

**BIASED ADULTS, BRASH YOUTH, AND UNEVEN PUNISHMENT:  
THE NEED FOR INCREASED LEGAL PROTECTIONS FOR YOUTH**

Our legal jurisprudence has only recently begun to take notice of adolescence as a stage of life from childhood and adulthood.<sup>1</sup> Yet common notions of this unique developmental period stretch back at least 400 years to an old Shepherd’s lament in *A Winter’s Tale*:

I would there were no age between sixteen and three-and-twenty, or that youth would sleep out the rest; for there is nothing in the between but getting wenches with child, wronging the ancients, stealing, fighting.<sup>2</sup>

Just as eternal is the angst of adults trying to figure out the best way to confront these teenage behaviors. Over the past few decades in America, confronting such classic misbehaviors through serious discipline has become increasingly common. Nowadays, teenagers accused of stealing, fighting, or otherwise “wronging the ancients”<sup>3</sup> increasingly face suspension from school, or even an introduction into the juvenile justice system.<sup>4</sup>

Take the story of Jerome, a sophomore in high school in the inner ring suburbs of Saint Louis.<sup>5</sup> His high school is relatively diverse, but he is one of the only black males in the honor track classes. During his AP English class, the teacher assigns the students into groups, and tasks them to come up with a creative presentation about the assigned book. Jerome brings in a BB gun he has at home to use in his presentation. When he takes the gun out of his backpack in

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1. *Graham v. Florida*, 560 U.S. 48, 76–78 (2010) (acknowledging special difficulties encountered by counsel in juvenile representation, given juveniles’ impulsiveness, difficulty thinking in terms of long-term benefits, and reluctance to trust adults).

2. WILLIAM SHAKESPEARE, *A WINTER’S TALE*, act 2 sc. 3.

3. Many states have criminal statutes’ more modern takes on such a concept, such as the charge “interference with the educational process.” *A.M. v. Holmes*, 830 F.3d 1123, 1130 (10th Cir. 2016).

4. DANIEL J. LOSEN & RUSSELL L. SKIBA, SOUTHERN POVERTY LAW CTR., *SUSPENDED EDUCATION: MIDDLE SCHOOLS IN CRISIS 3–5* (2010), [https://www.splcenter.org/sites/default/files/d6\\_legacy\\_files/downloads/publication/Suspended\\_Education.pdf](https://www.splcenter.org/sites/default/files/d6_legacy_files/downloads/publication/Suspended_Education.pdf) [<https://perma.cc/M6HU-R3N9>].

5. This story is based on the loose combination of a few real students’ stories from the author’s experience working as a youth advocate for a St. Louis education non-profit. Suspensions for toy guns are not limited to this story and are discouragingly common. See David Boroff, *Virginia 7th grader suspended one year for using zombie hunter airsoft gun, but family claims he did not use it on school property*, N.Y. DAILY NEWS (Sept. 13, 2013), <http://www.nydailynews.com/news/national/boy-suspended-school-toy-gun-family-property-article-1.1465745> [<https://perma.cc/4CW9-8YCW>].

class, the teacher panics. She calls the office to say there is an armed student in class. Startled, Jerome gets up and begins to yell at her that it is not a real gun. Jerome is tackled and handcuffed by the school resource officer. The school tells his mother he is expelled for bringing a weapon to school and for threatening the teacher. The superintendent tells his mother that he is doing Jerome a favor by only giving him a 180-day suspension rather than imposing the automatic expulsion rule for weapons in school. When Jerome returns to school the next year, he is behind in his credits, and angry with his white group members who did not get in trouble. His GPA has tanked, he is no longer on the college track, and his college applications are disrupted.

Jerome's journey through high school is far from unusual. Since the mid-1990s, schools have been preoccupied with the fear of violent behaviors, adding penalties and housing law enforcement officers *inside* schools.<sup>6</sup> In the 1970s, only about 3% of students were excluded from school due to misbehavior, whereas in 2011 around 15% of students have received some form of long-term school suspensions.<sup>7</sup> Data shows almost all of these suspensions—95%—were either coded for “disruptive behavior” or “other.”<sup>8</sup> There has also been a large-scale increase in uniformed police in school settings.<sup>9</sup> The juvenile system has seen a documented influx of youth coming into the system for more minor offenses, many from incidents arising at schools.<sup>10</sup> Persistent data has shown this increase in punishment has a distinct and disparate impact on youth of color, particularly young black men.<sup>11</sup> Studies have indicated students from African-American families are about two to four times more likely to be referred to the office for problem behavior than white students, and are more likely to receive

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6. Alexander Volokh, *A Brief Guide to School-Violence Prevention*, 2 J.L. & FAM. STUD. 99, 103–04 (2000) (noting in the year 1994, Congress passed the Safe Schools Act, the Safe and Drug-Free Schools and Communities Act, and multiple other laws aimed at increasing sentences).

7. LOSEN & SKIBA, *supra* note 4, at 2–3.

8. *Id.* at 9.

9. *Ending the School to Prison Pipeline: Hearing Before the Subcomm. on Constitution, Civil Rights and Human Rights of the S. Comm. on the Judiciary*, 112th Cong. 29–30 (2012) (statement of the Hon. Steven C. Teske, Chief Judge, Juv. Ct. of Clayton County, GA).

10. JUDITH A. BROWNE, ADVANCEMENT PROJECT, *DERAILED: THE SCHOOLHOUSE TO THE JAIL TRACK* 14 (2003), <http://www.advancementproject.org/resources/entry/derailed-the-school-house-to-jailhouse-track>. This has also been accompanied by an increasing number of youth who are certified as adults to stand trial and removed out of the juvenile system altogether. Kathryn Monahan, Lawrence Steinberg, & Alex R. Piquero, *Juvenile Justice Policy and Practice: A Developmental Perspective*, 44 CRIME & JUST. 577, 588–89 (2015).

11. Hannah Rappleye et al., *Kids in Cuffs: Why Handcuff a Student With a Disability?*, NBC NEWS (Feb. 20, 2017), <http://www.nbcnews.com/news/us-news/kids-cuffs-why-handcuff-8-year-old-student-disability-n722451> [<https://perma.cc/3UZJ-S3HC>].

expulsion or out of school suspension as a punishment where a white student would not.<sup>12</sup>

There is little support for the idea that most youth who become “justice involved” undergo meaningful rehabilitation through punishment. Studies have not found that exclusion-based or “zero tolerance” school discipline policies effectively reduce instances of misbehavior.<sup>13</sup> In fact, studies have shown suspension and expulsion can act more as a reinforcement of behavior than as a deterrent for the affected student.<sup>14</sup> The overuse of suspensions and expulsions also appears to have a negative effect on overall student behavior and school climate.<sup>15</sup> Spending significant time out of school is also squarely linked to entry into the juvenile justice system.<sup>16</sup>

Moving school systems away from this punitive, ineffective method of addressing youth misbehavior will require reform. But any meaningful reform will need to incorporate three coextensive factors.

First, contemporary neurological understanding of youth behavior shows us this very behavior we punish is part of a natural stage of development.<sup>17</sup> Researchers have shown it is natural for youth to seek out adrenaline “rewards” despite risk;<sup>18</sup> youth typically seek peer approval by experimentation with problem behaviors;<sup>19</sup> and how the phenomenon of youth difficulty in communicating with and obeying adults is often a key part of development.<sup>20</sup> Jerome’s behavior in bringing a BB gun to school and yelling at his teacher, seen as threatening or violent, can be more correctly viewed as part of the natural mistakes made in development.

Complicating that, cognitive science research shows that teachers and principals may be making well-intentioned but biased decisions about which behavior is worthy of expulsion or arrest.<sup>21</sup> Researchers into decision making

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12. Russell Skiba, *Race Is Not Neutral: A National Investigation of African American and Latino Disproportionality In School Discipline*, 40 SCH. PSYCHOL. REV. 85, 101–02 (2011).

13. *Id.* at 101.

14. LOSEN & SKIBA, *supra* note 4, at 10.

15. American Psychological Association Zero Tolerance Task Force, *Are Zero Tolerance Policies Effective in the Schools? An Evidentiary Review and Recommendations*, 63 AM. PSYCHOL. 852, 854 (2008).

16. Lance Lochner & Enrico Moretti, *The Effect of Education on Crime: Evidence from Prison Inmates, Arrests, and Self Report*, 94 THE AM. ECON. REV. 155, 183 (2004).

17. David Dobbs, *Beautiful Brains*, NAT’L GEOGRAPHIC, Oct. 2011, <http://ngm.nationalgeographic.com/2011/10/teenage-brains/dobbs-text> [<https://perma.cc/GNW5-BQZ4>].

18. *Id.*

19. Terrie Moffitt, *Adolescence-Limited and Life-Course-Persistent Antisocial Behavior: A Developmental Taxonomy*, 100 PSYCHOL. REV. 674, 686 (1993).

20. Marty Beyer, *What’s Behind Behavior Matters: The Effects of Disabilities, Trauma and Immaturity on Juvenile Intent and Ability to Assist Counsel*, 58 GUILD PRAC. 112, 112–13, 124–25 (2001).

21. *A.M. v. Holmes*, 830 F.3d 1123, 1129–30 (10th Cir. 2016).

reveal people often rely on heuristics or biases, which are commonly defined as cognitive shortcuts or rules of thumb that simplify decisions.<sup>22</sup> These identifiable phenomenon such as “confirmation bias” or “belief in a just world” are adaptive traits which help us make quick decisions to deal with information overload.<sup>23</sup> Yet research shows these decisions can be sub-optimal in a variety of predictable ways.<sup>24</sup>

Finally, the structure of a typical school discipline process creates almost no way to check these biases in decisions, and in fact creates increased danger of bias. Schools are both comically underfunded and overloaded.<sup>25</sup> Harsh and punitive sanctions are normalized as being necessary to control youth like Jerome.<sup>26</sup> Accountability, which has been deemed as an essential element helping to reduce bias in decisions, is scarce. Our school discipline law gives mass, mostly unchecked, discretion to school officials.<sup>27</sup> Although technically students in a school setting have due process rights before removal, those have been interpreted in such a lax and weak manner that it essentially amounts to relying on the good will of the school officials.<sup>28</sup> Unsurprisingly, good will is not sufficient to prevent often chaotic school discipline decisions from being meted out in arbitrary, unfair, or even racially discriminatory ways.

