Barriers to Justice, Limits to Deterrence: Tort Law Theory and State Approaches to Shielding School Districts and Their Employees from Liability for Negligent Supervision

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Despite its importance, the law of tort and negligence in the context of American public schools is poorly understood and relatively understudied. Through the lens of tort law theory, this Article examines the various legal frameworks that govern the tort of negligent supervision in four states: Arkansas, Illinois, Colorado, and Maine. In these four states, various statutes serve to shield public school districts and their employees from liability for harms experienced by students under their supervision. This Article argues that the frameworks in these states fundamentally undermine the two primary purposes of tort law: corrective justice and deterrence. This Article then draws on tort law theory to provide suggestions for how legislators could revise the law in these states to strike a better balance between the goals of tort law and the public policy justifications for limiting the liability of districts and employees.

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INTRODUCTION

One of the most complicated areas of education law is the law of tort, particularly as it relates to school liability for negligence. This area of law is a complex product of centuries-old common law doctrines, statutory and judicial reforms of those doctrines, and an exhaustive body of case law in which those doctrines and related statutes have been applied by judges. Perhaps because of this complexity, the authors of education law textbooks have mischaracterized and underemphasized the issue of negligence as it applies to public schools.[1] Unsurprisingly, research shows that educators are poorly informed on the topic.[2] Despite the lack of awareness, negligence in the public school context is an important legal issue for parents, guardians, and children concerned about safety in schools and the ability to recover damages for injuries resulting from negligence. It is also important that districts, administrators, and teachers that may be vulnerable to legal claims based on negligence understand the implications of the law.

Although important, public school negligence remains relatively understudied. In 2008, Perry Zirkel and John Clark asserted that "school negligence is a staple [of education law] that merits more careful and complete study and training, tempered by the need for objective and

1. Peter J. Maher et al., *Governmental and Official Immunity for School Districts and Their Employees: Alive and Well*, 19 KAN. J.L. & PUB. POL'Y 234, 235 (2010).

2. *See* Todd A. DeMitchell & Thomas Carroll, *A Duty Owed: Tort Liability and the Perceptions of Public School Principals*, 201 EDUC. L. REP. 1, 19 (2005) (explaining that despite the importance of tort liability in education law, few principals spend considerable time examining the topic); Suzanne E. Eckes et al., *Trends in Court Opinions Involving Negligence in K–12 Schools: Considerations for Teachers and Administrators*, 275 EDUC. L. REP. 505, 505–06 (2012) (discussing that the purpose of the article is to attempt to provide practical guidance to teachers in the context of negligence in the school setting).

specific knowledge customized to the particular state jurisdiction and school situation."[3] Although scholars have begun to respond to the need for more research regarding school negligence,[4] the literature remains underdeveloped given the complexity and importance of this area of law.

This Article specifically focuses on district and employee liability for harm resulting from the negligent supervision of students. One premise of this Article is that understanding the legal landscape related to district and district-employee liability for negligence requires a comprehensive state-by-state approach that considers: (1) how statutory and common law define and apply the traditional elements of negligence, including duty and foreseeability, in the context of public schools; (2) how statutory and common law treat relevant immunity doctrines, particularly sovereign immunity and discretionary immunity; and (3) other relevant aspects of statutory law including damage limits and caps, heightened standards of evidentiary proof, and indemnification. This Article presents the results of a comprehensive analysis of the law of four states and examines the frameworks of those states from the perspective of tort law theory.

Part I of this Article discusses the two primary goals of tort law as understood by tort law theory: corrective justice and deterrence. Part II presents the legal frameworks that govern public school liability for negligent supervision in four states that represent four different regions of the United States: Arkansas, Illinois, Colorado, and Maine. These four states were chosen because they each take different approaches to limit the liability of states, school districts, and district employees by applying: sovereign immunity; discretionary immunity; less demanding standards of care for districts and their employees; more demanding evidentiary standards; potential liability for defendant legal fees; and damage caps. In the end, these four states' legal frameworks lead to the same legal result: districts, administrators, and teachers are practically shielded from all or nearly all liability for harms that result from the negligent supervision of students.[5]

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3. Perry A. Zirkel & John H. Clark, *School Negligence Case Law Trends*, 32 S. ILL. U. L.J. 345, 363 (2008).

4. *See, e.g.*, Eckes et al., *supra* note 2, at 505–06 (explaining that the purpose of the article is to address teachers' concerns regarding negligence in schools); Diane Holben & Perry A. Zirkel, *Empirical Trends in Teacher Tort Liability for Student Fights*, 40 J.L. & EDUC. 151, 152 (2011) (attempting to explain the limitations on teachers' actions due to litigation); Maher et al., *supra* note 1, at 238 (synthesizing statutory law relating to governmental immunity as it applies to schools).

5. In some cases involving improper supervision, the plaintiffs may be able to establish liability via section 1983 of the Federal Civil Rights Act of 1871. But this path, which rests on the assertion that the district or employee involved violated the student's liberty rights under substantive due process, has its own limitations including qualified immunity for individuals, a lack of a liability

Part III of this Article examines the implications of these four frameworks from the perspective of tort law theory. This Article demonstrates how the frameworks of these states conflict with the goals of tort law, as understood by tort law theory, and undermine the goals of corrective justice and deterrence. Moreover, these frameworks thwart the intentions of judges and legislators who dismantled the common law doctrine of sovereign immunity that once shielded districts, administrators, and teachers from liability for negligent supervision. In the end, while only Arkansas retains sovereign immunity in its previous, common law form, the law in all four states represents a legal reality where students injured because of district or employee negligence find themselves in the same situation they were in before the rejection of sovereign immunity: they lack a meaningful remedy for their injuries. This Article concludes with a brief discussion of how tort reform could address this shortcoming.

I. CORRECTIVE JUSTICE AND DETERRENCE: THE THEORETICAL BASES FOR THE TORT OF NEGLIGENCE

As legal scholar Ernest Weinrib stated: "Tort theory attempts to formulate a general conception of the justifications that underlie the norms of tort law."[6] Although tort law scholarship has been rife with debate about which theoretical conception of tort law best captures the goals and purposes of tort law that scholarship generally coalesces into two perspectives: the corrective justice perspective and the deterrence perspective.[7] The corrective justice perspective "focuses on correcting the wrong a particular tortfeasor committed against a particular victim."[8] And the method of correcting the wrong—the "remedy"—takes a particular form: the return of both parties to the status quo ante. This remedy, thus, correlates with, or is connected to, the wrong by placing the parties back to their positions before the wrong occurred. In Weinrib's words, "the remedy responds to the injustice [done by the defendant and suffered by the plaintiff] and endeavours, so far as

for failing to protect students from the actions of third parties, and a lack of vicarious liability. For a discussion of the hurdles facing plaintiffs who rely on § 1983, see Karen M. Blum, *Section 1983 Litigation: The Maze, the Mud, and the Madness*, 23 WM. & MARY BILL RTS. J. 913 (2015).

