12, 1949)

<https://www.icrc.org/applic/ihl/ihl.nsf/treaty.xsp?documentid=ae2d398352c5b028c12563cd002d6b5c>.

<sup>99</sup> Rado, *supra* note 98.

building is no longer part of the proportionality analysis.<sup>100</sup> This exception indirectly presumes that school operations are no longer taking place while military operations are, but what about a satellite that still provides 999 other civilian uses? Does it by a single use become a legitimate military threat, or should those 999 other civilian uses protect it from attack?

The answers to these questions can be inferred from the IHL.<sup>101</sup> If there are children present in the school while military operations are taking place,<sup>102</sup> then they must be accounted for in proportionality analysis. In other words, if the building's sole purpose is militaristic, then the focus will be on the use of the building at its present moment.<sup>103</sup> Therefore, collateral damage to the building will be unaccounted because at the moment of attack, the building's purpose was militaristic.<sup>104</sup> But where there are multiple purposes for a unit, proportionality analysis kicks in to protect people involved with civilian purposes.<sup>105</sup>

According to this logic, it would be difficult to lawfully attack a satellite with so many other civilian "purposes." However, nation-states can conceivably manipulate the proportionality analysis to their own military agenda, knowing that they will be shielded by 999 other civilian uses. In other words, what if military operations coming from a satellite hide behind many other civilian operations of that satellite?

This loophole is analogous to the use of human shields<sup>106</sup>, which therefore welcomes diversity in response. While many state

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<sup>100</sup> Except to the extent that structural damage and future civilian use are calculated. See, e.g., Amos N Guiora, *Determining a Legitimate Target: The Dilemma of the Decision-Maker*, 47 TEX. INT'L L. J. 315 (2012).

<sup>101</sup> See, e.g., Customary IHL Database, *Practice Relating to Rule 8. Definition of Military Objectives*, INT'L COMMITTEE RED CROSS, [https://www.icrc.org/customary-ihl/eng/docs/v2\\_rul\\_rule8](https://www.icrc.org/customary-ihl/eng/docs/v2_rul_rule8) (last visited Mar. 25, 2016).

<sup>102</sup> Presumably, these children are not part of the military operations.

<sup>103</sup> See, e.g., *Ukraine: Attacks, Military Use of Schools*, HUMAN RIGHTS WATCH (Feb. 11, 2016, 2:45 AM), <https://www.hrw.org/tet/node/286723>.

<sup>104</sup> Customary IHL Database, *supra* note 93.

<sup>105</sup> *Id.*

<sup>106</sup> Some groups are prone to employing human shields while conducting typical military objectives so that enemies are 'forced' to

actors will consider human shields in their proportionality analysis, the United States completely disregards collateral harm to involuntary human shields; they might too disregard the 999 other civilian uses in shooting down a satellite that is employed for one military use. Some special protections are created for objects that are indispensable to the civilian population, such as food and medicine.<sup>107</sup> Since the original 1864 Geneva Convention, special protections have generally increased, now including military chaplains, for example.<sup>108</sup> Does it then follow that such a special protection would soon also apply to multi-state satellites? To answer this question, I believe a relevant question is whether these satellites are essential.<sup>109</sup> The Geneva Convention and the United Nations have acknowledged the essentiality of food, medicine, and religion.<sup>110</sup> Food and medicine allow life, while religion provides fundamental purpose. To deny someone this right would be purportedly unjust. So what information do multi-state satellites provide?<sup>111</sup> Generally,

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calculate the added civilian effect. The hope is that the added civilian effect will offset the proportionality analysis enough so that it becomes conceivably illegal to attack a target due to the number of human shields present. *See, e.g.,* Jodi Rudoren & Majd Al Waheidi, *Red Cross Offers Workshops in International Law to Hamas*, N.Y. TIMES (Aug. 15, 2015), <http://www.nytimes.com/2015/08/16/world/middleeast/red-cross-offers-workshops-in-international-law-to-hamas.html?smid=pl-share>.

<sup>107</sup> Which could then operate as a shield against potential measures by the Department of Defense.

<sup>108</sup> Amos Harel & Yuval Yoaz, *IDF to Ask High Court to Review Ban on 'Human Shield' Practice*, HAARETZ (Oct. 11, 2005, 12:00 AM), <http://www.haaretz.com/news/idf-to-ask-high-court-to-review-ban-on-human-shield-practice-1.171689>.

<sup>109</sup> *See, e.g.,* UC Center for Hydrologic Modeling, *Satellite Data Will Be Essential to Future of Groundwater, Flood and Drought Management*, SCIENCE DAILY (June 13, 2013), <http://www.sciencedaily.com/releases/2013/06/130613142822.htm>.

<sup>110</sup> *See, e.g.,* Office of the High Commissioner, *Special Rapporteur on Freedom of Religion or Belief*, U.N. COMMISSION ON HUMAN RIGHTS, <http://www.ohchr.org/en/issues/freedomreligion/pages/freedomreligionindex.aspx> (last visited Mar. 25, 2016).

<sup>111</sup> *See What Are Satellites Used For?*, UNION OF CONCERNED SCIENTISTS (Jan. 15, 2015), <http://www.ucsusa.org/nuclear-weapons/space-weapons/what-are-satellites-used-for#.vt-aqiwrlja>.

information from artificial satellites<sup>112</sup> is categorized as: (1) scientific research, (2) weather, (3) communications, (4) navigation, (5) Earth observing, and (6) military. To name a few:

- Global weather trends to help monitor and predict weather and environmental events<sup>113</sup>
- Information and pictures of other entities in the solar system or of other galaxies<sup>114</sup>
- Geographical location of objects for drones and GPS<sup>115</sup>
- Effects of global warming/pollution<sup>116</sup>

Is this information necessary? Let's choose, for example, the ability of a geostationary satellite<sup>117</sup> to predict a forest fire<sup>118</sup> or a polar-orbiting satellite to collect data on volcanic eruptions.<sup>119</sup> Reasonable minds may differ on whether this is *necessary*. Some may argue that although the trend has been to expand special protections for what is deemed essential, information gathered from

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<sup>112</sup> Which are different from natural satellites, like the moon, which orbit the planet without human intervention.

<sup>113</sup> Paul J Meyer, *Interactive Weather Satellite Imagery Viewers From NASA GHCC Earth Science Office*, NASA <http://weather.msfc.nasa.gov/goes/> (last visited Mar. 25, 2016).

<sup>114</sup> See, e.g., Tom Chao, *Image of the Day*, SPACE.COM (Mar. 8, 2017) <http://www.space.com/34-image-day.html>.

<sup>115</sup> See, e.g., Ben Coxworth, *RAFAGA System Allows Autonomous Drones to Find Their Way Without GPS*, GIZMAG (May 25, 2015), <http://www.gizmag.com/rafaga-drone-navigation/37699/>.

<sup>116</sup> *NASA Launches Satellite to Track CO2 in the Atmosphere*, THE GUARDIAN (July 2, 2014), <https://www.theguardian.com/science/2014/jul/02/nasa-satellite-carbon-dioxide-atmosphere-co2>.

<sup>117</sup> *Id.*

<sup>118</sup> See, e.g., *Hazard Mapping System Fire and Smoke Product*, OFFICE OF SATELLITE AND PRODUCT OPERATIONS, [www.ospo.noaa.gov/Products/land/hms.html](http://www.ospo.noaa.gov/Products/land/hms.html) (last visited Mar. 25, 2016).

<sup>119</sup> See, e.g., *NASA Satellites Pinpoint Volcanic Eruption: Image of the Day*, EARTH OBSERVATORY, <http://earthobservatory.nasa.gov/iotd/view.php?id=78849> (last visited Mar. 25, 2016).

satellites might not be *as* essential as food, medicine, and religion, for example, and might just be *really important*. Others may argue that special protections do not just extend to that which is absolutely necessary to sustain life, e.g. religion.<sup>120</sup> Furthermore, the protection of life is certainly essential, as seen from the special protection that aid workers are given in their work to protect civilian lives.<sup>121</sup> Therefore, the prediction of forest fires and volcanic eruptions is essential because of its ability to warn communities and save lives.<sup>122</sup>

What threshold should be created to designate some satellites for special protection but not all? If the immunity standard, for example, is “satellites collecting information directly related to the protection of civilian lives,” then would such an exception still apply if a satellite has 1 use that directly relates to the protection of civilian lives but 999 other military uses? This is a thorny question that combines both aspects of a proportionality analysis with the idea of special protections. The idea is further implicated when scientific historians label our current period in human history as the Age of Information, where the most important tradable commodity is information.<sup>123</sup> Some of the most important tradable commodities in the past have been industry<sup>124</sup> and (prior to that) land,<sup>125</sup> both of

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<sup>120</sup> And furthermore that Art. 55 of the Geneva Convention, for example, which states that occupying powers are to provide necessary food and medical supplies to civilian populations is a tautology, because the Geneva Convention has now deemed it necessary.

<sup>121</sup> See, e.g., Nadia Abramson, *United Nations Peacekeepers Can Do No Wrong: How Blue Helmets Achieved Immunity for Sexual Abuse in Côte d'Ivoire and How to Ensure Accountability in the Future*, WILLIAM & MARY LAW SCHOOL: CENTER FOR COMPARATIVE LEGAL STUDIES & POST-CONFLICT PEACEBUILDING, <https://law.wm.edu/academics/intellectuallife/researchcenters/postconflictjustice/documents/abramson.paper.pdf>.

<sup>122</sup> See Issie Lapowsky, *How NASA Data Can Save Lives From Space*, WIRED.COM (Sept. 28, 2015), <http://www.wired.com/2015/09/nasa-usaid-servir/>.

<sup>123</sup> See, e.g., Theodore Kahn, *The Road to the Information Age*, THE ATLANTIC (July 2008), <http://www.theatlantic.com/magazine/archive/2008/07/the-road-to-the-information-age/306922/>.

<sup>124</sup> See Joseph A. Montagna, *The Industrial Revolution*, YALE-NEW HAVEN TEACHERS INST.,

which have played significant roles in the development of war.<sup>126</sup> Therefore, because of how critically linked information is to the way our globalized society operates, perhaps there is a reasonable argument to be made that in order to prevent a global financial apocalypse, for example, there needs to be an uninhibited supply of information that meets our needed demand.<sup>127</sup> In other words, information is so essential to the way we presently live (and so intrinsically linked to our markets) that we should be wary of underestimating its far-reaching effects.<sup>128</sup>

An example of how critical and influential information is to our society is seen through cyber warfare.<sup>129</sup> While some experts only recognize armed attacks from cyber warfare as those that result in physical damages, there is perhaps an equally significant and growing faction that recognizes information seizures as the real threat from cyber attacks, when there is no physical damage.<sup>130</sup> The severity of a cyber attack is often proportional to the criticality of information to a nation-state's confidential interests, and so in the case of cyber attacks that snip away information from satellites, the ever-growing and contentious realm of cyber warfare would likely

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<http://www.yale.edu/ynhti/curriculum/units/1981/2/81.02.06.x.html> (last visited Mar. 25, 2016).

<sup>125</sup> See, e.g., *Why Did Feudalism Fail in the American Colonies?*, COLONIAL ERA, <http://www.mtholyoke.edu/~sgabriel/EconHistoryText.htm> (last visited Mar. 25, 2016).

<sup>126</sup> Because finite resources reasonably lead to tension.

<sup>127</sup> Or for some, an inhibited, socialized flow of information free from consumer-markets, and driven instead by the fair access of information by all. See, e.g., Brian Skepys, *Is There a Human Right to the Internet?*, 5 J. POL. & L. 4 (2012).

<sup>128</sup> See, e.g., John Naughton, *The Internet : Is It Changing the Way We Think?*, THE GUARDIAN (Aug. 14, 2010), <http://www.theguardian.com/technology/2010/aug/15/internet-brain-neuroscience-debate>.

<sup>129</sup> International Committee of the Red Cross, *Cyber Warfare*, INT'L COMMITTEE RED CROSS, <https://www.icrc.org/en/war-and-law/conduct-hostilities/cyber-warfare> (last visited Mar. 26, 2016).

<sup>130</sup> See, e.g., Michael N. Schmitt, *The Law of Cyber Warfare: Quo Vadis?*, 25 STAN. L. & POL'Y REV. 269 (2014).

apply. One pertinent question from cyber warfare that can be applied to the law of space is whether the dominion of the military is appropriate.<sup>131</sup> Not all response to satellites that are purportedly being used from military operations will be by force. Some groups may, for example, hack into the infrastructure of a satellite to disengage it from further use. Such action would undoubtedly raise concerns about whether the most appropriate response is militarized – or whether such a strained analogy is antiquated .