A great deal of national attention in youth reform has justifiably been focused around ending juvenile capital punishment and life without parole,<sup>29</sup> as well as challenging the practice of certifying children to stand trial as adults.<sup>30</sup> Although school discipline seems comparatively more minor, these kinds of punishments have major impacts on the ability of young people to successfully grow up.<sup>31</sup>

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22. See Anuj K. Shah & Daniel M. Oppenheimer, *Heuristics Made Easy: An Effort-Reduction Framework*, 134 PSYCHOL. BULL. 207 (2008).

23. *Id.* at 216.

24. *Id.* at 207.

25. R.M. Ingersoll, *Why Do High-Poverty Schools Have Difficulty Staffing Their Classrooms With Qualified Teachers?*, 11 (Center for American Progress ed., 2004), <https://www.americanprogress.org/issues/education/news/2004/11/19/1205/why-do-high-poverty-schools-have-difficulty-staffing-their-classrooms-with-qualified-teachers/> [<https://perma.cc/A3D7-76L7>].

26. Mae C. Quinn, *The Other “Missouri Model”: Systemic Juvenile Injustice in the Show-Me State*, 78 MO. L. REV. 1194, 1205 (2014).

27. Matthew I. Fraidin, *Decision-Making in Dependency Court: Heuristics, Cognitive Biases, and Accountability*, 60 CLEV. ST. L. REV. 913, 925–26 (2013).

28. See *infra* Section III.

29. *Roper v. Simmons*, 543 U.S. 551, 578 (2005); *Miller v. Alabama*, 567 U.S. 460, 479 (2012).

30. Elizabeth Cauffman, Jennifer Woolard & N. Dickon Reppucci, *Justice for Juveniles: New Perspectives on Adolescents’ Competence and Culpability*, 18 QUINNIPIAC L. REV. 403, 410 (1999).

31. LOSEN & SKIBA, *supra* note 4, at 9–10. The experience of a young person starting with school consequences and spiraling deeper into the criminal justice system is known as the “school to prison pipeline.” Rappleye et al., *supra* note 11.

Successful reform should incorporate our understanding of successful youth development and the impact of trauma. To be truly impactful, however, reforms also need to focus on combatting the role of bias in adult decision makers. It is not enough to train or encourage adults to use a more forgiving approach toward teenagers without structural changes and procedural protections that can increase accountability and decrease discretion in adults.<sup>32</sup>

Part I will discuss the emerging scientific consensus around how adolescent brain development facilitates certain behaviors. Part II will discuss behavioral and psychological research in regard to bias in decision makers. Part III will show through case studies and national data how the legal framework in schools does not protect and in fact encourages biased decision making resulting in adverse outcomes. Finally, in part IV, I will argue that, although necessary to have increased training in trauma or decision making bias, we must also increase procedural and substantive protections available to youth.

### I. EMERGING UNDERSTANDING OF YOUTH DEVELOPMENT

Systems of education and of juvenile justice have the common goal to guide young people safely to adulthood.<sup>33</sup> Compulsory school attendance and juvenile courts both became widespread institutions in the early 1900s.<sup>34</sup> At the time, this was touted as a government intervention for the benefit of the impoverished, yet modern critics view both as a tool of social control.<sup>35</sup>

Yet in recent years scientists have been able to show that what was once considered delinquent may in fact just be symptoms of the psychological transition between childhood and adulthood—what we now call adolescence.<sup>36</sup> Historically, once a child appeared to have basic cognitive abilities then that child was subjected to adult standards.<sup>37</sup> But research has demonstrated this period of time is marked by psychosocial immaturity and tendencies toward “antisocial” actions.<sup>38</sup> Youth tend to engage in ways that seem at best bizarre, and at worst threatening. Additionally, a growing body of research demonstrates

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32. Fraidin, *supra* note 27, at 926.

33. CTR. ON JUV. & CRIM. JUST., JUVENILE JUSTICE HISTORY I <http://www.cjwj.org/education/1/juvenile-justice-history.html> [<https://perma.cc/HEW3-QYC5>].

34. MICHAEL S. KATZ, A HISTORY OF COMPULSORY EDUCATION LAWS 17 (1976), <http://files.eric.ed.gov/fulltext/ED119389.pdf> [<https://perma.cc/38CW-3S6N>].

35. *Id.* at 23 (“By 1910, the simplicity and lack of differentiation that often characterized earlier communities was being replaced.... New waves of eastern and southern European immigrants raised fears of crime, vagrancy, and a foreign-speaking pauper class. In response to these fears, schools were promoted as agencies of social control and assimilation.”).

36. Laurence Steinberg et al., *Are Adolescents Less Mature than Adults?*, 69 AM. PSYCHOL. 583, 592 (2009).

37. Monahan et al., *supra* note 10, at 589.

38. *Id.* at 603–04.

trauma and toxic stress has a huge effect on the development and decision making of youth.<sup>39</sup>

A. *Natural Tendencies towards Risk-Taking and Peer Orientation*

Neurobiological evidence shows there is a “dual system” change happening in the brain during adolescence. First, in early adolescence there is a significant redistribution and increase in dopaminergic activity specifically in our prefrontal cortex.<sup>40</sup> The increase in dopaminergic activity makes experiences inexplicably rewarding. Concurrently, but at a slower pace, our brain’s cortex is engaging in “synaptic pruning” where the most heavily used synapses become stronger and the least used wither away.<sup>41</sup> This affects our ability to set goals, weigh agendas, and make decisions.<sup>42</sup> Scientists hypothesize that this rapid increase in dopaminergic activity coupled with the slower development in the prefrontal cortex is exactly what leads to increases in reward seeking behavior—some call it akin to “starting the engine without someone behind the wheel.”<sup>43</sup>

This dual system change means adolescents have different biological tendencies toward rewards and risks.<sup>44</sup> Evolutionary researchers theorize these are adaptive processes helping adolescents move from the safety of home into new and often scary adult territories.<sup>45</sup> Yet it has resulted in some specifically documented tendencies.

First, adolescents have a tendency to minimize the danger an action presents if it will allow them to engage in sensation-seeking conduct.<sup>46</sup> There are simple age differences in the likelihood to engage in criminal behavior. In fact, criminologists have found young people *as a general group* score as problematically prone to make antisocial decisions such as shoplifting, smoking marijuana, and riding in a stolen car because of a general appetite for exhilaration.<sup>47</sup>

Second, the desire for sensation seeking and appetite for risk can also greatly affect what adolescents are willing to disclose and say. The frontal lobe, still

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39. Beyer, *supra* note 20, at 116–17.

40. Laurence Steinberg, *Adolescent Development and Juvenile Justice*, 5 ANNU. REV. CLIN. PSYCHOL. 459, 466 (2008) (discussing Dopamine’s role as a critical part of the brain’s reward circuitry); *see also* Dobbs, *supra* note 17.

41. Dobbs, *supra* note 17.

42. *Id.*

43. R. Dahl, *Affect Regulation, Brain Development, and Behavioral/Emotional Health in Adolescence*, CNS SPECTRUMS: DEVELOPMENTS IN NEUROSCIENCE AND DEVELOPMENTAL PSYCHOPATHOLOGY, Jan. 2001, at 2.

44. Steinberg, *supra* note 40, at 469.

45. Dobbs, *supra* note 17.

46. Marty Beyer, *Recognizing the Child in the Delinquent*, 7 KY. CHILD. RTS. J. 16, 17 (1999).

47. B. Bradford Brown et al., *Parenting Practices and Peer Group Affiliation in Adolescence*, 64 CHILD DEV. 467, 477 (1993).

developing for adolescents, is what adults use to apply brakes to emotional verbal responses.<sup>48</sup>

Third, adolescents also have difficulty understanding the long-term consequences of decisions—one study concluded that only 25% of tenth graders, compared to 42% of twelfth graders, considered what future consequences might occur before making decisions.<sup>49</sup> This can have heart-breaking consequences, such as the frequent documentation of cases where an adolescent will falsely confess to serious crimes, because the police promise they will be allowed to go home if they agree to the charges.<sup>50</sup>

Fourth, adolescents are naturally more oriented toward peers and away from adults. One recent behavioral study found that adolescents and adults performed similarly on a task prompting risk-taking when performing the task alone, but that the presence of same-aged friends *doubled* risk taking by the adolescents.<sup>51</sup> Studies of adolescence-limited offenders found that a prime motivation for crimes was imitation of higher status peers.<sup>52</sup> This puts youth at particular risk during the early high school years as pubertal changes combine with increased exposure to older adolescents, leaving those thirteen through fifteen-year olds eager to prove themselves.<sup>53</sup> For example, psychologists working in delinquency court have testified the typical child carrying a gun wants to impress his friends and “look bigger” and rarely has actually anticipated using it.<sup>54</sup> Youth in vulnerable situations also experience much greater anxiety than adults over the social consequences of refusing to engage in risky conduct.<sup>55</sup>

Fifth, most youth crave adult attention and support, but have simultaneous difficulty with the authority of adults in real life.<sup>56</sup> Studies have shown as a result of general anxiety, most adolescents being questioned by adults in any context display suspicious behavior such as difficulty making eye contact, qualify

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48. Deborah Yurgelun-Todd, *Brain Development, Culpability, and the Death Penalty*, INT’L. JUSTICE PROJECT (2003), <http://www.internationaljusticeproject.org/pdfs/juvBrainDev.pdf> [<https://perma.cc/6WAJ-653Y>].

49. Catherine C. Lewis, *How Adolescents Approach Decisions: Changes over Grades Seven to Twelve and Policy Implications*, 52 CHILD DEV. 538, 541–42 (1981) (subjects in seventh and eighth grade considered future consequences only 11% of the time).

50. Patrick McMullen, *Questioning the Questions: The Impermissibility of Police Deception in Interrogations of Juveniles*, 99 NW. U. L. REV. 971, 978–80 (2005).

51. Steinberg, *supra* note 40, at 468–69.

52. Moffitt, *supra* note 19, at 687.

53. *Id.*

54. Marty Beyer, *Immaturity, Culpability & Competency in Juveniles: A Study of 17 Cases*, 15 CRIM. JUST. 26, 27 (2000).

55. OFFICE OF THE SURGEON GENERAL, YOUTH VIOLENCE 87 (2001), <https://eric.ed.gov/?id=ED451422> [<https://perma.cc/2B8Y-TXVG>].

56. See HAIM GINOTT, BETWEEN PARENT AND TEENAGER 19–20 (1988).

statements, respond in monosyllables, and provide nonlinear and confusing narratives.<sup>57</sup>

Luckily, desistance from many of these behaviors seems to be a natural process through improvements over the course of adolescence as the prefrontal cortex catches up with the higher emotions.<sup>58</sup> The social attractiveness of engaging in crime also decreases as age increases.<sup>59</sup> However, as this next section will show, the process of desistance may be complicated if the adolescent is dealing with other trauma.