6. Ernest J. Weinrib, *Deterrence and Corrective Justice*, 50 UCLA L. REV. 621, 626 (2002).

7. Gary T. Schwartz, *Mixed Theories of Tort Law: Affirming Both Deterrence and Corrective Justice*, 75 TEX. L. REV. 1801, 1801 (1997) (noting the "two major camps of tort scholars"); Weinrib, *supra* note 6, at 622 (highlighting the gap between the two approaches to contemporary tort law).

8. Benjamin Shmueli, *Legal Pluralism in Tort Law Theory: Balancing Instrumental Theories and Corrective Justice*, 48 U. MICH. J.L. REFORM 745, 751 (2015).

possible, to undo it."[9] Undoing the injustice must involve both parties because the injustice encompasses the experience of two parties—the party who has committed the injustice and the party who has suffered from it. Under the guise of corrective justice, undoing that injustice calls for a remedy that impacts or involves both parties. Thus, the remedy must accomplish two things: in flowing to the plaintiff, it must "make the plaintiff whole," and in flowing from the defendant, it must exact a price roughly equal to the suffering experienced by the plaintiff due to the injustice committed by the defendant.[10]

From the second theoretical perspective, that of deterrence, tort law serves as a tool for pursuing a particular social end: influencing behavior in ways that reduce the chances that members of society will be harmed. In this way, the deterrence perspective views tort law more through an instrumentalist lens, with an eye toward preventing harm, as opposed to the moral and fairness-infused perspective of corrective justice. The desire to deter people from committing certain behaviors is reflected in several aspects of tort law. For example, the fact that monetary awards flow from the person who committed the harm reflects this deterrent goal: if courts did not hold tortfeasors liable for the damages they caused, there would be no deterrent effect. Punitive damages provide another example. With punitive damages, plaintiffs are awarded additional damages, damages that go beyond those to which they are otherwise entitled. Punitive damages do not reflect the goal of corrective justice—returning the parties to the status quo ante—for the award of punitive damages is beyond what is required to attain that goal. Rather, punitive damages serve as an additional incentive for the avoidance of risky behaviors.

This Article, similar to other tort law scholarship,[11] adopts a pluralistic understanding of the justifications of tort law. From a jurisprudential perspective, this pluralistic approach reflects the goals and purposes of tort law, including negligence, as understood by lawyers and judges. Particular principles related to negligence reflect the idea that tort law encompasses both normative and instrumentalist functions. Foreseeability represents one such principle. While the perspective of

9. Ernest J. Weinrib, *Corrective Justice in a Nutshell*, 52 U. TORONTO L.J. 349, 350 (2002).

10. Corrective justice is thwarted if the plaintiff is not compensated. Partly for this reason, if the defendant is unable to pay, principles of vicarious liability apply to hold other parties liable under particular circumstances. A harder question is raised by insurance: if having an insurance company pay leads to an avoidance of the harm on the part of the tortfeasor, corrective justice is undermined. But insurance is often the only way a plaintiff will recover large damage awards and insurance serves other social goals. In addition, the defendants may experience other penalties when found liable for negligence: higher insurance rates, the payment of deductibles, public relations issues, and possible job security implications.

11. Schwartz, *supra* note 7, at 1801; Shmueli, *supra* note 8, at 749.

corrective justice supports awarding damages to plaintiffs harmed by the conduct of others, those same principles also support restricting the award of damages in cases where the negligent party is less morally culpable for the harms. Under negligence law, a negligent actor is not responsible for all harms caused by his or her wrongdoing; the actor is responsible for only those harms that are foreseeable and, thus, should have led the actor to refrain from behaving in a less-than-careful way. An actor's decision to behave in a particular way is only a moral transgression when that decision exposes another person to risks of which the actor should have been aware. Likewise, one can understand the requirement of foreseeability from the perspective of deterrence: if a particular result is unforeseeable to an actor, one should not expect the actor to take actions to prevent the result from happening. Moreover, punishing an actor for the unforeseeable consequences of his or her conduct will not lead that actor to refrain from such conduct because he or she is unaware that such consequences could result.

The rules that focus on awarding punitive damages also reflect the pluralistic perspective. Punitive damages typically are awarded only in cases where the tortfeasor grossly deviates from the applicable standard of care so that his or her culpability rises above the level of unreasonableness and amounts to gross negligence or recklessness. Because punitive damage awards surpass the amount necessary to make the plaintiff whole, they are not called for under the guise of corrective justice. But in cases involving more significant moral transgressions, the normative aspects of corrective justice support more significant damage awards that punish and, thus, deter such behavior.

II. THE TORT OF NEGLIGENT SUPERVISION AND FOUR STATES' APPROACHES TO SHIELDING DISTRICTS AND TEACHERS FROM LIABILITY

One must first understand the legal frameworks that govern negligent supervision before examining those frameworks through the lens of tort law theory. Doing so, however, is a mammoth task. The frameworks encompass several complex issues, including the traditional elements of the tort of negligence (duty, breach, causation/foreseeability, and injury), as well as other tort law principles that present particular issues in the context of public schools. These issues include school districts' vicarious liability for employee conduct and the viability of doctrines like contributory negligence and assumption of the risk when the injured party is a child. Principles and doctrines specifically related to state, district, and district-employee liability—particularly the issue of immunity—further exacerbate the complexity of these legal frameworks. All of this is compounded by the fact that every state defines and applies the

elements of negligence, state liability and immunity, and related doctrines in its own way. Rather than discussing the detailed traditional elements of, and defenses to, the tort of negligence, this Article specifically considers how state law acts to shield public school districts and district employees from liability for negligence in cases where private actors would otherwise be liable.

Like the liability of other entities of state government, the liability of public schools is governed by various state statutes and court decisions related to tort law and the doctrine of sovereign immunity. According to the traditional doctrine of sovereign immunity, the king—or subsequently, in the United States, state and federal government—was immune from liability. Under United States common law, courts originally interpreted the doctrine of sovereign immunity as shielding public school districts and teachers from tort liability.[12] For example, in Illinois, the state supreme court explicitly applied the doctrine of sovereign immunity to public schools in 1898 in *Kinnare v. City of Chicago*.[13] But beginning in the 1920s, some criticized the doctrine of sovereign immunity for requiring injured persons "to bear almost all the risks of a defective, negligent, perverse[,] or erroneous administration of the State's functions."[14] In response to such criticisms and perceived injustices, state courts and legislatures began altering or rejecting the common law doctrine of sovereign immunity. For example, the Illinois Supreme Court declared in 1959 that "the rule of school district tort immunity is unjust, unsupported by any valid reason, and has no rightful place in modern day society."[15]

In response to the common law shift away from absolute sovereign immunity, many states passed statutes that restricted state and local governmental liability for torts, including negligence. Under most of these laws, school districts and teachers no longer enjoyed absolute immunity from tort liability. But the extent to which districts and teachers could be held liable varied—and continues to vary—considerably: some states eliminated immunity completely; others merely weakened it.[16] For example, in response to the elimination of sovereign immunity by the Illinois Supreme Court's 1959 decision in *Molitor v. Kaneland Community Unit District*, the Illinois legislature

12. KERN ALEXANDER & DAVID M. ALEXANDER, AMERICAN PUBLIC SCHOOL LAW 722 (Wadsworth Cengage Learning 8th ed. 2011) (1985).