## B. INHERENTLY DANGEROUS OBJECTS

What if physical armed attacks are launched against satellites – what questions and problems are raised by this hypothetical that are unique to outer space? As noted above, objects in space that no longer function continue in orbit at 17,000 miles per hour, containing the inherent capacity to inflict serious damage on other objects that come in their path.<sup>132</sup> Some might say that the fast-pace of orbit and proximity of most satellites to earth make this realm of militarized hostility too dangerous, and therefore, armed attacks against satellites should be advised against. Others would point to the fact that there already exists 6,000 pieces of space junk in orbit<sup>133</sup> (including decommissioned, faulty, and abandoned satellites), and that adding more would not be marginally significant.

Some unique targets that unleash dangerous forces are governed by special rules – would similar rules apply to satellites? For example, attacking an oil tanker can destroy many ecosystems, so there are special rules that govern these attacks.<sup>134</sup> The law of war attempts to capture externalities and govern those that have serious

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<sup>131</sup> See, e.g., Mary Ellen O’Connell, *Cyber Security Without Cyber War*, 17 J. CONFLICT & SEC. L. 187 (2012).

<sup>132</sup> See, e.g., Brian Dunbar, *What is an Orbit?*, NASA (2010), <http://www.nasa.gov/audience/forstudents/5-8/features/nasa-knows/what-is-orbit-58.html>.

<sup>133</sup> While there are presently about 3,000 *useful* satellites in orbit.

<sup>134</sup> See, e.g., Beth Van Schaack, *Targeting Tankers - and Their Drivers - Under the Law of War (Part 2)*, JUST SECURITY RSS (Dec. 3, 2015, 9:30 AM), <https://www.justsecurity.org/28071/targeting-tankers-drivers-law-war-part-2/>.

knock-on effects.<sup>135</sup> Within the ICRC (Rule 42, Sec. A), ILC Draft Code of Crimes against the Peace and Security of Mankind (1996), Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, UN Secretary-General's Bulletin, as well as in the law of war manuals for 30 countries, and enacted in the legislations of 28 countries, and within the case law or national practice of 15 countries, is the idea that installations containing dangerous forces, like dams, dykes, or nuclear electrical generating stations, will be governed with special protections that almost always preclude the idea of any attack.<sup>136</sup> So why is unleashing dangerous forces such a prevalent concept in the international community, and what is the threshold that makes a force dangerous – does a free-orbiting satellite fit this category?

Let's begin with the threshold for what a dangerous force is. The most helpful guide from the above listed 62 options, although still not very instructive, is the ICRC (Rule 42, Sec. A), which is echoed in the manuals for many countries.<sup>137</sup> It states that a force is dangerous "if such attack may cause the release of dangerous forces and consequent severe losses among the civilian population."<sup>138</sup> In one way, it is self-evident; in another way, it sets the threshold of force as "severe."<sup>139</sup> Though this is insignificant in a vacuum, it is paired with the word "consequent," which implies that the release of dangerous forces is immediately and directly related to the attack.<sup>140</sup>

If a satellite is attacked and subsequently decommissioned, it may continue in orbit for many years before colliding and destroying another object in orbit. Do the law manuals of other countries help? Australia, for example, states that the policy against "release of

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<sup>135</sup> Rolf Weder & Herbert G. Grubel, *The New Growth Theory and Coasean Economics: Institutions to Capture Externalities*, 129 WELTWIRTSCHAFTLICHES ARCHIVE 488 (1993), [http://www.jstor.org/stable/40440327?seq=1#page\\_scan\\_tab\\_contents](http://www.jstor.org/stable/40440327?seq=1#page_scan_tab_contents).

<sup>136</sup> See, e.g., Customary IHL, *Practice Relating to Rule 42. Works and Installations Containing Dangerous Forces*, INT'L COMMITTEE RED CROSS, [https://www.icrc.org/customary-ihl/eng/docs/v2\\_rul\\_rule42](https://www.icrc.org/customary-ihl/eng/docs/v2_rul_rule42) (last visited Mar. 26, 2016).

<sup>137</sup> *Id.*

<sup>138</sup> *Id.*

<sup>139</sup> *Id.*

<sup>140</sup> *Id.*



dangerous forces” is an “absolute standard,” while the United States and Ecuador<sup>141</sup>, for example, set it against the rule of proportionality. For an absolute standard to exist, there usually need to be absolute variables; in other words, there need to be little issue with respect to causation. Therefore, the Australian standard, in a way, implies a direct, causal effect, while the proportionality standard set forth by the United States and Ecuador at least allows for greater disparity in the variables; in other words, there does not need to be an immediate aftereffect of an attack, but one that can be forthcoming.<sup>142</sup>

The Côte d’Ivoire’s Teaching Manual (2007), in Book I, Lesson 2, II.2.4 *Protection of objects containing dangerous forces*, states, “These installations . . . must not be made the object of attacks if the risk causing the release of dangerous forces likely to lead to catastrophic effects.”<sup>143</sup> Here is a country that allows for there to be culpability even if there is a several year delay between the attack of a satellite and its collision with another object in space, as long as that collision is “likely.”<sup>144</sup>

We are left then with the question, even under the broader category of Côte d’Ivoire, of whether a free-orbiting satellite fits the bill of releasing dangerous force? That depends on how likely of a scenario it is that debris in orbit will collide with a satellite. The chances of this happening are very slim for two reasons. First, the orbit around Earth is huge; second, manmade satellites travel in orbital bands at similar speeds, so two objects that are moving in the same direction at different heights will be unlikely to hit each other assuming that orbital bands do not overlap.<sup>145</sup>

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<sup>141</sup> Customary IHL, *Practice Relating to Rule 65. Perfidy*, INT’L COMMITTEE RED CROSS, [https://www.icrc.org/customary-ihl/eng/docs/v2\\_cou\\_ec\\_rule65](https://www.icrc.org/customary-ihl/eng/docs/v2_cou_ec_rule65) (last visited Mar. 26, 2016).

<sup>142</sup> *Id.*

<sup>143</sup> See, e.g., Customary IHL, *Section A. Attacks Against Works and Installations Containing Dangerous Forces and Against Military Objectives Located in Their Vicinity*, INT’L COMMITTEE RED CROSS, [https://www.icrc.org/customary-ihl/eng/docs/v2\\_cou\\_ci\\_rule42\\_sectiona](https://www.icrc.org/customary-ihl/eng/docs/v2_cou_ci_rule42_sectiona) (last visited Mar. 26, 2016).

<sup>144</sup> *Id.*

<sup>145</sup> See, e.g., Jonathan O’Callaghan, *Why Don't Objects Collide Often in Earth Orbit?*, SPACE ANSWERS (Feb. 20, 2014), <http://www.spaceanswers.com/space-exploration/why-dont-objects-collide-often-in-earth-orbit/>.

Despite the low probability of orbital bands overlapping at a moment when satellites could collide, in 2009 an active U.S. satellite collided with a Russian satellite, destroying both, and creating thousands of pieces of debris.<sup>146</sup> And since 2009, there have been four other reported incidents of collisions between satellites resulting space debris.<sup>147</sup> What about satellites leaving orbit and being pulled into Earth's atmosphere – what are the chances that it will kill a human? According to the European Space Agency, “The annual risk of a single person to be several injured by a re-entering piece of space debris is about 1 in 100 billion . . . in the course of a 75-year lifetime . . . less than one in 1 billion . . . [which is] about a factor 60,000 higher [than getting] struck by a lightning.”<sup>148</sup>

Still, in 1997, Lottie Williams of Tulsa, Oklahoma became the only person who was hit by space debris while going for a run in the park, but because of wind resistance, it fluttered to the ground so that it did not hurt her.<sup>149</sup> Heiner Klinkrad, head of the ESA's Orbital Debris Office, suggested that in this modern world, people should accept the risk posed by space debris due to their reliance upon satellites for communication and navigation.<sup>150</sup> In other words, the externalities should be born by civilian populations on Earth.

One theory, however, suggests that a space collision can be far more dangerous and likely than has been otherwise accepted. Kessler Syndrome purports that with each collision and subsequent debris that results, the chances of another collision are increased.<sup>151</sup>

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<sup>146</sup> A lot of debris will be pulled into the Earth's atmosphere and burned upon re-entry. See Becky Iannotta & Tariq Malik, *U.S. Satellite Destroyed in Space Collision*, SPACE.COM (Feb. 11, 2009), <http://www.space.com/5542-satellite-destroyed-space-collision.html>.

<sup>147</sup> *Id.*

<sup>148</sup> See, e.g., Natalie Wolchover, *What Are the Odds You'll Get Struck by a Falling Satellite?*, LIVESCIENCE (Sept. 21, 2011), <http://www.livescience.com/33511-falling-nasa-satellite-uars-risk.html>.

<sup>149</sup> Nell GreenfieldBoyce, *Where Falling Satellite Lands Is Anyone's Guess*, NATIONAL PUBLIC RADIO (Sept. 21, 2011), <http://www.npr.org/2011/09/21/140641362/where-falling-satellite-lands-is-anyones-guess>.

<sup>150</sup> Wolchover, *supra* note 151.

<sup>151</sup> There is actually a satellite collision every year contrary to common conceptions. See, e.g., *Lockheed Martin in Space Junk Deal with Australian*

The domino effect aggregates the risk of satellite and debris collisions.<sup>152</sup> Kessler Syndrome, first introduced by NASA scientist Donald Kessler in 1978, has had significant impact on understanding space collisions.

Nonetheless, even proponents of the Kessler Syndrome would likely agree that the conversion of *one* operating satellite into space debris will be unlikely to product an effect where dangerous forces are unleashed. Thus, the special provisions that govern these forces would probably be inapplicable in the context of satellite collisions with space debris, even under the broad discretion of Côte d'Ivoire and even when relying on the speculative, far-reaching Kessler Syndrome theory.

### C. MULTIPLE ACTORS

Last but not least, a third major wrinkle that has been previously mentioned is that many of these satellites are in orbit due to the effort of multiple state actors. If a satellite is put up by the United States, Russia, China, and India, and there is a dispute between the United States and Russia over a particular satellite, then in what ways do China and India become part of the calculus?

Whether or not satellites owned by multiple, headstrong state actors should gain immunity status is up for debate. Differing opinions from different state actors, as was seen in the discussion about human shields, can itself augment to the tension, making a tricky situation even thornier.

Extraterritoriality is the concept that the laws of the local jurisdiction do not apply to certain regions because of multiple-state interests involved.<sup>153</sup> Examples include offices of the United Nations and foreign embassies, and whether such a concept can be applied to satellites is questionable. First, there is no local jurisdiction that exists in outer space beyond that which has already been developed as international law.<sup>154</sup> Second, extraterritoriality usually operates

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*Firm*, BBC NEWS (Aug. 28, 2014), <http://www.bbc.com/news/business-28948367>.

<sup>152</sup> Some suggest to the point where specific orbital ranges would be uninhabitable for generations. See, e.g., Donald J. Kessler & Burton G. Cour-Palais, *Collision Frequency of Artificial Satellites: The Creation of a Debris Belt*, 83 J. GEOPHYSICAL RES. 2637, 2637–2646 (1978).

<sup>153</sup> See Anthony J. Colangelo, *What is Extraterritorial Jurisdiction?*, 99 CORNELL L. REV. 1303, 1303–1352 (2014).

<sup>154</sup> *Id.*

counter to the interests of the local jurisdiction, which is why there needs to be extraterritoriality in the first place – to serve as a check on otherwise tense situations.<sup>155</sup> However, in outer space, all our previously studied paradigms indicate that the weaponization and militarization of space is either illegal or frowned upon, so does there need to exist an added layer of extraterritoriality?

At the very least, multiple state-actors who are not part of the conflict will be considered analogous to civilians. Therefore, their consideration will become significant in the proportionality analysis when the military objective is being weighed against the civilian costs. Naturally, the greater number of military state actors that exist, the higher the civilian cost will be.

#### IV. PUBLIC POLICY IMPLICATIONS

As stated earlier, the space industry is potentially massive, potentially more encompassing than any market we have seen on earth. With space tourism, travel, asteroid mining, and increased technological exploration, tensions are undoubtedly soon to rise more. Foresight would necessitate that we seriously reconsider how our international law ought to apply in space.

On the one hand, it is ineffective to constantly particularize bodies of law to new arenas. Put differently, technology is constantly changing, and it is unnecessary to always question whether international law will apply. It is ineffective and disallows bodies of law to reform themselves to changes. A stagnant law that must be reconsidered with every generational change in technology would obviously lack foresight. More significantly, however, it undermines the very nature of the law. Laws are meant to be applied, and if there is a reconsideration for the applicability of a law to a body of technology, then what purpose for the enactment of the law in the first place? Not only is such a process ineffective, but it trivializes the ability of an international body of law to be relevant. Changed circumstances are an assumed constant in our globalized markets,<sup>156</sup> so at what point is a line drawn for some changes to be within the purview of a law? In this sense, reconsideration of a law's applicability forces current laws to become antiquated when faced with new arenas to tackle.