### B. Trauma

Childhood trauma is overwhelmingly common. Through an influential long-term study of over 17,000 people, researchers found that *almost half* of the youth reported serious ‘adverse childhood experiences’ (“ACEs”) such as abuse, violence, or abandonment.<sup>60</sup> Further research has shown a clear link between the number of ACEs a child has experienced and the likelihood of difficulty in school or entry into the juvenile justice system.<sup>61</sup> For detained youth, almost all have experienced a traumatic event, with male juveniles frequently reporting experiencing or witnessing violent crimes and female juveniles experiencing domestic violence and sexual abuse.<sup>62</sup> This is unsurprising - the idea that

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57. Beyer, *supra* note 20, at 112 (noting that this is only more difficult with adolescents with learning disabilities and difficulty processing information, which is an estimated 17 -53% of juveniles charged.)

58. Kim Taylor-Thompson, *States of Mind/States of Development*, 14 STAN. L. & POL’Y REV. 143, 156 (2003).

59. Moffitt, *supra* note 19 at 675.

60. Felitti et al., *Relationship of Childhood Abuse and Household Dysfunction to Many of the Leading Causes of Death in Adults*, 14 AM. J. OF PREVENTIVE MED. 245, 250 (1998). The original study connected these original experiences to morbidity data, and found a clear connection between the higher the ACEs score was, the greater the risk for a long list of health outcomes, including ischemic heart disease. *Id.* Interestingly, the first study participants were majority white, middle to upper class, with access to health care – yet the outcomes persisted. *Id.* at 251.

61. A study conducted in Washington State showed, “The 248 kids with three or more adverse childhood experiences had three times the rate of academic failure, five times the rate of severe attendance problems, six times the rate of school behavior problems, and four times the rate of poor health compared with children with no known trauma.” Jane Ellen Stevens, *Spokane WA, Students’ Trauma Prompts Search for Solutions*, ACES TOO HIGH (Feb. 28, 2012), <https://acestoohigh.com/2012/02/28/spokane-wa-students-child-trauma-prompts-search-for-prevention/> [https://perma.cc/BUU7-QQ5W].

62. Representative studies of youth in juvenile detention facilities reveal two complex trauma subgroups – about 20% of youth, report a combination of sexual or physical abuse or family violence, with 15% reporting emotional abuse and family violence (but no personal physical or sexual abuse). Keith R. Cruise & Julian D. Ford, *Trauma Exposure and PTSD in Justice-Involved Youth*, 40 CHILD AND YOUTH CARE F. 337, 338, 340 (2011).

traumatic experiences yield misbehaving youth was the origin of our juvenile justice system.<sup>63</sup>

However, how complex trauma manifests in actual behavior can be complex. Traumatized adolescents deal particularly poorly with changes in adult caretakers, and often engage in long periods of “testing” adults:

[Y]outh with complex trauma histories may react surprisingly negatively to well-intentioned and well-designed milieu programs—not simply to be “resistant” or “callous and indifferent,” but to maintain an avoidant and detached stance to not be either disappointed or victimized by those programs and the staff running them, as they too often have been betrayed and exploited by apparently helpful people in the past.<sup>64</sup>

Adolescents with trauma react particularly poorly to physical or legal means of intimidation particularly out of sensitivity to perceived injustice or abuse of power.<sup>65</sup> The after effects of trauma also make many adolescents poor at accurately perceiving threats, and leads to what seems like self-initiate aggression.<sup>66</sup> This is particularly potent when combined with the natural inclination to take risks.

Adults, to be successful with any youth, need to be conscious of their own perspective and use of power. Society recognizes that an adolescent’s thought process in engaging in unlawful conduct is simply different than an adult’s decision to do so.<sup>67</sup> As such, a key concern is how an adult *perceives* a youth’s decision making, and especially times when that perception might be skewed.

## II. COGNITIVE BIAS IN ADULT DECISION MAKERS

Laws for American youth are built around the idea that rather than punitive action, the given decision maker – whether a Judge, a Superintendent, or a Probation Officer – will make a decision in the child’s best interest.<sup>68</sup> Courts presume a given adult is objectively and fairly viewing the situation.<sup>69</sup> Because in theory the decisions are not punitive, courts also allow unchecked discretion unheard of in an adult context.

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63. KATZ, *supra* note 34, at 11, 21.

64. Julian D. Ford et al., *Complex Trauma and Aggression in Secure Juvenile Justice Settings*, 39 CRIM. JUST. & BEHAV. 694, 701 (2012).

65. *Id.*

66. *Id.*

67. Taylor-Thompson, *supra* note 58, at 143.

68. Schall v. Martin, 467 U.S. 253, 263–64 (1984) (holding the role of the judge and staff in addressing the best interests of the child through individual decisions “makes a juvenile proceeding fundamentally different from an adult criminal trial.”).

69. *Id.* at 263.

This is in tension with cognitive science research which shows even well-intentioned decision makers fall into predictable patterns of bias.<sup>70</sup> In reality, people's decisions are subject to common heuristics which function to speed up processing.<sup>71</sup> These heuristics are essentially adaptive, serving as unconscious but necessary tools to help us deal with a complicated world.<sup>72</sup> However, these patterns in the way we process and interpret information in the world can result in cognitive bias, which is an incorrect conclusion in certain circumstances with predictable and troubling outcomes.<sup>73</sup>

A typical school discipline decision works in the following way: a teacher will have a negative interaction with a student or observe a forbidden behavior. The teacher will then report that behavior to an in-building principal or administrator, who will then take the information from the teacher—and potentially the perspective of the student or other students—and make a decision of what kind of discipline will help reform the student's behavior. The student can then challenge the decision to the administrators, who are reviewing the principal's decision for some kind of error. Each of those stages is ripe for the decision to be impacted by cognitive bias.

A. *Cognitive Bias Impacting Initial Identification of Misbehavior: Priming and Self-Serving Bias*

Priming refers to the mental process in which our response to information is influenced by certain prior knowledge structures that are “primed” in our brain.<sup>74</sup> Essentially if new information triggers an association with an accessible knowledge category, any new information will be more quickly and easily correlated with that knowledge category.<sup>75</sup> We judge initially and remember later what we have been primed to look for.<sup>76</sup> For example, if research subjects

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70. DAN ARIELY, PREDICTABLY IRRATIONAL: THE HIDDEN FORCES THAT SHAPE OUR DECISIONS, xx-xxi (2010).

71. Amos Tversky & Daniel Kahneman, *Judgment Under Uncertainty: Heuristics and Biases*, 185 SCIENCE 1124, 1124 (1974). This original paper has been cited over 7,000 times. Klaus Fiedler & Momme von Sydow, *Heuristics and Biases: Beyond Tversky and Kahneman's (1974) Judgment Under Uncertainty*, in COGNITIVE PSYCHOL.: REVISITING THE CLASSIC STUDIES 146, 146 (Michael W. Eysenck & David Groome eds., 1st ed. 2015).

72. Shah, *supra* note 22, at 216–17.

73. Fielder & von Sydow, *supra* note 71, at 146–49.

74. John A. Bargh, Mark Chen, & Lara Burrows, *Automaticity of Social Behavior: Direct Effects of Trait Construct and Stereotype Activation on Action*, 71 J. PERSONALITY & SOC. PSYCHOL. 230, 230 (1996).

75. Christine Jolls, Cass R. Sunstein, & Richard Thaler, *A Behavioral Approach to Law and Economics*, in BEHAVIORAL LAW & ECONOMICS 13, 37–38 (Cass R. Sunstein ed., 2000) (discussing availability heuristic).

76. Thomas K. Srull & Robert S. Wyer, *The Role of Category Accessibility in the Interpretation of Information About Persons: Some Determinants and Implications*, 37 J. OF PERSONALITY & SOC. PSYCHOL., 1660, 1661 (1979).

are told words suggesting violence—“leg, break, arm, his”—immediately before being asked to characterize behavior of people they encountered, those subjects are more likely to characterize the behavior as aggressive.<sup>77</sup> People’s initial impressions of another person, especially if it creates particularly positive or negative emotions, will remain consistent despite new encounters in large part due to how we are primed to view them.<sup>78</sup>

Self-serving bias describes people’s tendency to interpret events in a way that is advantageous for their own esteem by taking credit for success and denying responsibility for failure.<sup>79</sup> Self-serving bias is shown through behavior demonstrating, “a common human tendency to interpret the world to make it square more comfortably with one’s own interests.”<sup>80</sup> People often overstate the role they have played in an event where they participated, particularly if they are proud of the outcome.<sup>81</sup> This is adoptive behavior, and can give a person the confidence to reach beyond what he or she could otherwise initiate.<sup>82</sup> These biases help decision makers feel better in difficult situations by relieving cognitive dissonance arising out of uncertainty.<sup>83</sup>

This bias is amplified in a profession like teaching, where a teacher’s belief in his or her own efficacy is essential for functioning.<sup>84</sup> For example, research shows teachers will attribute students’ high grades to their own skill in teaching and preparing, and low grades to the students’ failure to pay attention or prepare.<sup>85</sup> Teachers seem generally at a loss to identify causes for student misbehavior, but most teachers commonly cited students’ poor home lives as the

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77. *Id.* “Once the encoding takes place and an overall impression of the target is formed, however, it may then be used as a basis for inferring traits of the target that are unrelated to either the original behavioral information or the material in the priming task.” *Id.* at 1670. The likelihood any information will be used to encode future inputs increases with the number of times the person has been primed with that specific information. *Id.*

78. Kathryn M. Stanchi, *The Power of Priming in Legal Advocacy: Using the Science of First Impressions to Persuade the Reader*, 89 OR. L. REV. 305, 305–06 (2010).

79. Hunter McAllister, *Self-Serving Bias in the Classroom: Who Shows It? Who Knows It?*, 88 J. EDUC. PSYCHOL. 123, 123–31 (1996).

80. Ward Farnsworth, *The Legal Regulation of Self-Serving Bias*, 37 U.C. DAVIS L. REV. 567, 570 (2003).

81. Jeffrey J. Rachlinski, *The Uncertain Psychological Case For Paternalism*, 97 NW. U. L. REV. 1165, 1172–73 (2003).

82. Farnsworth, *supra* note 80, at 575 (discussing the role of self-serving biases and wishful thinking in motivating creative enterprises, arguing these biases, “create behavior and results closer to what the actor wants than he would otherwise be able to manage.”).