13. 171 N.E. 535, 536–37 (Ill. 1898).

14. Edwin M. Borchard, *Government Liability in Tort*, 34 YALE L.J. 1, 1 (1924).

15. Molitor v. Kaneland Cmty. Unit Dist., 163 N.E.2d 89, 96 (Ill. 1959).

16. ALEXANDER & ALEXANDER, *supra* note 12, at 727.

passed the Local Governmental and Governmental Employees Tort Immunity Act ("Illinois Tort Immunity Act") and section 24-24 of the Illinois School Code in 1965.[17] These two laws acknowledged the elimination of absolute state immunity under common law, but nonetheless provided Illinois school districts and teachers with a significant degree of protection against tort law liability. Many states took a similar approach and preserved much of the immunity recognized under the doctrine of sovereign immunity, showing that, despite the assertion by some scholars and commentators that sovereign immunity is "moribund," the doctrine remains "alive and well."[18]

As a result of these legislative and court-mandated limitations on, and reassertions of, the doctrine of sovereign immunity, what was once a cut-and-dried nationwide rule—public schools and teachers are immune from civil liability—was replaced by a patchwork of policies that varied from state to state. This Article takes a closer look at the patchwork in four states: Illinois, Colorado, Arkansas, and Maine.

A. Illinois Approach: Alter the Common Law Rules of Negligence by Applying a More Forgiving Standard of Care

In comparison with Colorado and Arkansas, Illinois responded to the common law abrogation of sovereign immunity in a way that provides districts and district employees with less protection from liability for negligent supervision. But the protection in Illinois is nonetheless still robust. The linchpin of this protective framework is the statutory definition of the standard of care that districts and district employees owe to the students they are supervising. Specifically, under Illinois law, neither a school district nor an employee is liable for injuries incurred by a student unless the injuries are the result of "willful and wanton conduct" on the part of the district or employee supervising that student.[19] Both judicial interpretation of the Illinois School Code and the language of several sections of the Illinois Tort Immunity Act reflect this standard.

For cases involving the negligent supervision of public school students, the Illinois Tort Immunity Act provides the most straightforward language establishing the willful and wanton standard:

> Except as otherwise provided in this Act, neither a local public entity nor a public employee who undertakes to supervise an activity on or the use of any public property is liable for an injury unless the local public

17. 105 ILL. COMP. STAT. 5/24-24 (2017); 745 ILL. COMP. STAT. 10 (2017).

18. Maher et al., *supra* note 1, at 234.

19. Other states, including Connecticut, Florida, Indiana, and West Virginia, also apply the willful and wanton standard.

> entity or public employee is guilty of willful and wanton conduct in its supervision proximately causing such injury.[20]

Other sections of the Illinois Tort Immunity Act also confer immunity absent a showing of willful and wanton conduct.[21]

In addition to the protections afforded to school districts and their employees under the Illinois Tort Immunity Act, courts interpret the Illinois School Code to apply the willful and wanton standard to claims based on negligent supervision of school students. The Illinois School Code applies the principle of *in loco parentis* ("in place of a parent") to the relationship between educators and students.

> In all matters relating to the discipline in and conduct of the schools and the school children, [teachers, other certificated educational employees, and any other person, whether or not a certificated employee, providing a related service for or with respect to a student] stand in the relation of parents and guardians to the pupils. This relationship shall extend to all activities connected with the school program, including all athletic and extracurricular programs, and may be exercised at any time for the safety and supervision of the pupils in the absence of their parents or guardians.[22]

As interpreted by the Illinois courts, this language from the Illinois School Code "specifically confers upon educators the status of parent or guardian to the students and since a parent is not liable for injuries to his child absent wilful [sic] and wanton misconduct, it therefore follows that the same standard applies as between educator and student."[23]

Thus, under both the Illinois Tort Immunity Act and the Illinois School Code, teachers, administrators, and districts act pursuant to the standard of care owed to students under their supervision so long as they do not evidence a showing of willful and wanton conduct. As defined under the Illinois Tort Immunity Act, "willful and wanton conduct" is "a course of action which shows an actual or deliberate intention to cause harm or which, if not intentional, shows an *utter indifference* to or *conscious disregard* for the safety of others."[24] Within the context of the Illinois

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20. 745 ILL. COMP. STAT. 10/3-108(a) (2015). Section 1-206 of the Illinois Tort Immunity Act defines "local public entity" to include a "school district, school board, educational service region, regional board of school trustees, trustees of schools of townships, treasurers of schools of townships." 745 ILL. COMP. STAT. 10/1-206 (2015).

21. *See, e.g.*, *id.* at 10/2-202 ("A public employee is not liable for his act or omission in the execution or enforcement of any law unless such act or omission constitutes willful and wanton conduct.").

22. 105 ILL. COMP. STAT. 5/24-24 (2015).

23. Doe *ex rel.* Doe v. Lawrence Hall Youth Servs., 2012 IL App (1st) 103758, ¶ 9, 966 N.E.2d 52, 58.

24. 745 ILL. COMP. STAT. 10/1-210 (2015) (emphasis added).

School Code, as interpreted by Illinois courts, "[w]ilful [sic] and wanton conduct is conduct which is either 'intentional or done with a conscious disregard or indifference for the consequences when the known safety of other persons is involved.'"[25]

This forgiving standard of care has provided the basis for the rejection of many negligent supervision claims in Illinois courts, including:

- *Doe v. Lawrence Hall Youth Services*, in which a teacher gave drugs and alcohol to a high school student at a residential school for at-risk youth and then engaged in sexual acts with the student.[26]
- *Braun v. Board of Education*, in which an epileptic student suffered a seizure and was subsequently injured when a coach told the student to use a ladder, rather than a school-provided scaffold, to reach the scoreboard.[27]
- *Brooks v. McLean County Unit District No. 5*, in which a junior high school student collapsed and died after he and a group of junior high school students played a "game" called "body shots," which involved voluntarily punching each other with closed fists as hard as they could in the abdomen, chest, and ribs.[28]
- *Repede v. Community Unit School District No. 300*, in which a freshman cheerleader, while practicing a pyramid routine, fell and broke her arm. The plaintiff-cheerleader alleged that the squad was insufficiently trained and that the coaches failed to provide "spotters."[29]

Although the defendants in these cases may have acted unreasonably and, thus, would be liable for ordinary negligence, the application of the more forgiving willful and wanton standard has led courts to reject these and other similar sorts of claims.