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<sup>155</sup> *Id.*

<sup>156</sup> See *Fast-changing Nature of World Trade Poses New Policy Challenges, Report Says*, WORLD TRADE ORGANIZATION (July 18, 2013), [https://www.wto.org/english/news\\_e/pres13\\_e/pr692\\_e.htm](https://www.wto.org/english/news_e/pres13_e/pr692_e.htm).

On the other hand, international law of war has, in many ways, proved ineffective,<sup>157</sup> and maybe it is time we reconsidered a more universal international body of war that does not need to be re-particularized for every new arena. In other words, an international constitutional convention may be required to give greater clout to international agencies to regulate areas like war in space. Such reconsideration might be necessary here.

## V. CONCLUSION

Technology in space is one of the greatest examples of human collaboration. But collaboration is tricky and can sometimes lead to conflict. A reevaluation of how law of war can play in space is essential, and there is no better case study than satellites.

On the International Space Station, “[a]stronauts can perform science experiments in European and Japanese laboratories, operate a Canadian robotic arm, exercise on an American treadmill and eat dinner at a Russian table.”<sup>158</sup> But because of the mega-industry that space presents, it is likely that tension in space between state-actors will lead to questions of how war will operate in outer space.

Because this can exist through a multitude of conceptions,<sup>159</sup> the idea of dual-use satellites is a particularly helpful (though largely hypothetical) case study. At the most rudimentary level, it appears that proportionality analysis would apply, which it most likely would, even when dealing with satellites that are being used for military purposes – why? Because unlike a school building that has been taken over by hostile forces that is no longer discounted in proportionality, a satellite *continues* to operate in a multitude of ways, and simply because it used for one endeavor does not preclude it from being used for many others.

But some would argue that proportionality analysis would not apply when dealing with installations that are capable of unleashing great forces. However, because the likelihood of a defunct satellite colliding into other satellites is so rare, this argument would likely fail, even when dealing with a theory that presupposes a massive

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<sup>157</sup> See, e.g., Elihu Root, *The Outlook for International Law*, 10 AM. J. INT’L L. 1, 1–11 (1916).

<sup>158</sup> A Home in Space, BBC WORLD SERVICE, <http://www.bbc.co.uk/programmes/p03b6t7p> (2015).

<sup>159</sup> For example, competing economic interests when it comes to space mining, or internal tension in space when human civilization is set on Mars, or a war with extraterrestrial species.

domino effect. What about defunct satellites falling down to earth? This is also rare, largely because the debris will burn itself through as it falls down to earth.

If the idea of an installation unleashing great force fails, we move to the idea that a satellite is essential to earth. At first glance, it is not in the same category that food, medicine, or a rabbi is. Food and medicine sustain life, while a rabbi helps provide fundamental purpose. However, satellites help predict severe natural disasters, for example which can help save millions of lives, so from this angle, it is essential to the way we live. Furthermore, information is arguably the most valuable commodity in our current markets, which additionally implicates the idea that satellites are essential. Where we draw the line between what is essential to human life versus what is just superbly helpful is difficult.

Whether or not physical attacks will even play a role in taking down satellites is questionable. Similar to cyber warfare, attacks may be non-physical in nature, and when they are, questions about the dominion of the military of these objectives come into play. Is there a better-suited body of scholars and practitioners that ought to be grappling with these questions? Time will tell.

Though many issues remain unresolved, examining the role war will play in space is enlightened through an analysis of dual-use satellites. Many core concepts of traditional warfare apply, but they must be accommodated into the frame of space, accounting for varied physics and different externalities. The law of war, in this sense, is like a spine – strong enough to hold the body of law upright, yet malleable enough to allow for its mobility. How far it will bend itself to accommodate ‘outer space’ is a tricky question, but time will give it increased pertinence.



## STUDENTS HELPING STUDENTS: AN ALTERNATIVE TO CURRENT DISCIPLINARY MECHANISMS IN SCHOOLS

SHUVO ROBI SIRCAR\*

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## I. INTRODUCTION

Across the United States, students are being pushed out of schools. In the wake of the shooting at Columbine High School in 1999, the policing of schools has become a rigid practice, fraught with little room for mitigating circumstances. As a result, “schools have increasingly relied on suspensions (and lesser extent, expulsions) as disciplinary responses to a wide range of student infractions of school rules and norms.”<sup>1</sup> According to a survey conducted by the National Center for Education Statistics, in 2006 over 3.3 million students were suspended from school.<sup>2</sup> These suspensions are suspected to be the cause of diminishing graduation numbers, the growing school to prison pipeline and even the increasing poverty rates. Consequently, there is a growing consensus among educators and researchers that too many students are being suspended. Disturbing trends in recidivism and dropout rates have led many to call for reform to school disciplinary practices. Arguments in favor of reform however have not been without opposition. On the other side of the debate, some parents and administrators believe that efforts to keep these so-called “bad kids” in school will result in a less safe and poorer learning environment. The debate between these two sides gained national attention with the story of Ahmed Mohamed.

It was just an ordinary English class like any other around the United States. In this particular class, Ahmed Mohamed, an ambitious ninth grader from Irving, Texas, came to school eager to impress his teachers and classmates with the clock he had built out of

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<sup>1</sup> Danfeng Soto-Vigil Koon, *Exclusionary School Discipline: An Issue Brief and Review of the Literature*, THE CHIEF JUST. EARL WARREN INST. ON L. & SOC. POL’Y, UNIV. OF CAL. BERKELEY SCH. OF L. (Apr. 2013), [https://www.law.berkeley.edu/files/BMOC\\_Exclusionary\\_School\\_Discipline\\_Final.pdf](https://www.law.berkeley.edu/files/BMOC_Exclusionary_School_Discipline_Final.pdf) (“Since the early 1970s, the national suspension rate has more than doubled, rising from 3.7% of students in 1973 to 7.4% in the latest 2009-2010 date”).

<sup>2</sup> *Number of Students Suspended and Expelled From Public Elementary and Secondary Schools by Sex, Race/Ethnicity, and State: 2006*, THE NATIONAL CENTER FOR EDUCATION STATISTICS (July 2008), [http://nces.ed.gov/programs/digest/d10/tables/dt10\\_169.asp](http://nces.ed.gov/programs/digest/d10/tables/dt10_169.asp).



a pencil box.<sup>3</sup> To his and many in the country's surprise, Ahmed's ingenuity was met with admonishment.<sup>4</sup> Instead of receiving praise, Ahmed received handcuffs.<sup>5</sup> Over a simple misunderstanding, Ahmed was treated as suspected terrorist.<sup>6</sup> He was handcuffed, interrogated, fingerprinted, and forced to take a "mugshot."<sup>7</sup> Although criminal charges were dropped, young Ahmed was nevertheless suspended for three days.<sup>8</sup> While many were relieved to learn Ahmed would not suffer criminal punishment, they overlooked the dire effects of his suspension. (Needs support)

Too many students are being suspended and expelled from school in the United States.<sup>9</sup> Many of these students face harsher

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<sup>3</sup> Ashley Fantz et al., *Muslim Teen Ahmed Mohamed Creates Clock, Shows Teachers, Gets Arrested*, CNN (Sept. 16, 2015, 6:03 PM), <http://www.cnn.com/2015/09/16/us/texas-student-ahmed-muslim-clock-bomb/>.

<sup>4</sup> Jessica Durando, *#IStandWithAhmed Takes Twitter By Storm*, USA TODAY (Sept. 16, 2015, 11:41 AM), <http://www.usatoday.com/story/news/nation-now/2015/09/16/hillary-clinton-tweets-support-ahmed-mohamed/32497949/>.

<sup>5</sup> Manny Fernandez & Christine Hauser, *Handcuffed For Making Clock, Ahmed Mohamed, 14, Wins Time With Obama*, N.Y. TIMES (Sept. 16, 2015), [http://www.nytimes.com/2015/09/17/us/texas-student-is-under-police-investigation-for-building-a-clock.html?\\_r=0](http://www.nytimes.com/2015/09/17/us/texas-student-is-under-police-investigation-for-building-a-clock.html?_r=0).

<sup>6</sup> Heather Tooley, *Ahmed Mohamed: Teen Clock Maker Meets African Dictator Who Harbored Osama Bin Laden*, INQUISITR (Oct. 16, 2015), <http://www.inquisitr.com/2500113/ahmed-mohamed-teen-clock-maker-meets-african-dictator-who-harbored-osama-bin-laden/>.

<sup>7</sup> See CNN.COM, *supra* n. 2. (Not sure what this is in reference to, note 2 is not a CNN article and I wasn't able to find support for this in the previously cited CNN article in note 4)

<sup>8</sup> *Id.*

<sup>9</sup> *Fact Sheet on School Discipline and the Pushout Problem*, DIGNITY IN SCHOOLS (last visited Dec. 17, 2015), [http://www.dignityinschools.org/files/Pushout\\_Fact\\_Sheet.pdf](http://www.dignityinschools.org/files/Pushout_Fact_Sheet.pdf). ("In 2006, more than 3.3 million students were suspended...and 102,000 were expelled").

punishments than warranted by the actual “crimes” they committed.<sup>10</sup> Ahmed’s story shed light on the need to reform disciplinary policies in schools, as well as the disparate treatment faced by millions of minority students around the country.<sup>11</sup> This comment will address both of these issues. It will show why suspension and expulsion practices, like corporal punishment, need to be left in the past. It will conclude by showing the benefits of restorative justice models in lieu of current suspension and expulsion measures.

First, this comment will frame the problem in its legal context, showing how suspension and expulsion practices constitute a violation of Due Process Rights under the Fourteenth Amendment. Second, this comment will then identify some of the problems posed by relying solely on suspension and expulsion practices. These problems include: rising opportunity costs, increasing recidivism rates and growing financial costs that burden both schools and society, and the disparate impact among races. These problems all contribute to a paradigm known as the School-to-Prison Pipeline (“the Pipeline”), a social complex where “problem kids” who have been suspended or expelled become adults who will be incarcerated. Third, this comment will then discuss how courts have only exacerbated the problems listed above through their interpretation of the Due Process clause. This comment will then also offer a judicial avenue through which courts may demand that schools place more of an effort on tailoring a case-specific disposition. This novel judicial avenue could spur widespread reforms in the Suspension and Expulsion System.

Fourth, in order to craft effective judicial and legislation reforms, a keen understanding of some of the important background

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<sup>10</sup> Brooks Gibbs, *7 Steps to Stop Bullying Now*, GRAPEVILLE COLLEYVILLE INDEPENDENT SCHOOL DISTRICT (last visited Dec. 18, 2015), [http://www.gcisd-k12.org/cms/lib4/TX01000829/Centricity/Domain/894/Bullying\\_Ebook.pdf](http://www.gcisd-k12.org/cms/lib4/TX01000829/Centricity/Domain/894/Bullying_Ebook.pdf) (referring to a child in Florida who was charged with “using an egg as a deadly weapon” and two New Jersey students accused of “Terrorism—playing cops and robbers with a paper gun”).

<sup>11</sup> Suey Park, *Ahmed Mohamed and the Problem With the ‘Model Minority’ Myth*, THE DAILY DOT (last updated Dec. 11, 2015, 12:43 PM), <http://www.dailydot.com/opinion/ahmed-mohamed-model-minority-perfect-victim/>.

issues is essential. Among these background issues to be discussed are: (1) the history of disciplinary policies in schools, (2) the societal fears driving these policies, (3) the psychological perspectives involved in disciplining students and (4) the politics preventing reform.

Finally, the last section of this comment will discuss restorative justice models as an alternative to the Suspension and Expulsion model. Restorative justice programs like Youth Court are designed to prevent students from entering the school-to-prison pipeline in the first place. Youth Court seeks to rehabilitate offending students, rather than simply punishing them. Restorative programs offer students the tools, support, and understanding they need to address and fix their problems rather than simply making the “problem student” go away via suspension or expulsion.

## II. PROBLEM

The Fourteenth Amendment of the United States specifically states, “[n]o state shall make or enforce any law which abridge the privileges or immunities of citizens of the United States... nor deny to any person within its jurisdiction the equal protection of the laws.”<sup>12</sup>

The constitutional problem pertaining to suspension and expulsion is clear—schools are abridging the rights of students to attend school. The United States Supreme Court held in *Goss v. Lopez*<sup>13</sup> that students have a “property interest” in a public education. However, the *Goss* court also established a framework for schools to legally expel and suspend students.<sup>14</sup>

With an easy to follow framework set forth, schools began to rely on suspension and expulsion solutions as a catchall resolution to dealing with students who have failed to meet institutional behavioral standards.<sup>15</sup> Soon schools found that rather than going to

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<sup>12</sup> U.S. CONST. amend. XIV, § 1.

