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Volume 46
Number 3 *Symposium: Juveniles and the
Supreme Court*

Article 4

Spring 2013

School Discipline Reform: Incorporating the Supreme Court's "Age Matters" Jurisprudence

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School Discipline Reform: Incorporating the Supreme Court's "Age Matters" Jurisprudence

Cover Page Footnote

Barbara Fedders is a clinical associate professor of law at the University of North Carolina School of Law. Jason Langberg is an attorney and education justice activist in Cary, North Carolina.

SCHOOL DISCIPLINE REFORM: INCORPORATING THE SUPREME COURT’S “AGE MATTERS” JURISPRUDENCE

*Barbara Fedders & Jason Langberg**

Relying on social science, neuroscience, and common sense to elucidate the differences between childhood and adulthood, including levels of maturation, impulsivity, and susceptibility to peer pressure, the Supreme Court altered the criminal justice landscape for youth in Roper v. Simmons, Graham v. Florida, J.D.B. v. North Carolina, and Miller v. Alabama—the “age matters” cases. In this Article, we argue that these holdings should be applied outside of the criminal justice system to support efforts to reform school discipline laws, policies, and practices. Specifically, we argue that the science and common sense relied upon in the “age matters” cases similarly support eliminating punitive school discipline approaches, such as zero tolerance policies and school policing, and instead employing developmentally appropriate approaches such as positive behavioral interventions, community building in schools, robust due process for disciplinary proceedings, and adequate counselors, social workers, and psychologists. Implementing these reforms will help prevent youths from becoming ensnared in the school-to-prison pipeline.

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I. INTRODUCTION

Roper v. Simmons,¹ *Graham v. Florida*,² *J.D.B. v. North Carolina*,³ and *Miller v. Alabama*⁴ have profoundly altered the youth justice landscape. Central to the holdings in *Roper*, *Graham*, and *Miller* are findings from social science and neuroscience that youths are less mature, more impetuous, and more susceptible to peer influence than adults, and that youths are, therefore, categorically less culpable.⁵ In *J.D.B.*, the Court made similar findings but relied less on science than “common sense.”⁶ The thrust of these “age matters” cases is that the fundamental differences between juveniles and adults entitle juveniles to substantively different treatment by police, prosecutors, and judges.⁷

Child advocates and scholars have pressed for application of these holdings in an array of additional juvenile and criminal settings.⁸ With respect to sentencing, advocates and scholars have argued that the cases discussed above, singly or in combination, should logically lead to the abolition of all life without parole sentences for juveniles;⁹ the abolition of sentencing statutes that mandate the same sentence for minors as for adults for certain

1. 543 U.S. 551 (2005) (abolishing the death penalty for juvenile offenders).

2. 130 S. Ct. 2011 (2010) (abolishing life without parole sentences for juvenile nonhomicide offenders).

3. 131 S. Ct. 2394 (2011) (holding that age is a factor that must be taken into account by police officers and judges in the analysis of whether an individual was in custody for purposes of triggering the warnings required under *Miranda v. Arizona*, 384 U.S. 436 (1966)).

4. 132 S. Ct. 2455 (2012) (abolishing statutes mandating life without parole sentences for juvenile offenders).

5. See *Roper*, 543 U.S. at 569–70; see also *Miller*, 132 S. Ct. at 2465 (explaining that juveniles’ transient rashness, proclivity for risk, and inability to assess consequences made them morally less culpable); *Graham*, 130 S. Ct. at 2026 (explaining that lack of maturity, underdeveloped sense of responsibility, and susceptibility to peer pressure make juveniles less morally reprehensible than adults).

6. 131 S. Ct. at 2407, 2416.

7. See *id.* at 2402–03; *Miller*, 132 S. Ct. at 2468–69; *Graham*, 130 S. Ct. at 2025–27; *Roper*, 543 U.S. at 561–64.

8. See *infra* notes 84–104.

9. Robert Johnson & Chris Miller, *An Eighth Amendment Analysis of Juvenile Life Without Parole: Extending Graham to All Juvenile Offenders*, 12 U. MD. L.J. RACE, RELIGION, GENDER & CLASS 101, 101 (2012).

crimes;¹⁰ and the establishment of a right to rehabilitation rather than punishment for juveniles.¹¹ As to the interrogation of minors, advocates and scholars have argued that “age matters” jurisprudence should lead to a reinvigoration of the voluntariness doctrine, such that trial courts would take seriously the likelihood that a minor may feel coerced and intimidated in circumstances in which an adult may not;¹² to a new analysis of interrogation that considers the experiences of a reasonable juvenile in determining whether an officer’s statements or actions might elicit an incriminating response;¹³ and to the imposition of a bright-line rule that statements may not be taken from a juvenile without counsel.¹⁴ Scholars have also urged that *J.D.B.*’s holding that age affects legal analysis in the confession area should be applied to other doctrinal areas, notably *Terry* stops,¹⁵ waivers of right to counsel,¹⁶ duress, justified uses of force, provocation, negligent homicide, and the felony-murder doctrine.¹⁷

For the most part, juvenile justice advocates and scholars have not considered whether and how the Supreme Court’s “age matters” cases apply to school safety, discipline policies, and practices.¹⁸ This Article seeks to fill that omission. A focus on schools by advocates

10. Martin Guggenheim, *Graham v. Florida and a Juvenile’s Right to Age-Appropriate Sentencing*, 47 HARV. C.R.-C.L. L. REV. 457, 458 (2012).

11. Neelum Arya, *Using Graham v. Florida to Challenge Juvenile Transfer Laws*, 71 LA. L. REV. 99, 103–04 (2010).

12. Martin Guggenheim & Randy Hertz, *J.D.B. and the Maturing of Juvenile Confession Suppression Law*, 38 WASH. U. J.L. & POL’Y 109, 161–62 (2012).

13. *Id.* at 165–66.

14. *Id.* at 170.

15. *Terry v. Ohio*, 392 U.S. 1, 27 (1968) (permitting limited search for weapons for protection of police officer who has reasonable belief that his safety is in danger).

16. Hillary Farber, *J.D.B. v. North Carolina: Ushering in a “New” Age of Custody Analysis Under Miranda*, 20 J.L. & POL’Y 117, 120–21 (2011).

17. See Marsha Levick et al., *The Eighth Amendment Evolves: Defining Cruel and Unusual Punishment Through the Lens of Childhood and Adolescence*, 15 U. PA. J.L. & SOC. CHANGE 285, 308–14 (2012); see also Emily C. Keller, *Constitutional Sentences for Juveniles Convicted of Felony Murder in the Wake of Roper, Graham & J.D.B.*, 11 CONN. PUB. INT. L.J. 297, 308–23 (2012) (“Sentencing a juvenile convicted of felony murder to life without parole is constitutionally suspect in light of Supreme Court precedent that children are fundamentally different than adults.”).

18. For an important exception, see Josie Foehrenbach Brown, *Developmental Due Process: Waging a Constitutional Campaign to Align School Discipline with Developmental Knowledge*, 82 TEMP. L. REV. 929, 931 (2009) (examining “the potential transferability of *Roper*’s recognition of the relevance of developmental psychology and neurobiology to a constitutional assessment of prevalent school disciplinary practices”).

and scholars is necessary and timely. Schools should be a primary mechanism for helping young people mature into productive, law-abiding adults who can function in a democracy and contribute to society. Yet, increasingly, schools are functioning to funnel ever-greater numbers of low-income students, students of color, and students with disabilities into jails and prisons. The juvenile in *J.D.B.*, for example, was an African American special education student at the time police questioned him.¹⁹ While juvenile arrests are down in nearly every criminal offense category,²⁰ in many states school-based arrests have declined more slowly than other types of arrests.²¹ Over the last twenty years, school discipline has become increasingly criminalized, which harms the most vulnerable students and creates a “school-to-prison pipeline.”²² What is more, young people in the juvenile and criminal justice systems consistently have problems in school, which often contribute to and deepen their court involvement.²³

In the “age matters” cases, the Supreme Court provided a blueprint for how youthfulness mandates different treatment by the

19. *In re J.D.B.*, 686 S.E.2d 135, 136 (N.C. 2009), *rev'd*, 131 S. Ct. 2394 (2011) (noting special education status). *J.D.B.*'s race is not specified in any of the reported decisions on the case, but the authors know that he is African American based on discussions with his trial attorney.

20. CHARLES PUZZANCHERA & BENJAMIN ADAMS, U.S. DEP'T OF JUSTICE, OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION, *JUVENILE ARRESTS 2009* 1 (2011).

21. *See, e.g.*, N.C. DIV. OF JUVENILE JUSTICE, *ANNUAL REPORT 2011*, at 13 (2011); ADVANCEMENT PROJECT ET AL., *TEST, PUNISH, AND PUSH OUT: HOW “ZERO TOLERANCE” AND HIGH-STAKES TESTING FUNNEL YOUTH INTO THE SCHOOL-TO-PRISON PIPELINE* 18 (rev. ed. 2010) [hereinafter *TEST, PUNISH, AND PUSH OUT*], *available at* http://www.advancementproject.org/page/-/resources/rev_fin.pdf; (noting that in Pennsylvania, the number of school-based arrests has almost tripled in just seven years); AMANDA PETTERUTI, JUSTICE POLICY INST., *EDUCATION UNDER ARREST: THE CASE AGAINST POLICE IN SCHOOLS* 14 (2011), *available at* http://www.justicepolicy.org/uploads/justicepolicy/documents/educationunderarrest_fullreport.pdf (citing Michael P. Krezmien et al., *Juvenile Court Referrals and the Public Schools: Nature and Extent of the Practice in Five States*, 26 J. CONTEMP. CRIM. JUST. 252, 273–293 (2010) (noting that in four of five states, referrals from schools to the juvenile justice system made up a greater proportion of all referrals in 2004 than in 1995)).

22. *See generally* Matt Cregor & Damon Hewitt, *Dismantling the School-to-Prison Pipeline: A Survey from the Field*, 20 POVERTY & RACE 5, 5 (2011) (defining school-to-prison pipeline and providing data regarding school discipline and criminalization trends).

23. *See generally* Ashley Nellis, *Addressing the Collateral Consequences of Convictions for Young Offenders*, CHAMPION, July/Aug. 2011, at 22 (noting that regular school attendance is a protective factor against delinquency).

courts.²⁴ We believe the insights in these cases can and should spur and inform reforms of punitive school discipline policies and practices. This Article makes concrete recommendations for how teachers, school administrators, law enforcement officers, and policymakers can voluntarily incorporate the findings in these cases and appropriately account for and respond to students' impetuosity, immaturity, and susceptibility to peer influence.²⁵ Doing so will improve school safety and at the same time improve the chances for all young people to attain a quality education.

The Article proceeds in three parts. Part I provides necessary background, briefly summarizing the four "age matters" cases and their possible applications in juvenile and criminal justice. It also describes the role of the juvenile court, an institution founded out of a recognition that youths are fundamentally different from adults. In Part II, we argue that schools should voluntarily reform their policies and practices to comport with the reasoning of the four cases. Part III makes specific suggestions for progressive school change that both account for the unique qualities of youths that the Court recognized and offer hope for dismantling the pipeline.

II. THE CASES AND THEIR APPLICATION TO JUVENILE AND CRIMINAL JUSTICE

This Part offers a brief synopsis of the four "age matters" cases and notes their possible applications in the juvenile and criminal justice settings. It then sets out a concise history of the juvenile court, which serves as an example of an institution created to help youths develop into productive and creative adults. Like the Supreme Court roughly one hundred years later, the founders of the juvenile court system also recognized that differences in juveniles mandate distinct treatment by state actors.²⁶ To be sure, the juvenile court has

24. See Editorial, *Juvenile Injustice*, N.Y. TIMES, Nov. 25, 2012, at SR10 ("The court has done more than set new limits on punishment. It has also set new expectations about American criminal justice.").

25. See generally Emily Buss, *The Gap in Law Between Developmental Expectations and Educational Obligations*, 79 U. CHI. L. REV. 59, 59 (2012) (exploring the "gap in law between developmental expectations and educational obligations").

26. Elizabeth Scott & Lawrence Steinberg, Princeton-Brookings, *Adolescent Development and the Regulation of Youth Culture* 18 THE FUTURE OF CHILDREN 15, 16 (2008) ("At the dawn of the Juvenile court era in the late nineteenth century, most youths were tried and punished as adults. Much had changed by 1909 . . .").

frequently failed to live up to its founders' aspirations.²⁷ We offer this account for the purpose of demonstrating that schools can and should make similar efforts in constructing and implementing their disciplinary policies.

A. *Roper v. Simmons*

In 2005, the Supreme Court held in *Roper v. Simmons* that the Eighth and Fourteenth Amendments prohibit capital sentences for individuals who commit crimes while under the age of eighteen.²⁸ Writing for the majority, Justice Kennedy began with a discussion of society's "evolving standards of decency" in order to determine which punishments are so disproportionate that they are cruel and unusual.²⁹ In assessing the "objective [indicia] of national consensus" on the issue, he noted that thirty states had banned the death penalty for juveniles.³⁰ After determining that a national consensus did exist and opposed the juvenile death penalty, Justice Kennedy stated that youth under age eighteen are fundamentally different from adults, so the usual justifications for the death penalty (i.e., retribution and deterrence) are less applicable to juveniles.³¹ Relying on assessments of death-row inmates arrested as juveniles, Justice Kennedy laid out three primary differences between minors and adults that justified a finding that minors cannot be reasonably classed "among the worst offenders": (1) a "lack of maturity" and an "underdeveloped sense of responsibility" that "result in impetuous and ill-considered actions and decisions"; (2) a heightened susceptibility to peer pressure that renders them more deserving of forgiveness; and (3) a less developed character and less fixed personality traits, which make rehabilitation more possible.³²

27. See generally Barry Feld, *Abolish the Juvenile Court: Youthfulness, Criminal Responsibility, and Sentencing Policy*, 88 J. CRIM. L. & CRIMINOLOGY 68, 68 (1997) (arguing that reforms to juvenile court have transformed it "from a nominally rehabilitative social welfare agency into a scaled-down, second-class criminal court for young people . . . that provides young offenders with neither therapy nor justice").

28. 543 U.S. 551, 578 (2005).

29. *Id.* at 560–61 (quoting *Trop v. Dulles*, 356 U.S. 86, 101 (1958)).

30. *Id.* at 564 (noting that twelve states had "rejected the death penalty altogether" while eighteen, "by express provision or judicial interpretation, exclude juveniles from its reach").

31. *Id.* at 571.

32. *Id.* at 569–70.

B. Graham v. Florida

Five years after the decision in *Roper v. Simmons*, the Court considered the constitutionality of juvenile sentences of life without parole in nonhomicide cases.³³ The Court had never before employed the more searching Eighth Amendment appellate review used in death penalty cases in a noncapital context.³⁴ Prior to *Graham*, courts applied much more stringent standards of review to death sentences than to noncapital sentences.³⁵ What is more, the majority in *Roper* took pains to find that the availability of life without parole sentences could supply a necessary deterrent effect that the now-abolished death penalty might have provided earlier.³⁶ Nevertheless, in *Graham*, in an opinion once again authored by Justice Kennedy, the Court applied *Roper*'s scientific insights regarding juveniles and held unconstitutional juvenile sentences of life without parole for nonhomicides.³⁷

Without acknowledging that it was breaking the “death is different” barrier, the Court in *Graham* applied the two-part analysis previously used only in capital cases to assess whether the sentence violated the Eighth Amendment.³⁸ First, the Court assessed the national consensus on life without parole sentences for nonhomicide crimes.³⁹ Examining state sentencing statutes, Justice Kennedy concluded that “[t]hirty-seven States, the District of Columbia, and the Federal Government permit sentences of life without parole for a juvenile nonhomicide offender in some circumstances.”⁴⁰ To Justice Kennedy, Florida’s argument that the state legislative tally demonstrated that there was no national consensus against juvenile

33. *Graham v. Florida*, 130 S. Ct. 2011, 2017–18 (2010).

34. *Id.* at 2022–23.

35. See Rachel E. Barkow, *The Court of Life and Death: The Two Tracks of Constitutional Sentencing Law and the Case for Uniformity*, 107 MICH. L. REV. 1145 (2009) (analyzing and arguing for abandonment of the “two-track approach to sentencing”).

36. *Roper*, 543 U.S. at 572.

37. *Graham*, 130 S. Ct. at 2030.

38. Guggenheim, *supra* note 10, at 463 (“What is most remarkable about *Graham* is how casually the majority broke the ‘death is different’ barrier.”). Justice Thomas in dissent noted the Court’s transformation of its Eighth Amendment jurisprudence. *Graham*, 130 S. Ct. at 2044 n.1, 2046 (Thomas, J., dissenting) (“The Court radically departs from the framework those precedents establish by applying to a noncapital sentence the categorical proportionality review its prior decisions have reserved for death penalty cases alone . . . ‘Death is different’ no longer.”).

39. *Graham*, 130 S. Ct. at 2023–26 (majority opinion).

40. *Id.* at 2015.

life without parole was “incomplete and unavailing.”⁴¹ He went on to analyze sentencing *practices* within the states and found a “consensus” against the application of life without parole sentences for juveniles who commit nonhomicide offenses, as there was only a small number of such sentences imposed in a handful of states.⁴²

Second, the Court determined whether the punishment itself violated the Constitution.⁴³ As he had in *Roper*, Justice Kennedy emphasized, “[T]he task of interpreting the Eighth Amendment remains our responsibility.”⁴⁴ In holding that sentencing juveniles to life in prison without the possibility of parole for crimes other than homicide is categorically forbidden, the Court relied on the three findings it previously made in *Roper* regarding youths’ immaturity, susceptibility to peer pressure, and incomplete character development.⁴⁵ Justice Kennedy expressed the Court’s belief that psychology and brain science continued to show “fundamental differences” between adults and juveniles.⁴⁶ The Court then held:

A State is not required to guarantee eventual freedom to a juvenile offender convicted of a nonhomicide crime. What the State must do, however, is give defendants like Graham some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation. . . . The Eighth Amendment does not foreclose the possibility that persons convicted of nonhomicide crimes committed before adulthood will remain behind bars for life. It does forbid States from making the judgment at the outset that those offenders never will be fit to reenter society.⁴⁷

As several commentators have noted, the fact that the Court applied this more stringent form of review to a noncapital sentence seems to indicate the Court’s comfort with applying a different set of

41. *Id.* at 2023. Justice Kennedy did note, however, that federal law allows for the possibility of a life without parole sentence for offenders as young as thirteen. *Id.*

42. *Id.* at 2023–24.