B. Colorado Approach: Couple a Forgiving Duty of Care with a More Demanding Evidentiary Standard and the Threat of Plaintiff Liability for the Defendant's Attorney's Fees

In comparison with Illinois law, Colorado law presents even further barriers to plaintiffs seeking recovery for damages resulting from negligent supervision. Similar to Illinois, Colorado constructs those strong barriers by relying on a patchwork of policies. Colorado follows

25. Grant v. Bd. of Trs., 676 N.E.2d 705, 708 (Ill. 1997).
26. *Lawrence Hall Youth Servs.*, 2012 IL App (1st) 103758, ¶¶ 1–5, 966 N.E.2d at 54–55.
27. 502 N.E.2d 1076, 1078 (Ill. App. Ct. 1986).
28. 2014 IL App (4th) 130503,¶ 1, 8 N.E.3d 1203, 1206.
29. 779 N.E.2d 372, 374 (Ill. App. Ct. 2002).

Illinois in restricting negligent supervision liability for district employees unless the harm resulted from willful and wanton misconduct. But unlike Illinois, Colorado strengthens its barriers to liability by granting near absolute immunity to school districts. Two Colorado statutes govern negligent supervision claims against employees and districts and, in conjunction, grant robust immunity to school districts and their employees in negligent supervision cases: the Teacher and School Administrator Protection Act[30] and the Colorado Governmental Immunity Act.[31] First, under the Colorado Governmental Immunity Act, school districts, like all public entities, are absolutely immune from liability except under a limited set of circumstances, most of which would not be relevant in negligent supervision cases.[32] Second, under the Teacher and School Administrator Protection Act:

> An educational entity and its employees are immune from suit for taking an action regarding the supervision, grading, suspension, expulsion, or discipline of a student while the student is on the property of the educational entity or under the supervision of the educational entity or its employees; except that immunity shall not apply if the action is committed willfully and wantonly and violates a statute, rule, or regulation or a clearly articulated policy of the educational entity.[33]

While the Teacher and School Administrator Protection Act would appear to restrict the absolute immunity that districts enjoy under the Colorado Governmental Immunity Act, article 12 of the Teacher and School Administrator Protection Act requires that, if a provision of that act conflicts with a provision of the Governmental Immunity Act, "the provision that grants the greatest immunity and protection to an educational entity and its employees shall prevail."[34] Thus, while the Teacher and School Administrator Protection Act allows for recovery against employees under the willful and wanton standard, the more sweeping immunity for school districts found in the Governmental Immunity Act would apply to claims made against districts.

While neither the Colorado Teacher and School Administrator Protection Act nor the Colorado Governmental Immunity Act define the willful and wanton standard, Colorado courts and the Colorado

30. COLO. REV. STAT. § 22-12 (2017).

31. *Id.* § 24-10.

32. "A public entity shall be immune from liability in all claims for injury which lie in tort or could lie in tort regardless of whether that may be the type of action or the form of relief chosen by the claimant except as provided otherwise in this section." *Id.* § 24-10-106(1). The one exception that is relevant to schools is the operation of a motor vehicle. The other exceptions pertain to things such as the condition of public roads and the operation of a public hospital.

33. *Id.* § 22-12-104.

34. *Id.* § 22-12-102(3).

legislature in other statutes have defined the standard. As noted in a recent decision by the Jefferson County District Court in Colorado:

> An early decision defined the term as follows: The demarcation between ordinary negligence, and willful and wanton disregard, is that in the latter the actor was fully aware of the danger and should have realized its probable consequences, yet deliberately avoided all precaution to prevent disaster. A failure to act in prevention of accident is but simple negligence; a mentally active restraint from such action is willful. Omitting to weigh consequences is simple negligence; refusing to weigh them is willful.[35]

The Jefferson County District Court went on to note that Colorado's punitive damages statute defines "willful and wanton conduct" as conduct "purposely committed which the actor must have realized as dangerous, done heedlessly and recklessly, without regard to consequences, or of the rights and safety of others."[36]

In 2015, Colorado law regarding negligent supervision became further complicated when the legislature passed the Claire Davis School Safety Act.[37] This act, passed in response to the 2013 murder of Claire Davis at her Colorado high school, recognizes a very narrow exception to the grant of absolute immunity to districts found in the Colorado Governmental Immunity Act.[38] At first blush, the Claire Davis School Safety Act seems to drastically alter the standard of care applicable in negligent supervision cases. Specifically, subsection three of the act suggests that the reasonable care standard applies to claims made against districts and district employees for negligent supervision, not the willful and wanton standard that the Teacher and School Administrator Protection Act provides.[39] But much of what the act gives plaintiffs in subsection three is retracted by other provisions of the act. First, subsection four of the act reasserts districts' absolute immunity for tort liability, albeit while also recognizing the possibility of exceptions:

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35. Order re: claims concerning willful and wanton conduct of individual defending parties, In re *The Lower North Fork Fire Litigation*, No. 12 CV 2550, at 3 (Colo. Dist. Ct. Feb. 18, 2014) (citing Pettingell v. Moede, 271 P.2d 1038, 1042 (Colo. 1954)).

36. *See id.* (referring to COLO. REV. STAT. § 13-21-102(1)(b) (2016)).

37. COLO. REV. STAT. § 24-10-106.3 (2015).

38. Tom Barry, *Claire Davis School Safety Act Passes Both Houses: Governor Expected to Sign Bill Waiving Immunity*, VILLAGER (May 6, 2015), http://www.villagerpublishing.com/72321/front-page/claire-davis-school-safety-act-passes-both-houses/.

39. COLO. REV. STAT. ANN. § 24-10-106.3(3) (West 2015) ("All school districts and charter schools and their employees in this state have a duty to exercise reasonable care to protect all students, faculty, and staff from harm from acts committed by another person when the harm is reasonably foreseeable, while such students, faculty, and staff are within the school facilities or are participating in school-sponsored activities.").

> Notwithstanding any other provision of this article, a public school district or charter school is immune from liability in all claims for injury that lie in tort or could lie in tort regardless of whether that may be the type of action or the form of relief chosen by the claimant except as otherwise provided in this section or in this article.[40]

Subsection four goes on to formulate the precise exception to absolute district liability that the Claire Davis School Safety Act creates. Specifically, absolute immunity does not apply when a breach of duty claim arises from an incident of school violence.[41] In other words, the reasonable care standard applies in cases in which an incident of school violence[42] causes harm.[43] But the reasonable care standard only applies to claims asserting direct or vicarious liability against districts because subsection four of the act specifically states: "[a]n employee of a public school, school district, or a charter school is not subject to suit under this section in his or her individual capacity unless the employee's actions or omissions are willful and wanton."[44]

In addition to this tangled statutory web related to district and district employee immunity, Colorado law contains two other provisions that directly and indirectly enhance that immunity. Per the Claire Davis School Safety Act, because these two provisions appear in article 12 of the Colorado Teacher and School Administrator Protection Act, they do not apply to claims "arising from an incident of school violence."[45] But they do apply to any other claim based on negligent supervision. First, subsection 1 of section 104 of article 12, the same provision that establishes the willful and wanton standard to negligent supervision claims, also establishes a heightened evidentiary standard for the

40. COLO. REV. STAT. ANN. § 24-10-106.3(4) (West 2015).

41. *Id.* § 24-10-106.3.