<sup>13</sup> *Goss v. Lopez*, 419 U.S. 565 (1975).

<sup>14</sup> *Id.* at 581 (establishing that students who are suspended for “10 days or less must 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.”).

<sup>15</sup> Motoko Rich, *Administration Urges Restraint in Using Arrest or Expulsion to Discipline Students*, N.Y. TIMES (Jan. 8, 2014),

the effort of helping “problem students”, they could simply make “the problem” go away by following the *Goss* framework for expulsion. Making matters worse, the introduction of programs, such as the No Child Left Behind Act, created incentives for schools to push out low-performing students.<sup>16</sup> As a consequence, minority students were often disproportionately affected.<sup>17</sup> According to the former United States Secretary of Education, Arne Duncan, “the widespread use of suspensions and expulsions has tremendous costs...Students who are suspended or expelled from school may be unsupervised during daytime hours and cannot benefit from great teaching, positive peer interactions and adult mentorship offered in class and in school.”<sup>18</sup>

By over relying on suspension and expulsion, schools have overlooked better disciplinary alternatives that better comport with the Fourteenth Amendment’s balancing test set forth in *Mathews v. Eldridge*.<sup>19</sup> Specifically, in assessing whether there has been an abridgement of a privilege, courts should balance three factors: (1) the importance of the private interest affected; (2) the risk of erroneous deprivation through the procedures used, and *the probable value of any additional or substitute procedural safeguards*; and (3) the importance of the state interest involved and the burdens which any additional or substitute procedural safeguards would impose on the state.”<sup>20</sup> Under this standard of review, it is clear that Courts are to weigh both the harms presented and alternatives available.

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<http://www.nytimes.com/2014/01/09/us/us-criticizes-zero-tolerance-policies-in-schools.html> (“Sometimes getting rid of these kids can help you do better on the metrics that you are evaluated on.”).

<sup>16</sup> *School-To-Prison Pipeline*, AMERICAN CIVIL LIBERTIES UNION, <https://www.aclu.org/issues/juvenile-justice/school-prison-pipeline> (last visited Dec. 17, 2015).

<sup>17</sup> Rich, *supra* note 16. (“[B]lack students without disabilities are more than three times as likely as their white peers to be suspended or expelled.”).

<sup>18</sup> *Id.*

<sup>19</sup> *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976).

<sup>20</sup> *Id.* (emphasis added).

That being said, many schools, particularly those within the most disenfranchised communities, have lost complete touch with the “importance of the private interest” to the individual student. In evaluating the private interest, it is not simply the weight of the interest that must be considered, but also the nature of the interest involved.<sup>21</sup> More often than not, school is one of the few structured environments students have to empower themselves towards a better future. Paradoxically, it is the students that are most likely to face disciplinary consequences that are in the greatest need of more structure and schooling. By entrenching themselves into rigid disciplinary measures such as mandatory suspension and expulsion policies, schools overlook the fact “that due process is flexible and calls for such procedural protections as the particular situation demands.”<sup>22</sup> Accordingly, Section III of this comment will discuss the harms possessed by the current Suspension and Expulsion System, while Section VI will offer an alternative model that better comports to the balancing test set forth in *Mathews v. Eldridge*. Meanwhile, sections IV and V are designed to enlighten readers to recent New Jersey court decisions and interpretations, as well as understand some of the intricacies that need to be accounted for in applying a new disciplinary model.

### III. ANALYZING PROBLEMS INHERENT IN THE SUSPENSION AND EXPULSION SYSTEM

#### 1. OPPORTUNITY COSTS – BOTH IN SCHOOL AND BEYOND

The Suspension and Expulsion System (“S&E System”) impose tremendous opportunity costs, particularly against the most at-risk children. The most obvious concern in disciplining students is their personal well-being, as well as enriching their academic education. Studies have shown that grade point average (GPA) is directly correlated to behavioral problems in school.<sup>23</sup> Students with

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<sup>21</sup> *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972).

<sup>22</sup> *Morrissey*, 408 U.S. at 481 (1972); *see also* *Cafeteria Workers v. McElroy*, 367 U.S. 886 (1961).

<sup>23</sup> *See* Melissa E. DeRosier & Stacey W. Lloyd, *The Impact of Children’s Social Adjustment on Academic Outcomes*, NATIONAL

lower GPAs tend to be much more frustrated in school, which can manifest into out-of-character behavior. Frustration can further lead to isolation, anti-social behavior, and acting out. By imposing further isolation in the form of a suspension or expulsion, students' behavioral problems only seem to escalate, not dissipate.

By suspending or expelling "problem students", schools are only pushing these students further behind their classmates academically. A suspension of nine days, roughly two weeks of school, conceivably builds a barrier to catching up that many students find insurmountable. Eventually, "problem students" get pushed so far behind their classmates academically that they often choose to simply drop out rather than catch up on their own. In some instances, poor performing students are forced to drop out.<sup>24</sup> By essentially telling these problem students to go away via suspension or expulsion, schools are giving students no support or resources to help make better decisions in the future. Without a high school education, the opportunities for many high school dropouts are few and far between.

Aside from teaching reading, writing, and arithmetic, schools play, or at least should play, a fundamental role in teaching students how to function in society. Expelling students further deprives them of essential tools needed to function in society. While theoretically the S&E System should act as a deterrent for future misconduct, this theory is sadly disconnected from the true reality of the situation. In order for deterrence to be a feasible model, the targeted audience must have a vested interest in the *status quo*. The reality however is that the *status quo* disfavors "problem students," who often face financial and familial problems beyond their control. A disproportionate number of students that face such financial problems come from minority backgrounds.

## 2. DISPARATE TREATMENT

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CENTER FOR BIOTECHNOLOGY INFORMATION (Dec.17, 2015, 7:30 PM), <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC3095951/>.

<sup>24</sup> See Andri Antoniadis, *Superintendent Lorzeno Garcia Receives Jail Time After Forcing Students to Drop Out*, TAKEPART (Oct. 6, 2012), <http://www.takepart.com/article/2012/10/06/school-district-administrator-receives-jail-time-after-forcing-students-drop-out>.

Every year over 1.2 million students drop out of high school.<sup>25</sup> Of these drops out, 32% are minority students attending “dropout factories” compared to just 8% of white students.<sup>26</sup> Moreover, reports indicate “42% of Hispanic students and 43% of African American students will not graduate high school on time.”<sup>27</sup> These rates are almost twice as high as Caucasian (22%) and Asian (17%) Americans.<sup>28</sup> Translating these dropout rates to earning potential, studies have shown that “a high school dropout will earn \$200,000 less than a high school graduate over a life time, and almost a million dollars less than a college graduate.”<sup>29</sup> Thus, in order to bring economic equality to minority communities, it is imperative that preventative solutions be implemented at the middle school and high school levels.

### 3. RECIDIVISM

While the S & E System is meant to serve as a deterrent to misbehavior in schools, recent studies have shown that expulsion and suspension may have the exact opposite effect on some students. According to a 2011 report by the New York Civil Liberties Union, “studies have repeatedly demonstrated that overuse of suspensions can increase recidivism, worsen school climate, and is correlated with lower standardized test scores.”<sup>30</sup> The report found that in a

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<sup>25</sup> See *11 Facts About High School Dropout Rates*, DOSOMETHING.ORG (Feb. 21, 2017), <https://www.dosomething.org/facts/11-facts-about-high-school-dropout-rates>.

<sup>26</sup> *Id.*

<sup>27</sup> Andrew Freeman, *The 9 Most Shocking Facts About High School Dropout Rates*, TAKEPART (Nov. 20, 2012), <http://www.takepart.com/photos/nine-shocking-facts-high-school-drop-out-rates/minority-students-suffer-most>.

<sup>28</sup> *Id.*

<sup>29</sup> *11 Facts About High School Dropout Rates*, *supra* note 26.

<sup>30</sup> Johanna Miller et. al, *Education Interrupted: The Growing Use of Suspension in New York City’s Public Schools*, THE NEW YORK CIVIL LIBERTIES Union (Jan. 2011), [https://www.nyclu.org/sites/default/files/publications/Suspension\\_Report\\_FINAL\\_noSpreads.pdf](https://www.nyclu.org/sites/default/files/publications/Suspension_Report_FINAL_noSpreads.pdf).

span of only nine years, New York City students had spent more than 16 million hours serving suspensions instead of being in “supportive, familiar school environments.” Understandably, when the threshold for an offense that is deemed worthy of a suspension or expulsions is lowered, students become desensitized and no longer feel this degree of punishment is a “big deal.”<sup>31</sup> Despite policymakers’ original intent to cover only weapons in school, grounds for suspension or expulsion has been expanded to “everything from lateness to swearing.”<sup>32</sup>

A joint study between Pennsylvania State University and the University of Pittsburgh revealed that “excluding disruptive students from school may actually reinforce negative behavior and put these students at greater risk for further negative outcomes.”<sup>33</sup> As a result, the study recommended, the “use of these exclusionary sanctions such as expulsion and suspension should be minimal and reserved for the most serious infractions involving habitual or violent conduct.”<sup>34</sup> The study ultimately found that the methods that proved most effective at lowering recidivism rates were programs that involved “interpersonal skills training and cognitive-behavioral approaches.”<sup>35</sup> Therefore without the benefit of reducing recidivism, does it really make sense for schools continue to rely on exclusionary sanctions?

#### 4. FINANCIAL BURDEN ON THE SYSTEM

One of many consequences of the S & E System is the increased financial burden on the government. A common misconception is that expulsion and suspension is a simple, low-cost

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<sup>31</sup> Hilary George-Parkin, *Life After Getting Expelled: What Really Happens When Students Are Kicked Out of School*, TEEN VOGUE (May 9, 2014 8:35 AM), <http://www.teenvogue.com/story/high-school-expulsion>.

<sup>32</sup> *Id.*

<sup>33</sup> Brian Bumbarger, *School Violence: Disciplinary Exclusion, Prevention and Alternatives*, UNIVERSITY CHILDREN’S POLICY PARTNERSHIP (March 1999), <http://www.prevention.psu.edu/pubs/docs/expulsion.pdf>.

<sup>34</sup> *Id.* (“exclusionary discipline sends the message to students that they are not wanted in school and that attendance is not important,” furthermore, “it teaches them that problems can be avoided rather than addressed.”).

<sup>35</sup> *Id.* at 5.



process requiring that the school principal merely notify the student of his or her punishment. However, as direct result of *Goss v. Lopez*,<sup>36</sup> schools are now legally mandated to give every student his or her due process rights before imposing a suspension.

As discussed earlier, schools are now mandated to provide “oral or written notice of the charges against him [or her].”<sup>37</sup> Then, if those charges are denied, the student must be given “an explanation of the evidence” the school has, as well as “an opportunity to present his [or her] side of the story.”<sup>38</sup> This whole process can cost the school “\$170 of combined staff time per incident.”<sup>39</sup> By factoring in the additional \$40 loss of average daily attendance (ADA) funds per day of suspension, it is very likely that the average three-day suspension will cost the school around \$300 dollars.<sup>40</sup> Multiplying the \$300 dollar cost to the 3.45 million students that were suspended out of school in the 2011-2012 school year, the total cost to the nation was \$1.035 billion dollars on suspensions alone.<sup>41</sup> This number does not even take into account the costs associated with students who are expelled, or who end up dropping out of school. With such enormous costs, it is in the schools’ interest to adopt alternative disciplinary mechanisms.

Furthermore, on a macro-level, economists have found that having more educated populations increases the likelihood of attracting new businesses and jobs.<sup>42</sup> Studies have shown that the

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<sup>36</sup> *Gross*, 419 U.S. 565, 579 (1975).

<sup>37</sup> *Id.* at 581.

<sup>38</sup> *Id.*

<sup>39</sup> Rick Phillips, *The Financial Costs of Bullying, Violence, and Vandalism*, THE NATIONAL ASSOCIATION OF SECONDARY SCHOOL PRINCIPALS (NASSP), (Feb. 2011), [http://www.principals.org/Content.aspx?topic=The\\_Financial\\_Costs\\_of\\_Bullying\\_Violence\\_and\\_Vandalism](http://www.principals.org/Content.aspx?topic=The_Financial_Costs_of_Bullying_Violence_and_Vandalism).

<sup>40</sup> *Id.*

<sup>41</sup> *School Climate and Discipline*, U.S. DEPT. OF EDUC., (Nov. 22, 2015), <http://www2.ed.gov/policy/gen/guid/school-discipline/index.html>.