83. *Id.*

84. Leslie C. Soodak & David M. Podell, *Teachers’ Thinking About Difficult-to-Teach Students*, 88 J. EDUC. RES. 44, 45 (2001) (showing teacher feelings of efficacy are essential for daily management).

85. *Id.*

largest problem facing their students.<sup>86</sup> Yet students report misbehavior really arising out of situations within the classroom - needing more attention from teachers, teachers being disrespectful to students, and non-meaningful class activities.<sup>87</sup> Teachers reported spending immense amounts of time and frustration on student discipline—one stated they usually spent around forty minutes of a fifty-five-minute class disciplining.<sup>88</sup> Yet studies show teachers are often unable or unwilling to think about which of their own actions might be leading to misbehavior.<sup>89</sup>

*B. Cognitive Bias Impacting Discipline Decisions: Belief in a Just World and Overconfidence*

‘Just world theory’ posits that most people have intrinsically organized their mindset around the idea of ‘deservingness’ – that for both themselves and for others, the outcomes they receive are the ones they deserve.<sup>90</sup> In the face of examples of injustice or suffering, people are motivated to minimize these examples to maintain the appearance that the world gives out resources and ill fate accordingly as people deserve them.<sup>91</sup> For example, if people can compensate a victim for a one-time wrong, people have been shown to react with compassion, but if those same people were presented with an example of a victim suffering from larger systemic wrongs, people will begin to criticize the victim’s character.<sup>92</sup>

Studies have shown those who need to maintain their own personal emotional well-being while being asked to participate in meting out punishments

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86. Donetta J. Cothran, et al., *Attributions For and Consequences of Student Misbehavior*, 14 PHYSICAL ED. & SPORT PEDAGOGY 155, 160 (2009). A common answer from a teacher regarding student misbehavior reads, “I think it starts way back a long time ago. It starts at home. Unfortunately you have children who are coming from a single parent home.” *Id.*

87. *Id.* at 161–62.

88. *Id.* at 162. Another said, “You spend all day yelling and screaming. You spend so much time with the discipline you’re not able to do all the other kinds of things that make it fun.” *Id.*

89. *Id.* at 165. Cothran et al., also noted the student feedback also shows self-serving bias, and notes that children may not be positioned to understand the impact of a dysfunctional family structure if it is the only one they have ever known. *Id.* All in all, the authors noted neither side showed a willingness to “own” the problem of student misbehavior, and, “if one feels that they are not responsible then there is little reason to attempt to change behaviors.” *Id.* In another recent study where teachers who were shown a fictional case study involving a difficult-to-teach student, a large proportion suggested the solutions would need parent involvement, special education testing, or outside services – all solutions outside of the teacher’s control. Soodak & Podell, *supra* note 84 at 46–47.

90. Carolyn L. Hafer & Laurent Bègue, *Experimental Research on Just-World Theory: Problems, Developments, and Future Challenges*, 131 PSYCHOL. BULL. 128, 130 (2005).

91. Melvin J. Lerner, *The Justice Motive: Some Hypotheses as to Its Origins and Forms*, 45 J. PERSONALITY 1, 30 (1977).

92. Hafer & Bègue, *supra* note 90, at 130–31.

tend to show a stronger bias toward the belief that there is a just world.<sup>93</sup> Like other identifiable cognitive patterns, this has a functional component—it allows individuals to invest in long-term goals because they know any investments they make will be rewarded.<sup>94</sup> Research shows the more an individual has invested in a certain system, the more that person will generally psychologically distance themselves from examples of suffering or injustice within that system.<sup>95</sup>

The belief in a just world also leads people to re-interpret unjust events to see something that “‘make[s] up for’ the suffering itself.”<sup>96</sup> If there is an outcome with one positive aspect or one procedural protection, people with a strong just world orientation will use that to justify the entire situation.<sup>97</sup> This has a particular relevance for our juvenile and school discipline systems which claim to be non-punitive and only focused on the ‘best interest’ of the adolescent. Those with a strong ‘just world’ orientation might, for example, be more willing to overlook whether an adolescent needs to be on probation at all if they concurrently believe probation helps children.

Meanwhile, most human beings are confident in their own abilities regardless of actual outcomes.<sup>98</sup> For example, we generally consider ourselves to be better drivers than others,<sup>99</sup> and more ethical than others.<sup>100</sup> Almost all newlyweds assume their marriage is not at risk even with a divorce rate above 50%.<sup>101</sup> Lawyers tend to display unjustified confidence regarding the outcome

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93. Jozef Dzuka & Carolyn Dalbert, *The Belief in a Just World and Subjective Well-being in Old Age*, 10 AGING & MENTAL HEALTH 439, 440 (2006) (“Numerous studies have shown that the belief in a just world serves to protect subjective well-being.”).

94. Carolyn L. Hafer, *Investment in Long-Term Goals and Commitment to Just Means Drive the Need to Believe in a Just World*, 26 PERSONALITY AND SOC. PSYCHOL. BULL. 1059, 1069 (showing that when circumstances were potentially threatening to the belief in a just world, people who were concerned with long-term investments, either because of situational pressures or because of chronic tendencies, acted to protect that belief (e.g., by blaming the victim for her fate) more than did people less so invested).

95. *Id.*

96. Hafer & Bègue, *supra* note 90, at 146.

97. Mariet Hagedoorn et al., *Do Just World Believers Process Unfair Authoritative Decisions Differently?*, 51 APPLIED PSYCHOL.: AN INT’L REV. 126, 140 (2002).

98. David Dunning et al., *The Overconfidence Effect in Social Prediction*, 58 J. PERSONALITY & SOC. PSYCHOL., 568, 580 (1990).

99. Ola Svenson, *Are We All Less Risky and More Skillful Than Our Fellow Drivers?*, 47 ACTA PSYCHOLOGICA 143, 145–46 (1981) (reporting that 88% of drivers report that they are safer drivers than average).

100. Robert A. Prentice, *Behavioral Ethics: Can It Help Lawyers (And Others) Be Their Best Selves*, 29 NOTRE DAME J. L. ETHICS & PUB. POL’Y 35, 68–69 (2015).

101. Lynn A. Baker & Robert E. Emery, *When Every Relationship Is Above Average: Perceptions and Expectations of Divorce at the Time of Marriage*, 17 L. & HUM. BEHAV. 439, 442–43 (1993) (showing that recently married couples almost unanimously expect that they will not get divorced even when aware the average divorce rate is over 50%).

of litigation,<sup>102</sup> and even medical professionals with sub-par outcomes overestimate the effect their clinical interventions will have on patients.<sup>103</sup> In fact, anyone in a professional role who considers themselves to have “expertise” tends to be especially over-confident in their own judgments and more resistant to change.<sup>104</sup>

Overconfidence is especially prevalent in professional settings where uncertainty and vulnerability is discouraged, and in situations where a person is relied upon for instruction or guidance by others.<sup>105</sup>

### C. *Cognitive Bias Impacting School Discipline Appeals: Confirmation Bias*

Confirmation bias is the tendency to bolster a hypothesis by seeking consistent evidence while minimizing inconsistent evidence.<sup>106</sup> Once a person has an idea or theory, research shows people will undervalue, not notice, or not remember information conflicting with that theory.<sup>107</sup> Research has shown even when a complete invalidation of evidence is shown, people tend to adhere to their initial conclusions.<sup>108</sup>

When there is a dominant perspective of a group, members often will look for evidence to help them conform their perspectives to the dominant beliefs out of a desire to achieve harmony and fit in.<sup>109</sup> Research shows that in organizations like schools where there are a few central decision makers who give both implicit and explicit directions, lower level staff members will shape their perspectives to conform.<sup>110</sup> For example, research shows school psychologists or counselors are likely to find agreement with the teacher’s referral in testing a

102. Linda Babcock, George Loewenstein, & Samuel Issacharoff, *Creating Convergence: Debiasing Biased Litigants*, 22 L. & SOC. INQUIRY 913, 914–16 (1997).

103. P. Croskery & G. Norman, *Overconfidence in Clinical Decision Making*, 121 THE AM. J. MED. S24, S24–26 (2008).

104. Chip Heath & Amos Tversky, *Preference and Belief: Ambiguity and Competence in Choice under Uncertainty*, 4 J. RISK & UNCERTAINTY 5, 7–8, 23–24 (1991).

105. Andrea O. Baumann, Raisa B. Deber & Gail G. Thompson, *Overconfidence Among Physicians and Nurses: The ‘Micro-Certainty, Macro-Uncertainty’ Phenomenon*, 32 SOC. SCI. & MED. 167, 167–74 (1991). Any institution with long-standing staff who consider themselves the authority on “how things work” is at particular risk. Melissa L. Breger, *Making Waves or Keeping the Calm?: Analyzing the Institutional Culture of Family Courts Through the Lens of Social Psychology Groupthink Theory*, 34 L. & PSYCHOL. REV. 55, 56 (2010).

106. Barbara O’Brien, *Prime Suspect: An Examination Of Factors That Aggravate And Counteract Confirmation Bias In Criminal Investigations*, 15 PSYCHOL., PUB. POL’Y., & L. 315, 316 (2009).

107. *Id.* at 316–17.

108. Craig A. Anderson, Mark R. Lepper & Lee Ross, *Perseverance of Social Theories: The Role of Explanation in the Persistence of Discredited Information*, 39 J. PERSONALITY & SOC. PSYCHOL. 1037, 1039–41 (1980).

109. Jane M. Spinak, *Romancing the Court*, 46 FAM. CT. REV. 258, 267 (2008).

110. See Philip Tetlock et al., *Assessing Political Group Dynamics: A Test of the Groupthink Model*, 63 J. PERSONALITY & SOC. PSYCHOL. 403, 403 (1992).

student for special education needs despite contradictory evidence arising in the actual testing itself.<sup>111</sup> In another study, teachers were presented with a pool of students who were in actuality similar, but told some were referred for “Emotional Disturbance.”<sup>112</sup> The teachers involved in the study were almost four times as likely to identify behaviors from the Emotional Disturbance group as “problem” despite there being no actual pre-determined clinical or logistical differences between the two sets of students.<sup>113</sup>

Unchecked confirmation bias has also been noted to impact a person’s ability to adequately investigate an issue. A recent study where participants were asked to evaluate a case file of an assault featuring several possible suspects showed the effects of confirmation bias on investigations in action.<sup>114</sup> The participants who were asked early in the case to name a suspect showed a greater tendency to confirm that hypothesis by suggesting lines of investigation focusing on that suspect, doubting the applicability of motives only applicable to other suspects, and put greater stock in the reliability of witnesses incriminating that suspect.<sup>115</sup> These same pressures and resulting preference for confirming information also affect defense attorneys tasked with evaluating the decision to plea or proceed to trial.<sup>116</sup>

#### D. *What Increases and Decreases Use of Bias by Decision Makers*

While cognitive scientists have been able to clearly document observable effects of various biases, research showing a clear path to reduce these bias is less promising. Initially researchers hoped awareness of biases alone would be enough to combat them, but have found that, “a crucial component of automatic processes is their inescapability; they occur despite deliberate attempts to bypass or ignore them.”<sup>117</sup> People have a blind spot when it comes to biases that is resistant to education or even awareness.<sup>118</sup>

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111. C. O’Reilly et al., *The Confirmation Bias in Special Education Eligibility Decisions*, 18 SCH. PSYCHOL. REV. 126, 126–35 (1989).