42. *Id.* § 24-10-106.3(2) (an incident of school violence is defined as "an occurrence at a public school or public school-sponsored activity in which a person: (I) Engaged in a crime of violence; and (II) The actions described in subparagraph (I) of this paragraph (c) by that person caused serious bodily injury or death to any other person"). Under the statute, "'[c]rime of violence' means that the person committed, conspired to commit, or attempted to commit one of the following crimes: (I) Murder; (II) First degree assault; or (III) A felony sexual assault, as defined in section 18-3-402, C.R.S." *Id.*

43. Article 12 of the Colorado Teacher and School Administrator Protection Act requires courts to apply whichever of the two acts provides the most protection to districts. But subsection four of the Claire Davis School Safety Act adds that, with respect to claims arising out of incidents of school violence, "the provisions of article 12 . . . . do not apply to school districts and charter schools." *Id.* § 24-10-106.3. Thus, although the Colorado Teacher and School Administrator Act provides more protection to districts, the Claire Davis School Safety Act nonetheless applies in cases involving school violence.

44. *Id.* § 24-10-106.3(4).

45. *Id.*

establishment of liability for such claims:

> [I]mmunity [under the Act] shall not apply if the action is committed willfully and wantonly and violates a statute, rule, or regulation or a clearly articulated policy of the educational entity. The burden of proving the violation shall rest with the plaintiff and must be established by clear and convincing evidence to the court as part of a summary proceeding. If at the summary proceeding the court finds a violation exists, the educational entity and its employee may raise immunity at trial under the provisions of this article and the "Colorado Governmental Immunity Act."[46]

In other words, before a negligent supervision claim may proceed to trial, the plaintiff first must establish by clear and convincing evidence that the district or its employees willfully and wantonly committed a violation of a statute, rule, regulation, or a clearly articulated district policy. In contrast, in Colorado civil actions generally, the plaintiff prevails upon meeting the less demanding "preponderance of the evidence" standard.[47]

As if these provisions were not enough to discourage plaintiffs from filing claims for negligent supervision, Colorado adds one more provision that should give plaintiffs and their lawyers pause:

> (1) In a civil action or proceeding against an educational entity or its employee in which the court finds the educational entity or its employee is immune from suit or from liability pursuant to the provisions of section 22-12-104, the court shall award costs and reasonable attorney fees to the defendant or defendants. The court in its discretion may determine whether such fees and costs are to be borne by the plaintiff's attorney, the plaintiff, or both.
>
> (2) Expert witness fees may be included as part of the costs awarded under this section.[48]

In other words, if the plaintiff loses on the basis of immunity—if, at the end of the trial, it is determined that either the district was immune, perhaps because the action did not arise out of an incident of school violence, or the employee was immune, because he or she did not act willfully and wantonly—the plaintiff and/or the plaintiff's lawyer could be required to pay the attorney and expert witness fees for the district and/or the employee. Although the heading for this provision reads, "frivolous actions—attorney fees—costs," nothing in the actual wording of the statute requires that the claim be "frivolous."[49] Rather, the plaintiff simply must not prevail. This is in contravention of the traditional rule

46. *Id.* § 22-12-104.
47. *Id.* § 13-25-127.
48. *Id.* § 22-12-106.
49. *Id.*

under which parties to a civil action are responsible for their own attorneys' fees absent a determination that the action was based on a groundless claim or designed to harass the defendant.

In addition to possibly deterring the filing of negligent supervision claims, the protections against liability recognized under Colorado law have provided the basis for dismissing many of the claims that are actually filed. These cases include:

- *Young v. Brighton School District 27J*, in which "a minor child, slipped and fell in a puddle of water that had accumulated on a concrete walkway at his public elementary school."[50]
- *Robinson v. Ignacio School District, 11JT*, in which, while riding on the school bus, "two older students, including the bus driver's son . . . grabbed [a seven-year-old student's] neck and began to jerk his head back and forth, causing a severe cervical strain and a concussion."[51]
- *Padilla v. School District No. 1*, in which the mother of Padilla—a ten-year-old developmentally disabled child who suffered from serious medical conditions and became frightened and agitated when restrained, pulled, or grabbed—informed personnel of the Denver Public Schools ("DPS") that Padilla should not be pulled or restrained. One day, DPS employees placed Padilla in her stroller out of sight against a door when "Padilla refused to eat her lunch, and became agitated when DPS employees tried to get her to eat." When in the stroller, "Padilla became agitated, the stroller fell backward, and Padilla struck her head against the floor, fracturing her skull."[52]

C. Arkansas Approach: Reinstate the Common Law Approach to Sovereign Immunity

Compared to the approaches taken in Colorado and Illinois, the approach in Arkansas is refreshingly straightforward, albeit problematic from the perspective of corrective justice, deterrence, and the rights of injured plaintiffs. The foundation of the Arkansas framework is the absolute immunity granted to the State under article 5, section 20 of the Arkansas Constitution: "The State of Arkansas shall never be made defendant in any of her courts."[53] The principles that apply to the liability of school districts and their employees are only slightly more

50. Young *ex rel.* C.Y. v. Brighton Sch. Dist. 27J, 325 P.3d 571, 574 (Colo. 2014).
51. Robinson *ex rel.* C.R. v. Ignacio Sch. Dist., 11JT, 328 P.3d 297, 298 (Colo. App. 2014).
52. Padilla *ex rel.* Padilla v. Sch. Dist. No. 1, 25 P.3d 1176, 1178 (Colo. 2001).
53. ARK. CONST. art. V, § 20.

complicated. In 1968, the Arkansas Supreme Court abrogated the extension of absolute sovereign immunity to municipalities and other political subdivisions of the State, including school districts.[54] But in 1969, the Arkansas legislature reinstated that immunity.[55] Arkansas statutory law, specifically section 21-9-301(a) of the annotated state code, extends tort immunity to charter schools and school districts, at least to the extent that such schools and districts are not insured:

> It is declared to be the public policy of the State of Arkansas that all counties, municipal corporations, school districts, public charter schools, special improvement districts, and all other political subdivisions of the state and any of their boards, commissions, agencies, authorities, or other governing bodies shall be immune from liability and from suit for damages except to the extent that they may be covered by liability insurance.[56]

Section 21-9-301(b) of the same statute extends that immunity to cover claims based on respondeat superior: "No tort action shall lie against any such political subdivision because of the acts of its agents and employees."[57] Another provision requires that all political subdivisions acquire motor vehicle insurance, thus indirectly creating an exception to the blanket immunity enjoyed by school districts.[58] But that insurance needs to only meet the minimum requirements for drivers in the state, potentially limiting the liability under this exception to $25,000 for one person or $50,000 for two or more persons.[59]

Thus, most Arkansas plaintiffs seeking restitution for harms caused by negligent supervision must look to state employees—namely, school teachers and administrators—for relief if the district or charter school responsible for the harm is not insured. But even these relatively shallow pockets are shielded under a line of court cases stretching back to 1983. Specifically, in 1983, the Arkansas Supreme Court held that the immunity

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54. This decision maintained limited immunity for discretionary acts.