<sup>42</sup> Andrew Freeman, *supra* note 28.

percentage of high school graduates in an area inversely correlates to the amount of money the government spends on social services in that same area.<sup>43</sup> Thus, it is clear that exclusionary disciplinary methods carry tremendous costs to the student, the school, and society at large.

#### IV. DUE PROCESS IN THE COURTS

An argument can be made that many of the problems mentioned above are facilitated by the courts' disregard for alternative disciplinary models. The following cases: *Ross v. Board of Education*,<sup>44</sup> *Ocean Township Board of Education v. E.R.*<sup>45</sup> and *C.L. v. Mars Area School District*<sup>46</sup> are illustrative of how the courts have typically handled suspension and expulsion appeals. By analyzing these cases, decision makers can reform policies in a way that is both constitutional and easy to understand. Furthermore, by looking at the Supreme Court's opinion in *Washington v. Davis*,<sup>47</sup> advocates for reform can argue that there is judicial precedent for courts to initiate social change, particularly within institutions that disproportionately affect minorities.

*Washington* is a case challenging alleged prejudicial measures taken to ensure African American's could not become police officers.<sup>48</sup> The plaintiffs in *Washington* argued that the use of a test "designed to test verbal ability, vocabulary, and reading comprehension" discriminated against African American applicants.<sup>49</sup> As evidence of the test's discriminatory nature, the

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<sup>43</sup> *Id.*

<sup>44</sup> *Ross v. Bd. of Educ.*, No. 11-6590, 2015 U.S. Dist. LEXIS 74113 (D.N.J. 2015).

<sup>45</sup> *Ocean Twp. Bd. of Educ. v. E.R. ex rel. O.R.*, No. 13-1436, 2014 U.S. Dist. LEXIS 30479 (D.N.J. 2014).

<sup>46</sup> *C.L. v. Mars Area Sch. Dist.*, No.14-1666, 2015 U.S. Dist. LEXIS 84736, 3 (W.D. Pa. 2015).

<sup>47</sup> *Wash. v. Davis*, 426 U.S. 229 (1976).

<sup>48</sup> *Id.* at 232.

<sup>49</sup> *Id.* at 235.

plaintiffs offered statistics showing that African American applicants scored far worse than their Caucasian American counterparts which “excluded a disproportionately high number” of African American applicants.<sup>50</sup> They argued that the purpose of this test was to serve as an additional obstacle for African American applicants to overcome.

In reversing the Appellate Court’s decision to grant the plaintiff’s motion for summary judgment, the Supreme Court held that “the test did not violate the Due Process Clause of the Fifth Amendment and its Equal Protection component” because the test was designed to serve no discriminatory purpose.<sup>51</sup> However, very importantly for the purposes of this paper, the Court did concede that a rule’s disproportionate impact is relevant to consider.<sup>52</sup> Moreover, the Court affirmed that “a [rule], otherwise neutral on its face, must not be applied so as invidiously to discriminate on the basis of race.”<sup>53</sup> The Court then went on to state that “an invidious discriminatory purpose may often be inferred from the totality of the relevant facts, including the fact, if it is true, that the law bears *more heavily on one race than another*.”<sup>54</sup>

Using this language, proponents for disciplinary reform may argue there are tangible Due Process violations under the current system. Utilizing statistics showing the disparate impact of suspension and expulsion on minority students, an argument can be made that current disciplinary policies constitute a violation of students’ Due Process rights. Along this same *Washington* line of reasoning, the complainant only need to prove that there are: (1) disparate outcomes under the current disciplinary scheme and (2) that schools are aware of alternative disciplinary programs that are just as effective and no more expensive. Once these two elements are established, this can create an inference of discriminatory intent by schools. The following cases represent individual case studies of these discriminatory practices at work.

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<sup>50</sup> *Id.* at 233.

<sup>51</sup> *Id.* at 252.

<sup>52</sup> *Id.* at 242.

<sup>53</sup> *Wash.*, 426 U.S. 229, 241.

<sup>54</sup> *Id.* at 242 (emphasis added).

In *Ross v. Board of Education*, the plaintiff, a sophomore at Absegami High School in Galloway Township, NJ, brought suit against the local school district after the plaintiff was suspended for nine days despite not being the aggressor in a physical altercation at school.<sup>55</sup> The altercation between the two students, like many high school altercations, arose out of a dispute over the plaintiff's relationship with a female student.<sup>56</sup> After a war of words grew into a hormonal wrestling match, the students involved were all suspended, including even the students who had not substantively contributed to the incident.<sup>57</sup> In weighing whether the school had "imposed unwarranted punishment and criminal charges," the court held that the suspension was justified, regardless of the student's non-aggressor status.<sup>58</sup> Pursuant to N.J.S.A. 18A:25-2, the court held that "the school had discretion to enforce its policies as it deemed appropriate under the circumstances."<sup>59</sup> The court further went on to cite N.J.S.A. 18A:37-2, which allows "for the punishment and suspension or expulsion from school of any pupil who is guilty of any of a non-exclusive list of offenses against school staff, fellow students, or school property."<sup>60</sup> It is along this vein of reasoning where the court goes awry.

The court's first mistake was finding the victim of an assault culpable. Here, the school had complete discretion to determine that any behavior short of strict adherence to the school's disciplinary policy was grounds for suspension. While the school district's disciplinary policy strives to create a utopian world, it readily admits that these standards may be too high for students who are still

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<sup>55</sup> *Ross v. Bd. of Educ.*, No. 11-6590, 2015 U.S. Dist. LEXIS 74113 (D.N.J. 2015).

<sup>56</sup> *Id.* at 1-2.

<sup>57</sup> *Id.* at 15.

<sup>58</sup> *Id.* at 16.

<sup>59</sup> *Id.*

<sup>60</sup> *Id.*, at 16 (citing *G.D.M. v. Bd. of Educ. of the Ramapo Indian Hills Reg'l High Sch. Dist.*, 427 N.J. Super. 246 (Super. Ct. App. Div. 2012)).

maturing.<sup>61</sup> The incongruity lies in suspending a young victim for not having the maturity or skills to defuse a volatile situation—a skill presumable learned in school. By also suspending the victim, aggressors have added institutional support in inflicting harm upon the victim. This suspension could have been avoided, and only highlights the need for alternative methods to discipline students. By suspending the victim, the victim is left without true justice—and perhaps even more damaging—the psychological feeling that institutional rules are inherently inequitable and not worth following.

The next case, *Ocean Township Board of Education v. E.R.*, is a case where the school board filed a motion to place an expelled-student in an “alternative educational setting” until the disciplinary proceedings came to an end.<sup>62</sup> The respondent in this case was a special needs high school senior whose disabilities included several behavioral disorders.<sup>63</sup> The student was removed from the school after he brought a three-inch-long knife (without threatening anyone) and alcohol to school.<sup>64</sup> As a result of the student’s Due Process challenge, the Administrative Law Judge placed the student back into school.<sup>65</sup> The district court, however, determined that the

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<sup>61</sup> *Ross*, at 14-15 (explaining the school’s discipline policy “[w]e let them know that they are not to be physically engaged in any way, shape or form. We let them know that it is really quite impossible when you’re not there at the scene to determine exactly what leads to the spark of a physical event and it is the expectation of this high school that if somebody swings on you first, it is not your initial reaction to react and fight back, but to get yourself to an area that’s safe...” “We expect the student [] to get themselves (sic) out of a negative situation in advance. Certainly if you’re arguing with another student in the hallway and it’s getting heated, there’s a certain point where, like even with adults, you expect somebody to be mature enough and walk away so it doesn’t become a physical event. Often what we see in high school because of the maturity level is opposite.”).

<sup>62</sup> *Ocean Twp. Bd. of Educ. v. E.R. ex rel. O.R.*, 2014 U.S. Dist. LEXIS 30479, CIV No. 13-1436, 1 (D.N.J. 2014).

<sup>63</sup> *Id.* at 1-2.

<sup>64</sup> *Id.* at 2.

<sup>65</sup> *Id.* at 2-3.

student should not be allowed back into school.<sup>66</sup> This decision was partly based on factoring the student's history of being tardy and disruptive, as well as using inappropriate language.<sup>67</sup> These factors led the court to believe that the school would have suffered irreparable harm by allowing him to remain in school.<sup>68</sup>

The court's decision in *Ocean Township* is reflective of the low threshold of evidence court's require schools to argue in order to show "irreparable harm." While it is readily agreed that no student should be allowed to escape punishment for bringing a weapon and alcohol to school, the actions taken against such students should aim to rehabilitate the student, not merely punish the student. Instead of giving blind deference to the schools, courts should weigh whether steps were taken to rehabilitate the student's behavior. Here, the court made no inquiry as to whether the student had the opportunity to apologize for his past poor behavior, or whether he was even given notice that his past behavior was unacceptable. Punishing a student who openly defies the efforts of adults attempting to counsel him reflects poorly on the student. However, punishing a student who was never given the opportunity to learn the error of his ways reflects poorly on schools. As such, it stands to reason that courts' analysis of these situations should require an inquiry into whether the student had notice and opportunity to modify his or her behavior.

Finally, *C.L. v. Mars Area School District* offers some insight into how inherently unfair many Due Process expulsion hearings can be. In this case, the student was a seven-year-old with special needs.<sup>69</sup> The first grader was expelled after he had pushed a student, kicked a teacher, and overturned tables in the classroom.<sup>70</sup> In making its decision, the school made no effort to determine whether these actions were a manifestation of the student's special needs, a procedural determination required by law.<sup>71</sup> In making an appeal, the

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<sup>66</sup> *Id.* at 1.

<sup>67</sup> *Id.* at 9.

<sup>68</sup> *Id.*

<sup>69</sup> *C.L. v. Mars Area Sch. Dist.*, No.14-1666, 2015 U.S. Dist. LEXIS 84736, 3 (W.D. Pa. 2015).

<sup>70</sup> *Id.* at 7.

<sup>71</sup> *Id.* at 8-9.

petitioner described the school expulsion hearing as “tantamount to a ‘kangaroo court’.”<sup>72</sup> In support of his complaint, the plaintiff cited the fact that: 1) “the school’s attorney acted as both the governing hearing officer and as counsel for the School District”; 2) notice was not adequately provided; 3) the student was never provided with copies of the schools expulsion policies; 4) references were made to the student’s prior suspension; 5) notice of the students right to appeal the decision was not provided; and finally 6) no other first grader had ever been suspended or expelled for pushing a child or flipping a chair.<sup>73</sup> In dismissing the plaintiff’s claims, the court required that the plaintiff first exhaust all administrative remedies.<sup>74</sup> The court held that the school should be given “the first crack at formulating a plan to overcome the consequences of educational shortfalls.”<sup>75</sup>

The court’s holding in this case essentially holds students seeking redress hostage to the school’s decision-making process even when there is evidence that the school runs a “kangaroo court.” This case is undoubtedly representative of countless other “hearings” schools are holding.<sup>76</sup> While to hold otherwise would impose a great burden on the judicial economy, this case is an illustration of the degree of deference schools are given in expelling and suspending students. When the courts make it so easy for schools to go unchecked in their “Due Process procedures” there is little doubt to

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<sup>72</sup> *Id.* at 9.

<sup>73</sup> *Id.* at 9-11.

<sup>74</sup> *Id.* at 22.

<sup>75</sup> *Id.* at 36 (citing *Batchelor v. Rose Tree Media Sch. Dist.*, 759 F.3d 266, 276 (3d Cir. 2014)).

<sup>76</sup> See *Minnicks v. McKeesport Area Sch. Dist.*, 74 Pa. D. & C.2d 744 (C.P. 1975) (finding notice to guardians 24 hours before the hearing was scheduled to be inadequate notice.); *Mifflin Cnty Sch. Dist. v. Stewart*, 503 A.2d 1012 (Pa. Cmwlth. Ct. 1986) (holding that the student’s due process rights were violated because the school failed to give parents written notice of the reasons for suspension.); *Yatron by Yatron v. Hamburg Area Sch. Dist.*, 631 A.2d 758 (Pa. Cmwlth. Ct. 1993) (finding the school violated the students due process rights by failing to notify the student of all charges against the student).

as to why schools feel no need to restrain their power to suspend and expel students.

## V. UNDERSTANDING THE BACKGROUND OF THE PROBLEM

In order to find the best solution to the problems posed by exclusionary disciplinary methods, one must first understand several uniquely different perspectives to the problem. These unique perspectives include: 1) historical perceptions, 2) social fears, 3) psychological goals, and 4) political stances. Only by understanding commonly held attitudes and beliefs in each these realms can a pragmatic solution be found.