43. *Id.* at 2026–30.

44. *Id.* at 2026 (citing *Roper v. Simmons*, 543 U.S. 551, 575 (2005)).

45. *Id.*

46. *Id.*

47. *Id.* at 2030.

rules to juveniles.⁴⁸ *J.D.B.* and *Miller* are further examples of this trend.

C. *J.D.B. v. North Carolina*

In *J.D.B. v. North Carolina*,⁴⁹ the Court had the opportunity to apply *Roper*'s and *Graham*'s insights regarding youth in the Fifth Amendment context. *J.D.B.* was a thirteen-year-old, seventh-grade, middle school, special education student in Chapel Hill, North Carolina.⁵⁰ A police investigator, who was investigating off-campus home break-ins, went to the school to find and question *J.D.B.*⁵¹ The investigator had a uniformed police officer, also known as a school resource officer (SRO), remove *J.D.B.* from his social studies class and take him to a conference room.⁵² The assistant principal aided the investigator by verifying *J.D.B.*'s date of birth, address, and parent contact information.⁵³ The investigator then interrogated *J.D.B.* in the conference room, with the door closed, for thirty to forty-five minutes with the SRO, assistant principal, and an administrative intern present.⁵⁴ The assistant principal told *J.D.B.*, "[D]o the right thing. . . the truth always comes out in the end."⁵⁵ The investigator threatened *J.D.B.* with a custody order.⁵⁶ *J.D.B.* then confessed.⁵⁷ Only after his confession did the police investigator inform *J.D.B.* that he could refuse to answer the investigator's

48. See, e.g., Mary Berkheiser, *Death Is Not So Different After All: Graham v. Florida and the Court's "Kids Are Different" Eighth Amendment Jurisprudence*, 36 VT. L. REV. 1, 14 (2011) ("And it is remarkable in that, without pausing, the [*Graham*] Court deftly applied its capital jurisprudence in the context of a non-capital sentence."); William W. Berry III, *More Different Than Life, Less Different Than Death: The Argument for According Life Without Parole Its Own Category of Heightened Review Under the Eighth Amendment After Graham v. Florida*, 71 OHIO ST. L.J. 1109, 1122 (2010) ("The Court had crossed, without explanation, the clear and previously unquestioned Eighth Amendment divide between capital and non-capital cases.")

49. 131 S. Ct. 2394 (2011).

50. *Id.* at 2399. The Supreme Court opinion did not include in its factual recitation of *J.D.B.*'s status as a special education student. However, the North Carolina trial court judge who heard *J.D.B.*'s original motion to suppress included in his factual findings that *J.D.B.* was a special education student. In re *J.D.B.*, 686 S.E.2d 135, 136 (N.C. 2009), *rev'd*, 131 S. Ct. 2394.

51. *J.D.B.*, 131 S. Ct. at 2399.

52. *Id.*

53. See *id.*

54. *Id.*

55. *Id.*

56. See *id.* at 2400.

57. *Id.*

questions and that he was free to leave.⁵⁸ At no point did the police or school administrators call J.D.B.'s guardian.⁵⁹

The Court granted certiorari to consider “whether the *Miranda* custody analysis includes consideration of a juvenile suspect’s age.”⁶⁰ In 1966, when *Miranda* was issued,⁶¹ the Court had not yet held that Fifth Amendment protections apply to juveniles; that decision came the following year in *In re Gault*.⁶² Prior to *J.D.B.*, the analysis of whether a person was entitled to *Miranda* warnings rested on the question of whether she had been taken into custody or otherwise deprived of her freedom of action in any significant way.⁶³ A court’s interpretation of custody focused on how a “reasonable person” in the suspect’s position would perceive her circumstances,⁶⁴ without regard to the age of the suspect.⁶⁵

Citing *Roper* and *Simmons* regarding the fundamental differences between juveniles and adults,⁶⁶ Justice Sotomayor wrote for the majority:

It is beyond dispute that children will often feel bound to submit to police questioning when an adult in the same circumstances would feel free to leave. Seeing no reason for police officers or courts to blind themselves to that commonsense reality, we hold that a child’s age properly informs the *Miranda* custody analysis.⁶⁷

D. Miller v. Alabama

In the 2012 case of *Miller v. Alabama*,⁶⁸ the Court extended the holding of *Graham* and held that statutes mandating life without parole sentences for juvenile homicides violate the Eighth

58. *Id.*

59. *Id.* at 2399.

60. *Id.* at 2401.

61. *Miranda v. Arizona*, 384 U.S. 436 (1966).

62. 387 U.S. 1, 55 (1967).

63. *Miranda*, 384 U.S. at 444.

64. *Yarborough v. Alvarado*, 541 U.S. 652, 663 (2004).

65. *Id.* at 666–68 (noting that age is a factor in considerations of the voluntariness of a suspect’s statement under the Fourteenth Amendment, as well as whether or not any waiver of the right against self-incrimination was voluntary).

66. *J.D.B. v. North Carolina*, 131 S. Ct. 2394, 2403 (2011).

67. *Id.* at 2398–99; *see also id.* at 2401–06 (providing an overview of *Miranda*’s requirements).

68. 132 S. Ct. 2455 (2012).

Amendment.⁶⁹ Justice Kagan, writing for the majority in *Miller*, acknowledged that *Graham* was limited to nonhomicides, but opined:

[N]one of what [the opinion] said about children—about their distinctive (and transitory) mental traits and environmental vulnerabilities—is crime-specific. Those features are evident in the same way, and to the same degree, when (as in both cases here) a botched robbery turns into a killing. So *Graham*'s reasoning implicates any life-without-parole sentence imposed on a juvenile, even as its categorical bar relates only to nonhomicide offenses.⁷⁰

Justice Kagan further asserted that while the holding did not bar all juvenile life without parole sentences—instead barring only those imposed by a mandatory sentencing scheme—such sentences should be “uncommon.”⁷¹ The Court rested its opinion not only on *J.D.B.*'s “commonsense” conclusions but also on the science at the center of *Roper* and *Graham*, which, Justice Kagan wrote, had become “even stronger.”⁷²

E. Back to the Future: A Brief History of the Juvenile Court

Groundbreaking though they are, these four Supreme Court cases in fact hearken back to the founding of the juvenile court at the turn of the twentieth century. The juvenile court was founded on the notion that children are different from adults and are essentially good.⁷³ Whether motivated by a belief that children were less blameworthy or innately innocent, the court's founders viewed children as differing significantly from adults in the reasons they commit crimes and as a result believed that the consequences society

69. *Id.* at 2460. The Court further held that all youth sentenced pursuant to a mandatory life without parole sentence are entitled to a resentencing hearing that takes into account “how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison.” *Id.* at 2469.

70. *Id.* at 2465.

71. *Id.* at 2469.

72. *Id.* at 2465 & n.5.

73. Cf. Barbara Fedders, *Losing Hold of the Guiding Hand: Ineffective Assistance of Counsel in Juvenile Delinquency Representation*, 14 LEWIS & CLARK L. REV. 771, 776 (2010) (noting shortcomings in the juvenile court's effectiveness of representation); see also *In re Gault*, 387 U.S. 1, 17 (1967) (detailing a case of inadequate representation).

attaches to those crimes should be different.⁷⁴ The juvenile court was created to offer rehabilitative alternatives to the adult criminal courts, focus on treatment rather than punishment, and provide for confidentiality to protect youths from the stigma associated with court involvement.⁷⁵ In short, “[T]he juvenile court was to act as would a kind and just parent.”⁷⁶

Beginning in the 1960s, civil rights activists, civil libertarians, child advocates, and scholars critiqued the juvenile court’s benevolent aspirations as window dressing for the denigration of children’s rights and disregard of basic due process.⁷⁷ Over time, the Supreme Court instituted due process protections in juvenile court proceedings, insisting that the juvenile court’s rehabilitative trappings could not excuse disregard of fair procedure.⁷⁸ While scholars and advocates praised this “constitutionalization” of juvenile court, they also worried that instituting procedural protections might simultaneously weaken the juvenile court’s founding principle—that children should be treated differently than adults.⁷⁹ Their concern was that criticism of the juvenile court, along with calls for heightened, adult-like protections in the court, would undermine its legitimacy as a separate institution.⁸⁰

Some of those fears seem to have been realized. Beginning in the late 1980s, state legislatures began making it easier for minors to be transferred to adult criminal court.⁸¹ While no state has abolished

74. Guggenheim, *supra* note 10, at 465–66.

75. *McKeiver v. Pennsylvania*, 403 U.S. 528, 551–52 (1971) (White, J., concurring) (noting that the court’s founders employed a deterministic philosophy by which they viewed children’s law-breaking behavior as resulting not from personal choices, but from forces—poverty, a chaotic home life, peer pressure—largely outside their control).

76. Fedders, *supra* note 73, at 778 (internal quotation marks omitted).

77. *Id.* at 779–80.

78. *Gault*, 387 U.S. at 22–55 (holding that juveniles are entitled to counsel in the fact-finding portion of cases that can end in commitment to a youth facility, notice of charges, the right to confront and cross-examine witnesses, and the right against self-incrimination); *In re Winship*, 397 U.S. 358, 368 (1970) (holding that juveniles have the right to have charges against them proven beyond a reasonable doubt); *Breed v. Jones*, 421 U.S. 519, 541 (1975) (holding that juveniles are entitled to protection against double jeopardy).

79. Arya, *supra* note 11, at 101 n.13 (citations omitted).

80. *Id.*

81. PATRICK GRIFFIN, NAT’L CTR. FOR JUVENILE JUSTICE, DIFFERENT FROM ADULTS: AN UPDATED ANALYSIS OF JUVENILE TRANSFER AND BLENDED SENTENCING LAWS, WITH RECOMMENDATIONS FOR REFORM 5–7 (2008), available at <http://www.modelsforchange.net/publications/181>.

its juvenile court, every state has passed laws that resulted in more young people being prosecuted and incarcerated as adults.⁸² Until the four “age matters” cases, support seemed to be declining for the notion that children’s uniqueness entitles them to substantively different, more protective treatment from the state, at least in the case of serious crimes.⁸³

F. Implications of the “Age Matters” Cases for Juvenile and Criminal Justice

The four “age matters” cases constitute a sea change in the punitive trends in juvenile and criminal justice that began in the late 1980s.⁸⁴ Taken together, *Roper*, *Graham*, and *Miller* have transformed sentencing practices for juveniles. *J.D.B.*’s declaration that a child’s age must be a factor in the *Miranda* custody analysis similarly changes law enforcement interrogation practices. How broad will the reach of these cases ultimately be? Chief Justice Roberts (who, ironically, wrote a concurring opinion in *Graham*) dissented in *Miller*, opining that the majority’s assertion that life without parole sentences for juveniles should be rare is in fact an “invitation to overturn life without parole sentences imposed by juries and trial judges.”⁸⁵ He went on to describe *Miller*’s reach:

This process has no discernible end point—or at least none consistent with our Nation’s legal traditions. . . . Having cast aside those limits, the Court cannot now offer a credible substitute, and does not even try. After all, the Court tells us, “none of what *Graham* said about children . . . is crime-specific.” The principle behind today’s decision seems to be only that because juveniles are different from adults, they must be sentenced differently. There is no clear reason that principle would not bar all mandatory sentences for juveniles, or any juvenile sentence as harsh as what a similarly situated adult would receive. Unless confined, the only stopping point for the Court’s

82. See generally *id.* (mapping the current landscape of laws governing sanctioning juveniles as adults).

83. Guggenheim, *supra* note 10, at 466.

84. *Id.* at 472–74.

85. *Miller*, 132 S. Ct. at 2481 (Breyer, J., concurring).

analysis would be never permitting juvenile offenders to be tried as adults.⁸⁶

The end point of these cases may in fact be the establishment of a constitutional principle that minors must always be sentenced differently from adults. One scholar argues that it is impermissible after *Graham* for a legislature to authorize the imposition of an automatic sentence on children that is the same sentence imposed on adults for the same crime, regardless of whether the children are prosecuted in juvenile or criminal court.⁸⁷ Another scholar pushes this argument further and suggests that retribution may no longer properly be a goal of prosecuting juveniles.⁸⁸ Another argues that the cases establish a constitutional right to rehabilitation for minors.⁸⁹

Outside of the sentencing context, the four cases suggest other fundamental alterations in the treatment of minors in the juvenile and criminal systems. Scholars assert that *J.D.B.*'s holding that age must be factored in the *Miranda* custody analysis should logically apply to other areas pertaining to juvenile confession law.⁹⁰ For example, when assessing whether the prosecution has proven that a juvenile confessed freely and voluntarily, a trial judge might logically apply, as a general presumption, the insights from *Roper*, *Graham*, *J.D.B.*, and *Miller* that children are “‘more vulnerable or susceptible to . . . outside pressures’ than adults”⁹¹ and thus more likely to succumb to police interrogation by giving statements that are “‘the product of . . . adolescent fantasy, fright or despair.’”⁹² Under this view, the analysis of a juvenile’s waiver of his or her Fifth Amendment rights should be similarly searching.⁹³ Taken seriously, these cases could also support an argument for a bright-line rule that a child below the age of

86. *Id.* at 2481–82 (citations omitted).

87. Guggenheim, *supra* note 10, at 489–90.

88. Dan Markel, *May Minors Be Retributively Punished After Panetti (and Graham)?*, 23 FED. SENT’G REP. 62, 65 (2010) (“[J]uveniles must [now] be treated *somewhat* like the incompetent: that is, as sources of risk and objects of compassion who can hopefully be cured or treated or contained until they exhibit the competence expected from them as adults. Until that time . . . they should be spared the special sting of condemnation associated with the retributive rebuke commonly connected to punishments in prisons or trials as adults.”).

89. Arya, *supra* note 11, at 102.

90. Guggenheim & Hertz, *supra* note 12, at 110.

91. *Id.* at 163.

92. *In re Gault*, 387 U.S. at 55 (1966).

93. Guggenheim & Hertz, *supra* note 12, at 165–66.

eighteen must be afforded an opportunity to confer not only with her parent or guardian, as is true in several states, but also with counsel prior to police interrogation.⁹⁴ That is because juveniles' lack of maturity and susceptibility to adult influence render them unable to appropriately assert their rights.⁹⁵

J.D.B. could apply in other doctrinal areas in delinquency and criminal law that involve the use of the "reasonable person" test. Felony murder,⁹⁶ negligent homicide, provocation, justified force, and duress are all criminal law doctrines requiring judges and juries to analyze "reasonableness." These doctrines could well be altered to account for the reasonable *juvenile*, as is now required for *Miranda* analysis after *J.D.B.*⁹⁷

Similarly, the "'commonsense conclusions about behavior and perception' that the Court categorically applied to youth in *J.D.B.*" could apply in the Fourth Amendment context.⁹⁸ The analysis of whether an individual has been seized by the police and is thus entitled to some protection under the Fourth Amendment turns on whether a reasonable person in that position would feel free to walk away from the officer.⁹⁹ Given *J.D.B.*'s findings regarding young people's deference to authority, a juvenile is arguably less likely than an adult to feel free to walk away from authority.¹⁰⁰ Thus the rubric for analyzing seizures under the Fourth Amendment should include considerations of age.¹⁰¹

In sum, the four cases collectively stand for the proposition that the status of being young entitles a minor to different treatment from, and heightened protections against, the state in juvenile and criminal

94. *See id.* at 165–67.

95. *Id.*; *see also* BARRY FELD, KIDS, COPS, AND CONFESSIONS: INSIDE THE INTERROGATION ROOM 35–59 (2012) (proposing interrogation reforms for youth suspects to prevent false confessions).

96. *See Miller*, 132 S. Ct. at 2476 (Breyer, J., concurring) ("[T]here is no basis for imposing a sentence of life without parole upon a juvenile who did not himself kill or intend to kill.").

97. Levick et al., *supra* note 17, at 291 n.39.

98. Farber, *supra* note 16, at 140.

99. *See Terry v. Ohio*, 392 U.S. 1, 16–18 (1968).

100. Farber, *supra* note 16, at 136.

101. *Id.* at 121. In some states, courts must take age into consideration in Fourth Amendment analyses. *See, e.g., In re I.R.T.*, 647 S.E.2d 129, 130 (N.C. Ct. App. 2007) ("[The] age of a juvenile is a relevant factor in determining whether a seizure has occurred within the meaning of the Fourth Amendment.").

justice settings.¹⁰² The cases tell us little, however, about what role adults can play to prevent youths from criminal involvement.¹⁰³ Youths in the juvenile and criminal systems have made mistakes, sometimes serious ones. But their families, communities, and schools have also often failed them in significant ways.¹⁰⁴ What might the “age matters” cases also tell us regarding what we owe to youths in other state systems, such as public schools? And how, if at all, can the cases galvanize advocacy on behalf of young people to prevent their movement from schools to jails and prisons? It is to these questions that our discussion now turns.

III. “AGE MATTERS” IN SCHOOL

We argue here that those who care about the welfare of young people in the juvenile and criminal systems should push for an end to the way in which schools currently funnel young people into those systems. The “age matters” cases provide tools to do so.¹⁰⁵ The cases speak to a vision of childhood as a time of growth, development, and amenability to redemption and rehabilitation.¹⁰⁶ They point to the necessity of second chances.¹⁰⁷ The cases can be persuasive in urging teachers, principals, and education policymakers to enact policies and practices that curtail the increasingly punitive environment of contemporary public education.¹⁰⁸ In so doing, schools can become both safer and more just.¹⁰⁹

102. See, e.g., *Miller* 132 S. Ct. at 2463–65 (2012) (summarizing the major implications of the case law).

103. See Buss, *supra* note 25, at 61–63.

104. Aaron Sussman, *The Paradox of Graham v. Florida and the Juvenile Justice System*, 37 VT. L. REV. 381, 392 (2012) (“[O]ffenses by the young also represent a failure of family, school, and the social system, which share responsibility for the development of America’s youth.”) (quoting TWENTIETH CENTURY FUND TASK FORCE ON SENTENCING POLICY TOWARD YOUNG OFFENDERS, CONFRONTING YOUTH CRIME 7 (1978)).