> We would make plain that this decision imposes liability on municipalities only for the imperfect, negligent, unskillful execution of a thing ordained to be done. No tort action will lie against them for those acts involving judgment and discretion; which are judicial and legislative or quasi-judicial and quasi-legislative in nature. The exercise of discretion necessarily carries with it the right to be wrong. It is only for ordinary torts committed in the execution of the activities decided upon that a tort action will lie; not for the decision itself.

Parish v. Pitts, 429 S.W.2d 45, 53 (Ark. 1968).

55. Hardin v. City of Devalls Bluff, 508 S.W.2d 559, 561 (Ark. 1974).

56. ARK. CODE. ANN. § 21-9-301 (West 2011).

57. *Id.*

58. *Id.*

59. *Id.* § 27-22-104.

created by section 21-9-301 extends to the employees of any state actor covered by the law when such employees commit "acts of negligence in carrying out their official duties."[60] The immunity applies when the employee is sued in his or her official or individual capacity. As summarized by the United States District Court for the Western Division of Arkansas in *Braden v. Mount Home School District*: "Officials and employees of governmental entities named in [section] 21-9-301 are also immune from suit for negligence in their official capacities. School officials are specifically immune from suit in their individual capacities, as well."[61]

These constitutional, statutory, and judicial protections against state, district, and public employee liability have been applied in numerous cases in which children attending Arkansas public schools have been harmed at, or while travelling to and from, school. These cases have included:

- *Doe v. Baum*, in which an eighth grader allegedly raped a female third grader while she traveled home on the school bus.[62]
- *Brown v. Fountain Hill School District*, in which a high school shop teacher allegedly removed the safety guard from a table saw, leading a male student to amputate the fingers on his right hand.[63]
- *Young v. Blytheville School District*, in which a "minor male" allegedly raped a thirteen-year-old female student inside the men's bathroom at her school.[64]
- *R.P. v. Springdale School District*, in which classmates allegedly abused a seventeen-year-old special needs student, confined him in a dog cage, forced him to eat dog feces, and sexually exposed him to a group of other students.[65]

In most cases, Arkansas courts grant the defendants' motions to dismiss or motions for summary judgment absent a showing by the plaintiff that districts or their employees acted with intent.[66] In other words, for students harmed due to negligent supervision in Arkansas

60. Mathews v. Martin, 658 S.W.2d 374, 375 (Ark. 1983).

61. Braden *ex rel.* M. v. Mount Home Sch. Dist., 903 F. Supp. 2d 729, 738–39 (W.D. Ark. 2012) (internal citations omitted).

62. Doe v. Baum, 72 S.W.3d 476, 476 (Ark. 2002).

63. Brown v. Fountain Hill Sch. Dist., 1 S.W.3d 27, 28 (Ark. Ct. App. 1999).

64. Young v. Blytheville Sch. Dist., 425 S.W.3d 865, 868 (Ark. Ct. App. 2013).

65. R.P. *ex rel.* K.P. v. Springdale Sch. Dist., No. 06-5014, 2007 WL552117, at *1 (W.D. Ark. Feb. 21, 2007).

66. The one bright spot in Arkansas immunity law from the perspective of plaintiffs came in 1989, when the Arkansas Supreme Court held that the immunity from liability for employees under section 21-9-301 did not extend to intentional torts. Battle v. Harris, 766 S.W.2d 431, 433 (Ark. 1989).

public schools, no path to recovery apparently exists under tort law, unless a district chooses to acquire insurance against claims to which they otherwise would be immune.

D. Maine Approach: Sovereign Immunity for Districts, Discretionary Immunity for Employees, and Liability and Damages Caps

The law in Maine illustrates two other powerful means of limiting district and district employee liability: discretionary immunity and damage caps. Maine law, like the law in many other states, starts with a blanket grant of immunity for school districts: "Except as otherwise expressly provided by statute, all governmental entities shall be immune from suit on any and all tort claims seeking recovery of damages."[67] The blanket immunity exceptions that are most relevant to school districts include the use and maintenance of motor vehicles and the operation and maintenance of public buildings.[68] In most situations in which an immunity exception applies, there are additional exceptions to the exception, including one for discretionary acts.[69] In cases in which an exception to districts' blanket immunity applies, Maine law also imposes a damage award limit of $400,000 for all claims arising out of a single occurrence.[70]

In terms of district employees, Maine law does not provide this sort of blanket grant of immunity coupled with exceptions. Rather, Maine law carves out specific areas of immunity, including:

- The performance of discretionary functions;
- Any intentional act or omission within the course and scope of employment, provided that such immunity does not exist in any case in which an employee's actions are found to have been in bad faith;
- The use of reasonable force by teachers against students who create a disturbance.[71]

In cases in which no specific immunity applies to employees, Maine law provides a back-stop: a personal liability cap of $10,000.[72]

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67. ME. REV. STAT ANN. tit. 14, § 8103 (2015).

68. *Id.* § 8104-A.

69. Except for cases involving the operation of a motor vehicle, a governmental entity is not liable for any claim which results from "[p]erforming or failing to perform a discretionary function or duty, whether or not the discretion is abused and whether or not any statute, charter, ordinance, order, resolution[,] or policy under which the discretionary function or duty is performed is valid or invalid." *Id.* § 8104-B.

70. *Id.* § 8105.

71. *Id.* § 8111.

72. *Id.* § 8104-D.

Maine's use of discretionary immunity reflects a common approach to limiting liability of districts and district employees. While states' definitions of discretionary immunity vary, Maine's definition, like that of some other states,[73] largely encompasses the supervision of public school students by teachers and districts. As explained by the Maine Supreme Court: "An act qualifies as a discretionary function if the act is essential to the realization or accomplishment of a basic governmental policy program or objective, and 'requires the exercise of basic policy evaluation, judgment, and expertise on the part of the governmental employee involved.'"[74] Lower courts have applied this definition to teacher supervision of students.[75]

In the rare instances where immunity is not available to a district or its employees, the caps on district and employee liability apply. While the extent to which districts and employees are immune may be more important from a jurisprudential perspective, the caps on liability and damages may be more important from the practical perspective of plaintiffs. Specifically, when damage caps apply, lawyers may be reluctant to take a case on a contingency basis. Some research suggests that the net effect of damage caps is diminished access to the civil justice system, particularly for low-income plaintiffs.[76] In the case of teacher liability, the effect is obvious: a $10,000 award would not allow for the recovery of any significant contingency fee for an attorney. While this may be less of a concern in cases where districts are liable, given the higher cap that would apply, the legal framework in Maine means that such cases are few and far between.[77]

The impact of Maine's legal framework related to negligent supervision is illustrated by the dismissal of several cases, including:

- *Peterson v. Bangor*, in which a kindergartener was injured after

73. *E.g.*, Alaska, Connecticut, and Delaware. The consequences of interpreting discretionary immunity so as to cover acts related to the supervision of public school students vary by state. In Maine, districts and their employees are absolutely immune from liability for most discretionary acts. In contrast, in Connecticut, discretionary immunity applies unless damages result from wanton, reckless, or malicious conduct.