### 1. HISTORICAL PERSPECTIVE – AMERICA’S SLOW EVOLUTION FROM CORPORAL PUNISHMENT

The historical background of discipline within American schools finds its roots in corporal punishment. Like many other traditions, it took a long time for many states to abandon this abusive tactic to disciplining students. Despite the Supreme Court stating in *Ingraham v. Wright*<sup>77</sup> that the Eighth Amendment does not apply to disciplinary corporal punishment in public schools, 31 states nevertheless abandoned this model for disciplining students.<sup>78</sup> In doing so, these states had to overcome several barriers such as overcoming both traditional and cultural practices towards raising children, as well as establishing an infrastructure for implementing the current system.<sup>79</sup> In fact, New Jersey was the first state to legislatively ban corporal punishment in schools in 1967.<sup>80</sup>

The fact that 19 states have still not adopted bans on corporal punishment illustrates that institutional change often comes

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<sup>77</sup> *Ingraham v. Wright*, 430 U.S. 651 (1977).

<sup>78</sup> Valerie Strauss, *19 States Still Allow Corporal Punishment In School*, THE WASHINGTON POST (Nov. 23, 2015, 3:25 AM), <https://www.washingtonpost.com/blogs/answer-sheet/wp/2014/09/18/19-states-still-allow-corporal-punishment-in-school>.

<sup>79</sup> See Alison Dundes Renteln, *Corporal Punishment and the Cultural Defense*, 73 LAW & CONTEMP. PROBS. 253 (2010).

<sup>80</sup> Steven W. Lee, *Encyclopedia of School Psychology*, 120 (2005).



in piecemeal form.<sup>81</sup> If the disciplinary models within schools have already changed once in the United States, there is no reason it cannot change again. For example, if New Jersey were to adopt a new disciplinary method, there would be precedent for many other states to do so as well. Anecdotes aside, history has shown that it often only takes one state to start a wave of change across the United States.

## 2. SOCIAL FEARS – THE FEAR OF THE UNCONTROLLABLE TEENAGER

The fear of gang violence, school shootings, and bullying has shaped today's policymaker's attitudes towards discipline in schools.<sup>82</sup> What is lost in the sensationalism of these fears is that these concerns constitute a very small percentage of the problems schools are likely to face. It is clear that policymakers' response to these fears has irrationally caused many schools to adopt zero-tolerance policies.<sup>83</sup> While politically popular, these zero-tolerance policies have led to a far greater number of students being suspended and expelled than there otherwise would have been.<sup>84</sup> The problem has gotten so big that the White House has gone to great

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<sup>81</sup> See generally Strauss, *supra* note 79.

<sup>82</sup> Caroline Bringenberg, *Effective and Unifying Discipline Policies in an Era of Unprecedented School Violence: A Comparative Analysis of Denver Public Schools and Los Angeles Unified School District*, OCCIDENTAL COLLEGE (Feb. 20, 2016, 5:13 PM), [https://www.oxy.edu/sites/default/files/assets/UEP/Comps/2014/Bringenberg\\_Caroline\\_Effective%20and%20Unifying%20School%20Discipline%20Policies.pdf](https://www.oxy.edu/sites/default/files/assets/UEP/Comps/2014/Bringenberg_Caroline_Effective%20and%20Unifying%20School%20Discipline%20Policies.pdf).

<sup>83</sup> Kimberly Hefling, *Government Offers New Recommendations to Combat 'School-To-Prison' Pipeline*, THE HUFFINGTON POST (Nov. 23, 2015, 11:43 PM), [http://www.huffingtonpost.com/2014/01/08/school-to-prison-pipeline\\_n\\_4560737.html](http://www.huffingtonpost.com/2014/01/08/school-to-prison-pipeline_n_4560737.html).

<sup>84</sup> Rhonda Brownstein, *Pushed Out*, TOLERANCE.ORG (Feb. 20, 2016, 5:17 PM), <http://www.tolerance.org/pushed-out>; see also Kris Bosworth, Lysbeth Ford, Kirsteen E. Anderson, & David Paiz, *Community Service as an Alternative To Suspension: A Practical Program Toolkit*, UNIVERSITY OF ARIZONA (Feb. 21, 2016 2:44 AM), <http://www.serviceoptions.org/documents/manual.pdf> (noting how some schools have used suspension as a means to pressure "marginal or disruptive students to transfer or otherwise leave school").

lengths to publicly denounce these zero-tolerance policies.<sup>85</sup> Moreover, both locally and nationally, there is little evidence supporting the theory that zero-tolerance policies make schools safer.<sup>86</sup> As a result of letting social fears and media sensationalism shape attitudes on school discipline, the current system is making otherwise teachable kids, such as Ahmed Mohammed, into public enemy number one. Only by adopting policies grounded by the everyday realities of the school can an appropriate disciplinary solution be determined.

### 3. PSYCHOLOGICAL THEORIES –AN INSTITUTION BUILT ON CONFORMITY

A persistent criticism of the American education system is that schools, rather than cultivating individualism and fostering self-discovery, frequently act as institutions geared towards conformity. From a young age, children are told to color within the lines and given rigid formulaic approaches to writing. While this style of teaching has been effective for some students, the same cannot be said for many others, particularly those from minority cultural backgrounds. Many studies have found that Black and Hispanic students are “much more likely to be suspended or expelled, even when the infractions are the same.”<sup>87</sup> One novel explanation for this comes from a Harvard study that found that black children were perceived to be older, less innocent, and more threatening.<sup>88</sup> The

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<sup>85</sup> *Id.*

<sup>86</sup> Dale Mezzacappa, *Advocates Call for Review of District Expulsion Process*, THE NOTEBOOK.ORG (Mar. 6, 2016, 1:38 PM), <http://thenotebook.org/articles/2010/11/01/advocates-call-for-review-of-district-expulsion-process>.

<sup>87</sup> *Black Preschoolers Far More Likely To Be Suspended*, NATIONAL PUBLIC RADIO (Nov. 23, 2015, 10:30 PM), <http://www.npr.org/sections/codeswitch/2014/03/21/292456211/black-preschoolers-far-more-likely-to-be-suspended>.

<sup>88</sup> *Black Boys Viewed as Older, Less Innocent Than Whites, Research Finds*, AMERICAN PSYCHOLOGICAL ASSOCIATION (Nov. 23, 2015 10:44 PM), <http://www.apa.org/news/press/releases/2014/03/black-boys-older.aspx>.

study specifically found that black children were on average thought to be 4.5 years older than they actually were.<sup>89</sup>

Other scholars have hypothesized other factors behind why children of color are disproportionately disciplined. One psychologist hypothesized that minority students were responding to the “fear of confirming lowered expectations.”<sup>90</sup> Another scholar attributed the disparity to tracking programs and teachers expectations.<sup>91</sup> One particularly controversial hypothesis by Professor John Ogbu from the University of California-Berkley theorized that minorities did not do well in school because they associated doing well in school with “acting white.”<sup>92</sup> Commenting on this theory one professor stated, “black kids don’t get validation and are seen as trespassing when they exceed academic expectations.”<sup>93</sup> These attitudes within minority communities sadly often lead minority students to withdraw from the most challenging classes even though they are capable of doing the work.<sup>94</sup>

Finally, one study showed that African American students appeared to be referred to the office for “less serious and more subjective reasons.”<sup>95</sup> The study attributes these findings to “implicit bias,” a “mental process that causes us to have negative feelings and attitudes about people based on characteristics like race, ethnicity, age, and appearance.”<sup>96</sup> As evidence of implicit bias in schools, “a

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<sup>89</sup> *Id.*

<sup>90</sup> Felicia R. Lee, *Why Are Black Students Lagging?*, N.Y. TIMES, (Nov. 30, 2002), <http://www.nytimes.com/2002/11/30/arts/why-are-black-students-lagging.html?pagewanted=all>.

<sup>91</sup> *Id.*

<sup>92</sup> *Id.*

<sup>93</sup> *Id.*

<sup>94</sup> *Id.*

<sup>95</sup> Thomas Rudd, *Racial Disproportionality in School Discipline: Implicit Bias Is Heavily Implicated*, KIRWAN INSTITUTE FOR THE STUDY OF RACE AND ETHNICITY, (Feb. 2014), <http://kirwaninstitute.osu.edu/racial-disproportionality-in-school-discipline-implicit-bias-is-heavily-implicated/>.

<sup>96</sup> *Id.*

2003 study found that students who displayed a ‘black walking style’ were perceived by their teachers as lower in academic achievement, highly aggressive and more likely to be in need of special education services.”<sup>97</sup> Furthermore, a lowered classroom expectation can cause kids to act out in relatively harmless ways, which under the current model still results in disciplinary action.<sup>98</sup> As a result, it is clear that not only do schools need to redress the viability of suspensions and expulsions, but they also need to take time to address and understand the various psychological factors at play when electing to discipline a troubled student.

#### 4. POLITICS – THE GREATEST OBSTACLE TO REFORM

The last perspective that needs to be accounted for is perhaps the single greatest obstacle to pushing forward changes to the current school disciplinary model. The school system is all too often at the mercy of politicians who want to appear tough on “crime” and bullying. It is near political suicide for a politician to advocate for the plight of the “offender.”<sup>99</sup>

Furthermore, the current voting system has empowered schoolteachers and educational unions to heights never before reached.<sup>100</sup> With both judicial and political backing, school boards have been resistant to any alternative models that threaten the *status quo* where they are currently given almost total deference. The only hope of changing this *status quo* therefore lies in bringing to light the compelling arguments discussed in earlier sections. Recent events however have given reason to hope for change in the immediate future. The Black Lives Matter movement as a result of the implicit bias in numerous police shootings across the United States had

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<sup>97</sup> *Id.* This is similar to the concept that “sassy” girls of color are punished for their general attitude and not for intentional acts of misconduct.

<sup>98</sup> *Id.*

<sup>99</sup> Joe Battaglia, *NY Teachers Unions Pledge Millions to Fight Cuomo On Charter Schools*, NEWSMAX, (Mar. 24, 2014), <http://www.newsmax.com/US/teachers-unions-Cuomo-charter-schools/2014/03/24/id/561297/> (“Opposing powerful teacher unions as a Democrat has long been viewed as committing political suicide.”).

<sup>100</sup> *Id.*

highlighted the unequal treatment minorities receive from state institutions. With growing awareness of the failures of zero-tolerance policies and the school-to-pipeline prison, politicians can no longer ignore the systemic injustice occurring within American schools.

## VI. SOLUTIONS

After understanding the historical, social, psychological and political problems surrounding current suspension and expulsion disciplinary system, a solution that addresses each of these areas of concern is necessary. To properly address these problems, schools require institutional change in disciplinary methods that is reminiscent of the transition away from corporal punishment in the late 1960s. The solution must allow for social and psychological factors to be addressed rather than simply looking at academic and financial goals. However, to be truly lasting, this solution must have political support at all levels, from the ground up. Such wide support will likely only be attainable if these reformatory measures are both cost-effective and relatively easy to implement.

Until recently, traditional alternatives to suspension and expulsion practices fell into three categories:

(a) custody-style in school suspension, where the student usually sits silently in a designated room or the hallway and receives no academic or social skills programming; (b) in-school suspension programs that incorporate structured skill building designed to strengthen academics, social skills, or both; and (c) short- or long-term alternative school placements.<sup>101</sup>

Newer alternatives to suspensions however now combine elements of each category. These alternatives models fall into four different categories: (1) the punitive model; (2) the academic model; (3) the therapeutic model; and (4) the individual model. The punitive model's aim is to punish and deter future misbehavior. The academic model aims to address the frustrations and misbehavior brought on by learning difficulties. The therapeutic model "recognizes several possible root causes for misbehavior, including family or social issues."<sup>102</sup> And finally, the individual model aims to

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<sup>101</sup> Bosworth, Ford, Anderson, & Paiz, *supra* note 85, at 11.

<sup>102</sup> *Id.*

incorporate all of the above models and particularize remedies to the individual's needs.

#### 1. COMMUNITY SERVICE PROGRAMS

One suggested solution is giving students community service hours instead of ordering long suspensions.<sup>103</sup> “Community service is unpaid work that benefits the school, neighborhood, or community in meaningful ways by providing necessary and productive labor.”<sup>104</sup> Generally speaking, community service is a win-win solution for both the student and community at large. This solution was adopted within the No Child Left Behind Act, and the act provided funding for state-level projects aimed at giving suspended students mandatory community services.<sup>105</sup> The goal of these mandatory hours was to impress upon the students that “being suspended from school is not a vacation.”<sup>106</sup> Studies of the resulting programs showed “statistically significant reductions in tardies and days absent, disciplinary referrals and disciplinary infractions.”<sup>107</sup> It is particularly noteworthy that many of these community service programs incorporated “some type of counseling or skill-building component that complemented the community service.”<sup>108</sup>

One study showed that community service activities that were designed to be punitive did not have nearly as many positive outcomes as community service designed to be instructive.<sup>109</sup> Another study found that students who engaged in school activities or community service were less likely than other students to engage

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<sup>103</sup> *Id.*

<sup>104</sup> *Id.* at 7.