105. See *Miller*, 132 S. Ct. at 2455.

106. See *id.*

107. See *id.*

108. See, e.g., *id.*

109. See *id.*

*A. The Role of School Discipline
in Youth Development*

Schools play a central role in the socialization and development of children.¹¹⁰ Children and adolescents spend more time in schools than they do in any place other than their homes.¹¹¹ Compulsory attendance laws are in place in all fifty states.¹¹² On average, students spend over thirty hours per week and over one thousand hours per year in school.¹¹³ Additionally, children tend to, and are encouraged to, identify with adults in schools.¹¹⁴ Those adults—teachers, administrators, support staff, security personnel, and others—do more than transfer knowledge; they transmit attitudes and values.¹¹⁵ Education and child development scholars agree that schooling is a kind of child-rearing, a process by which society formally expresses itself to youths regarding what is important.¹¹⁶ Teachers help their

110. See JEFFREY J. COHEN & MARIAN C. FISH, HANDBOOK OF SCHOOL-BASED INTERVENTIONS: RESOLVING STUDENT PROBLEMS AND PROMOTING HEALTHY EDUCATIONAL ENVIRONMENTS 336 (1993); JACQUELYNNE S. ECCLES & ROBERT W. ROESER, SCHOOL AND COMMUNITY INFLUENCES ON HUMAN DEVELOPMENT, DEVELOPMENTAL PSYCHOLOGY: AN ADVANCED TEXTBOOK 504 (Marc H. Bornstein & Michael E. Lamb eds., 4th ed. 1999); PILAR MARIN & BRETT BROWN, CHILD TRENDS, THE SCHOOL ENVIRONMENT AND ADOLESCENT WELL-BEING: BEYOND ACADEMICS 1 (2008), available at http://www.childtrends.org/files/child_trends-2008_11_14_rb_schoolenviron.pdf; KAREN PITTMAN, UCLA CTR. FOR MENTAL HEALTH IN SCHS. INFO. RES., ABOUT PROMOTING YOUTH DEVELOPMENT IN SCHOOLS 6–8, available at <http://smhp.psych.ucla.edu/pdfdocs/yd.pdf>.

111. See ECCLES & ROESER, *supra* note 110, at 504.

112. See *Ingraham v. Wright*, 430 U.S. 651, 660 n.14 (1977); *Brown v. Bd. of Educ.*, 347 U.S. 483, 489 n.4 (1954).

113. See NAT'L ACAD. OF EDUC., TIME FOR LEARNING 4 (2009), available at http://www.naeducation.org/xpedio/groups/naedsite/documents/webpage/NAED_080868.pdf; cf. SANDRA L. HOFFERTH & JOHN F. SANDBERG, POPULATION STUDIES CTR. AT THE INST. FOR SOC. RESEARCH: UNIV. OF MICH., HOW AMERICAN CHILDREN SPEND THEIR TIME 7 (2000), available at <http://www.psc.isr.umich.edu/pubs/pdf/rr00-458.pdf> (stating twenty-one hours per week).

114. See JAMES P. COMER & ALVIN F. POUSSAINT, RAISING BLACK CHILDREN 198 (1992).

115. See *Ambach v. Norwick*, 441 U.S. 68, 76–77 (1979); *Brown*, 347 U.S. at 493; COMER & POUSSAINT, *supra* note 114, at 198; EMILE DURKHEIM, MORAL EDUCATION 79 (1961) (“The school has, above all, the function of linking the child to this society.”); PAULO FREIRE, PEDAGOGY OF FREEDOM: ETHICS, DEMOCRACY, AND CIVIC COURAGE (1998); cf. Augustina Reyes, *The Criminalization of Student Discipline Programs and Adolescent Behavior*, 21 ST. JOHN’S J. LEGAL COMMENT. 73, 90 (2006).

116. See WILLIAM AYERS, TEACHING TOWARD FREEDOM: MORAL COMMITMENT AND ETHICAL ACTION IN THE CLASSROOM 91–101 (2004); DEBORAH MEIER, THE POWER OF THEIR IDEAS: LESSONS FOR AMERICA FROM A SMALL SCHOOL IN HARLEM 114 (1995); ROBERT ULICH, CRISIS AND HOPE IN AMERICAN EDUCATION (1951); ROBERT ULICH, FUNDAMENTALS OF DEMOCRATIC EDUCATION: AN INTRODUCTION TO EDUCATIONAL PHILOSOPHY (1940).

students grow along crucial developmental pathways.¹¹⁷ Therefore, to be successful, schools must create conditions that foster positive development and learning.¹¹⁸ Indeed, this is what they do for the most privileged children and families.¹¹⁹

Discipline is one of the ways young people are socialized and undergo development in schools.¹²⁰ School safety can be achieved using proactive strategies that promote healthy development and support a democratic, progressive vision of public education.¹²¹ Alternatively, reactive school safety efforts, driven by a goal of achieving control and conformity and accomplished by meting out punishment, may inhibit youth development and contribute to the flow of young people into the juvenile and criminal systems.¹²²

B. Discipline as Social Control

Some critics of public education view it as being primarily focused on a hidden curriculum of conformity, uniformity, competition, and control.¹²³ They see education as a tool to manipulate students from poor and working class families, to serve the needs of global capitalism by molding future low-cost workers, and to entrench and reproduce deep social inequalities.¹²⁴ Under this view, sectors of students are, first and foremost, taught to follow orders,¹²⁵ and in the process of schooling, diversity, independent

117. See James P. Comer, *Schools That Develop Children*, AMERICAN PROSPECT, Apr. 23, 2011, available at <http://prospect.org/article/schools-develop-children>.

118. See *id.*

119. See *id.*

120. See RUSSELL SKIBA & M. KAREGA RAUSCH, CHILDREN'S NEEDS III: DEVELOPMENT, PREVENTION, AND INTERVENTION 87 (George G. Bear & Kathleen M. Minke eds., 2006).

121. See COMER & POUSSAINT, *supra* note 114, at 198; Catherine Y. Kim, *Policing School Discipline*, 77 BROOK. L. REV. 861, 868–71 (2012).

122. See Deborah N. Archer, *Introduction: Challenging the School-to-Prison Pipeline*, 54 N.Y.L. SCH. L. REV. 867, 868–69 (2010); Johanna Wald & Daniel J. Losen, *Defining and Redirecting a School-to-Prison Pipeline*, NEW DIRECTIONS FOR YOUTH DEV., Fall 2003, at 9–15.

123. See THE HIDDEN CURRICULUM AND MORAL EDUCATION: DECEPTION OR DISCOVERY (Henry Giroux & David Purpel eds., 1983); JULIE A. WEBBER, FAILURE TO HOLD: THE POLITICS OF SCHOOL VIOLENCE (2003).

124. See DIANE RAVITCH, THE REVISIONISTS REVISITED: A CRITIQUE OF THE RADICAL ATTACK ON THE SCHOOLS 37 (1977); Svi Shapiro, *Tikkun Olam and the Work of Education*, TIKKUN (Winter 2011), <http://www.tikkun.org/nextgen/tikkun-olam-and-the-work-of-education>.

125. See JOHN TAYLOR GATTO, DUMBING US DOWN (2002); JOHN TAYLOR GATTO, THE UNDERGROUND HISTORY OF AMERICAN EDUCATION: A SCHOOLTEACHER'S INTIMATE INVESTIGATION INTO THE PRISON OF MODERN SCHOOLING (2006).

thinking, and individuality can be crushed,¹²⁶ leading many students to become alienated, complacent, passive, bored, and anxious.¹²⁷ This view does not, of course, extend to children of the wealthy ensconced in well-resourced suburban public or private schools.

Unfortunately, the school discipline regime that has emerged over the last two decades supports this highly critical view of education. At the height of the “tough on crime” era and on the heels of mandatory minimum sentencing, three-strikes laws, the “broken windows” theory of aggressive policing, unprecedented construction of a prison regime, high-profile school shootings (e.g., Columbine), the media saturating a panicked public with hyperbolic stories about juvenile “super-predators,”¹²⁸ and changing public perceptions of children,¹²⁹ the federal government,¹³⁰ state legislatures,¹³¹ and local school districts¹³² began adopting zero-tolerance policies¹³³ and

126. See, for example, REPUBLICAN PARTY OF TEX., REPORT OF PLATFORM COMM. 11–14 (2012), available at http://s3.amazonaws.com/texasgop_pre/assets/original/2012Platform_Final.pdf (“higher order thinking skills” and “critical thinking skills,” early childhood education, multicultural education, free public schooling for noncitizens, “any sex education other than abstinence until marriage” and zero tolerance, corporal punishment, “instill[ing] patriotism,” and “school subjects with emphasis on the Judeo-Christian principles upon which America was founded and which form the basis of America’s legal, political and economic systems”); Danny Weil, *Texas GOP Declares: “No More Teaching of ‘Critical Thinking Skills’ in Texas Public Schools”*, TRUTHOUT (July 7, 2012), <http://truth-out.org/news/item/10144-texas-gop-declares-no-more-teaching-of-critical-thinking-skills-in-texas-public-schools>.

127. See Shapiro, *supra* note 124.

128. See Vincent Schiraldi & Jason Ziedenberg, *How Distorted Coverage of Juvenile Crime Affects Public Policy*, in ZERO TOLERANCE: RESISTING THE DRIVE FOR PUNISHMENT IN OUR SCHOOLS 114, 114–25 (William Ayers et al. eds., 2001) [hereinafter ZERO TOLERANCE]; Ronald Burns & Charles Crawford, *School Shootings, the Media, and Public Fear: Ingredients for Moral Panic*, 32 CRIME L. & SOC. CHANGE 147, 147–68 (1999); Alicia C. Insley, *Suspending and Expelling Children from Educational Opportunity: Time to Reevaluate Zero Tolerance Policies*, 50 AM. U. L. REV. 1039, 1058–61 (2001).

129. See Bernardine Dohrn, “Look Out Kid/It’s Something You Did”: Zero Tolerance for Children, in ZERO TOLERANCE, *supra* note 128, 89, 89–113.

130. See, e.g., Gun Free Schools Act of 1994 § 14601, 20 U.S.C. § 8921 (1994), *repealed and reenacted under* No Child Left Behind Act, 20 U.S.C. § 7151(b)(1) & (f) (2002) (mandating expulsion and referral to law enforcement for possession of a firearm on campus).

131. See, e.g., CAL. EDUC. CODE § 48915(c)(1) (West 2013) (recommending expulsion for possession of firearm on school premises).

132. See, e.g., FLA. STAT. § 1006.13(3)(a) (2012), available at <http://www.fldoe.org/safeschools/zero.asp> (stating zero-tolerance policy for possession of firearms in schools).

133. See TEST, PUNISH, AND PUSH OUT, *supra* note 21, at 9–11; RUSSELL J. SKIBA, IND. EDUC. POLICY CTR., ZERO TOLERANCE, ZERO EVIDENCE: AN ANALYSIS OF SCHOOL DISCIPLINARY PRACTICE 2 (2000), available at <http://www.indiana.edu/~safeschl/ztze.pdf>; Peter Price, *When Is a Police Officer an Officer of the Law?: The Status of Police Officers in Schools*, 99 J. CRIM. L. & CRIMINOLOGY 541, 543–46 (2009).

expanding the presence of law enforcement in schools.¹³⁴ The “take no prisoners discipline”¹³⁵ that emerged is situated in, and in some ways is motivated by, the unrelenting drive for “accountability” in public education that largely takes the form of high-stakes, standardized testing for students.¹³⁶

These factors have led to the criminalization of school disciplinary systems,¹³⁷ even though schools are among the safest places for children and serious acts of violence in schools are rare.¹³⁸

134. See JOHANNA WALD & LISA THURAU, CHARLES HAMILTON INST. FOR RACE AND JUSTICE, FIRST, DO NO HARM: HOW EDUCATORS AND POLICE CAN WORK TOGETHER MORE EFFECTIVELY TO KEEP SCHOOLS SAFE AND PROTECT VULNERABLE STUDENTS 1 (2010), available at http://www.njjn.org/uploads/digital-library/resource_1574_1.pdf; Katayoon Majd, *Students of the Mass Incarceration Nation*, 54 HOW. L.J. 343, 363–64 (2011).

135. ADVANCEMENT PROJECT ET AL., OPPORTUNITIES SUSPENDED: THE DEVASTATING CONSEQUENCES OF ZERO TOLERANCE AND SCHOOL DISCIPLINE 3–7 (2000) [hereinafter OPPORTUNITIES SUSPENDED].

136. See ADVANCEMENT PROJECT ET AL., FEDERAL POLICY, ESEA REAUTHORIZATION, AND THE SCHOOL-TO-PRISON PIPELINE 3–5 (2011) [hereinafter FEDERAL POLICY]; ADVANCEMENT PROJECT ET AL., TAKING BACK OUR CLASSROOMS! THE UNITED STRUGGLE OF TEACHERS, STUDENTS, AND PARENTS IN NORTH CAROLINA AGAINST HIGH-STAKES TESTING 2–4 (2012) [hereinafter TAKING BACK OUR CLASSROOMS], available at http://b.3cdn.net/advancement/1d207ddd7b0ba851fc_zqm6bs9e6.pdf; TEST, PUNISH, AND PUSH OUT, *supra* note 21, at 25–27; Deborah Gordon Klehr, *Addressing the Unintended Consequences of No Child Left Behind and Zero Tolerance: Better Strategies for Safe Schools and Successful Students*, 16 GEO. J. ON POVERTY L. & POL’Y 585, 586 (2009); *How Testing Feeds the School-to-Prison Pipeline*, NAT’L CTR. FAIR & OPEN TESTING FAIRTEST (Mar. 31, 2010, 2:58 PM), <http://www.fairtest.org/how-testing-feeds-schooltoprison-pipeline>. Scholars further argue that U.S. practices of mass incarceration depend on criminalizing student misconduct. See generally Reyes, *supra* note 115, at 77 (“[I]t has been in the interests of builders of prisons and detention facilities to exploit children’s proclivities for defying authority and failing to conform to societal expectations.”).

137. See Paul J. Hirschfield, *Preparing for Prison? The Criminalization of School Discipline in the USA*, 12 THEORETICAL CRIMINOLOGY 79, 81–88 (2008).

138. See KIM BROOKS ET AL., JUSTICE POLICY INST. & CHILDREN’S LAW CTR., SCHOOL HOUSE HYPE: TWO YEARS LATER 5 (2000), available at http://www.justicepolicy.org/uploads/justicepolicy/documents/school_house_hype.pdf; ELIZABETH DONOHUE ET AL., JUSTICE POLICY INST., SCHOOL HOUSE HYPE: SCHOOL SHOOTINGS AND THE REAL RISKS KIDS FACE IN AMERICA 10 (1998), available at http://www.justicepolicy.org/uploads/justicepolicy/documents/98-07_rep_schoolhousehype_jj.pdf; Joseph C. Gagnon & Peter E. Leone, *Alternative Strategies for School Violence Prevention*, in NEW DIRECTIONS FOR YOUTH DEVELOPMENT—ZERO TOLERANCE: CAN SUSPENSION AND EXPULSION KEEP SCHOOLS SAFE? 101, 101–02 (Russell J. Skiba & Gil G. Noam eds., 2001) [hereinafter NEW DIRECTIONS: ZERO TOLERANCE]; AMANDA PETTERUTI, JUSTICE POLICY INST., EDUCATION UNDER ARREST: THE CASE AGAINST POLICE IN SCHOOLS 10 (2011), available at http://www.justicepolicy.org/uploads/justicepolicy/documents/educationunderarrest_fullreport.pdf; Am. Psychological Ass’n, Zero Tolerance Task Force, *Are Zero Tolerance Policies Effective in the Schools? An Evidentiary Review and Recommendations*, 63 AM. PSYCHOLOGIST 852, 853 (2008); Randall R. Beger, *The “Worst of Both Worlds”: School Security and the Disappearing Fourth Amendment Rights of Students*, 28 CRIM. JUST. REV. 336, 338–39 (2003) [hereinafter *The “Worst of Both Worlds”*].

Over forty years ago, the U.S. Supreme Court declared that “schools may not be enclaves of totalitarianism[,]”¹³⁹ yet in many ways, those are precisely what they have become.¹⁴⁰ Crime-control imperatives increasingly dominate educational policy.¹⁴¹ High-profile tragedies produce more calls for policing of schools.¹⁴² Students are increasingly viewed as one dimensional, either as potential victims¹⁴³ or as suspects¹⁴⁴ whose behavior needs to be managed and controlled.¹⁴⁵ After the latter group of students is identified, disciplinary policies and practices serve to push them out of schools, rather than simply eliminating or managing their negative behaviors and helping them to grow out of adolescence.¹⁴⁶ As in *J.D.B.*,

139. See *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 511 (1969).

140. See John W. Whitehead, *Zero Tolerance Schools Discipline Without Wiggle Room*, HUFFINGTON POST (Feb. 8, 2011, 7:45 PM), http://www.huffingtonpost.com/john-w-whitehead/zero-tolerance-policies-schools_b_819594.html (“As surveillance cameras, metal detectors, police patrols, zero tolerance policies, lock downs, drug sniffing dogs and strip searches become the norm in elementary, middle and high schools across the nation, America is on a fast track to raising up an Orwellian generation—one populated by compliant citizens accustomed to living in a police state and who march in lockstep to the dictates of the government. In other words, the schools are teaching our young people how to be obedient subjects in a totalitarian society.”).

141. See Majd, *supra* note 134, at 361.

142. E.g., Craig Davis, *With Police in Schools, More Children in Court*, N.Y. TIMES, Apr. 12, 2013, at A1.

143. See Henry A. Giroux, *Schools and the Pedagogy of Punishment*, TRUTHOUT (Oct. 20, 2009), <http://archive.truthout.org/10200910> [hereinafter Giroux, *Schools and the Pedagogy of Punishment*] (“The combination of school punishments and criminal penalties has proven a lethal mix for many poor minority youth and has transformed schools from spaces of youth advocacy, protection, hope and equity to military fortresses, increasingly well-positioned to mete out injustice and humiliation, transforming the once-nurturing landscapes that young people are compelled to inhabit.”); Henry A. Giroux, *The Tragedy of Youth Deepens: Ten Years After Columbine*, COUNTERPUNCH (Apr. 20, 2009), <http://www.counterpunch.org/2009/04/20/ten-years-after-columbine/> [hereinafter Giroux, *The Tragedy of Youth Deepens*] (“[M]any public schools, traditionally viewed as . . . nurturing, youth-friendly spaces dedicated to protecting and educating children, have become one of the most punitive institutions young people now face Educating for citizenship, work, and the public good has been replaced with models of schooling in which students are viewed narrowly either as a threat or perpetrator of violence, on the one hand, or as infantilized potential victims of crime . . . on the other.”).