74. Selby v. Cumberland Cty. et al., 796 A.2d 678, 680 (Me. 2002) (citing Carroll v. City of Portland, 736 A.2d 279, 282 (Me. 1999)) (internal citations omitted).

75. *See* Peterson *ex rel.* Fiandaca v. City of Bangor, 831 A.2d 416, 419 (Me. 2003) (discussing how the city is not responsible for the teacher's actions regarding the supervision of students).

76. *See* Stephen Daniels & Joanne Martin, *The Texas Two-Step: Evidence on the Link Between Damage Caps and Access to the Civil Justice System*, 55 DEPAUL L. REV. 635, 636–37 (2006) (discussing the link between damage caps and access to the legal system).

77. Trying to circumvent the cap on employee damages via the assertion of vicarious liability is unlikely to be successful. *See* Richards v. Town of Eliot, 780 A.2d 281, 294 (Me. 2001) (quoting a state statue about vicarious liability not attaching).

falling off the school playground monkey bars.[78]

- *Lightfoot v. School Administrative District No. 35*, in which a school allowed its wrestling team to use the high school hallways for timed relay races, leading a student to smash his arm through a glass window.[79]
- *MS. K* ex rel. *S.B. v. South Portland*, in which a fifteen-year-old ninth grader with cerebral palsy slipped and fell on a patch of ice on the sidewalk, suffering severe injuries, leading to multiple surgeries, including a hip fusion.[80]

In addition to resulting in the dismissal of such cases, the cap on damages may result in a number of cases not being filed in Maine courts at all.

III. RETURNING TO CORRECTIVE JUSTICE AND DETERRENCE

Overall, the legal frameworks from these four states violate, to varying degrees, the purposes of the law of tort and negligence as understood by tort law theory—corrective justice and deterrence. To some extent, this conflict is apparent: denying a plaintiff the ability to recover damages for legitimate negligence claims is unjust and removes some of the incentive for providing high levels of care. This is most clearly evident in the legal framework in Arkansas, although the frameworks in all four states establish significant hurdles for plaintiffs harmed as a result of negligent supervision in schools, hurdles they would not face if they sued private actors for negligent conduct.

Beyond documenting the extent to which the law in these states makes recovery for negligent supervision difficult, the research presented in this Article demonstrates the means through which states accomplish it. Only the Arkansas framework more or less mirrors the status quo ante of sovereign immunity that had been roundly decried as unjust by scholars and judges. The other three states' legal frameworks undermine the goals of tort law in more complex and subtle ways, perhaps masking the extent to which they conflict with the principles of corrective justice and deterrence. The extent to which these frameworks favor the position of the state, school districts, and district employees is evident not only in terms of which side is likely to prevail at trial, but also in terms of how the civil justice system treats plaintiffs harmed by negligent supervision overall.

As suggested by the examples of cases from Illinois, Colorado, Arkansas, and Maine, and others with similar provisions, the civil justice

78. *Peterson*, *supra* note 75, at 416.
79. Lightfoot v. Sch. Admin. Dist. No. 35, 816 A.2d 63, 63 (Me. 2003).
80. MS. K *ex rel.* S.B. v. City of S. Portland, 407 F. Supp. 2d 290, 290 (D. Me. 2006).

system often unjustly treats public school students asserting claims on the basis of negligent supervision. For those plaintiffs whose cases make it to the courts, the likelihood that a judge will reject their claims is substantially higher than it would be in a typical negligence case. This reality raises two issues that interfere with the achievement of the principles of corrective justice: the denial of recovery for legitimate claims and the unequal treatment of plaintiffs. If one accepts the validity of the tort of negligence, denying recovery for legitimate claims is problematic. What's more, the fact that different principles apply when a defendant is a public entity, principles that provide extensive protections to that defendant, means that plaintiffs suing such defendants are denied justice in ways that plaintiffs suing private entities are not.

These violations of justice, both the denial of recovery and the unequal treatment, are magnified when one considers how these legal frameworks undermine plaintiffs' pursuit of justice prior to any formal adjudication of their claims. For example, these frameworks hinder the likelihood of a plaintiff recovering a favorable pretrial settlement. Defendants have many incentives to settle a case, but two major incentives are avoiding a substantial damages award after trial and escaping the large costs associated with defending a suit. A defendant's knowledge that he or she is likely to prevail in a case will inevitably make the defendant less likely to settle because the risk of an unfavorable outcome is small. Further, when damage caps and restrictions on punitive damages apply, defendants know that the harm associated with the worst-case scenario—losing after a trial—will be limited. Finally, the frameworks that this Article examines largely hinge on issues of law decided via pretrial motions and hearings, reducing the likelihood that a claim will go to trial. Thus, the incentive to settle to avoid large legal bills is also mitigated.

In addition to making the likelihood of an out-of-court settlement low, these legal frameworks also make it less likely that negligent supervision claims will ever surface. Because the likelihood of a plaintiff recovering is so small and the amount of damages plaintiffs may recover is often capped,[81] plaintiffs may find it difficult to even begin the legal process after an injury in a school, especially if they lack the financial resources to pay a lawyer rather than rely on representation through contingency. While such barriers might be less significant in cases involving more egregious behavior (i.e., behavior that rises to the level of willful and wanton conduct), damages caps and the lack of punitive damages limit

81. A 2010 study found that twenty-six states have caps applicable to boards, and fifteen states have caps for employees. Maher et al., *supra* note 1, at 250–53 tbls. 1, 2. Of the four states that this Article examines, in addition to Maine, Colorado has a $350,000 cap on damages applicable to boards and employees. COLO. REV. STAT. ANN. § 24-10-114 (West 2015).

the potential award even if a plaintiff prevails in such a case. Although only applicable in Colorado, the potential liability for defendants' legal costs likely serves as an additional significant disincentive for plaintiffs and their lawyers contemplating filing a negligence supervision claim.