112. John L. Hosp & Daniel J. Reschly, *Referral Rates for Intervention or Assessment: A Meta-Analysis of Racial Differences*, 37(2) J. SPECIAL EDUC. 67, 75–76 (2003).

113. *Id.* at 68.

114. O’Brien, *supra* note 106, at 318–20.

115. *Id.* at 328.

116. Molly J. Walker Wilson, *Defense Attorney Bias and the Rush to the Plea*, KAN. L. REV. 271, 300–03 (2016).

117. Patricia G. Devine, *Stereotypes and Prejudice: Their Automatic and Controlled Components*, 56 J. PERSONALITY & SOC. PSYCHOL. 5, 6, 15 (1989) (“Perceivers cannot attend to all aspects of a situation or their behavior. In situations in which controlled responses are precluded or interfered with, automatic processing effects may exert the greatest influence on responses.”).

118. Wilson, *supra* note 116, at 289 (showing how studies have demonstrated participants tend to believe they are less biased than others, and hold fast to those judgments even after receiving education about how they could have been biased.).

Given this body of research, it seems clear that a person overloaded with information will make more biased decisions, whereas a person who has more time and space will make less biased decisions. Unwanted implicated attitudes are used less as decision makers can access strategically induced controlled processes.<sup>119</sup> But the use of bias in decisions is far more likely when a person is under cognitive load, defined as when an individual is asked to process too many complex and dense messages.<sup>120</sup> As a result, their memory and ability to create higher order thought decreases. Fatigue, sleep deprivation, and feeling overwhelmed also appear, unsurprisingly, to increase reliance on intuitive processing.<sup>121</sup> Theories of bounded rationality argue that as demands on a person's cognition continue to increase a person will turn to strategies to allow coping –accessing more available mental images, spending less energy examining the validity of recent ideas, integrating less new information.<sup>122</sup>

Cognitive load also means that bias can increase if individuals feel helpless or stuck. Research shows if someone has been tasked with making a large number of recent decisions about unsolvable problems, that individual's attention will become increasingly fixated on easy and non-complex decisions.<sup>123</sup>

Researchers have tried to mitigate the effects of heuristics by informing or training people about bias detection and bias avoidance, but they found that training had no long-term effect on the decision making.<sup>124</sup> In part, this is due to how individuals making choices are often subject to multiple heuristics and made in conjunction with a group, leading to complex causal connections.<sup>125</sup> Further, because most heuristics are fundamentally adaptive – for example,

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119. Jennifer T. Kubota et al, *The Neuroscience of Race*, 15 NATURE NEUROSCIENCE 940, 946 (2012), <https://www.ncbi.nlm.nih.gov/pubmed/22735516> [<https://perma.cc/QR8P-9DAY>] (arguing emotion regulation strategies can demonstrate a lasting effect on decision making but require effortful practice over time to be successful). For an interesting example of how increased time and decreased caseloads could impact bias, see Shai Danziger, Jonathan Levav & Liora Avnaim-Pesso, *Extraneous Factors in Judicial Decisions*, 108 PROCEEDINGS NAT'L ACAD. SCI. 6889, 6892 (2011) (This shows evidence suggesting that as a panel of Israeli judges made repeated rulings, they showed an increased tendency not to rule in favor of the defendant regardless of the facts of the case. This tendency was overcome when the judges took a break to eat a meal, meaning the likelihood of a ruling in favor of a prisoner changed depending on how close to lunch the prisoner appeared.)

120. Shah & Oppenheimer, *supra* note 22, at 212.

121. Pat Croskerry, Geeta Singhal & Silvia Mamede, *Cognitive Debiasing 1: Origins of Bias and Theory of Debiasing*, 22 BMJ QUALITY & SAFETY ii58, ii58–ii64 (2013).

122. Shah & Oppenheimer, *supra* note 22, at 211–12.

123. Grzegorz Sedek et al., *Effects of Uncontrollability on Subsequent Decision Making: Testing the Cognitive Exhaustion Hypothesis*, 65(6) J. PERSONALITY & SOC. PSYCHOL. 1270, 1279 (1993).

124. Babcock et al., *supra* note 102, at 916; see also Farnsworth, *supra* note 80, at 582.

125. Jennifer Arlen, *Comment: The Future of Behavioral Economic Analysis Of Law*, 51 VAND. L. REV. 1765, 1777 (1998).

people who engage in over optimistic biased-thinking also tend to be more productive and happier – total removal of heuristics is neither possible nor desired.<sup>126</sup>

However, researchers have demonstrated success with combatting various biases by implementing procedures that break through mental inertia and “break the habit.” One promising practice sets up a mandatory process where a given official has to explicitly consider counterarguments to their own thinking before making a judgment.<sup>127</sup> Even if the decision maker thought of themselves as being open minded, the process of explicitly naming other options led the official to less biased decisions.<sup>128</sup> However, researchers have also found that consideration of a counterargument can actually *worsen* bias if done in a cursory way without having another plausible option.<sup>129</sup>

There has also been tentative success with increased oversight and accountability. Knowing a decision will be open to scrutiny and future accountability increases accuracy. If a person knows they will have to justify a decision later, research shows that person will survey a wider range of conceivably relevant cues and think through potential alternatives.<sup>130</sup> For example, requiring police officers to present evidence of how often their stops lead to finding contraband can improve bias in stops.<sup>131</sup> Studies have shown that if experts receive constantly unbiased feedback, they learn more quickly to avoid egocentric biases.<sup>132</sup> Other studies show subjects who will have to explain their actions were *more* likely to consider the actions of others in a situational context and less likely to attribute actions to alleged negative personality traits.<sup>133</sup>

This accountability, however, only works if the accountability is “pre-decisional” meaning that the person knows before making the decision that he or she will be asked to later justify it.<sup>134</sup> Research shows a decision maker who

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126. *Id.* at 1783.

127. Babcock et al., *supra* note 102, at 916.

128. *Id.*

129. O’Brien, *supra* note 106, at 330. For example, in the O’Brien study regarding confirmation bias in investigations, generating a hyper-factual (a theory about another suspect) did not decrease subject’s determination to stick with their initial suspect when there wasn’t any other real evidence leading away from that person. *Id.* at 329. O’Brien also cites to a similar study examining gender prejudice where men who were given the chance to show that they were not sexist (by disagreeing with a flagrantly sexist statement) went on to express more sexist ideas than the norm on later measure, with the theory being the men felt they had established virtuosity and could indulge in stereotypes. *Id.*

130. Fraudin, *supra* note 27, at 938–39.

131. L. Song Richardson, *Cognitive Bias, Police Character, and the Fourth Amendment*, 44 ARIZ. ST. L. J. 267, 287 (2012).

132. Rachlinski, *supra* note 81, at 1220–21.

133. Gary L. Wells et al., *Anticipated Discussion of Interpretation Eliminates Actor-Observer Differences in the Attribution of Causality*, 40 SOCIOMETRY 247, 251–52 (1977).

134. *Id.*

is asked after making a decision to justify it will go to great lengths to bolster and defend the decision.<sup>135</sup> Instead, if a decision maker is told in advance that they will have to justify future decisions in a certain way to a certain audience,<sup>136</sup> research shows most people will then apply more self-critical attention to judgment processes and put more effort into the calculus.<sup>137</sup>

Finally, research on implicit bias also suggests that one of the most effective long-term ways to combat inter-group bias is to create and foster strong inter-group relationships.<sup>138</sup> However, this integration takes further time and money—research on workplace integration shows it cannot be done through a few sponsored social outings; rather it must be done through intentional fostering over time of an inter-group team.<sup>139</sup>

#### E. Conclusion - The Impracticability of Unbiased Discretion

Courts have tried to recognize these loads by affording special deference to schools out of the belief a caring official who has the youth's best interest at heart should have significant latitude to make decisions.<sup>140</sup> These cognitive patterns are a large part of how a busy person bearing huge responsibilities handles an otherwise unmanageable load. Yet this research demonstrates how it is almost impossible that a responsible person is going to be able to neutrally take in information and make an unbiased decision in another person's best interest. People most often want information that is *consonant* with their beliefs rather than *dissonant*. If exposed to dissonant information, people are motivated to defend their beliefs, scrutinize challenging information, and search for information that will confirm.<sup>141</sup> This research fundamentally calls into question

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135. Fraidin, *supra* note 27, at 938–39.

136. It is also essential that the decision maker not know exactly how the decision maker will feel. For example, there is frequently criticism of the “close” nature of juvenile courts, leading some prosecutors and defense attorneys to self-edit valid arguments in front of judges who they know will not be pleased with certain challenges. See Josh Gupta-Kaga, *Where the Judiciary Prosecutes in Front of Itself: Missouri's Unconstitutional Juvenile Court Structure*, 78 MO. L. REV. 1245, 1282 (2014).

137. Jennifer S. Lerner, Julie H. Goldberg & Philip E. Tetlock, *Sober Second Thought: The Effects of Accountability, Anger and Authoritarianism on Attributions of Responsibility*, 24 PERSONALITY & SOC. PSYCHOL. BULL. 563, 563 (1998).

138. Tracy L. Dumas, Katherine W. Phillips & Nancy P. Rothbard, *Getting Closer at the Company Party: Integration Experiences, Racial Dissimilarity, and Workplace Relationships*, 24 ORG. SCI. 1377, 1377 (2013).

139. *Id.* at 1396.

140. *Mitchell v. Bd. of Trs. of Oxford Mun. Separate Sch. Dist.*, 625 F.2d 660, 662, 664–65 (5th Cir. 1980) (finding policy mandating expulsion for weapon possession was rationally related to school official's duty to provide a safe learning environment).