144. See Jody Sokolower, *Schools and the New Jim Crow: An Interview with Michelle Alexander*, RETHINKING SCHOOLS, Winter 2011–2012, at 15.

145. See Giroux, *Schools and the Pedagogy of Punishment*, *supra* note 143; Giroux, *The Tragedy of Youth Deepens*, *supra* note 143; see also SUSAN SANDLER ET AL., TURNING TO EACH OTHER NOT ON EACH OTHER: HOW SCHOOL COMMUNITIES PREVENT RACIAL BIAS IN SCHOOL DISCIPLINE 2 (2000), available at http://web.multco.us/sites/default/files/ccfc/documents/justice_matters__how_school_communities_prevent_racial_bias_in_school_discipline.pdf (addressing the discipline crisis and suggesting approaches that work to prevent racial bias in discipline).

146. See OPPORTUNITIES SUSPENDED, *supra* note 135, at 2–3.

teachers and administrators increasingly function as and work hand-in-hand with law enforcement. Across the country, very young children have been suspended from school and restrained and arrested at school.¹⁴⁷ Conditions in schools in working-class and poor communities often reflect an obsession with security and violence¹⁴⁸ and resemble prison conditions: both have decaying and overcrowded facilities, undertrained and underpaid staff, and a penury of equipment and supplies. Additionally, both prisons and schools in low-income communities tightly regulate conduct by employing armed guards, conducting random searches, and utilizing surveillance equipment, emergency phones, and sign-in desks.¹⁴⁹ In short, schools are in many ways preparing some students for life as a criminal,¹⁵⁰ and have become “‘accomplices’ to the project of mass incarceration.”¹⁵¹

The singular, misguided focus on removing students identified as problems through suspension, expulsion, and policing has come at the expense of academic achievement, school safety, and overall

147. *E.g.*, SKIBA, *supra* note 133, at 1; TEST, PUNISH, AND PUSH OUT, *supra* note 21, at 13–14; OPPORTUNITIES SUSPENDED, *supra* note 135, at 4–7; JUDITH A. BROWNE, ADVANCEMENT PROJECT, DERAILED! THE SCHOOLHOUSE TO JAILHOUSE TRACK 11 (2003), available at http://b.3cdn.net/advancement/c509d077028b4d0544_mlbrq3seg.pdf; Price, *supra* note 133, at 545–46; Bob Herbert, *6-Year-Olds Under Arrest*, N.Y. TIMES, Apr. 9, 2007, at A17.

148. See ANNETTE FUENTES, LOCKDOWN HIGH: WHEN THE SCHOOLHOUSE BECOMES A JAILHOUSE 81–104 (2011).

149. See CHRISTOPHER G. ROBBINS, EXPPELLING HOPE: THE ASSAULT ON YOUTH AND THE MILITARIZATION OF SCHOOLING (2008); Randall R. Beger, *Expansion of Police Power in Public Schools and the Vanishing Rights of Students*, 29 SOC. JUST. 119, 120 (2002); Majd, *supra* note 134, at 361; Aaron Sussman, *Learning in Lockdown: School Police, Race, and the Limits of the Law*, 59 UCLA L. REV. 788, 793–94, 794, 816–18 (2012); Giroux, *Schools and the Pedagogy of Punishment*, *supra* note 145, at 8 (“Students being miseducated, criminalized and arrested through a form of penal pedagogy in lockdown schools that resemble prisons is a cruel reminder of the degree to which mainstream politicians and the American public have turned their backs on young people in general and poor minority youth in particular.”); Henry A. Giroux, *Youth in a Suspect Society: Coming of Age in an Era of Disposability*, TRUTHOUT (May 5, 2011), <http://truth-out.org/news/item/923:youth-in-a-suspect-society-coming-of-age-in-an-era-of-disposability> (“As the culture of fear, crime and repression embraces public schools, the culture of schooling takes on the obscene and violent contours one associates with the ‘all [too] familiar procedures of efficient prison management’” (quoting ZYGMUNT BAUMAN, WASTED LIVES 82 (2004))).

150. See Reyes, *supra* note 115, at 91.

151. See Majd, *supra* note 134, at 360–63.

student well-being.¹⁵² It also comes at a time when many schools do not have libraries, art rooms, computer labs, or robust athletic programs.¹⁵³ The punitive approach overlooks young people's critical developmental needs.¹⁵⁴ Punitive discipline is a missed opportunity for positive socialization, affirming democratic norms, and meeting the developmental needs of students.¹⁵⁵ The current school discipline regime is alienating and isolating,¹⁵⁶ and increasingly instills in children a sense of hopelessness and despair.¹⁵⁷

1. Zero Tolerance, Suspension, and Expulsion

Zero tolerance policies mandate predetermined consequences—typically suspension and expulsion from the educational setting—for various student offenses.¹⁵⁸ Zero tolerance policies are designed, in part, to express school-wide intolerance for certain behaviors by punishing those behaviors severely, without regard to context, actual

152. See WEBBER, *supra* note 123, at 2; Rachel Garver & Pedro Noguera, *For Safety's Sake: A Case Study of School Security Efforts and Their Impact on Education Reform*, 3 J. OF APPLIED RES. ON CHILD. 19–26 (2012).

153. See WEBBER, *supra* note 123, at 118–20.

154. See WEBBER, *supra* note 123, at 119 (“The public, unable to see an alternative method of dealing with student violence due to shock and political indolence, allows the processing of students by the now panicked hidden curriculum to continue without acknowledging the negative effects of such socialization. Shiftless in front of the television screen, the public blinks at the policy of containment operating in schools and only seeks comfort in the visible signs of security (police uniforms, clear backpacks, camera lenses, and children paraded in front of courthouses donning bulletproof vests.)”); TEST, PUNISH, AND PUSH OUT, *supra* note 21, at 10 (citation omitted).

155. See Cara Suvall, *Restorative Justice in Schools: Learning from Jena High School*, 44 HARV. C.R.–C.L. L. REV. 547, 547 (2009).

156. See AARON KUPCHIK, HOMEROOM SECURITY: SCHOOL DISCIPLINE IN AN AGE OF FEAR 194 (2010); Suvall, *supra* note 155, at 553.

157. See KUPCHIK, *supra* note 156, at 6–7; Giroux, *Youth in a Suspect Society*, *supra* note 149 (“As schools increasingly resemble zones of abandonment, trust and respect give way to fear, disdain and suspicion, creating an environment in which critical education withers. Unfortunately, policies and practices designed to foster exclusion and mete out shame and humiliation make it easier for young people to look upon their society and their futures with suspicion and despair, rather than anticipation and hope. What is horrifying about the plight of youth today is not just the severity of deprivations and violence they experience daily, but also how they have been forced to view the world and redefine the nature of their own childhood within the borders of hopelessness, cruelty and despair.”).

158. See AUGUSTINA H. REYES, DISCIPLINE, ACHIEVEMENT, AND RACE: IS ZERO TOLERANCE THE ANSWER? (2006); NAT'L CTR. FOR EDUC. STATISTICS, VIOLENCE AND DISCIPLINE PROBLEMS IN U.S. PUBLIC SCHOOLS: 1996–97 (1998).

harm, mitigating factors, or extenuating circumstances.¹⁵⁹ Proponents of zero tolerance policies argued that, in addition to deterrence, these policies would create more consistency in discipline. As shown below, however, these predictions about more equity in punishment have not been proven true.¹⁶⁰

By the mid-1990s, zero tolerance policies were in place in most schools across the country.¹⁶¹ The policies were implemented without any empirical support for their efficacy in schools. Worse yet, there is now ample evidence—and conclusions by organizations such as the National Association of School Psychologists,¹⁶² the American Psychological Association,¹⁶³ and the American Academy of Pediatrics¹⁶⁴—that zero tolerance policies are not only ineffective, but also destructive. The harm arises largely due to the mismatch between zero tolerance policies and prescriptions for positive youth development.¹⁶⁵ No one should be punished by being deprived of an education.

First, zero tolerance disregards the adolescent brain development research¹⁶⁶ that formed the basis of the Supreme Court’s “age

159. Russell J. Skiba & Reece Peterson, *The Dark Side of Zero Tolerance: Can Punishment Lead to Safe Schools?*, 80 PHI DELTA KAPPAN 372, 381–82 (1999).

160. See Judith A. Browne et al., *Zero Tolerance: Unfair, with Little Recourse*, in NEW DIRECTIONS: ZERO TOLERANCE, *supra* note 138, 73, 73; Am. Psychological Ass’n, *supra* note 138, at 854. Instead of deterrence and consistency, zero tolerance policies seem to be merely superficial and political stopgap measures to deeper problems of inequality. See OPPORTUNITIES SUSPENDED, *supra* note 135, at 17; SKIBA, *supra* note 133, at 2–3.

161. See OPPORTUNITIES SUSPENDED, *supra* note 135, at 2, 17; Emily Bloomenthal, *Inadequate Discipline: Challenging Zero Tolerance Policies as Violating State Constitutional Education Clauses*, 35 N.Y.U. REV. L. & SOC. CHANGE 303, 305–06 (2011).

162. NAT’L ASS’N OF SCH. PSYCHOLOGISTS, ZERO TOLERANCE AND ALTERNATIVE STRATEGIES: A FACT SHEET FOR EDUCATORS AND POLICYMAKERS (2001), available at http://www.nasponline.org/resources/factsheets/zt_fs.aspx.

163. See Am. Psychological Ass’n, *supra* note 138, at 860.

164. Am. Acad. of Pediatrics, *Out of School Suspension and Expulsion*, 131 PEDIATRICS e1000, e1005 (2013), available at <http://pediatrics.aappublications.org/content/early/2013/02/20/peds.2012-3932.full.pdf>.

165. See OPPORTUNITIES SUSPENDED, *supra* note 135, at 10; TEST, PUNISH, AND PUSH OUT, *supra* note 21, at 14; Gil G. Noam et al., *Beyond the Rhetoric of Zero Tolerance: Long-Term Solutions for At-Risk Youth*, in NEW DIRECTIONS: ZERO TOLERANCE, *supra* note 138, 155, 156; Am. Psychological Ass’n, *supra* note 138, at 855; Majd, *supra* note 134, at 377–78.

166. See Steven C. Teske, *A Study of Zero Tolerance Policies in Schools: A Multi-Integrated Systems Approach to Improve Outcomes for Adolescents*, 24 J. CHILD & ADOLESCENT PSYCHIATRIC NURSING 88, 90 (2011).

matters” cases.¹⁶⁷ It punishes young people for exhibiting some of the normative adolescent behaviors that characterize their development, including questioning authority, being susceptible to peer influence, and failing to fully consider or understand the consequences of their actions.¹⁶⁸

Second, zero tolerance policies push youths out of school, depriving them of an education, often through unfair and arbitrary processes.¹⁶⁹ These policies impede developmental needs such as strong and trusting relationships with adults, positive attitudes toward fairness and justice, and the ability to manage conflicts and learn from mistakes.¹⁷⁰ Zero tolerance is a form of abandonment:¹⁷¹ it disinvests in youths by isolating them from supportive peers and adults.¹⁷² Moreover, zero tolerance is most often implemented at the middle and high school levels, a time when adolescents are keenly attuned to issues of justice and fairness.¹⁷³ Finally, overly harsh punishment can destroy a child’s spirit¹⁷⁴ and cause significant heartbreak for students and their families.¹⁷⁵

Third, youth development in schools requires flexibility because each learning environment is different¹⁷⁶ and students possess varying backgrounds and needs.¹⁷⁷ However, zero tolerance is, by

167. See *Miller v. Alabama*, 132 S. Ct. 2455, 2464–65 (2012); *J.D.B. v. North Carolina*, 131 S. Ct. 2394, 2402–04 (2011); *Graham v. Florida*, 130 S. Ct. 2011, 2026–27 (2010); *Roper v. Simmons*, 543 U.S. 551, 569–70 (2005).

168. See TEST, PUNISH, AND PUSH OUT, *supra* note 21, at 14 (“Indeed, in a great many schools, it is seemingly no longer acceptable for young people to act their age.”); DANIEL J. LOSEN & RUSSELL J. SKIBA, SUSPENDED EDUCATION: URBAN MIDDLE SCHOOLS IN CRISIS 11 (2010).

169. See OPPORTUNITIES SUSPENDED, *supra* note 135, at 4.

170. See Noam et al., *supra* note 165, at 156; *cf.* OPPORTUNITIES SUSPENDED, *supra* note 135, at 10–12.

171. See generally ZERO TOLERANCE, *supra* note 128.

172. See ROBBINS, *supra* note 149.

173. See TEST, PUNISH, AND PUSH OUT, *supra* note 21, at 11–12.

174. See SANDLER ET AL., *supra* note 145, at 4; Browne et al., *supra* note 160, at 73.

175. See SANDLER ET AL., *supra* note 145, at 4–5.

176. See School-Wide PBIS, OSEP TECHNICAL ASSISTANCE CENTER ON POSITIVE BEHAV. INTERVENTIONS & SUPPORTS, <http://www.pbis.org/school/default.aspx> (last visited Jan. 21, 2013).

177. See Ken Bernstein, *AFT Advocates Against a One-Size-Fits-All Approach to Education*, AFL-CIO NOW (July 23, 2012), <http://www.aflcio.org/Blog/Other-News/AFT-Advocates-Against-a-One-Size-Fits-All-Approach-to-Education> (“[AFT President Randi Weingarten and] the American Federation of Teachers . . . insist we remember that not all children are alike, that we not reduce their education to the single measure of performance on test and that we remember that it is our responsibility to adjust the education we give them to the needs they have—and not

definition, inflexible¹⁷⁸ and thus limits educators' ability to perceive and implement positive, developmentally appropriate, individualized, and proportional solutions to behavior problems.¹⁷⁹

Worse yet, as zero tolerance policies gained prevalence, school administrators retained wide discretion to use out-of-school suspension and expulsion for relatively minor, subjective offenses.¹⁸⁰ Incentives for suspending students discretionarily, such as relieving overworked teachers, reducing student competition for funds and resources, and artificially boosting scores on standardized tests, have remained firmly in place.¹⁸¹ In fact, the majority of suspensions are for nonviolent, less serious offenses, such as inappropriate language, tardiness, truancy, disobedience, and disrespect.¹⁸² Suspensions in these cases are not typically required by zero tolerance policies but have become a habit—in the absence of school social workers, nurses, parent aids, and trained volunteers in resource-starved schools.¹⁸³

Zero tolerance policies, combined with virtually unlimited discretion for administrators to suspend students for minor offenses,¹⁸⁴ have dramatically increased the use of school suspension and expulsion.¹⁸⁵ The number of school suspensions nearly doubled from 1974 to 2006.¹⁸⁶ According to the U.S. Department of

to force them into a single pattern for the convenience of others.”); Elizabeth G. Hines, *This Week: “One Size Fits All” Fits None of Our Kids*, ALTERNET (May 9, 2009), <http://www.alternet.org/story/155629>.

178. See Noam et al., *supra* note 165, at 155.

179. See Garver & Noguera, *supra* note 152, at 26.

180. See TONY FABELO ET AL., COUNCIL OF STATE GOV'TS JUSTICE CTR., *BREAKING SCHOOLS' RULES: A STATEWIDE STUDY OF HOW SCHOOL DISCIPLINE RELATES TO STUDENTS' SUCCESS AND JUVENILE JUSTICE INVOLVEMENT* 37–39 (2011) (tracking discretionary suspensions and expulsions from Texas public schools for a variety of disciplinary infractions); Dean Hill Rivkin, *Legal Advocacy and Education Reform: Litigating School Exclusion*, 75 TENN. L. REV. 265, 272 (2008).

181. See India Geronimo, *Systemic Failure: The School-to-Prison Pipeline and Discrimination Against Poor Minority Students*, 13 J.L. SOC'Y 281, 282–83, 293–94 (2011).

182. See LOSEN & SKIBA, *supra* note 168, at 9.

183. See *id.*

184. See SKIBA, *supra* note 133, at 10.

185. See TEST, PUNISH, AND PUSH OUT, *supra* note 21, at 20–24; Russell J. Skiba & Kimberly Knesting, *Zero Tolerance, Zero Evidence: An Analysis of School Disciplinary Practice*, in *NEW DIRECTIONS: ZERO TOLERANCE*, *supra* note 138, 17, 36.

186. DANIEL J. LOSEN, NAT'L EDUC. POLICY CTR., *DISCIPLINE POLICIES, SUCCESSFUL SCHOOLS, AND RACIAL JUSTICE* 4–5 (2011), available at <http://civilrightsproject.ucla.edu/>

Education's Office for Civil Rights,¹⁸⁷ over 3,000,000 students were suspended from school at least one time during the 2009–10 school year.¹⁸⁸

Yet there is no evidence to suggest that widespread use of suspension and expulsion makes schools safer,¹⁸⁹ improves student behavior,¹⁹⁰ deters misbehavior effectively,¹⁹¹ or benefits nonsuspended students academically by improving the learning climate.¹⁹² The reality is that suspension and expulsion cause significant damage to youth development. Suspension and expulsion are associated with negative educational outcomes,¹⁹³ including less time for learning,¹⁹⁴ grade retention,¹⁹⁵ poor academic performance,¹⁹⁶ failure to graduate on time or dropping out,¹⁹⁷ and less satisfactory school climates.¹⁹⁸ Additionally, suspension and

research/k-12-education/school-discipline/discipline-policies-successful-schools-and-racial-justice/NEPC-SchoolDiscipline-Losen-1-PB_FINAL.pdf.