While the extent to which these frameworks treat plaintiffs unjustly would be problematic regardless of the legal basis upon which their claims rest, the denial of recovery for harms related to negligent supervision arguably raises more concerns from the perspective of corrective justice than does the denial of recovery for other forms of negligence. The tort of negligent supervision rests on the notion that those having physical custody of children are obligated to protect those children from harm. This obligation is particularly weighty in the context of mandatory schooling: children and their parents have no choice; attendance at school is required. By forcing children to attend school, the state becomes particularly responsible for any harms children experience there. But these legal frameworks not only prevent the translation of this heightened responsibility into heightened consequences for failing to protect children, they also substitute lower consequences than those facing defendants without such heightened responsibility.

In addition to undermining the goals of corrective justice, the restrictions on district and district employee liability thwart the instrumentalist goals associated with deterrence. Although the impact on the goals associated with deterrence may be less significant than the impact on the goals of corrective justice,[82] the impact on deterrence nonetheless may be significant. Tort law, including the tort of negligence, assumes that the possibility of legal liability spurs individual and institutional actions designed to limit the exposure to that potential liability. Large damage awards receive media coverage and force individuals to consider their own vulnerability and the preventative actions they will take to limit that vulnerability. Likewise, institutions have the incentive to invest in training, personnel, and equipment designed to decrease the risk that children will be harmed due to negligent supervision. The removal or limitation of potential liability removes one's incentive to take such action to reduce the risks facing others.

82. My point here is that while corrective justice likely is completely denied when a legitimate negligence claim is thwarted, a legal framework that limits defendant liability may only weaken deterrence. One reason is that the possibility of being sued, regardless of whether the actor would prevail at trial or not, is an incentive to avoid negligent behavior. I am not suggesting that fears of being sued are the only or even the primary motivator behind districts' and teachers' concern for children's well-being. Rather, the prospect of litigation and liability is only one of many factors educators may consider when properly caring for children in their custody. Other possible sources of this concern include compassion, job security, and public/community relations. The existence of these other incentives may weaken the impact that limiting liability has on the goal of deterrence.

IV. WHAT IS TO BE DONE?

The extent to which the laws in Illinois, Colorado, Arkansas, and Maine shield public school administrators and teachers from liability for negligent supervision suggests that neither the values of corrective justice nor the goals of deterrence are served by the frameworks that this Article presents. Rules that prevent plaintiffs from being made whole after an injury fall short of achieving the goals of corrective justice. The unjust nature of this denial of recovery is amplified by the fact that these frameworks deny recovery to only some plaintiffs, those harmed by the negligence of state actors, as opposed to private actors. Finally, if society accepts the notion that one goal of negligence law is the deterrence of behavior that exposes others to unreasonable risks, these frameworks fail from that perspective as well.

Given the extent to which the legal frameworks in Illinois, Colorado, Arkansas, and Maine conflict with the goals of corrective justice and deterrence, what changes should be made to these frameworks and the frameworks of other states that also conflict with these goals? Of course, there are policy justifications for restricting district and district employee liability for negligent supervision. For example, subjecting public employees to liability might discourage some from pursuing public employment; encourage public officials to make decisions pursuant to public policy goals, not merely to avoid litigation; and cause high damages awards and legal costs to drain important resources from the public purse, resources that otherwise support instruction. But it is important to consider the costs of such restrictions as well.

What, then, should be done? From the perspective of tort law theory, the law should strike a better balance between the potential costs of liability and the potential costs of immunity. Tort law theory provides some guidance for how these frameworks should be altered to strike such a balance, but society could take the first step toward this equilibrium by treating districts and their employees the same way that private actors are treated under state law. If one accepts the position the Illinois Supreme Court articulated in 1959—that "school district tort immunity is unjust, unsupported by any valid reason, and has no rightful place in modern day society"[83]—that answer makes sense. Making this change need not prevent the state from pursuing the goals reflected in restricting district and district employee liability. Other public policies, informed by tort law theory, would support these goals without undermining the goals of corrective justice and deterrence.

For example, if immunity is discarded, state indemnification could

83. Molitor v. Kaneland Cmty. Unit Dist. No. 302, 163 N.E.2d 89, 96 (Ill. 1959).

achieve the goal of protecting public employees. But complete indemnification arguably conflicts with the goal of deterrence: if the potential for personal liability has a positive effect on behavior (i.e., leads an actor to be more careful), complete indemnification for individuals blunts that deterrent effect. Likewise, retaining some degree of direct personal liability on employees is necessary to achieve the aspect of corrective justice that compels tortfeasors to make plaintiffs whole. To address these concerns, state legislatures could revise indemnification policies to allow for some degree of exposure to liability for negligent conduct by administrators and teachers. This could be achieved by making indemnification contingent upon the payment of co-pays or deductibles common in insurance. For example, indemnification could cover 80 percent of a damage award with the negligent actor responsible for the remaining twenty percent.

Narrowly defined discretionary immunity for those charged with policy making should meet the goal of promoting sound policy judgment over fears of liability. But the state should only extend immunity to those state actors that the state actually charges with *setting* policy, not any state actor charged with implementing policy on a day-to-day basis. Though drawing the "immunity line" in terms of administrators who both set and implement policy would remain difficult, laws could be revised to encourage courts to interpret "policy setting" narrowly. Most importantly, the direct supervision of public school students, typically by teachers, should be placed explicitly outside of the scope of discretionary immunity.

One concern motivating immunity for negligent conduct by state actors is protecting the public purse. But insurance for liability and legal costs is available to somewhat address this concern, at least from the perspective of individual districts.[84] While some states provide a waiver of immunity when districts acquire applicable insurance, many of these states do not require districts to purchase insurance. But mandating that districts purchase insurance would address this shortcoming by, in effect, waiving immunity. School districts could be allowed to negotiate with insurers jointly to keep costs low. But as with indemnification for employees, if districts and employees are covered by insurance for damages that arise pursuant to negligent conduct, tort law theory supports exposing those state actors to some level of direct liability via co-pays or

84. From the perspective of the state, insurance does not completely address the concern with protecting the public purse. The amount of premiums paid by districts still amounts to a drain on the amount of aggregate public money spent on education. But from the perspective of districts, insurance prevents the sort of big financial hit that could result from a finding of liability for negligent supervision.

deductibles.

Damages caps present another route to protecting the public purse. But any cap on damages undermines the values of corrective justice and deterrence; therefore, such caps should be limited. In theory, if a plaintiff receives an award that is less than he or she would otherwise receive, fairness and justice are undermined; if caps on liability exposure reduce the incentive to be more careful and better protect public school students, deterrence is also undermined. But if caps are retained as part of the framework governing negligent supervision, tort law theory and the workings of the American civil justice system support formulating those caps with an eye toward incentivizing contingency-based representation for plaintiffs. In addition, punitive damages, even if capped, should be available in cases involving egregious behavior.

While not ideal for either plaintiffs or defendants, these sorts of policies would strike a better balance between the values of corrective justice and deterrence and the goals reflected in restrictions on liability for districts and their employees. While the political climate in many states may not support any increase in public exposure to liability, a realistic assessment of the extent to which school districts and their employees currently are shielded from liability might temper the resistance to such changes.