141. Alafair S. Burke, *Improving Prosecutorial Decision Making: Some Lessons of Cognitive Science*, 47 WM. & MARY L. REV. 1587, 1598 (2006).

the structure of how and when adults are legally allowed to remove a youth from school.

### III. STRUCTURAL ASPECTS OF SCHOOL DISCIPLINE LAW ENCOURAGES USE OF COGNITIVE BIAS

School discipline laws can differ from state to state, yet share certain structural similarities. In general, our system of meting out punishment to youth involves the following: an adult decision maker who has largely unchecked discretion, a strong belief in their own expertise, a limited understanding of the youth's perspective, a recalcitrant youth who is often traumatized, immense pressures for a quick decision, huge caseloads, and little to no accountability. These structural aspects of how we discipline youth encourage and enhance the use of bias in decisions made about any particular child.

#### A. *School Discipline Law Gives Startling Amounts of Discretion to Adult Officials*

J.J. was a senior in high school, on the honor roll with no disciplinary record, when he was suspected of stealing a computer.<sup>142</sup> Within forty minutes of being confronted by the principal and vice-principal, J.J. had admitted to taking the computer and called his father to bring the laptop to school.<sup>143</sup> The two officials then accused him of taking other items around the school, and even accused him of stealing the iPad in his backpack.<sup>144</sup> The two threatened to contact the University he was planning to attend as well as call the police to have him “convicted of a felony.”<sup>145</sup> After his father arrived with the laptop, the two officials told J.J. and his father that J.J. would be suspended indefinitely and would not be permitted on school grounds from here on.<sup>146</sup> The entire conversation took about forty minutes.<sup>147</sup> The superintendent, who had not been present or spoken independently with J.J. or his family, issued a formal recommendation that J.J. be suspended from school.<sup>148</sup> Later that day, his father and mother went back to school to ask if there was anything to be done to allow J.J. to graduate given his previously clean disciplinary record, but the principal told them J.J. was “done.”<sup>149</sup> Earlier, the principal said he was troubled by how long it took J.J. to confess, and by not admitting to the other thefts he could see

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142. Plaintiff's Response to Defendants' Motion for Summary Judgment at 1, *Jahn v. Farnsworth*, 617 F. App'x. 453 (6th Cir. 2015) (No. 2:13-cv-11309).

143. *Jahn v. Farnsworth*, 617 F. App'x. 453, 455 (6th Cir. 2015).

144. *Id.*

145. *Id.*

146. *Id.* at 456.

147. *See Jahn*, 617 F. App'x. at 455–56.

148. *See id.* According to the school's Code of Conduct, J.J. was supposed to be given an appeal to that very Superintendent despite her having issued a “final” recommendation. *Id.* at 457.

149. *Id.* at 456.

J.J. was, “very cold, calculating, and unremorseful.”<sup>150</sup> Later that night, J.J. killed himself.<sup>151</sup>

His parents brought suit against the school.<sup>152</sup> The actual decision to expel this young man and undercut his stability and future could not be reached through a legal claim. Instead his parents argued that the procedure used to functionally expel J.J. violated his procedural due process rights to an education.<sup>153</sup> His parents alleged many procedural violations: 1) the meeting was less than an hour; 2) that neither parent nor counsel was present; 3) that the Superintendent who formally issued the suspension was not there; 4) that the school did not follow the discipline procedure it had created itself; and 5) other thefts were being factored into J.J.’s suspension without any evidence actually connecting him to them.<sup>154</sup> The Sixth Circuit found the school complied with procedural due process just by having a meeting where J.J. was told about the charges and given a chance to respond.<sup>155</sup>

This decision shows the incredible amount of discretion given to school officials in making the decision to suspend or expel. Because public education has long been considered to be a property right, deprivation of the right to receive a public education does need to observe due process protections such as notice and the opportunity to be heard.<sup>156</sup> However, only the process is reviewable—so a court will almost never consider whether the official made the right call in finding whatever offense justified the length of the suspension or exclusion.<sup>157</sup> In J.J.’s case, this means the decision to indefinitely suspend an honor roll student based on a first offense—jeopardizing his college acceptance, his social connections, and his ability to become self-sufficient—is not reviewable in any way. Here, the official reasoning given for his suspension was the Principal’s perception that J.J., a pre-suicidal teenager with no discipline record who

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150. *Id.*

151. *Id.* at 456. His parents brought suit against the school, alleging violations of both his procedural and substantive due process rights to an education. *Id.* at 458. The school district won on both counts. *Id.* at 458, 464.

152. *Jahn v. Farnsworth*, 617 F. App’x. 453, 458 (6th Cir. 2015).

153. *Id.* at 458. The school policies given to J.J. and his parents at the beginning of the year provided any student subject to a long-term suspension or expulsion receive written notice of the violation and consequences, be allowed the opportunity for a formal hearing, have the right to bring counsel, and be allowed two layers of appeal—one to the superintendent and one to the board. *Id.* at 457. The school district won. *Id.* at 458, 464.

154. Plaintiff’s Response to Defendants’ Motion for Summary Judgment, *supra* note 142.

155. *Id.* at 461. The court also found that J.J.’s substantive due process rights were not damaged based on the “state-created-danger” doctrine (liability where the state knows its actions specifically endanger the plaintiff) because the doctrine is generally inapplicable to suicide. *Id.* at 463.

156. *See Warren v. City of Athens*, 411 F.3d 697, 709 (6th Cir. 2005).

157. *See Mitchell v. Bd. of Trs. of Oxford Mun. Separate Sch. Dist.*, 625 F.2d 660, 665 (5th Cir. 1980) (stating mandatory punishments do not violate substantive due process due to the wide latitude afforded schools to make disciplinary decisions).

confessed in forty minutes, was a “cold and calculating” character. J.J.’s family had no way to challenge this perception of the Principal, formed in less than an hour and then finalized into a life-altering decision.<sup>158</sup>

J.J.’s story exemplifies how the right to procedural due process has been interpreted with such flexibility as to be somewhat meaningless. In *Goss v. Lopez*, the court held a student “must be given *some* kind of notice and afforded *some* kind of hearing.”<sup>159</sup> Even though notice needs to be given, notice need not be formal, and there need be no time between the notice and the hearing.<sup>160</sup> Forty-minute, one-time conversations count as a sufficient hearing.<sup>161</sup>

The term “hearing” is vastly different in a school discipline context than a trial, and courts have been reluctant to recognize many rights. Youth are allowed to *bring* legal counsel, but the school does not have to allow attorneys to examine witnesses or speak in any way.<sup>162</sup> There does not have to be testimony—but if there is, the district can have any employee testify without allowing the student to confront the official who observed the misbehavior.<sup>163</sup> School officials can present hearsay evidence that would be impermissible in a court.<sup>164</sup> Perhaps most importantly, in many states school administrators are allowed to take into account prior encounters with the youth when deciding whether to suspend or expel.<sup>165</sup> Officials do not need to take or even consider alternate measures before deciding to suspend or expel a student.<sup>166</sup> Students can be given multiple suspensions for the same offense.<sup>167</sup> It is also worth knowing that these loose procedural protections only apply for the most serious of disciplinary options. Schools can transfer a student to a different school within the same district, even if the school is seen as ‘inferior’ and even if it is being framed a disciplinary decision, without a youth being able to challenge that decision.<sup>168</sup> A student

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158. See *supra* notes 142–154 and accompanying text.

159. 419 U.S. 565, 579 (1975).

160. *Id.* at 582.

161. *Jahn v. Farnsworth*, 617 F. App’x. 453, 464 (6th Cir. 2015); see *Engele v. Indep. Sch. Dist. No. 91*, 846 F. Supp. 760, 763, 766 (D. Minn. 1994) (holding school who declined to intervene in case of student who expressed fear of fellow classmates satisfied due process requirements through one-time meeting between student and school officials).

162. *Sykes v. Sweeney*, 638 F. Supp. 274, 278 (E.D. Mo. 1986).

163. *Id.*

164. *Id.* at 278–79 (“The courts have consistently declined to impose the formal procedures and rules of evidence which govern court trials on student disciplinary proceedings.”).

165. MO. REV. STAT. § 167.161.1 (1997). Specifically, the statute says school administrators cannot justify a suspension with only prior disciplinary actions but can consider those actions in light of a new situation. *Id.*

166. See *Walter v. Sch. Bd. of Indian River Cty.*, 518 So. 2d 1331, 1336 (Fla. Dist. Ct. App. 1987).

167. See *Reasoner v. Meyer*, 766 S.W.2d 161, 164 (Mo. Ct. App. 1989).

168. *Zamora v. Pomeroy*, 639 F.2d 662, 670 (10th Cir. 1981).

cannot challenge the decision to deprive them of the right to play a sport or do an extracurricular activity.<sup>169</sup>

This enormous amount of discretion is true even for physical contact with children. The Supreme Court held corporal punishment of two middle school students—one who received twenty swats with a paddle that left him out of school for days with a hematoma and another who was struck across the arms so hard the child was unable to use his arms for weeks—raised no Constitutional issues.<sup>170</sup> The Court held a child being beaten by an adult at his or her school has no procedural due process right to notice or a hearing.<sup>171</sup> The Court has also found it constitutional for a school official to use reasonable physical punishment *even if* the child was beaten after the parent tried to limit or restrict the use of corporal punishment.<sup>172</sup>

The casualness with which these decisions are made belie their true importance. A long-term suspension or expulsion from school can impact a youth's life as much or more than a criminal conviction. Youth are rarely able to find adequate resources for the time spent out of school. In Missouri, as soon as a student is suspended or expelled from one school, they are barred from transferring to another school district without explicit waiver of such bar by the superintendent in the new district.<sup>173</sup> The information about their suspension will be shared with a host of other adults regardless of other privacy interests.<sup>174</sup> Lost credits seriously delay and in some cases endanger graduation with a high school diploma.<sup>175</sup> A suspension or expulsion on record can diminish the chances the youth will be accepted into a four-year college.<sup>176</sup> Of schools who utilize disciplinary information in the admissions process, 93% report that an out of school suspension would influence their decision, while 76% report likewise for

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169. *See* Hebert v. Ventetuolo, 638 F.2d 5, 6 (1st Cir. 1981).

170. *Ingraham v. Wright*, 430 U.S. 651, 657, 682-83 (1977).

171. *Id.* at 682.

172. *Baker v. Owen*, 395 F. Supp. 294, 300 (M.D. N.C.), *aff'd*, 423 U.S. 907, 907 (1975).