187. See *Civil Rights Data*, U.S. DEP'T OF EDUC., <http://ocrdata.ed.gov> (last visited Feb. 20, 2013).

188. See OPPORTUNITIES SUSPENDED, *supra* note 135, at 11–12.

189. See Skiba & Knesting, *supra* note 185, at 35; Michelle Fine & Kersha Smith, *Zero Tolerance: Reflections on a Failed Policy That Won't Die*, in ZERO TOLERANCE, *supra* note 128, 256, 258 (arguing that zero tolerance prevents youths who need help from coming forward); LOSEN & SKIBA, *supra* note 168, at 2.

190. See THE COUNCIL OF STATE GOVERNMENTS JUSTICE CENTER, THE SCHOOL DISCIPLINE CONSENSUS REPORT: STRATEGIES FROM THE FIELD TO KEEP STUDENTS ENGAGED IN SCHOOL AND OUT OF THE JUVENILE JUSTICE SYSTEM (2014), available at http://csgjusticecenter.org/wp-content/uploads/2014/06/The_School_Discipline_Consensus_Report.pdf; SKIBA, *supra* note 133, at 13.

191. See LOSEN, *supra* note 182, at 9–10; Linda M. Raffaele Mendez, *Predictors of Suspension and Negative School Outcomes: A Longitudinal Investigation*, in NEW DIRECTIONS FOR YOUTH DEVELOPMENT: DECONSTRUCTING THE SCHOOL-TO-PRISON PIPELINE 17, 25, 31 (Johanna Wald & Daniel J. Losen eds., 2003) [hereinafter DECONSTRUCTING THE SCHOOL-TO-PRISON PIPELINE]; Russell J. Skiba et al., *African American Disproportionality in School Discipline: The Divide Between Best Evidence and Legal Remedy*, 54 N.Y.L. SCH. L. REV. 1071, 1077 (2009–2010).

192. See Mendez, *supra* note 191, at 25; Skiba et al., *supra* note 191, at 1077–78.

193. See OPPORTUNITIES SUSPENDED, *supra* note 135, at 13.

194. See LOSEN & SKIBA, *supra* note 168, at 2.

195. See FABELO ET AL., *supra* note 180, at xi, 54–60.

196. See Mendez, *supra* note 191, at 25.

197. See LOSEN & SKIBA, *supra* note 168, at 10 (citation omitted); Am. Psychological Ass'n, *supra* note 138, at 854; Lawrence M. DeRidder, *How Suspension and Expulsion Contribute to Dropping Out*, EDUC. DIG., Feb. 1991, at 44; Ruth B. Ekstrom et al., *Who Drops Out of High School and Why? Findings from a National Study*, 87 TEACHERS COLL. RECORD 356 (1986); Mendez, *supra* note 191, at 25; Skiba & Knesting, *supra* note 185, at 33.

198. See LOSEN & SKIBA, *supra* note 168, at 10; Am. Psychological Ass'n, *supra* note 138, at 854.

expulsion make schools and communities less safe by exacerbating behavior problems,¹⁹⁹ antisocial behavior,²⁰⁰ and developmental problems,²⁰¹ and creating a self-fulfilling belief that the student is incapable of abiding by the school's social and behavioral codes.²⁰² These policies cause some students to view confrontational discipline as a challenge to escalate their behavior.²⁰³ Additionally, suspended and expelled students are left with more time unsupervised,²⁰⁴ prevented from receiving needed treatment or assistance,²⁰⁵ and provided with more opportunities to socialize with negative peers,²⁰⁶ which all eliminate the possibility of school serving as a protective factor against delinquent conduct and violence.²⁰⁷ Adolescents who are out of school are also more likely to engage in self-destructive behavior such as smoking and using drugs.²⁰⁸ Furthermore, suspension and expulsion breed distrust,²⁰⁹ confrontation,²¹⁰ and alienation,²¹¹ thereby resulting in psychological damage and negative mental health outcomes for students.²¹² Removing students from

199. See Michael P. Krezmien et al., *Juvenile Court Referrals and the Public Schools: Nature and Extent of the Practice in Five States*, 26 J. CONTEMP. CRIM. JUST. 273, 274 (2010); Am. Psychological Ass'n, *supra* note 138, at 854, 860.

200. See Gale M. Morrison et al., *School Expulsion as a Process and an Event: Before and After Effects on Children at Risk for School Discipline*, in NEW DIRECTIONS: ZERO TOLERANCE, *supra* note 138, 45, 57.

201. See Teske, *supra* note 166, at 91 (explaining that MRI studies have shown that a zero tolerance policy may exacerbate the existing challenges for youths, since youths are developmentally immature at that age).

202. See Browne et al., *supra* note 160, at 77 (citation omitted).

203. See SKIBA, *supra* note 133, at 14 (referring to this phenomenon as "counter-coercion").

204. See Am. Acad. of Pediatrics Comm. on Sch. Health, *Out-of-School Suspension and Expulsion*, 112 PEDIATRICS 1206, 1207 (2003) ("Children who are suspended are often from a population that is the least likely to have supervision at home.").

205. Cf. *id.*

206. SKIBA, *supra* note 133, at 14; Morrison et al., *supra* note 200, at 57; Skiba & Peterson, *supra* note 159, at 376.

207. See Teske, *supra* note 166, at 89–90.

208. See Am. Acad. of Pediatrics Comm. on Sch. Health, *supra* note 204, at 1207; Ctrs. for Disease Control and Prevention, *Health Risk Behaviors Among Adolescents Who Do and Do Not Attend School—United States, 1992*, MORBIDITY & MORTALITY WKLY REP., Mar. 1994, at 129–30.

209. See OPPORTUNITIES SUSPENDED, *supra* note 135, at 10; BROWNE, *supra* note 147, at 28.

210. See NEW DIRECTIONS: ZERO TOLERANCE, *supra* note 138, at vi.

211. See Morrison et al., *supra* note 200, at 56–57.

212. See Am. Psychological Ass'n Zero Tolerance Task Force, *supra* note 138, at 856 ("[Z]ero tolerance policies may create, enhance, or accelerate negative mental health outcomes for youth by creating increases in student alienation, anxiety, rejection, and breaking of healthy adult bonds." (citation omitted)).

school inhibits their preparation to become participants in a self-governing democracy.²¹³ Finally, as developed further below, these sanctions are applied in a wildly discriminatory fashion.

2. School Policing

The facts of *J.D.B.* are a microcosm of an increasingly pervasive intertwining of policing and schooling.²¹⁴ Suspensions and expulsions increased dramatically over the last two decades, while school districts at the same time experienced an explosion in the presence of law enforcement officers and other security personnel in schools.²¹⁵ For example, the number of SROs assigned to patrol North Carolina public schools increased 249 percent from 1995–96 to 2008–09.²¹⁶ In Texas, approximately 167 school districts now have their own police departments, whereas in 1989, police departments were present in only seven districts.²¹⁷ The U.S. Department of Justice estimates that, in 1997, there were 9,446 SROs nationwide, and then, in 2007, there were 13,056 SROs—a 38 percent increase.²¹⁸

Despite the lack of reliable evidence that shows SROs make schools safer²¹⁹ and the fact that SROs often lack adequate training, accountability, and oversight,²²⁰ the proliferation of school police

213. See LOSEN & SKIBA, *supra* note 168, at 11.

214. See *J.D.B. v. North Carolina*, 131 S. Ct. 2394, 2399–400 (2011).

215. See TEST, PUNISH, AND PUSH OUT, *supra* note 21, at 15–16.

216. N.C. DEP'T OF JUVENILE JUSTICE & DELINQUENCY PREVENTION, CTR. FOR PREVENTION OF SCH. VIOLENCE, ANNUAL SCHOOL RESOURCE OFFICER CENSUS 2008–2009, at 1–2 (2009), available at http://www.ncdjjdp.org/cpsv/pdf_files/SRO_Census_08_09.pdf.

217. DEBORAH FOWLER ET AL., TEX. APPELESEED, TEXAS' SCHOOL-TO-PRISON PIPELINE: TICKETING, ARREST & USE OF FORCE IN SCHOOLS 43 (2010), available at http://www.texasappleseed.net/images/stories/reports/Ticketing_Booklet_web.pdf.

218. BRIAN A. REAVES & ANDREW L. GOLDBERG, U.S. DEP'T OF JUSTICE, LOCAL POLICE DEPARTMENTS, 1997, at 16, available at <http://bjs.ojp.usdoj.gov/index.cfm?ty=tp&tid=71>; BRIAN A. REAVES, U.S. DEP'T OF JUSTICE, LOCAL POLICE DEPARTMENTS, 2007, at 28, available at <http://bjs.ojp.usdoj.gov/index.cfm?ty=tp&tid=71>.

219. See PETTERUTI, *supra* note 138, at 10–11; *The "Worst of Both Worlds"*, *supra* note 138, at 340. *But see* Matthew T. Theriot, *School Resource Officers and the Criminalization of Student Behavior*, 37 J. CRIM. JUST. 280, 285 (2009) (suggesting that "the presence of SROs . . . might deter certain behaviors").

220. See WALD & THURAU, *supra* note 134, at 7–9, 11; Lisa H. Thureau & Johanna Wald, *Controlling Partners: When Law Enforcement Meets Discipline in Public Schools*, 54 N.Y.L. SCH. L. REV. 977, 998–1000, 1016–17 (2010).

officers has become common across the country.²²¹ Recent estimates place the total number of SROs nationwide at 17,000.²²² Law enforcement officers patrol nearly half of all U.S. public schools, and school-based law enforcement officers are the fastest growing segment of law enforcement.²²³ The Los Angeles Unified School District has its own school police department with over 350 sworn police officers, 126 nonsworn school safety officers, and 34 civilian support staff.²²⁴ In New York City, nearly 5,500 school safety agents (who wear NYPD uniforms and have the power to stop, frisk, question, detain, search, and arrest students) and 200 armed police officers are assigned to patrol the public schools.²²⁵ Even when SROs are not present, law enforcement may be heavily intertwined with schools. Forty-one states currently require schools to report students to law enforcement for certain school-based offenses.²²⁶ Anecdotal evidence shows that schools make law enforcement

221. See Garver & Noguera, *supra* note 152, at 6; Mae C. Quinn, *The Fallout from Our Blackboard Battlegrounds: A Call for Withdrawal and a New Way Forward*, 15 J. GENDER RACE & JUST. 541, 555, 557, 578 (2012) (commenting that public schools are “occupied territories and police states” and that “SROs add to the oppressive environment that poor and minority youths experience in public schools” and are part of the United States’ “multi-front attacks on our most vulnerable children”).

222. See WALD & THURAU, *supra* note 134, at 1 (citing Ben Brown, *Understanding and Assessing School Police Officers: A Conceptual and Methodological Comment*, 34 J. OF CRIM. JUST. 591, 592 (2006)); Thurau & Wald, *supra* note 220, at 978.

223. See Hirschfield, *supra* note 137, at 82 (citation omitted); Kim, *supra* note 121, at 878–79.

224. CMTY. RIGHTS CAMPAIGN & DIGNITY IN SCHS., POLICE IN LAUSD SCHOOLS: THE NEED FOR ACCOUNTABILITY AND ALTERNATIVES 3 (2010); see also *What Is the LASP About*, L.A. SCH. POLICE DEP’T, <http://www.laspd.com/about.html> (last visited Feb. 14, 2013) (explaining the LAUSD Police Department’s basic functions and goals).

225. Udi Ofer, *Criminalizing the Classroom: The Rise of Aggressive Policing and Zero Tolerance Discipline in New York City Public Schools*, 56 N.Y.L. SCH. L. REV. 1373, 1383–84 (2012); see also ELORA MUKHERJEE & MARVIN M. KARPATKIN FELLOW, CRIMINALIZING THE CLASSROOM: THE OVER-POLICING OF NEW YORK CITY SCHOOLS 10 (2007) (explaining how schools are policed in New York City today).

226. See OPPORTUNITIES SUSPENDED, *supra* note 135, at 13; see also, e.g., ALA. CODE § 16-1-24 (2012); ARK. CODE ANN. § 6-17-113 (2007); CONN. GEN. STAT. § 10-233g (2010) (limited to physical assaults made by a student on a teacher or other school employee); GA. CODE ANN. §§ 20-2-756, -1184 (2007); 105 ILL. COMP. STAT. §§ 5/10-20.14, -21.7, 5/34-84a.1 (2006); KAN. STAT. ANN. § 72-89b03 (2000); LA. REV. STAT. ANN. § 17:81.7 (2001); MICH. COMP. LAWS § 380.1310a (2008); MISS. CODE ANN. § 37-11-29 (2001); MO. REV. STAT. § 160.261 (2001); NEB. REV. STAT. § 79-293 (2007); N.H. REV. STAT. ANN. § 193-D:4 (2011); N.C. GEN. STAT. 115C-288(g) (2011); TEX. EDUC. CODE ANN. § 37.015 (Vernon 2000).

referrals for offenses that go beyond those mandated by state statute.²²⁷

Surveillance and other security measures in schools also increased over the last two decades.²²⁸ Today, public schools—with video cameras, metal detectors, standardized tests, attendance records, drug tests, SROs, tracking of online activity, and constant watching and listening by staff—are some of most surveilled public spaces and constitute one of the largest markets for security companies.²²⁹ Aside from prison and jail inmates, students are among the most policed and surveilled groups.²³⁰

Similar to suspension and expulsion, school policing has many negative impacts on youth development. First, school policing diverts limited financial resources toward security.²³¹ For example, New York City's budget for police and security equipment increased 65 percent between 2002 and 2008, to more than \$221 million.²³² In 2004, the Denver Public Schools had fourteen SROs that cost taxpayers approximately \$1.35 million.²³³ In the Wake County Public School System (in and around Raleigh, North Carolina), one of the most poorly funded large school systems in the nation,²³⁴ a national board-certified teacher with a bachelor's degree would need six years of licensed experience before earning the average security investigator salary and twelve years of licensed experience before earning the average SRO salary.²³⁵ Second, school policing can produce alienation and mistrust, disrupt the learning environment, create adversarial relationships between school officials and students, interfere with student learning, and negatively affect student

227. See, e.g., OPPORTUNITIES SUSPENDED, *supra* note 135, at 4–7.

228. JUSTICE POLICY INST., EDUCATION UNDER ARREST: THE CASE AGAINST POLICE IN SCHOOLS 6 (2011).

229. SCHOOLS UNDER SURVEILLANCE, CULTURES OF CONTROL IN PUBLIC EDUCATION (Torin Monahan & Rodolfo D. Torres eds., 2010).

230. Majd, *supra* note 134, at 366–67.

231. Sussman, *supra* note 149, at 797.

232. TEST, PUNISH, AND PUSH OUT, *supra* note 21, at 16.

233. ADVANCEMENT PROJECT, EDUCATION ON LOCKDOWN: THE SCHOOLHOUSE TO JAILHOUSE TRACK 25 (2005).

234. MARK DIXON, U.S. CENSUS BUREAU, PUBLIC EDUCATION FINANCES: 2010, at 105 (2012).

235. JASON LANGBERG, BARBARA FEDDERS, & DREW KUKOROWSKI, LAW ENFORCEMENT OFFICERS IN THE WAKE COUNTY SCHOOLS: THE HUMAN, EDUCATIONAL, AND FINANCIAL COSTS 2, 7 (2011).

morale.²³⁶ Third, the presence of SROs results in more students being referred to court for minor offenses, which could be more easily and productively handled through school administrative procedures.²³⁷ Fourth, students who must regularly appear in court miss valuable class time.²³⁸ Fifth, school-based searches, interrogations, arrests, and court referrals can cause emotional trauma, embarrassment, and stigmatization.²³⁹ Adolescence is a volatile period of identity development, and therefore, the stigma of being treated like a criminal in school can be devastating.²⁴⁰ Nevertheless, aggressive school policing teaches students that they are dangerous, do not belong, and have little to contribute.²⁴¹ Students may internalize or even embrace the label of troublemaker or criminal, at which point it may become a self-fulfilling prophecy.²⁴² Finally, students who are funneled into the juvenile and criminal systems often face debilitating collateral consequences, including stigmatization, academic failure, ineligibility for student loans, reduced employment opportunities, eviction from public housing, and deportation.²⁴³

3. Disparities

School discipline as a form of social control has had a disproportionately negative effect on the development of certain categories of students.²⁴⁴ Harsh discipline policies and practices—namely, zero tolerance, suspension, expulsion, and over-policing—

236. *The “Worst of Both Worlds”*, *supra* note 138, at 340.

237. PETERUTI, *supra* note 138, at 13–15; Heather Cobb, *Separate and Unequal: The Disparate Impact of School-Based Referrals to Juvenile Court*, 44 HARV. C.R.-C.L. L. REV. 581, 583–84 (2009); Paul J. Hirschfield, *Preparing for Prison?: The Criminalization of School Discipline in the USA*, 12 THEORETICAL CRIMINOLOGY 79, 83 (2010); Majd, *supra* note 134, at 367–68; Theriot, *supra* note 219, at 280.

238. *See* Cobb, *supra* note 237, at 595.

239. TEST, PUNISH, AND PUSH OUT, *supra* note 21, at 12.

240. Sussman, *supra* note 149, at 819.

241. MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* 157–60 (2010).

242. *Id.* at 166–67; Tamar R. Birckhead, *Toward a Theory of Procedural Justice for Juveniles*, 57 BUFF. L. REV. 1447, 1500–01 (2009); Pedro Noguera, *Schools, Prisons and the Social Implications of Punishment: Rethinking Disciplinary Practices*, 42 THEORY INTO PRAC. 341, 343 (2003).

243. LANGBERG, FEDDERS & KUKOROWSKI, *supra* note 235, at 5–6.

244. *See* Quinn, *supra* note 221, at 542–43.

have a disparate racial impact.²⁴⁵ National data from the Office for Civil Rights (OCR) of the U.S. Department of Education²⁴⁶ show that nearly one in every six African American students (17 percent), one in fourteen Latino students (7 percent), and one in twelve Native American students (8 percent) were suspended at least once during the 2009–10 school year, compared with only one in twenty white students (5 percent) and one in fifty Asian American students (2 percent).²⁴⁷ The data further reveal that during the same school year, African American students made up 18 percent of students enrolled in the schools sampled, yet they accounted for 35 percent of students suspended once, 46 percent of students suspended more than once, and 39 percent of students expelled.²⁴⁸ The OCR's data further show that African American students were disproportionately arrested at school.²⁴⁹ These data prompted the U.S. Secretary of Education, Arne Duncan, to comment in March 2012: “The sad fact is that minority students across America face much harsher discipline than non-minorities—even within the same school.”²⁵⁰ These racial disparities have grown over the last forty years.²⁵¹

Additionally, African American students are, in many places, punished more harshly than similarly situated white students who commit the same offenses.²⁵² For example, during the 2010–11 school year in the Wake County Public School System, African Americans who committed “cell phone use” for the first time were suspended 72 percent of the time compared to white first time offenders who were suspended 30 percent of the time for the same

245. Tamar Lewin, *Black Students Punished More, Data Suggests*, N.Y. TIMES, Mar. 6, 2012, at A11; *see also* OPPORTUNITIES SUSPENDED, *supra* note 135, at 7.