<sup>105</sup> *Id.*

<sup>106</sup> *Id.* at 12.

<sup>107</sup> Bosworth, Ford, Anderson, & Paiz, *supra* note 85, at 7.

<sup>108</sup> *Id.* at 8.

<sup>109</sup> *Id.* at 11. (“[A] wealth of evidence shows that a focus on punishment alone will not affect the students who are most frequently suspended or who commit the most serious offenses.”) *Id.*

in delinquent behavior.<sup>110</sup> Therein lies the problem however, as many of these “troubled students” are not actively involved in any official activity, let alone community service. The concern is that mandatory community service hours add simply another barrier to student reintegration.

As this comment has previously examined, misbehavior frequently arises from a feeling of isolation.<sup>111</sup> Thus any proposed order of community service on any individual student could aggravate those feelings of isolation. In addition to the psychological and social effects of mandatory community service, school administrators always worry about the dollar and cents of any additional programs. A community service program would require at least 2-3 adults willing to supervise and manage the program. However, by its very nature, the hope is that these adults would be willing to provide this community service at little to no cost. While it may be difficult to get faculty to commit to another school activity on a volunteer basis, community service programs don’t necessarily require a trained professional to supervise children while they clean the school, maintain a garden, or whatever other assignment the community needs. Thus from a financial perspective, community service programs offer a relatively cost free alternative to suspension or expulsion.

## 2. MENTORSHIP PROGRAMS

A similar alternative disciplinary model would be to take advantage of local private non-profit organizations such as the Big Brothers Big Sisters program. The belief of mentoring programs like Big Brothers Big Sisters is that “inherent in every child is the ability to succeed and thrive in life.”<sup>112</sup> What makes Big Brothers Big Sisters

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<sup>110</sup> *Id.* at 13.

<sup>111</sup> *What’s Wrong With Timeouts*, AHAPARENTING.COM (Feb. 21, 2016, 2:58 PM), <http://www.ahaparenting.com/parenting-tools/positive-discipline/timeouts> (noting that “research shows that timeouts don’t necessarily improve behavior.... The relational pain of isolation in timeout is deeply wounding to young children and that when repeated over and over, the experience of timeout can ‘actually change the physical structure of the brain.’”).

<sup>112</sup> *Changing Perspectives. Changing Lives.*, BIG BROTHERS BIG SISTERS (Feb. 21, 2016, 3:29 PM),

particularly useful in helping troubled students is that its mission is to provide students facing adversity with his or her own mentor. Mentors are able to give troubled students the individualized attention that teachers cannot provide. While social and familial issues often make addressing students' individualized needs for attention and mentorship difficult, programs like Big Brothers Big Sister help to fill the void so that children may raise their aspirations, gain an education, and avoid delinquent behavior. According to one local Philadelphia study, students enrolled in Big Brothers Big Sisters are 52% less likely to skip school.<sup>113</sup> Another local Philadelphia mentorship program is the Advancing Civics Education (A.C.E.) program. Like the Big Brother Big Sister program, the A.C.E. program provides an avenue for volunteer lawyers and judges to serve as role models for students and help encourage students to set high goals.<sup>114</sup> Other local Philadelphia programs such as the Philadelphia Youth Sports Collaborative (PYSC), the Philadelphia Reads Programs and the Voices of Youth project provide additional opportunities for at-risk students to receive support and mentoring from adults who care about their well-being.<sup>115</sup>

The problem, however, with implementing private non-profit mentoring programs Big Brother Big Sister as an alternative solution

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[http://www.bbbs.org/site/c.9iILl3NGKhK6F/b.5962351/k.42EB/We\\_are\\_he\\_re\\_to\\_start\\_something.htm](http://www.bbbs.org/site/c.9iILl3NGKhK6F/b.5962351/k.42EB/We_are_he_re_to_start_something.htm).

<sup>113</sup> J.P. Tierney, J.B. Grossman, and N.L. Resch, *Making a Difference: An Impact Study of Big Brothers Big Sisters*, BIG BROTHERS BIG SISTERS (Feb. 21, 2016, 3:29 PM), [http://www.bbbs.org/site/c.9iILl3NGKhK6F/b.5962351/k.42EB/We\\_are\\_he\\_re\\_to\\_start\\_something.htm](http://www.bbbs.org/site/c.9iILl3NGKhK6F/b.5962351/k.42EB/We_are_he_re_to_start_something.htm).

<sup>114</sup> *Volunteer for the A.C.E. Program*, THE PHILADELPHIA BAR ASSOCIATION (Mar. 6, 2016, 2:30 AM), <http://www.philadelphiabar.org/page/SCPublicSchoolEducation>.

<sup>115</sup> See *About Philadelphia Youth Sports Collaborative (PYSC)*, PYSC.ORG (Mar. 6, 2016, 3:13 AM), <http://www.pysc.org/about/index.html>; see also *About Philadelphia Reads*, PHILAREAD.ORG (Mar. 6, 2016, 3:13 AM), <http://www.philareads.org/about/>; see also *Youth Films Address Violence and Crime in Northwest Philadelphia*, NEWSWORKS.ORG (Mar. 6, 2016, 3:17 AM), <http://www.newsworks.org/index.php/local/item/21186>.



to suspension and expulsion are similar to those facing community service programs. The biggest problem facing mentorship programs is simply finding enough caring and committed individuals willing to take on the additional responsibilities of being a mentor. The responsibilities facing a mentor are arguably greater than those of a community service organizer. A mentor is expected to fulfill a large void in their mentee's life. Whether it is simply taking the student out for pizza, playing sports, or simply giving advice, a mentor is expected to commit to helping their mentor for at least a year period. Moreover, much of the programs' activities and infrastructure depend on the donations of the community. Without funding, it would be impossible to have the kind of supervision necessary to protect both the students and mentors. In addition, while these programs may be great for growing a child's confidence, it does not offer same formal environment student's need to adapt and succeed in school. Thus, despite the infinite good mentorship programs provide, their feasibility, as a sustainable solution for helping *all* students who are facing school discipline is doubtful.

### 3. COUNSELING PROGRAMS.

A third alternative to suspension that is often brought up is the use of counseling. School districts around the country have slowly comes to terms that suspending students is in the long run doing very little to curb delinquent behavior.<sup>116</sup> As a result, many schools are giving students an option to receive counseling in exchange for a reduction to their suspensions. In one school, students who are facing a suspension of 60 days can choose to attend a once a week two-hour counseling session for six weeks to reduce their suspension by 30 days.<sup>117</sup> The goal in allowing students to seek counseling is to

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<sup>116</sup> See Marc Fetzer, *Education Dealing with Defiance An After-School Counseling Program Offers Troubled Students an Alternative to Suspension*, SUN SENTINEL (Feb. 21, 2016, 5:15 PM), [http://articles.sun-sentinel.com/1988-12-14/news/8803120274\\_1\\_counseling-program-students-atlantic-high-school](http://articles.sun-sentinel.com/1988-12-14/news/8803120274_1_counseling-program-students-atlantic-high-school); Daniel Kelley, *Counseling Could Slash Student Suspensions By Half at Lindbergh High*, PATCH (Feb. 21, 2016, 5:16 PM), <http://patch.com/missouri/affton/counseling-could-slash-student-suspensions-by-half-atdad747d0ba>.

<sup>117</sup> Daniel Kelley, *Counseling Could Slash Student Suspensions By Half at Lindbergh High*, PATCH (Feb. 21, 2016, 5:16 PM), <http://patch.com/missouri/affton/counseling-could-slash-student-suspensions-by-half-atdad747d0ba>.

find a compromise between the need for a strong punishment to deter violations and the need to help kids learn to make more responsible decisions—a struggle that is all too often at odds.

An analysis of the costs-benefits balance of the counseling option is but a microcosm of the debate school officials and parents are having around the country. The benefits of offering counseling as a disciplinary tool are numerous. Aside from offering an outlet for students to constructively air their own frustrations and grievances, counseling can help students adjust their own perspective to the world around them. School counselors often assist students adjust to new environments, establish effective study skills, develop positive feelings towards themselves and others, and help students develop better communication skills.<sup>118</sup>

The benefits of counseling also help more than just the students themselves. Through counseling, guardians receive support and advice on how to best advocate for their child's needs. School counselors also provide an extra set of eyes to ensure that children's learning and behavior continue to progress in a positive direction. Together, the counselor, parents and students can call formulate realistic goals and strategies to help students reach their potential. As studies have shown, students who are succeeding in school are less likely to dropout.<sup>119</sup> Moreover, dropouts are more likely to exhibit poor classroom behavior and have bad relationships with both their teachers and peers a like.<sup>120</sup> These negative attributes all contribute to degrade the educational environment and make learning much harder for the students around them. Thus any efforts to prevent these consequences of misbehavior represent the benefits of counseling.

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<sup>118</sup> *Benefits of School Counseling Services*, FAIRFAX COUNTY PUBLIC SCHOOLS (Mar. 5, 2016, 1:39 AM), <http://www.fcps.edu/is/schoolcounseling/benefits.shtml>.

<sup>119</sup> *Keeping Kids In School: What Research Tells Us About Preventing Dropouts*, CENTER FOR PUBLIC EDUCATION (Mar. 5, 2016, 1:57 AM), <http://www.centerforpubliceducation.org/Main-Menu/Staffingstudents/Keeping-kids-in-school-At-a-glance/Keeping-kids-in-school-Preventing-dropouts.html> (“Dropouts are more likely to have struggled academically: Low grades, low test scores, Fs in English or math, falling behind in course credits, and being retained are associated with lower chances for graduation.”).

<sup>120</sup> *Id.*

The costs of counseling in comparison to community service and mentoring programs are far greater. The average high school counselor gets paid \$62,950.<sup>121</sup> Not only do counselors require a great deal of training, they also demand a great deal of familiarity with the school district and areas in which they work. Because counselors are charged with assessing and creating realistic goals that fit each individual student, good counselors are grown only after years of experience. Additionally, given the nature of a counselor's duties, this solution requires that the student-to-counselor ratio be very small. In schools where overcrowding in the classrooms is an issue, overcrowding is exponentially more troublesome from a counselor's perspective. Without the ability to particularize counseling sessions to an individual's needs, students are left with a generic plan that may not work for them. Large-scale evaluations of intervention programs funded by the government in the 1990's revealed that "low-intensity programs that provide occasional tutoring, counseling, or activities to boost self-esteem—the norm in most districts—do almost nothing to keeping students to keep students in school."<sup>122</sup> Conversely, "high-intensity interventions can significantly reduce dropout rates."<sup>123</sup> Thus, because the counseling strategy requires a high degree of commitment, it stands to reason that the costs of such commitments would also be high. As a consequence, high-intensity counseling may simply be too expensive for many school districts to afford.

#### 4. TRANSITIONAL SUPPORT PROGRAMS

While results from early federal initiatives to survey the efficacy of school intervention programs showed that intensity is a key factor, the study also showed that intervention programs do not need to be provided exclusively at schools.<sup>124</sup> It showed that when intervention programs "improve[d] connections between homes,

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<sup>121</sup> *Professional School Guidance Counselor: Job Requirements and Salary Information*, CONCORDIA ONLINE EDUCATION (Mar. 5, 2016, 2:50 AM), <http://education.cu-portland.edu/blog/teaching-careers/guidance-counselor/>.

<sup>122</sup> *Keeping Kids In School*, *supra* note 120.

<sup>123</sup> *Id.*

<sup>124</sup> *Id.*

schools, and communities,” students were far less likely to both misbehave in school and were less likely to ultimately drop out.<sup>125</sup> One such program, Achievement for Latinos through Academic Success (ALAS) was implemented in Los Angeles County from 1990 to 1995.<sup>126</sup> This program created an additional support system for students and parents whereby student’s attendance was monitored and parents were contacted daily about truancy or cut classes. Perhaps most importantly, the ALAS program helped teachers establish “a system of regular feedback to parents and students about behavior, class work, and homework—on a monthly, weekly, or even daily basis as needed.”<sup>127</sup> By establishing a structured system for students to articulate expectations to students and provide consistent feedback regarding their progress towards meeting those expectations, the ALAS program illustrates the type of program necessary for problem students to be held accountable, but also find support. In essence, the ALAS programs aim is to reform and not punish. This system provides an opportunity for students to earn trust and show responsibility.