173. MO. REV. STAT. § 167.171.

174. Stanley Matthew Burgess, *Missouri's Safe Schools Act: An Attempt to Ensure A Safe Education Opportunity*, 66 UMKC L. REV. 603, 613 (1998).

175. TONY FABELO ET AL., COUNCIL OF STATE GOV'TS JUST. CTR. & TEX. A&M U. PUB. POL'Y RES. INST., *BREAKING SCHOOLS' RULES* 54 (2011), <https://csgjusticecenter.org/youth/breaking-schools-rules-report/> [<https://perma.cc/R56C-SRZ7>]; MINER P. MARCHBANKS, III, ET AL., UCLA CIVIL RIGHTS PROJECT, *THE ECONOMIC EFFECTS OF EXCLUSIONARY DISCIPLINE ON GRADE RETENTION AND HIGH SCHOOL DROPOUT 15-16* (2013), <https://www.civilrightsproject.ucla.edu/resources/projects/center-for-civil-rights-remedies/school-to-prison-folder/state-reports/the-economic-effects-of-exclusionary-discipline-on-grade-retention-and-high-school-dropout/marchbanks-exclusionary-discipline-ccrr-conf.pdf> [<https://perma.cc/K84L-MX3A>].

176. MARSHA WEISSMAN & EMILY NAPIER, CTR. FOR COMMUNITY ALTERNATIVES, *EDUCATION SUSPENDED: THE USE OF HIGH SCHOOL DISCIPLINARY RECORDS IN COLLEGE ADMISSIONS*, 10 (2015), <http://www.communityalternatives.org/pdf/publications/EducationSuspended.pdf> [<https://perma.cc/5U64-8DYG>].

an in-school suspension.<sup>177</sup> Time away from peers and from meaningful opportunities create deficiencies in social emotional skills and harms youth who are often already at risk.<sup>178</sup> The seriousness of the consequences makes it even more disturbing that these decisions are made with such loose procedures and the absence of meaningful review.

### B. *Overloaded Officials*

Schools, particularly those that serve high-need youth, are understaffed.<sup>179</sup> School funding continues to fall in most states.<sup>180</sup> Public schools serving low-income students are often less able to access state or local funding than their counterparts serving higher income communities.<sup>181</sup> Teachers in urban or rural schools with high poverty receive comparatively low wages, often lack qualifications for the subject matter they are teaching, and cope with constantly fluctuating student populations in the school.<sup>182</sup> The average national caseload for a high school counselor is 350 students to one counselor.<sup>183</sup>

These funding problems lead to a few staff attempting to make a whole host of decisions. And unsurprisingly, studies have shown the larger the school is, the more frequently principals choose to suspend, expel, or report disciplinary

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177. *Id.*

178. AM. ACAD. PEDIATRICS, POLICY STATEMENT: OUT OF SCHOOL SUSPENSION AND EXPULSION (2013), <http://pediatrics.aappublications.org/content/131/3/e1000.full> [<https://perma.cc/9ZFW-JD87>].

179. U.S. DEP'T EDUC., ELIMINATING BARRIERS TO IMPROVING TEACHING 8 (2000), <https://eric.ed.gov/?id=ED450113> [<https://perma.cc/L23L-EU6Q>].

180. Thirty-one states provided less funding for public schools in 2014 than in 2008. MICHAEL LEACHMAN ET AL., CTR. ON BUDGET & POLICY PRIORITIES, MOST STATES HAVE CUT SCHOOL FUNDING, AND SOME CONTINUE CUTTING (2016), <http://www.cbpp.org/research/state-budget-and-tax/most-states-have-cut-school-funding-and-some-continue-cutting> [<https://perma.cc/V4KF-94H2>].

181. U.S. DEP'T EDUC., COMPARABILITY OF STATE AND LOCAL EXPENDITURES AMONG SCHOOLS WITHIN DISTRICTS: A REPORT FROM THE STUDY OF SCHOOL-LEVEL EXPENDITURES (2011), <https://www.ed.gov/news/press-releases/more-40-low-income-schools-dont-get-fair-share-state-and-local-funds-department-> [<https://perma.cc/75TG-SGTX>].

182. Brian A. Jacob, *The Challenges of Staffing Urban Schools with Effective Teachers*, 17 FUTURE CHILD 129, 132, 134, 139–40 (2007).

183. COLL. BD. NAT'L OFF. FOR SCH. COUNSELOR ADVOCACY, THE COLL. BD. ADVOCACY & POLICY CTR., NATIONAL SURVEY OF SCHOOL COUNSELORS AND ADMINISTRATORS 24 (2012), [https://secure-media.collegeboard.org/digitalServices/pdf/nosca/Barriers-Supports\\_TechReport\\_Final.pdf](https://secure-media.collegeboard.org/digitalServices/pdf/nosca/Barriers-Supports_TechReport_Final.pdf) [<https://perma.cc/9YF4-8RG6>]. Schools with 75% or more of the students on free and reduced lunch have averages reaching to 408 students to one counselor. *Id.* at 13. Counselors at larger schools often have as many as 500 students each. *Id.*

problems.<sup>184</sup> Although this is often attributed to ‘urban issues’, often it can arise out of just a basic problem with numbers.

In Michigan, education researchers found that in one district, Muskegon Public Schools, in 2013–2014, there were 6,065 long-term suspensions a year, or around twelve a day.<sup>185</sup> Statutorily, as in most states, only the superintendent, the school board, or a specific designee were able to long-term suspend or expel a student for an instance of violence, a gross misdemeanor, or persistent disobedience on school property.<sup>186</sup> The district would need a fleet of employees to adequately investigate, give notice, or hold hearings. Unsurprisingly, this burden has led to disciplinary decisions that are likely unwarranted. While the officials were dealing with some violent incidents, other suspension-worthy actions were writing a cuss word on art work, kissing another student, and throwing a snowball.<sup>187</sup> Increased demands with few resources means officials are more likely to skip a thorough evaluation and go immediately to the easiest solution.

Enhancing this, most teachers report choosing the profession out of an intrinsic motivation to help children and think of themselves as a caring person.<sup>188</sup> Many teachers or others working in education believe they personally can improve outcomes for youth. Studies of adults training to be teachers showed the majority believed they have a special calling and will be more successful than other individuals at teaching, despite having *no experience* outside of limited student-teaching roles.<sup>189</sup> Teachers typically overemphasize the importance of the affective variables like having a harmonious relationship

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184. DIV. ACCOUNTABILITY SERVICES, PUB. SCHS. N.C., SCHOOL SIZE AND ITS RELATIONSHIP TO ACHIEVEMENT AND BEHAVIOR 10 (2000), <http://www.ncpublicschools.org/docs/accountability/evaluation/legislative/size.pdf> [<https://perma.cc/HG58-LMLH>].

185. Lynn Moore, ‘*Staggering*’ Numbers of Students Expelled and Suspended, *MLive Probe Finds*, *MLIVE* (June 8, 2015, 5:00 AM), [http://www.mlive.com/news/muskegon/index.ssf/2015/06/staggering\\_numbers\\_of\\_students.html](http://www.mlive.com/news/muskegon/index.ssf/2015/06/staggering_numbers_of_students.html) [<https://perma.cc/7SX5-C6S4>]. The study quoted the President of the Muskegon School Board as saying, “It’s staggering the amount of kids we have out of school . . . It’s frightening . . . There are kids that figure out how to get suspended . . . They do it deliberately. They do it on purpose.” *Id.*

186. MICH. COMP. LAWS § 380.1311 (1976). It is worth noting that this statute applies to students in sixth grade and above, and only concerns acts of violence. *Id.*

187. Moore, *supra* note 185.

188. Duane A. Whitebeck, *Born To Be a Teacher: What Am I Doing in a College of Education?*, 15 *J. RES. CHILDHOOD EDUC.* 129, 132–34 (2000).

189. *Id.* at 134. One student, who has never taught before, said:

Special people are set aside. . . I speak to God daily, “Lord, tell me I am suppose to do this. Tell me that again.” But in praying to God, I would be like, He’s led me to teach. I feel like this would be the best thing that I could do with my abilities and talents . . . And trying to teach them why they live, the things that life has to offer that you wouldn’t get on the street, I’d rather be in school.

*Id.* at 133. The authors found it was common for students to speak in these religious terms about their abilities to teach. *Id.* at 134.

with students, while underemphasizing the actual technical skills needed in teaching.<sup>190</sup>

This emotional attachment to the work can trigger biases. Teachers who badly want to believe they are making differences in the lives of their students have a mental incentive to see their actions as positive and helpful.<sup>191</sup> Burnout happens faster and more seriously in situations where an individual undergoes more stress.<sup>192</sup> Professionals working as human service care providers experience higher levels of chronic workplace stress than other professions.<sup>193</sup> Teachers are shown to suffer from motivational problems at higher levels than other professions perhaps due to feelings of frustration and helplessness.<sup>194</sup> Teachers thus may exaggerate their role in a child's success, if only to be consistent with the dramatic rhetoric of teachers' value. Yet we see this pride in successful students too often accompanied by those same teachers minimizing their responsibility or agency for adverse outcomes for youth.<sup>195</sup>

Data from school exclusions shows the more subjective the offense is, the more the decision maker will penalize minority students—offenses like “disrespect” show more racial disparity than less subjective offenses like “excessive noise.”<sup>196</sup> Research shows teachers often report lower expectations for black students than for white students.<sup>197</sup> However, in a study wherein teachers were asked to rate students' academic profiles, requiring these teachers to explain and account for their rankings made for much more accurate decisions about students' abilities, with reduced differences based on the ethnic background of the student.<sup>198</sup>

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190. *Id.* at 134–35.

191. See McAllister, *supra* note 79, at 126, 128.

192. See Fernando Betoret, *Stressors, Self-Efficacy, Coping Resources, and Burnout Among Secondary School Teachers in Spain*, 26 EDUC. PSYCHOL. 519, 519, 520–21, 535 (2006).

193. See Vanda Lucia Zammuner, Lorella Lotto, & Christina Galli, *Regulation of Emotions in the Helping Professions: Nature, Antecedents, and Consequences*, in MENTAL HEALTH AND WORK: ISSUES AND PERSPECTIVES 217, 220 (Lou Morrow, Irene Verins, & Eileen Willis eds., 2002).