246. For the complete set of Office of Civil Rights reports, see *Civil Rights Data Collection*, U.S. DEP'T EDUC. OFF. FOR C.R., <http://www2.ed.gov/about/offices/list/ocr/data.html> and Lewin, *supra* note 245.

247. DANIEL J. LOSEN & JONATHAN GILLESPIE, C.R. PROJECT, OPPORTUNITIES SUSPENDED: THE DISPARATE IMPACT OF DISCIPLINARY EXCLUSION FROM SCHOOL 12 (2012).

248. Lewin, *supra* note 245.

249. Donna St. George, *Black Students Are Arrested More Often, Data Reveal*, WASH. POST, Mar. 6, 2012, at A2.

250. *Id.*

251. LOSEN & SKIBA, *supra* note 168, at 2–3.

252. LOSEN & GILLESPIE, *supra* note 247, at 32–33; *see* U.S. DEP'T OF EDUCATION, GUIDING PRINCIPLES: A RESOURCE GUIDE FOR IMPROVING SCHOOL CLIMATE AND DISCIPLINE (2014), available at <http://www2.ed.gov/policy/gen/guid/school-discipline/guiding-principles.pdf>.

offense.²⁵³ Worse still, these racial disparities exacerbate social inequality. Students with the highest rates of suspension already disproportionately face potential obstacles to healthy youth development, such as poverty,²⁵⁴ single-parent families,²⁵⁵ a lack of health insurance,²⁵⁶ abuse and neglect,²⁵⁷ and food insecurity.²⁵⁸

Students with disabilities are also disproportionately pushed out of schools.²⁵⁹ Nationwide, students with disabilities are suspended about twice as often as their nondisabled peers.²⁶⁰ During the 2009–10 school year, 13 percent of students with disabilities were suspended at least once, compared to 7 percent of students without disabilities.²⁶¹ Additionally, students with disabilities made up 12 percent of the student body, but 70 percent of those students who were subject to physical restraints.²⁶² The largest ever study of school discipline found that, in Texas, three-quarters of students with a disability were suspended or expelled at least once, compared to 55 percent of students with no recorded disability.²⁶³ A 2004 report

253. Ken Gattis, *Wake County 2010–11 Data and LEA Comparisons*, WAKE COUNTY BOARD EDUC.: ECONOMICALLY-DISADVANTAGED TASK FORCE (2011), <http://legacy.wcpss.net/e-d-task-force/oct-6-11.html>.

254. ANNIE E. CASEY FOUND., *KIDS COUNT DATA BOOK 19* (2012) (noting that in 2010, 66 percent of African American children, 52 percent of American Indian children, and 41 percent of Latino children lived in single-parent families, compared to 24 percent of white children, and 16 percent of Asian children).

255. *Id.* (noting that in 2010, 39 percent of African American children, 37 percent of American Indian children, and 34 percent of Latino children lived in poverty, compared to 14 percent of white children, and 14 percent of Asian children).

256. CHILDRENS DEF. FUND, *THE STATE OF AMERICA'S CHILDREN 2011*, at E-4 (2011) (noting that in 2009, 12 percent of African American children, 18 percent of Latino children, and 18 percent of American Indian children lacked health insurance, compared to 7 percent of white children).

257. *Children in Foster Care by Race or Hispanic Origin (Percent)*, ANNIE E. CASEY FOUND. (2010), <http://datacenter.kidscount.org/data/acrossstates/Rankings.aspx?ind=6246> (noting that in 2010, African American children represented 14 percent of the total child population in the United States but 29 percent of children in foster care).

258. CHILDRENS DEF. FUND, *supra* note 256, at F-6 (noting that in 2009, 35 percent of African American children and 35 percent of Latino children were food insecure, compared to 17 percent of white children).

259. Joseph B. Tulman & Douglas M. Weck, *Shutting Off the School-to-Prison Pipeline for Status Offenders with Education-Related Disabilities*, 54 N.Y.L. SCH. L. REV. 875, 876, 884 (2009–2010); Motoko Rich, *Suspensions Are Higher for Disabled Students, Federal Data Indicate*, N.Y. TIMES, Aug. 7, 2012, at A10.

260. Rich, *supra* note 259.

261. *Id.*

262. Lewin, *supra* note 245.

263. FABELO ET AL., *supra* note 180, at 50.

found that though students with disabilities comprised only 13 percent of the school-aged population in Pennsylvania, they comprised 24 percent of the school-based referrals to the police or juvenile justice system.²⁶⁴

Consequently, African American students with disabilities are at an especially high risk of being victimized by harsh discipline. According to Dan Losen, director of the Center for Civil Rights Remedies at the Civil Rights Project at UCLA, “[O]ne out of every four Black K-12 students with disabilities was suspended out of school at least one time in 2009–2010[,] . . . a full 16 percentage points higher than for white students with disabilities.”²⁶⁵

IV. SUGGESTIONS FOR REFORM

Public education can be, and numerous schools currently are, vastly different from the predominant culture described above. School administrators and educational policymakers can incorporate the concepts and principles derived from social science and neuroscience that formed the basis of the “age matters” cases into improved educational policies and practices. The principles of these cases—that youth are categorically less culpable than adults and therefore less deserving of the harshest punishment and that consequences must account for the individual circumstances of a child—can animate a return to the spirit of optimism regarding the potential of youth that motivated the juvenile court founders. If educators take the reasoning of these cases seriously, they can contribute to positive youth development by helping young people mature,²⁶⁶ develop their strengths,²⁶⁷ and become adults who make

264. *Students with Disabilities and School Referrals to Law Enforcement in Pennsylvania*, DIGNITY SCH. (Jan. 1, 2004), <http://www.dignityinschools.org/content/students-disabilities-and-school-referrals-law-enforcement-pennsylvania>.

265. LOSEN & GILLEPSIE, *supra* note 252, at 14.

266. Comer, *supra* note 117, at 3 (“Adequate support for development must be restored. And school is the first place this can happen. It is the common pathway for all children—the only place where a significant number of adults are working with young people in a way that enables them to call on family and community resources to support growth systematically and continually. And school is one of the few places where students, staff, and community can create environments in which to help young people achieve the necessary levels of maturity.”)

267. *Positive Youth Development*, NAT’L CONF. STATE LEGISLATURES, <http://www.ncsl.org/issues-research/human-services/positive-youth-development-pyd.aspx> (last visited Apr., 25, 2013).

positive contributions to their communities²⁶⁸ and actively participate in a self-governing democracy.²⁶⁹ Schools can help students develop autonomy, individual mobility, independent thought, and, at the same time, teach children how to live together by developing an appreciation of diversity, fairness and compassion toward others, community, and interconnectedness.²⁷⁰ Schools can help students to “reach the full measure of their humanity.”²⁷¹ This type of schooling is consistent with principles expressed in international human rights documents.²⁷²

It is possible to accomplish the goals of instilling discipline and promoting safety while simultaneously encouraging positive youth development in school.²⁷³ Safe schools build on students’ assets and strengths in order to help them improve their behaviors and achieve academic success, rather than pushing them out through suspension, expulsion, and court referrals.²⁷⁴ There is no magic bullet or quick

268. See generally EDUCATION AND HOPE IN TROUBLED TIMES: VISIONS OF CHANGE FOR OUR CHILDREN’S WORLD (Svi Shapiro ed., 2009); Zoe Weil, *The Solutionaries Education for a Better World: What Is Schooling For?*, 71 INDEP. SCH., no. 3, 2012 at 30, 32 (arguing that transforming the school system will create better, sustainable cultural systems).

269. See *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954) (education “is the very foundation of good citizenship”); JOHN DEWEY, *DEMOCRACY AND EDUCATION: AN INTRODUCTION TO THE PHILOSOPHY OF EDUCATION* (1916).

270. LINDA DARLING-HAMMOND, *THE RIGHT TO LEARN: A BLUEPRINT FOR CREATING SCHOOLS THAT WORK* (1997); MEIER, *supra* note 116, at 7–8 (explaining that the public schools allow for a sense of community, and train students for political conversations dealing with “race, class, religion, and ideology”).

271. AYERS, *supra* note 116, at 1.

272. See generally Universal Declaration of Human Rights, 217 (III) A, art. 26 (Dec. 10, 1948) (calling for education that is “directed to the full development of the human personality”); United Nations Convention on the Rights of the Child, G.A. Res. 47/25, art. 29 (Nov. 20, 1989) (requiring that education of the child “be directed to: (a) The development of the child’s personality, talents and mental and physical abilities to their fullest potential; (b) The development of respect for human rights and fundamental freedoms . . . (d) The preparation of the child for responsible life in a free society, in the spirit of understanding, peace, tolerance, equality of sexes, and friendship among all peoples, ethnic, national and religious groups and persons of indigenous origin”); United Nations International Covenant on Economic, Social and Cultural Rights, G.A. Res. 2200A(XXI), art. 13 (Dec. 16, 1966) (“1. The States Parties to the present Covenant recognize the right of everyone to education. They agree that education shall be directed to the full development of the human personality and the sense of its dignity, and shall strengthen the respect for human rights and fundamental freedoms.”).

273. JEFFREY J. COHEN & MARIAN C. FISH, *HANDBOOK OF SCHOOL-BASED INTERVENTIONS: RESOLVING STUDENT PROBLEMS AND PROMOTING HEALTHY EDUCATIONAL ENVIRONMENTS 1* (Charles E. Schaefer & Howard L. Millman eds., 1993) (quoting Jean Ann Linney & Edward Seidman, *The Future of Schooling*, 44 AM. PSYCHOLOGIST 336 (1989)); PITTMAN, *supra* note 110, at 6–8.

274. Noam et al., *supra* note 165, at 155, 170.

fix for ensuring that schools are both developmentally appropriate and safe.²⁷⁵ Moreover, piecemeal approaches at reform have not, by and large, been successful.²⁷⁶ Thus, to ensure school safety in a way that supports youths, schools should begin by forming teams of respected members of the school community—including students, parents, teachers, and staff—to analyze available data and examine existing and potential resources,²⁷⁷ and then to develop a comprehensive, strategic plan that utilizes an array of strategies.²⁷⁸ Fortunately, extensive research exists that can provide teams with guidance about research-based strategies for promoting a safe school climate *and* developmentally appropriate responses to disruption. In the following sections, the strategies are divided into three levels from broadest to narrowest: (1) policy reform; (2) school-wide prevention practices; and (3) individualized interventions and alternatives.²⁷⁹

A. Recommended Policies

At the broadest level, state legislatures should adopt statutes and school boards should adopt policies that take into account principles of youth development. Such changes should begin with adopting a mission, guiding principles, or a statement of purpose that fosters a caring and supportive culture.²⁸⁰ Dignity in Schools is a national organization that challenges school push out and advocates for young people to receive a quality education and be treated with dignity.²⁸¹ In August 2012, after years of work by stakeholders around the

275. RUSSELL SKIBA ET AL., IND. EDUC. POLICY CTR., PREVENTING SCHOOL VIOLENCE: A PRACTICAL GUIDE TO COMPREHENSIVE PLANNING (2001), *available at* <http://www.indiana.edu/~safeschl/psv.pdf>.

276. Geronimo, *supra* note 181, at 284.

277. SKIBA & RAUSCH, *supra* note 120, at 96–98.

278. *Id.*; SKIBA ET AL., *supra* note 275, at 7–8.

279. Various authors have various categorizations. *See, e.g.*, SKIBA & RAUSCH, *supra* note 120, at 93–94 (noting (1) primary or universal prevention, (2) secondary or selected prevention, and (3) tertiary or indicated prevention); Gagnon & Leone, *supra* note 138, at 104 (noting (1) universal interventions; (2) student-centered approaches; and (3) school security).

280. DIGNITY IN SCH., A MODEL CODE ON EDUCATION AND DIGNITY: PRESENTING A HUMAN RIGHTS FRAMEWORK FOR SCHOOLS 3–4 (2012) [hereinafter A MODEL CODE ON EDUCATION AND DIGNITY], *available at* http://www.dignityinschools.org/files/DSC_Model_Code.pdf; David M. Osher et al., *The Best Approach to Safety Is to Fix Schools and Support Children and Staff*, in NEW DIRECTIONS: ZERO TOLERANCE, *supra* note 138, 127, 131–34, 146.

281. A MODEL CODE ON EDUCATION AND DIGNITY, *supra* note 280, at 3.

country, Dignity in Schools released a *Model Code on Education and Dignity*.²⁸² The *Model Code* recommends a policy that defines the components of a high-quality education, which is one that “[a]ddresses the mental, physical, social and emotional needs of children and youth”²⁸³ and “[p]rovides appropriate instruction, experiences and discipline for each age and grade level[.]”²⁸⁴ Policymakers should then revise codes of conduct, due process procedures, and policies or agreements governing SROs.²⁸⁵

1. Code of Conduct

State legislators should revise statutes and school board members revise codes of conduct to eliminate zero tolerance because, as discussed above, it does not account for adolescent development.²⁸⁶ Zero tolerance should be replaced by graduated systems of discipline, including less severe consequences for more minor offenses and younger students who are especially immature, impulsive, and susceptible to peer influence.²⁸⁷ The codes should require administrators to consider, prior to meting out any suspension or expulsion, mitigating factors—such as the student’s age and developmental level²⁸⁸—that might have influenced the student’s

282. *Id.*

283. *Id.* at 7.

284. *Id.*

285. *See id.* at 19.

286. *See* Majd, *supra* note 134, at 391. In June 2011, the North Carolina school discipline statute changed to prohibit the use of zero tolerance. N.C. GEN. STAT. § 115C-390 (2011); *see also* Jane Wettach, *Legislature Passes New School Discipline Law*, N.C. BAR ASS’N (Dec. 5, 2011), <http://juvenilejusticeandchildrensrights.ncbar.org/newsletters/jjcrdec2011/schooldiscipline.aspx> (describing the policy behind North Carolina’s new law).

287. Skiba & Knesting, *supra* note 185, at 36; SKIBA & RAUSCH, *supra* note 120, at 97; *see also, e.g.*, BALT. CITY PUB. SCHS., *CREATING GREAT SCHOOL COMMUNITIES 22–27* (2010), available at http://baltimoredesignschool.com/pdf/2010_11CodeofConduct.pdf; *Code of Student Conduct*, WAKE COUNTY PUB. SCH. SYS., <http://www.wcpss.net/policy-files/series/policies/print-friendly/6410-bp.html> (last visited Apr. 25, 2013); *Policies and Procedures: Policy JK-R-Student Conduct and Discipline Procedures*, DENVER PUBLIC SCHOOLS, <http://ed.dpsk12.org:8080/policy/FMPro?-db=policy.fp3&-format=detail.html&-lay=policyview&File=JK&recid=32967&-find=> (last visited Apr. 25, 2013).

288. Additional mitigating factors that should be considered include the following: the student’s ability to understand consequences; whether the student was a victim of bullying or acting in self-defense; whether the student has experienced abuse, neglect, domestic violence, or homelessness; whether the student has mental health issues; the student’s lack of disciplinary history; and the student’s expression of remorse.

behavior at no fault of her own.²⁸⁹ Replacing mandatory punishments with behavioral consequences that account for the individual circumstances of a child is consistent with the spirit and holdings of *Graham and Miller*.²⁹⁰ Administrators should also be required to use developmentally appropriate interventions and alternatives (see section C below for a discussion of interventions and alternatives).²⁹¹ Finally, the codes should also specify that students have rights related to positive youth development, such as the rights to be treated with fairness and respect,²⁹² be in a supportive²⁹³ and positive²⁹⁴ environment,²⁹⁵ and receive services for their developmental needs.²⁹⁶

2. Due Process

In 1975, the U.S. Supreme Court ruled that students have a state-created property interest in educational benefits and a liberty interest in reputation while in school, both of which are protected by the Due

289. A MODEL CODE ON EDUCATION AND DIGNITY, *supra* note 280; *see also, e.g., Policies and Procedures: Policy JK-R-Student Conduct and Discipline Procedures, supra* note 287; *Code of Student Conduct, supra* note 287; CHI. PUB. SCHS., STUDENT CODE OF CONDUCT 12 (2012), available at http://www.cps.edu/Documents/Resources/StudentCodeOfConduct/English_StudentCodeofConduct.pdf.

290. *See, e.g., Miller v. Alabama*, 132 S. Ct. 2455 (2012).

291. *See, e.g., Policy JK-R, supra* note 287; CHI. PUB. SCHS., CHICAGO PUBLIC SCHOOLS POLICY MANUAL: SECTION 705.5 (2011), available at <http://policy.cps.k12.il.us/documents/705.5.pdf>; L.A. UNIFIED SCH. DISTRICT POL'Y BULL., EXPULSION OF STUDENTS-POLICY AND PROCEDURES: ATTACHMENT G (2011), available at http://notebook.lausd.net/pls/ptl/docs/PAGE/CA_LAUSD/FLDR_ORGANIZATIONS/STUDENT_HEALTH_HUMAN_SERVICES/BUL-4655%201%20%20%209.9.11.PDF.

292. BALT. CITY PUB. SCHS., *supra* note 287, at 11 (“Be treated courteously, fairly and respectfully”); FAIRFAX COUNTY PUB. SCHS., STUDENTS RIGHTS AND RESPONSIBILITIES: GRADES K–12, at 8 (2011), available at <http://www.fcps.edu/dss/ips/ssaw/SRR/SRR2011-12.pdf> (“[E]xpect courtesy, fairness, and respect from members of the school staff and other students.”); S.F. UNIFIED SCH. DISTRICT, STUDENT AND FAMILY HANDBOOK 2012–13, at 46 (2012), available at <http://www.sfusd.edu/en/assets/sfusd-staff/20122013%20Student%20and%20Family%20Handbook%20-%20English.pdf> (stating guiding principles that all students should follow).