The Philadelphia area has similar programs to the ALAS program. One such program is called the Re-Entry Transition Initiative-Welcome Return Assessment Process (RETI-WRAP) program. This program was formed as a result of a 2002 Pennsylvania State law known as Act 88.<sup>128</sup> It was created out of a concern about the disruption that juvenile offenders were causing upon return to the public school system.<sup>129</sup> The RETI-WRAP program is designed to provide “transitional support for youth returning to the public school system from residential delinquent

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<sup>125</sup> *Id.*

<sup>126</sup> *Id.*

<sup>127</sup> *Id.*

<sup>128</sup> Susan Snyder, *Program Easing Reentry Into School Philadelphia’s Alternative Curriculum is Improving the Dropout Rate, Attendance and Grades of Juvenile Offenders*, PHILLY.COM (Mar. 5, 2016, 5:34 PM), [http://articles.philly.com/2004-10-03/news/25389935\\_1\\_disciplinary-school-regular-high-schools-juvenile-offenders](http://articles.philly.com/2004-10-03/news/25389935_1_disciplinary-school-regular-high-schools-juvenile-offenders).

<sup>129</sup> *Id.*

placement.”<sup>130</sup> This program’s ultimate goal is to increase school attendance and performance. It does so by bringing together multiple programs to coordinate and collaborate to ensure students receive support on multiple fronts.<sup>131</sup>

Together, representatives from the School District, Juvenile Probation Office, Department of Human Services, Behavioral Health Services and the Defender Association provide academic support, physical and mental health support, life skills and social services.<sup>132</sup> This multi-tiered approach to helping students has proven to be extremely successful in the Philadelphia Area. Studies have shown that students who re-enter high school after a juvenile placement have a 90% dropout rate.<sup>133</sup> Alternatively, among the students who receive services from the RETI-WRAP program, those students have a dropout rate closer to 60%.<sup>134</sup> This 10-day assessment program utilizes a “transition liaison,” who arranges meetings for the student with counselors and the principal. The liaison is also tasked with reviewing the student’s progress every 30 days for the first few months after transitioning back into school. As of 2010, the program served approximately 1,200 students.<sup>135</sup>

Although the RETI-WRAPs program exclusively serves students who have entered the juvenile justice system, it is certainly conceivable that a similar intervention model could be extended to students facing suspension or expulsion. It can even be argued that students who have not committed any crimes worthy of formal juvenile punishment would be easier to help. However, because of the costs of this program would increase ten-fold if expanded beyond

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<sup>130</sup> *Re-entry Transition Initiative-Welcome Return Assessment Process (RETI-WRAP)*, DEP. OF HUMAN SERVICES (Mar. 5, 2016, 3:05 PM), [http://dhs.phila.gov/intranet/scintrahome\\_pub.nsf/Content/Prevention+-+Delinquency+Prevention+-+RETI-WRAP](http://dhs.phila.gov/intranet/scintrahome_pub.nsf/Content/Prevention+-+Delinquency+Prevention+-+RETI-WRAP).

<sup>131</sup> *Id.*

<sup>132</sup> *Id.*

<sup>133</sup> Kate Nelson, *Adjudicated Youth*, THE NOTEBOOK (Apr. 1, 2010, 4:55 PM), <http://thenotebook.org/articles/2010/04/01/adjudicated-youth>.

<sup>134</sup> *Id.*

<sup>135</sup> *Id.*

juvenile offenders, many are skeptical of the programs viability as a wide-range interventional solution. As things stand currently, the program costs the Philadelphia school district \$500,000 per year.<sup>136</sup>

##### 5. RESTORATIVE JUSTICE PROGRAMS: YOUTH COURT.

One final alternative to suspension and expulsion practices is the use of restorative justice models. Of the aforementioned alternative programs mentioned, restorative justice has been looked upon favorably both nationally and locally.<sup>137</sup> “Restorative justice is a victim-centered response to crime that provides opportunities for those most directly affected by the crime —the victim, the offender, their families, and representatives of the community—to be directly involved in responding to the harm caused by the crime.”<sup>138</sup> The principal behind restorative justice within schools is that students take responsibility for their behavior, make their necessary amends, and are thereafter reintegrated into the academic community. Because no two students are the same, restorative justice offers schools the opportunity to particularize the dispositions handed down to offending students on a case-by-case basis.

One program local to Southern New Jersey and Philadelphia that implements such restorative justice models is Youth Court. As the brainchild of Dr. Edward Cahn, Youth Courts offer an alternative model to current traditional disciplinary models based on expulsion and suspension. In an attempt to solve the intrinsically illogical paradox of suspending kids who don’t want to be in school in the first place, Youth Court offers both the victim and respondent (the offending student) a forum to air their grievances in a mature and sympathetic environment. Youth Court provides a unique opportunity for the offending student to feel heard and hear others. Rather than simply suspending or expelling students, Youth Courts’ aim to get to the heart of a student’s behavioral problems. The premise is that in order to know *how* to correct problematic behavior, one has to know *why* the problematic behavior occurs in the first place. Thus by understanding the *why*, Youth Courts can

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<sup>136</sup> Snyder, *supra* note 129.

<sup>137</sup> Dale Mezzacappa, *What’s Working? What’s Not?*, THE NOTEBOOK (May 20, 2015, 8:15 AM), <http://thenotebook.org/articles/2015/05/20/what-s-working-what-s-not>.

<sup>138</sup> See *Racial Disproportionality in School Discipline*, *supra* note 96.

help provide students with the necessary tools to handle similar situations differently in the future. Dispositions are crafted on an individual case-by-case basis so as to help each individual. These can range from simple apologies or mandatory meetings with school counselors, tutors, or whatever else may be the cause of the student's misbehavior. The key aspect of these dispositions is that the dispositions themselves must be restorative rather than punitive. Youth Court is designed to rehabilitate and re-engage students back into the school community without any kind of exclusionary punishments (e.g. detention, suspension, or expulsion).

The offending students, otherwise known as respondents, are forced to confront their issues head on and take proactive steps towards restoring themselves in the eyes of their peers and the community. This is a far better alternative to waiting out a punishment at home in isolation. Recent results have proven that Youth Courts are effective in keeping students in school. One example of a Youth Court being implemented in a high-risk school can be found at Strawberry Mansion High School, considered one of Philadelphia's most at-risk schools. In 2014, according to United States Attorney for the Eastern District of Pennsylvania, Zane David Memeger, Strawberry Mansion has had 88 adjudications with zero expulsions or suspensions.<sup>139</sup> By letting adjudications be run by a jury of the respondent's classmates rather than by school staff and administrators, Youth Courts are unique among alternative discipline policies. While on paper this may seem like an imprudent choice, the results have shown that Youth Courts have progressively decreased recidivism among students.<sup>140</sup>

In addition, Youth Courts can also provide a unique mix of mentoring and intergenerational services. They allow Youth Court jurors to connect with dedicated and caring adults. Together, these groups come up with mantras that can be handed down through the generations. The mantra of the Strawberry Mansion Youth Court is

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<sup>139</sup> Interview with Zane David Memeger, United States District Attorney, and Robert Reed, Assistant United States District Attorney (Oct. 27, 2015).

<sup>140</sup> *Youth Courts: Facts and Stats*, NATIONAL ASSOCIATION OF YOUTH COURTS (Nov. 24, 2015, 2:38 AM), <http://www.youthcourt.net/about/facts-and-stats>.

“Facts, Harm, Fix it.”<sup>141</sup> The mantra of the Urban Promise Youth Court is “Restorative, Not Punitive.” These mantras illustrate Youth Courts’ commitment to fixing problematic behavior and not merely punishing it. Necessary to Youth Courts’ success are the help of dedicated volunteers and passionate supervisors. Supervisors such as Gregg Volz have helped Youth Court programs expand across Pennsylvania. As of 2011, there were 11 Youth Courts in Pennsylvania alone, and the popularity of the Youth Court model continues to grow.<sup>142</sup>

After studying these various Youth Court sites, it quickly becomes apparent that no two Youth Court Programs are identical. While most take place within individual high schools, some, like the Blair County Peer Jury Program, are community based. These community based restorative justice programs recruit jurors from multiple high schools, meet several times a year, and have adjudicated numerous infractions. These infractions can range from truancy and disorderly conduct up to theft, assault, drug possession and other misdemeanors.<sup>143</sup> Dispositions for these offenses often include “a letter of apology, paying restitution, writing an essay, community service, counseling, drug testing, and a tour of the prison.”<sup>144</sup> Student offenders typically have 60 days to complete their disposition.

To ensure that students comply with their dispositions, the Youth Court coordinator will supervise the student and will regularly call the family of the student to make sure the student is progressing towards completing their disposition. If a student fails to complete their disposition, the school has the option to then suspend or expel the student. In cases where a misdemeanor has been committed, the

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<sup>141</sup> *Youth Courts: Can They Interrupt the ‘School-To-Prison Pipeline’*, TEMPLE ESQ. (Mar. 6, 2016, 5:33 PM), <http://www.educationworks.org/programs/pdf/Temple%20Youth%20Court>.

<sup>142</sup> HANNAH KLEIN & GREGG VOLZ, STONELEIGH FOUNDATION, A SNAPSHOT OF PENNSYLVANIA YOUTH COURTS, (2011), [http://stoneleighfoundation.org/sites/default/files/Canvas%20of%20Pennsylvania%20Youth%20Courts%20Report\\_0.pdf](http://stoneleighfoundation.org/sites/default/files/Canvas%20of%20Pennsylvania%20Youth%20Courts%20Report_0.pdf).

<sup>143</sup> *Id.*

<sup>144</sup> *Id.*



student may face prosecution by the District Attorney's Office.<sup>145</sup> While neither expulsion nor formal prosecution is an ideal final stage, programs like Youth Court offer one more alternative to avoid these drastic final stages.

The costs for Youth Programs can vary. Some Youth Courts receive funding from the Department of Human Services, while others receive funding from private organizations. The Urban Promise Youth Court in Camden, New Jersey requires almost no funding. The school and program coordinators have to invest almost no money. The program runs within the confines of the normal school day and the program's law student volunteers donate any resources required. The biggest cost of Youth Court is the time invested within the program to make sure the students are well trained and understand the procedures and professionalism Youth Court requires. However, this is small price to pay for reform. Accordingly, through a combination of grass roots movements like Youth Court and the continued use of social media to raise awareness of the hazards of the school-to-prison pipeline, the chance for reform has never been more promising.

## VII. CONCLUSION

We as a society need to find methods for curing America's growing disciplinary problems within schools. If apathy and abuse are the diseases spreading within our schools, diversionary programs such as Youth Court represent the vaccine. Cases like Ahmad Mohammed's are representative of why the courts and society need to recognize the many problems attached to the Suspension and Expulsion System. As this comment shows, there are certainly no easy answers to these problems. However, the benefits of reforming school disciplinary policies far outweigh the costs attached. The benefits of transitioning away from the Suspension and Expulsion System and towards a restorative model will extend well beyond the classroom and into future generations.

As discussed, suspensions and expulsions are integral components of the school-to-prison pipeline.<sup>146</sup> Consequently, it

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<sup>145</sup> *Id.*

<sup>146</sup> See *Racial Disproportionality in School Discipline*, *supra* note 96 ("Suspensions, often the first stop along the pipeline, play a crucial role in pushing students from the school system and into the criminal justice system. Research shows a clear correlation between suspensions and both

stands to reason that if the number of suspensions and expulsions can be limited in the equation, the output would foreseeably lead to fewer individuals walking down the wrong path.<sup>147</sup> With more education and understanding, more students will graduate high school. With more students graduating, there will be more employment opportunities. With more employment opportunities, there will be a decrease in poverty. And lastly, this decrease in poverty should lead to a decrease in crime.<sup>148</sup> These are all outcomes that are in the best interest of all society, regardless of socioeconomic status or race. Thus, it is of the utmost importance that substantial measures are taken to stop relying on suspension and expulsion as disciplinary catchalls. The best way to do this is through the implementation of restorative justice programs such as Youth Court. As this comment has argued, Youth Courts have made tremendous strides in stemming the school-to-prison pipeline in the Southern New Jersey and Philadelphia area. As such, there is reason to believe wider implementation of Youth Court models may lead to even greater dividends.

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low achievement and dropping out of school altogether. Such research also demonstrates a link between dropping out of school and incarceration later in life. Specifically, students who have been suspended are three times more likely to drop out by the 10th grade than students who have never been suspended. Dropping out in turn triples the likelihood that a person will be incarcerated later in life. In 1997, 68 percent of state prison inmates were school dropouts.”).

<sup>147</sup> *Black Preschoolers Far More Likely To Be Suspended*, *supra* note 88.

<sup>148</sup> CENTER FOR PUBLIC EDUCATION, *supra* note 120 (“High dropout rates beget social and economic woes for communities as well. Dropouts are far more likely to become unemployed, receive public assistance, commit crimes, and become incarcerated.... the average dropout pays about \$60,000 less in taxes over his or her life time.”).