293. N.Y.C. DEP'T OF EDUC., CITYWIDE STANDARDS OF INTERVENTION AND DISCIPLINE MEASURES, THE DISCIPLINE CODE AND BILL OF STUDENT RIGHTS AND RESPONSIBILITIES, K–12, at 9 (2012), available at <http://schools.nyc.gov/NR/rdonlyres/F7DA5E8D-C065-44FF-A16F-55F491C0B9E7/0/DiscCode20122013FINAL.pdf>.

294. SCH. BOARD OF ORANGE CNTY., CODE OF STUDENT CONDUCT 3 (2012–13), available at <https://www.ocps.net/SiteCollectionDocuments/Docs%20Continually%20Updated/Code%20of%20Conduct.pdf>.

295. *Id.*

296. N.Y.C. DEP'T OF EDUC., *supra* note 293, at 9.

Process Clause of the Fourteenth Amendment.²⁹⁷ Therefore, students facing a suspension of ten days or fewer must be given some form of notice and hearing.²⁹⁸ Pursuant to lower court decisions, state statutes, and local board policies, students facing longer suspensions may be entitled to additional procedures,²⁹⁹ such as the right to written notice, the opportunity to review records prior to a hearing, and a hearing in front of a neutral decision maker at which the student can be represented by an attorney, present evidence, cross-examine witnesses, and make a recording.³⁰⁰

However, in reality, these minimal due process protections are often inadequate or ignored, which result in suspension appeals being a “kangaroo court.”³⁰¹ For example, written notice may not be provided in a timely manner or in the parent or guardian’s primary language;³⁰² schools may wrongly claim that records necessary for the student to prepare an adequate defense are protected by the Family Educational Rights and Privacy Act (FERPA);³⁰³ the “neutral” decisionmaker may be a teacher supervised by the principal who recommended the suspension or expulsion, or another individual paid by the school system that is seeking to remove the student;³⁰⁴ students from low-income families are not provided with an attorney appointed at public expense and may not be able to find free or affordable legal services;³⁰⁵ and students cannot cross-

297. *Goss v. Lopez*, 419 U.S. 565, 579 (1975) (noting that longer suspensions may require more formal procedures).

298. *See id.*

299. Simone Marie Freeman, *Upholding Students’ Due Process Rights: Why Students Are in Need of Better Representation at, and Alternatives to, School Suspension Hearings*, 45 FAM. CT. REV. 638, 642–43 (2007) (providing research that shows these rights are not afforded in many states and school districts).

300. *See, e.g.*, N.C. GEN. STAT. § 115C-390.8 (2011); 22 PA. CODE § 12.8 (2005) (providing procedures for hearings).

301. *See In re Gault*, 387 U.S. 1, 28 (1967) (“Under our Constitution, the condition of being a boy does not justify a kangaroo court.”).

302. *See, e.g.*, Melissa Gray, *Complaint Claims School District Discriminated Against Latino Students*, CNN (June 12, 2012, 9:43 PM), <http://www.cnn.com/2012/06/12/us/north-carolina-discrimination/index.html>.

303. 20 U.S.C. § 1232(g) (2006); Family Educational Rights and Privacy, 34 C.F.R. § 99 (2012).

304. *See William G. Buss, Procedural Due Process for School Discipline: Probing the Constitutional Outline*, 119 U. PA. L. REV. 545, 619 (1971) (noting risk to impartiality of school official performing two different functions in the disciplinary process).

305. *See, e.g.*, *Givens v. Poe*, 346 F. Supp. 202, 209 (W.D.N.C. 1972).

examine witnesses when schools are allowed to use hearsay evidence.³⁰⁶ When these violations occur, suspension hearings are fundamentally unfair and are “a facade for arbitrariness.”³⁰⁷

The lack of due process afforded to students being pushed out of school has negative effects on youth development and, consequently, harms school safety. Inadequate due process can cause a student to feel like the school is out to get her,³⁰⁸ send an improper message that the state can act arbitrarily,³⁰⁹ and cause a student to feel angry and defiant.³¹⁰ Alternatively, adequate procedures may help students perceive the discipline process and the larger society as fair and legitimate;³¹¹ cause students to feel empowered and confident;³¹² teach students about democracy and respect for the dignity of the individual;³¹³ reduce recidivism³¹⁴ by improving a student’s perception of and compliance with the law³¹⁵ and encouraging students to invest in rehabilitation;³¹⁶ enhance the possibility that the truth will emerge;³¹⁷ and expose bias.³¹⁸ Therefore, prior to an expulsion, long-term suspension, or transfer to an alternative school, due process should, at a minimum, provide the student with certain basic procedures. First, automatic, open discovery (with necessary

306. See *Stone v. Prosser Consol. Sch. Dist. No. 119*, 971 P.2d 125, 127 (Wash. Ct. App. 1999) (stating that “it is risky to base an expulsion on hearsay statements bolstered by a school official’s testimony that the proponent is reliable”); see also *Newsome v. Batavia Local Sch. Dist.*, 842 F.2d 920, 926 (1988) (refusing to require an opportunity to cross-examine witnesses and recognizing the importance of hearsay evidence in school disciplinary hearings).

307. Dean Hill Rivkin, *Legal Advocacy and Education Reform: Litigating School Exclusion*, 75 TENN. L. REV. 265, 271 (2008).

308. Brooke Grona, *School Discipline: What Process Is Due? What Process Is Deserved?*, 27 AM. J. CRIM. L. 233, 244 (2000).

309. Brent M. Pattison, *Questioning School Discipline: Due Process, Confrontation, and School Discipline Hearings*, 18 TEMP. POL. & CIV. RTS. L. REV. 49, 67 (2008).

310. Birkhead, *supra* note 242, at 1478 (citation omitted).

311. Freeman, *supra* note 299, at 646; Buss, *supra* note 304, at 574.

312. Freeman, *supra* note 299, at 646.

313. William G. Buss, *supra* note 304, at 549; Miriam Rokeach & John Denvir, *Front-Loading Due Process: A Dignity-Based Approach to School Discipline*, 67 OHIO ST. L.J. 277, 288 (2006) (“The philosophy of due process is based on a single premise that has special significance in the educational setting—every person possesses dignity that requires the government to treat them with respect. First, it teaches students a fundamental principle of democracy: the dignity of the individual. Second, it demands that schools treat students fairly.”).

314. Birkhead, *supra* note 242, at 1479.

315. *Id.* at 1477.

316. *In re Gault*, 387 U.S. at 26–27 (1967); Fedders, *supra* note 73, at 818.

317. *Goss v. Lopez*, 419 U.S. 565, 583 (1975); *In re Gault*, 387 U.S. at 19–20.

318. Buss, *supra* note 304, at 616–18.

redactions to comply with privacy laws) should be required along with automatic and timely hearings at which hearsay is prohibited. Additionally, the student should receive free legal counsel and an interpreter, if necessary. Lastly, the student's case should be reviewed by an independent decisionmaker who makes written findings based on a standard of clear and convincing evidence.³¹⁹

3. School Policing

For reasons detailed in section II.B.ii above, law enforcement officers should not be assigned to schools and should be replaced by youth development professionals (e.g., counselors, psychologists, social workers, and mentors).³²⁰ However, if SROs continue to patrol hallways, policymakers must enact policies or agreements to limit the SROs' negative impacts on youth development. For example, policymakers should prohibit SROs from being involved in matters that do not involve serious criminal activity of immediate threats to physical safety; carrying guns and TASERs; interrogating students without a parent or guardian present; searching or arresting students without probable cause; and conducting strip searches. Furthermore, policymakers should ensure that SROs are prepared to make positive contributions to youth development by undergoing training in adolescent development and psychology, and mental illness. Additionally SROs should be trained to recognize symptoms of trauma, abuse, neglect, exposure to violence, and—it should go without saying—to not sexually harass students. They should be trained to de-escalate and diffuse volatile situations, and work with students who have disabilities, while working to become culturally competent. They should be familiar with the effects of court involvement and the positive alternatives to arrest and court involvement, as well as students' rights.³²¹

319. A MODEL CODE ON EDUCATION AND DIGNITY, *supra* note 280, at 34–37, available at http://www.dignityinschools.org/files/DSC_Model_Code.pdf; see also CATHERINE Y. KIM, DANIEL J. LOSEN & DAMON T. HEWITT, THE SCHOOL-TO-PRISON PIPELINE: STRUCTURING LEGAL REFORM 83 (2010) (suggesting additional due process safeguards).

320. See, e.g., Majd, *supra* note 134, at 391.

321. ACLU & ACLU OF CONN., HARD LESSONS: SCHOOL RESOURCE OFFICER PROGRAMS AND SCHOOL-BASED ARRESTS IN THREE CONNECTICUT TOWNS 7–8, 11–13, 47–50 (2008), available at http://www.aclu.org/pdfs/racialjustice/hardlessons_november2008.pdf; WALD & THURAU, *supra* note 133, at 9–12; see also ADVANCEMENT PROJECT, *supra* note 233, at 46–47; DIGNITY IN SCHS. CAMPAIGN—L.A. CHAPTER, SOLUTIONS FOR LOS ANGELES SCHOOL POLICE

B. Recommended Prevention Efforts

Under prevailing school discipline regimes, misbehavior is treated as originating solely with students and their families, rather than as a reflection of a child's environment, socioeconomic status, neighborhood, and school.³²² In reality, educators would have to worry less about managing misbehavior if the school climate were more developmentally appropriate and responsive to children's individual needs in the first place. Creating a trusting, respectful, and supportive school culture,³²³ along with a foundation of protective factors,³²⁴ will help prevent misbehavior, maximize safety, and support youths. This can be accomplished by changing school-wide practices, engaging students, selecting and training appropriate staff, and creating a sense of community. Effective prevention efforts

DEPARTMENT: A BLUEPRINT FOR SCHOOL POLICE REFORM 3-8 (2010), available at <http://www.thestrategycenter.org/sites/www.thestrategycenter.org/files/Solutions%20for%20LASPD%20-%202006%20-%20cover.pdf> (proposing a model for structuring relationships between students, schools, and law enforcement); A MODEL CODE ON EDUCATION AND DIGNITY, *supra* note 280, at 38-44; FOWLER ET AL., *supra* note 217, at 155-61; CATHERINE Y. KIM & I. INDIA GERONIMO, ACLU POLICING IN SCHOOLS: DEVELOPING A GOVERNANCE DOCUMENT FOR SCHOOL RESOURCE OFFICERS IN K-12 SCHOOLS 22 (2009), available at http://www.aclu.org/pdfs/racialjustice/whitepaper_policinginschools.pdf; PETERUTI, *supra* note 138, at 31-32; LANGBERG, FEDDERS & KUKOROWSKI ET AL., *supra* note 235, at 11-13.

322. DANIEL J. LOSEN, NAT'L EDUC. POLICY CTR., DISCIPLINE POLICIES, SUCCESSFUL SCHOOLS, AND RACIAL JUSTICE 1 (2011), available at http://civilrightsproject.ucla.edu/research/k-12-education/school-discipline/discipline-policies-successful-schools-and-racial-justice/NEPC-SchoolDiscipline-Losen-1-PB_FINAL.pdf; Miriam Rokeach & John Denvir, *supra* note 313, at 282 ("The blame is placed upon the student while underlying problems of school culture, student-teacher relations, and students' frustration when their academic needs are not met remain unidentified and unaddressed."); see also Aaron Sussman, *supra* note 104, at 381 n.7 (discussing how *Graham v. Florida* is "systematically transformative" but "paradoxically limited" by its own transformative potential).

323. ZERO TOLERANCE: NEW DIRECTIONS, *supra* note 138, at 128; UDI OFER ET AL., NEW YORK CIVIL LIBERTIES UNION, SAFETY WITH DIGNITY: ALTERNATIVES TO THE OVER-POLICING OF SCHOOLS 21 (2009), available at http://www.nyclu.org/files/publications/nyclu_pub_safety_with_dignity.pdf; Clea A. McNeely et al., *Promoting School Connectedness: Evidence from the National Longitudinal Study of Adolescent Health*, 72 J. SCH. HEALTH 138, 138 (2002) ("When adolescents feel cared for by people at their school and feel like a part of their school, they are less likely to use substances, engage in violence, or initiate sexual activity at an early age. Students who feel connected to school in this way also report higher levels of emotional well-being.").

324. Osher, Susan Sandler, & Cameron Lynn Nelson, *The Best Approach to Safety Is to Fix Schools and Support Children and Staff in ZERO TOLERANCE*, *supra* note 280, at 130-35; Jossey-Bass, *New Directions for Youth Development* (Winter 2001).

include establishing, on a school-wide level, clear expectations,³²⁵ Positive Behavioral Interventions and Supports (PBIS) that create incentives for good behavior,³²⁶ and culturally responsive and competent classroom management, curricula, instruction, and leadership.³²⁷

Students should be engaged in the classroom through high-quality, varied, lively, engaging instruction,³²⁸ as well as in programs, such as conflict resolution,³²⁹ bullying prevention,³³⁰ and

325. CTRS. FOR DISEASE CONTROL & PREVENTION, *SCHOOL CONNECTEDNESS: STRATEGIES FOR INCREASING PROTECTIVE FACTORS AMONG YOUTH 13* (2009), available at <http://www.cdc.gov/healthyyouth/adolescenthealth/pdf/connectedness.pdf>.

326. See generally POSITIVE BEHAVIORAL INTERVENTIONS AND SUPPORTS, OSEP TECHNICAL ASSISTANCE CENTER (2014), available at <https://www.pbis.org/school/swpbis-for-beginners/pbis-faqs> (describing PBIS as a mechanism for assisting school personnel in incorporating evidence-based behavioral interventions to enhance academic and behavioral outcomes); see also OPPORTUNITIES SUSPENDED, *supra* note 135, at 35–36; LOSEN, *supra* note 322, at 14–15; CADRE, *REDEFINING DIGNITY IN OUR SCHOOLS: A SHADOW REPORT ON SCHOOL-WIDE POSITIVE BEHAVIOR SUPPORT IMPLEMENTATION IN SOUTH LOS ANGELES 2007–2010* (2010), available at http://www.dignityinschools.org/sites/default/files/Redef_Dignity_Shadow_Rept_Exec_Summ.pdf; JESSICA FEIERMAN ET AL., *SCH. JUST. PARTNERSHIP, KEEPING KIDS IN SCHOOL AND OUT OF COURTS* 110, 113–15 (Mar. 2012), available at <http://www.school-justicesummit.org/pdfs/journal-web.pdf> [hereinafter *KEEPING KIDS IN SCHOOL*]; SKIBA & RAUSCH, *supra* note 120, at 95–96; S. POVERTY LAW CTR., *EFFECTIVE DISCIPLINE FOR STUDENT SUCCESS: REDUCING STUDENT AND TEACHER DROPOUT RATES IN ALABAMA 10–14* (2008); Gagnon & Leone, *supra* note 138, at 107–08; NEW DIRECTIONS: ZERO TOLERANCE, *supra* note 138; Klehr, *supra* note 136, at 603–10; David Osher et al., *How Can We Improve School Discipline?*, 39 *EDUC. RESEARCHER* 48, 50–51 (2010); Russell Skiba & Jeffrey Sprague, *Safety Without Suspensions*, 66(1) *EDUC. LEADERSHIP* 38, 38–43 (2008); Majd, *supra* note 134, at 391.

327. *Are Zero Tolerance Policies Effective in the Schools?: An Evidentiary Review and Recommendations*, 63 *AM. PSYCHOLOGIST* 852, 859 (2008); Osher et al., *supra* note 280, at 131, 134–35; U.S. DEP'T OF EDUC., *supra* note 252, at 6–7.

328. OPPORTUNITIES SUSPENDED, *supra* note 135, at 36; CTRS. FOR DISEASE CONTROL & PREVENTION, *supra* note 325, at 13; SKIBA ET AL., *PREVENTING SCHOOL VIOLENCE*, *supra* note 275, at 13; Noam et al., *supra* note 165, at 159–60; NEW DIRECTIONS: ZERO TOLERANCE, *supra* note 138.

329. RUSSELL SKIBA ET AL., *IND. YOUTH SERV. ASS'N*, “DISCIPLINE IS ALWAYS TEACHING”: EFFECTIVE ALTERNATIVES TO ZERO TOLERANCE IN INDIANA’S SCHOOLS 2, 10–11 (2004), available at http://ceep.indiana.edu/projects/PDF/PB_V2N3_Discipline_is_Teaching.pdf; JEFFREY SPRAGUE, *THE HAMILTON FISH INST. ON SCH. & CMTY. VIOLENCE, CREATING PREVENTION AND INTERVENTION STRATEGIES: EFFECTIVE STRATEGIES FOR CREATING SAFER SCHOOLS AND COMMUNITIES 28–29* (2008), available at <http://gwired.gwu.edu/hamfish/merlingci/p/downloadFile/d/20707/n/off/other/1/name/preventionpdf/>; Gagnon & Leone, *supra* note 138.

330. SKIBA ET AL., *supra* note 329, at 3; SKIBA ET AL., *supra* note 275, at 14–15 (2001); SPRAGUE, *supra* note 329, at 28.

social and emotional learning.³³¹ Developmentally appropriate schools also have staff who are positive, compassionate, nurturing, caring, and respectful;³³² have positive attitudes and high expectations;³³³ model appropriate behaviors;³³⁴ create a climate of emotional support;³³⁵ are committed to maintaining strong, positive relationships with all students;³³⁶ are well-trained and capable in classroom management, working with students with disabilities, accommodating for adolescent development, and establishing supportive relationships with students and their families;³³⁷ are capable of recognizing early warning signs for violence and disruption;³³⁸ and have time to collaborate with each other, service providers, and families (e.g., by making home visits, holding parent conferences, and issuing newsletters).³³⁹

One of the best ways to prevent misbehavior is by creating a sense of community at a school. Small schools are essential to creating a sense of community; they allow people to know each other better, feel more responsible for one another, and respond faster to

331. Examples of social and emotional learning training include understanding one's emotions/self-awareness, self-management/managing emotions, stress management, problem-solving, communication, recognizing emotions in others/empathy, responsible decision-making, and social skills. AM. INST. FOR RES., SOCIAL AND EMOTIONAL LEARNING AND BULLYING PREVENTION (2009), available at <http://case1.org/wp-content/uploads/SEL-and-Bullying-Prevention-2009.pdf>; JEFFREY J. COHEN & MARIAN C. FISH, HANDBOOK OF SCHOOL-BASED INTERVENTIONS: RESOLVING STUDENT PROBLEMS AND PROMOTING HEALTHY EDUCATIONAL ENVIRONMENTS 4, 285 (1993); RITA COOMBS-RICHARDSON & CHARLES H. MEISGEIER, DISCIPLINE OPTIONS: ESTABLISHING A POSITIVE SCHOOL CLIMATE (2001); David Osher et al., *Deconstructing the Pipeline: Using Efficacy, Effectiveness, and Cost-Benefit Data to Reduce Minority Youth Incarceration*, in DECONSTRUCTING THE SCHOOL-TO-PRISON PIPELINE, *supra* note 191, 91, 100–01 (Johanna Wald & Daniel J. Losen eds., 2003); Joseph A. Durlak, *The Impact of Enhancing Students' Social and Emotional Learning: A Meta-Analysis of School-Based Universal Interventions*, 82 CHILD DEV. 1, 405–32 (2011); Osher et al., *supra* note 280, at 48–58.

332. OFER ET AL., *supra* note 323, at 15–16.

333. Jane G. Coggschall et al., *Enhancing Educators' Capacity to Stop the School-to-Prison Pipeline*, in KEEPING KIDS IN SCHOOL, *supra* note 326, 169, 171.

334. Osher et al., *supra* note 280, at 127, 131.

335. *Id.*

336. Garver & Noguera, *supra* note 152, at 1, 7–8; Osher et al., *supra* note 280, at 127, 131.

337. OPPORTUNITIES SUSPENDED, *supra* note 135, at 43–44; SKIBA ET AL., *supra* note 275, at 12–14; Coggschall et al., *supra* note 333, at 177–78; Comer, *supra* note 117, at 2 (“[W]e must create—and adequately support—a wide and deep pool of teachers and administrators who, in addition to having thorough knowledge of their disciplines, know how children develop generally and academically and how to support that development.”).

338. SKIBA ET AL., *supra* note 275, at 16–18.

339. Osher et al., *supra* note 326, at 53.

safety threats.³⁴⁰ In addition to being smaller, schools that are experienced as communities have ample social capital and connectedness,³⁴¹ a sense of belonging, common values, and caring and supportive relationships.³⁴² Schools can actively promote a sense of community by³⁴³

- using cooperative learning, such as group work and peer tutoring;³⁴⁴
- involving families wherever possible, including creating school-family liaisons, providing adequate translation and interpretation, encouraging family members to volunteer in classrooms, having adult learning classes³⁴⁵ and parent trainings,³⁴⁶ and forming parent advisory groups;³⁴⁷
- emphasizing joy and fun (e.g., celebrations, potlucks, performances, trips, clubs, dances, and assemblies);³⁴⁸
- emphasizing and celebrating students' cultures;³⁴⁹
- creating opportunities for collaboration, team-building, bonding, and "resiliency-supporting relationships"³⁵⁰ (e.g., all-school retreats, town-hall meetings, multi-day orientations for new staff and students, staff advisors for

340. MEIER, *supra* note 116, at 110–12.

341. CTRS. FOR DISEASE CONTROL & PREVENTION, *supra* note 325, at 5 ("Students are more likely to engage in healthy behaviors and succeed academically when they feel connected to school."); MARIN & BROWN, *supra* note 110, at 6.

342. Victor Battistich et al., *Caring School Communities*, 32 EDUC. PSYCHOLOGIST 137, 137 (1997); Daniel Solomon et al., *Creating Classrooms That Students Experience as Communities*, 24 AM. J. OF COMMUNITY PSYCHOL. 719, 720 (1996).

343. Pedro A. Noguera, *Finding Safety Where We Least Expect It: The Role of Social Capital in Preventing School Violence*, in ZERO TOLERANCE, *supra* note 128, 202, 202–18.

344. CTRS. FOR DISEASE CONTROL & PREVENTION, *supra* note 325, at 13; Solomon et al., *supra* note 342, at 723.

345. *E.g.*, GED and English language learner classes.

346. *E.g.*, identifying desirable behaviors, communication strategies, conflict resolution, listening skills, setting expectations, and appropriate praise.

347. JEFFREY SPRAGUE, HAMILTON FISH INST. ON SCH. & CMTY. VIOLENCE & NW. REG'L EDUC. LAB., EFFECTIVE STRATEGIES FOR CREATING SAFER SCHOOLS AND COMMUNITIES: CREATING SCHOOLWIDE PREVENTION AND INTERVENTION STRATEGIES 29–30 (2008), available at <http://gwired.gwu.edu/hamfish/merlin-cgi/p/downloadFile/d/20707/n/off/other/1/name/preventionpdf/>.

348. *See* SANDLER ET AL., *supra* note 145, at 32–33; *see also* Noam et al., *supra* note 165, at 223.

349. SANDLER ET AL., *supra* note 145, at 9, 33.

350. Noam et al., *supra* note 165, at 158.

students,³⁵¹ peer buddy programs,³⁵² class meetings,³⁵³ and classroom jobs³⁵⁴),³⁵⁵

- allowing students to have a voice in creating school norms and rules;³⁵⁶ and
- connecting students with community experiences and resources³⁵⁷ (e.g., through service-learning,³⁵⁸ student internships,³⁵⁹ and social service delivery³⁶⁰).

C. Recommended Intervention and Alternatives

Even the best policies and most thorough and effective prevention efforts will not eliminate all misbehavior. Students who are still at risk of misbehaving, or do misbehave, require extra support and “maximum understanding, sensible standards, benevolence, justice, and then a chance to grow beyond their

351. See CTRS. FOR DISEASE CONTROL & PREVENTION, *supra* note 325, at 6.

352. Solomon et al., *supra* note 342, at 724.

353. GEORGE H. WOOD, SCHOOLS THAT WORK: AMERICA’S MOST INNOVATIVE PUBLIC EDUCATION PROGRAMS 88–93, 118 (1992).

354. See CTRS. FOR DISEASE CONTROL & PREVENTION, *supra* note 325, at 12.

355. See *id.*; OFER ET AL., *supra* note 323, at 20–21; Robert C. Pianta et al., *How Schools Can Do Better: Fostering Stronger Connections Between Teachers and Students*, in NEW DIRECTIONS FOR YOUTH DEVELOPMENT: A CRITICAL VIEW OF YOUTH MENTORING 91 (2002).

356. CTRS. FOR DISEASE CONTROL & PREVENTION, *supra* note 325, at 13; A MODEL CODE ON EDUCATION AND DIGNITY, *supra* note 280, at 15; OFER ET AL., *supra* note 323, at 20; Grona, *supra* note 308, at 246 (“Involving students in the discipline process achieves two goals. First, the accused student may have more trust in a system in which students have an input, especially because juveniles often view adults as uncaring or arbitrary. . . . Second, involving students gives them a learning opportunity. Students better understand societal justice if they are able to participate in community decision-making.”); Rokeach & Denvir, *supra* note 313, at 291 (“[Giving students a voice] furthers the values of notice as well as participation. The more the students feel that they are in some sense authors of the system, the more respect they will give it.”); Solomon et al., *supra* note 342, at 724.

357. See CTRS. FOR DISEASE CONTROL & PREVENTION, *supra* note 325, at 10–11; Noam et al., *supra* note 165, at 161–63.

358. See OFER ET AL., *supra* note 323, at 20, 46; Jonathan F. Zaff & Richard M. Lerner, *Service Learning Promotes Positive Youth Development in High School*, PHI DELTA KAPPA, Feb. 2010, at 21–23.

359. See OFER ET AL., *supra* note 323, at 20.

360. Peter L. Benson, *Adolescent Development in Social and Community Context: A Program of Research*, in NEW DIRECTIONS FOR YOUTH DEVELOPMENT: PATHWAYS TO POSITIVE DEVELOPMENT AMONG DIVERSE YOUTH 123, 136 (Richard M. Lerner et al. eds., 2002) (“In theory, a school is at the hub of a wheel, with spokes to family, neighborhood, employer, youth organization, and social service delivery system.”).

transgression.”³⁶¹ Therefore, it is critical that schools have a continuum of planned interventions and alternatives³⁶² designed to pull students in rather than push them out.³⁶³

For each student who repeatedly and/or seriously misbehaves, the school should first conduct a functional behavioral assessment to determine the causes of the misbehavior.³⁶⁴ Then, the school should create and implement an individualized behavioral intervention plan³⁶⁵ that addresses the whole child.³⁶⁶ The plan should involve parents and guardians and utilize well-coordinated school-based and community-based services,³⁶⁷ such as support groups,³⁶⁸ social services,³⁶⁹ mental health services,³⁷⁰ medical/health services,³⁷¹ mentoring,³⁷² afterschool and summer programs,³⁷³ tutoring,³⁷⁴ and drug and alcohol counseling.³⁷⁵

To address ongoing minor misconduct, schools should develop productive consequences, such as student-teacher-parent/guardian

361. See ZERO TOLERANCE, *supra* note 128, at xvi; Noam et al., *supra* note 165, at 168.

362. Am. Psychological Ass’n, *supra* note 138, at 859.

363. Noam et al., *supra* note 165, at 160.

364. Gagnon & Leone, *supra* note 138, at 113–14.

365. SKIBA ET AL., *supra* note 329, at 1, 8; SKIBA ET AL., *supra* note 275, at 24–25; Rokeach & Denvir, *supra* note 313, at 298–99.

366. SKIBA ET AL., *supra* note 329, at 8.

367. Osher et al., *supra* note 280, at 138–39; Mendez, *supra* note 191, at 28.

368. Examples of support groups include managing anger, developing social skills, resolving conflicts, cultivating leadership skills, dealing with the loss of loved ones, and acquiring organizational skills. See Noam et al., *supra* note 165, at 174.

369. CTR. FOR EFFECTIVE COLLABORATION & PRACTICE, PREVENTION STRATEGIES THAT WORK: WHAT ADMINISTRATORS CAN DO TO PROMOTE POSITIVE STUDENT BEHAVIOR 14 (1999).

370. Examples of mental health services include counseling, aggression replacement therapy, multisystemic therapy, functional family therapy, and anger management training. KRISTA KUTASH & ALBERT J. DUCHNOWSKI, THE ROLE OF MENTAL HEALTH SERVICES IN PROMOTING SAFE AND SECURE SCHOOLS (2007); OFER ET AL., *supra* note 323, at 46; Noam et al., *supra* note 165, at 176–77; Osher et al., *supra* note 280, at 127, 138–39; Osher et al., *supra* note 331, at 102–05; see also Cheryl Smithgall et al., *Responding to Students Affected by Trauma: Collaboration Across Public Systems*, in KEEPING KIDS IN SCHOOL, *supra* note 326, at 40, 44–54; SKIBA ET AL., *supra* note 329, at 5; SKIBA ET AL., *supra* note 275, at 21–22, 24; Rokeach & Denvir, *supra* note 313, at 298–99.

371. OFER ET AL., *supra* note 323, at 46.

372. SKIBA ET AL., *supra* note 275, at 20–21; Noam et al., *supra* note 165, at 158.

373. Noam et al., *supra* note 165, at 176–77.

374. *Id.*

375. Rokeach & Denvir, *supra* note 313, at 299.

conferences, role-plays, reflective essays, and loss of privileges.³⁷⁶ For more serious misbehavior, schools should utilize rehabilitative measures on a case-by-case, individualized basis,³⁷⁷ in the spirit of the holding of *Graham and Miller*. Restorative justice practices, such as peer mediation, victim impact panels, school-based youth court, problem-solving or peace circles, fairness committees, and community service,³⁷⁸ as well as high-quality in-school intervention rooms,³⁷⁹ Saturday school, and alternative schools³⁸⁰ are developmentally appropriate substitutes for draconian discipline that abandons troubled students to the streets or disposes of them in the court system.

376. ADVANCEMENT PROJECT ET AL., ALTERNATIVES TO SUSPENSION, EXPULSION, AND SCHOOL-BASED ARREST (2009).

377. SANDLER ET AL., *supra* note 145, at 35.

378. Lisa Abregú, *Restorative Justice in Schools: Restoring Relationships and Building Community*, 18 DISP. RESOL. MAG. 10, 10 (2011–2012); *see also* INT’L INST. FOR RESTORATIVE PRACTICES, IMPROVING SCHOOL CLIMATE: FINDINGS FROM SCHOOLS IMPLEMENTING RESTORATIVE PRACTICE (2009); LINDA LANTIERI & JANET PATTI, WAGING PEACE IN OUR SCHOOLS (1996); LOSEN & GILLESPIE, *supra* note 247, at 36; OFER ET AL., *supra* note 323, at 46; Mara Schiff & Gordon Bazemore, “Whose Kids are These?” *Juvenile Justice and Education Partnership Using Restorative Justice to End the “School-to-Prison Pipeline”*, in KEEPING KIDS IN SCHOOL, *supra* note 326, 68, 68–82; SKIBA ET AL., *supra* note 329, at 8; SKIBA ET AL., *supra* note 275, at 11–12, 24–25; MICHAEL D. SUMNER ET AL., SCHOOL-BASED RESTORATIVE JUSTICE AS AN ALTERNATIVE TO ZERO-TOLERANCE POLICIES: LESSONS FROM WEST OAKLAND (2010); Heather A. Cole & Julian Vasquez Heilig, *Developing a School-Based Youth Court: A Potential Alternative to the School to Prison Pipeline*, 40 J.L. & EDUC. 305, 305 (2011); Thalia Gonzalez, *Keeping Kids in Schools: Restorative Justice, Punitive Discipline, and the School-to-Prison Pipeline*, 41 J.L. & EDUC. 281, 301–02 (2012); William Haft, *More than Zero: The Cost of Zero Tolerance and the Case for Restorative Justice in Schools*, 77 DENV. U. L. REV. 795, 804–10 (2000); Skiba & Knesting, *supra* note 185, at 17, 36–37; Rokeach & Denvir, *supra* note 313, at 298–99; Cara Suvall, *Restorative Justice in Schools: Learning from Jena High School*, 44 HARV. C.R.-C.L. L. REV. 547, 559 (2009); Nancy Fishman & Dory Hack, *School-Based Youth Courts: Creating a Restorative Justice Alternative to Traditional School Disciplinary Responses*, in KEEPING KIDS IN SCHOOL, *supra* note 326, 155, 156–58; David Karp & Beau Breslin, *Restorative Justice in School Communities*, 33 YOUTH & SOC’Y 249, 249–72 (2001).

379. *See* NAT’L ASS’N OF SCH. PSYCHOLOGISTS, FAIR AND EFFECTIVE DISCIPLINE FOR ALL STUDENTS: BEST PRACTICE STRATEGIES FOR EDUCATORS (2002), *available at* <http://www.nasponline.org/communications/spawareness/effdiscipfs.pdf>; SKIBA ET AL., *supra* note 275, at 24.

380. *See* NAT’L ASS’N OF SCH. PSYCHOLOGISTS, *supra* note 379 (listing the following characteristics of effective alternative programs: low staff to student ratio with highly trained, culturally diverse staff, strong component of parent and community agency involvement, use of nontraditional instruction, adapted curriculum and flexible staff roles, sufficient funding and resources to implement program, sensitivity to individual and cultural differences, clear program and student goals, onsite counseling services, multidisciplinary case management, research-based interventions, and formative and summative program evaluation); SKIBA ET AL., *supra* note 275, at 24.

V. CONCLUSION

Roper v. Simmons, *Graham v. Florida*, *J.D.B. v. North Carolina*, and *Miller v. Alabama* involved youths who were investigated by police, prosecuted, and punished. Advocates have won significant victories with the holdings of these cases, which have limited punishment and altered interrogation doctrine. What is now needed is more effort toward preventing young people from becoming ensnared in the juvenile and criminal systems in the first instance by reforming the ways schools attempt to prevent and manage misbehavior. Insisting that public schools become protective instead of reactive, treat rather than punish students, and disentangle themselves from the imperatives of law enforcement is a logical place to start.

The four “age matters” cases, in finding that youthfulness requires distinct treatment from the state, do not speak directly to institutions other than the juvenile and criminal systems. Yet nothing prevents educational policymakers from adjusting their disciplinary policies to reflect the changed jurisprudential reality by adopting the recommendations suggested here. To do so would be consistent with a series of research-based “best practices” proposed for years by advocates.

Juvenile justice and education justice activists and lawyers must join forces to find creative ways to push policymakers to recalibrate school safety and disciplinary policies and practices. Litigation is one tool but is not the only or even the best mechanism for achieving the kinds of changes we urge. Legislative advocacy³⁸¹ and parent and student organizing,³⁸² for example, should be pursued as means of creating necessary changes.

381. See, e.g., *DSC at Senate Hearing on Ending the School-to-Prison Pipeline*, DIGNITY IN SCHS. BLOG (Dec. 20, 2012), <http://www.dignityinschools.org/blog/dsc-senate-hearing-ending-school-prison-pipeline> (discussing advocacy efforts during 2012 Senate hearings on school discipline issues).

382. See, e.g., *About*, CADRE, <http://www.cadre-la.org/core/about/> (last visited Apr. 25, 2013) (describing that the organization is led by African American and Latino parents and caregivers whose children attend local schools in the Los Angeles Unified School District (LAUSD)); *End the School to Jail Track*, PADRES & JOVENES UNIDOS, <http://www.padresunidos.org/end-school-jail-track> (last visited Apr. 25, 2013) (documenting efforts of Denver-area organizing to end harsh discipline policies); *School to Prison Pipeline*, FAMS. & FRIENDS OF LA. INCARCERATED CHILD., <http://www.fflic.org/school-to-prison-pipeline> (last visited Apr. 25, 2013) (New Orleans-based organization dedicated to dismantling school-to-

prison pipeline); YOUTH UNITED FOR CHANGE, <http://www.youthunitedforchange.org> (last visited Apr. 25, 2013) (describing Philadelphia organization dedicated to empowering youth of color and youth from working-class communities on education issues).