194. See Ayesha Madni et al., *Assessment of Teachers from a Social Psychological Perspective*, 59 REV. OF RES. IN EDUC. 54, 58, 61 (2015); see also Sarah Marsh, *Five Top Reasons People Become Teachers – And Why They Quit*, THE GUARDIAN (Jan. 27, 2015), <https://www.theguardian.com/teacher-network/2015/jan/27/five-top-reasons-teachers-join-and-quit> [https://perma.cc/84WB-QB6F].

195. See McAllister, *supra* note 79, at 126, 128.

196. Russel Skiba et al., *The Color of Discipline: Sources of Racial and Gender Disproportionality in School Punishment*, 34 URBAN REV. 317, 334 (2002).

197. Emil Haller, *Pupil Race and Elementary School Ability Grouping: Are Teachers Biased Against Black Children?*, 22 AM. EDUC. RES. J. 465, 466, 470, 476 (1985). Expectations of students' capabilities have long been shown to alter the way teachers treat and judge the students. See *Id.* at 476.

198. Ineke M. Pit-ten Cate et al., *Accuracy of Teachers' Tracking Decisions: Short- and Long-Term Effects of Accountability*, 31 EUR. J. PSYCHOL. EDUC. 225, 236 (2016).

C. *Baffling and Counterintuitive Behavior by Youth*

While the high caseloads and lack of training on a case impact adult's ability to understand a specific youth's action, even an adult with unlimited training and time would face barriers. Youth are focused on rewards, negligent of risks, and overvalue peer approval in a way that defies adult logic.<sup>199</sup> This disconnect inevitably influences an interaction between an adult official and a youth in trouble, and it can help explain why adult officials tend to interpret youth actions as dangerous in situations where youth are simply sensation seeking. This is particularly amplified by the difficulty most youth have speaking with authority figures, particularly if the youth is struggling with trauma.

In *A.M. v. Holmes*, a School Resource Officer was called down to a classroom to deal with a student who was *supposedly* out of control.<sup>200</sup> The teacher explained to the police officer that the seventh grade youth (F.M.) had been generating fake burps in class to make other students laugh.<sup>201</sup> After she ordered him into the hallway, he would lean back into the classroom to burp.<sup>202</sup> The teacher told the police officer she needed F.M. removed because she could not control him.<sup>203</sup> Despite F.M.'s compliance, the officer handcuffed F.M. and removed him from school to the juvenile detention center.<sup>204</sup> He was charged with "interfering with the educational process."<sup>205</sup> This incident gained no small amount of local attention, much to the chagrin of the school officials—but F.M. continued to clash with his school. A year later, that same School Resource Officer suspected F.M. of being the culprit in a school rumor of drug sales.<sup>206</sup> After a fairly invasive search, the officer found no drugs, but did find a belt buckle with a marijuana leaf and suspended F.M. for displaying inappropriate symbols.<sup>207</sup>

That moody teenagers ended up incarcerated for both minor and frustrating behavior is consistent with national data. Experts argue that too often, officials rely on arrests or expulsions for situations that could be better resolved in other ways.<sup>208</sup> Unfortunately, even just a few days in pre-trial detention is linked to

199. Steinberg, *supra* note 40, at 466, 472.

200. 830 F.3d 1123, 1129–30 (10th Cir. 2016).

201. *Id.* at 1129.

202. *Id.* at 1129–30.

203. *Id.* at 1130.

204. *Id.*

205. *Holmes*, 830 F.3d at 1130.

206. *Id.* at 1131.

207. *Id.* at 1131–32. It is at this point that his mother filed suit against the school district, alleging retaliation for her original publicity. *Id.* at 1132. The court found the officials were acting reasonably in applying the statute—that the fake burping supplied him with being the requisite probable cause—and thus qualified immunity attaches. *Id.* at 1134, 1139–40.

208. See Cristina Dacchille & Lisa Thureau, *Improving Police and Youth Interactions*, AM. BAR ASS'N (Apr. 2, 2013), <https://apps.americanbar.org/litigation/committees/childrights/content/articles/spring2013-0413-improving-police-youth-interactions.html> [<https://perma.cc/BZL9-GHX4>].

recidivism, worsening mental health conditions, and difficulties with school.<sup>209</sup> Yet, in both cases, the behavior seems to trigger the adult reaction, not due to the severity (or really, any, harm), but because of how baffling and frustrating the behavior is.

F.M.'s behavior is annoying and frustrating. Yet, it is so typical as to be a painfully familiar read for anyone who has a background in education. Through making his peers laugh, F.M. engaged in behavior designed to seek attention and a certain status from peers.<sup>210</sup> This is exactly the sensation-seeking behavior which seems either silly or malicious to adults but which is *irresistible* to an adolescent brain.<sup>211</sup> Even though it is seemingly completely illogical that F.M. would risk escalating punishment after already being sent out of the class just to have that “reward” of getting more class laughter and attention, this is consistent with what we would expect to see from our understanding of his stage of brain development.<sup>212</sup> Behaviors like carrying around a marijuana leaf belt—particularly for someone who doesn't actually have any marijuana—is consistent with research showing certain behavior adults deem as anti-social is really desired.<sup>213</sup>

The more irrational and the more counterintuitive the behavior is, however, the more it will complicate the judgment of adults. In F.M.'s case, the officer and the teacher found the burping to be *so frustrating* that it left both helpless. The officer testified that he thought if he left F.M. in school the teacher would be unable to continue teaching.<sup>214</sup> Adults in these situations have a mental bias toward interpreting these behaviors into previously understood categories and to support the desired outcome.<sup>215</sup> An exasperated teacher may look at a burping student and, knowing she has the option to remove him quickly, mentally work to justify that conclusion.

Adolescence, which is ripe with seemingly incomprehensible behavior and yet squarely linked to brain development, creates behavior which can complicate adults' ability to accurately read the situation.

#### D. Conclusion

Officials in youth-serving systems are set up for bias. The average adult staff member in a school likely fits the following description—overworked, tasked with making disturbingly quick decisions, knowing they will likely never have to explain or justify their actions, and confronted with a teenager acting in

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209. NAT'L JUVENILE DEF. CTR., THE HARMS OF JUVENILE DETENTION (2016), <http://njdc.info/our-work/publications/njdc-factsheets/> [<https://perma.cc/QX39-AMJP>].

210. See Dobbs, *supra* note 17.

211. *Id.*

212. Steinberg, *supra* note 40, at 466, 472.

213. Moffitt, *supra* note 199, at 689.

214. A.M. v. Holmes, 830 F.3d 1123, 1130 (10th Cir. 2016).

215. See Bargh et al., *supra* note 74, at 230; Babcock et al., *supra* note 102, at 915–16.

counterintuitive and frustrating ways. In advocating for similarly stricter standards in family court, Matthew Fraidin writes:

The decision-makers who chose a harsh option in these examples unlikely did so due to a conscious hatred of the youth or a desire to harm the child . . . Like other humans, however, judges are subject to the vicissitudes of the human mind. Like the rest of us, judges seek to avoid embarrassment and to build self-esteem and achieve the respect of others.<sup>216</sup>

In all likelihood, any given youth official cares deeply about their job and about the youth they serve. However, the all-too-human susceptibility to act on biases can create havoc if any given individual is given such immense discretion to make such serious decisions. According to cognitive psychology, we should expect a person in this kind of suboptimal work environment to make decisions reliant on stereotypes and generalities—and the data shows us they do.

#### IV. HOW THE LESSONS OF YOUTH DEVELOPMENTAL SCIENCE AND COGNITIVE BIAS CAN BE USED TO HELP YOUTH IN NEED

Scholars, activists, lawyers, and statisticians have done heroic work in showing how the decisions made theoretically in the best interests of our children can all too often result in arbitrary and biased treatment. Many voices are advocating for reforms in our school discipline system.<sup>217</sup> Yet transitioning from societal recognition of a problem to actual improvements in the treatment of youth will take systemic reform. Our youth systems have relied from the beginning on giving theoretically good-intentioned, caring officials the latitude to make decisions on behalf of youth.<sup>218</sup> Now, decades of research in cognitive science have demonstrated a long-term reduction in biased or irrational decisions will take more than just better rhetoric.

To guard against arbitrary and counterproductive adult actions, we have to advocate for proven methods that can reduce bias in decision makers. Schools need to introduce and legislatures need to codify both procedural protections that respond to research around reduction in cognitive bias as well as substantive protections to limit what kinds of punishments can be inflicted on youth. Each will require a great increase in resources to allow for more nuanced thinking which can make those procedures possible.

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216. Fraidin, *supra* note 7, at 966–67.

217. See, e.g., INT'L INST. FOR RESTORATIVE PRACTICE, IMPROVING SCHOOL CLIMATE: EVIDENCE FROM SCHOOLS IMPLEMENTING RESTORATIVE PRACTICES 2 (2014), <https://www.iirp.edu/pdf/IIRP-Improving-School-Climate.pdf> [<https://perma.cc/966Y-6CDM>].

218. CTR. ON JUV. & CRIM. JUST., *supra* note 333.

A. *Why ‘Perspective Shifting’ Training Alone is Insufficient and Counterproductive as a Strategy to Combat Bias*

Commonly, upon the discovery of bias, particularly of racial bias, the community and leaders will call for increased training.<sup>219</sup> For example, in the last few years it has become increasingly common to provide “trauma-informed” training to help officials shift tactics in working with youth.<sup>220</sup> In theory, this training could help informed schools follow advocates’ calls for increased mental health professionals on site and give teachers the appropriate tools to facilitate less punitive treatment of children.<sup>221</sup>

However, these trainings could also just ultimately pay lip service to reform if not introduced along with substantive limits on how those same teachers can suspend or expel youth. In a *New York Times Magazine* profile of a school attempting to shift discipline practices, a teacher described how, although excited with the program during training, when an actual confrontation with a student happened, she only complied with the program because it was required.<sup>222</sup> She told the reporter she was enthusiastic for the training, but in the face of an actual conflict, advocated for suspension and strongly resisted mediation.<sup>223</sup>

At this school, the training was only a first step, and an insufficient one at that. Teachers enjoyed the training, but still did not implement mediations as a first recourse.<sup>224</sup> Instead, the mediation actually *only* took place after the school created policy requiring a procedural protection (the mediation), and a substantive protection (no more long-term suspensions could be given for minor behavior).<sup>225</sup> States looking to copy that success need to be looking at making those policy changes as well.

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219. See, e.g., Mariah Stewart, *Black Ladue Students Protest Incidents, Assault Charges Filed Over Student Burned by Glue Gun*, ST. LOUIS AM. (Nov. 16, 2016), [http://www.stlamerican.com/news/local\\_news/black-ladue-students-protest-racist-incidents-assault-charges-filed-over/article\\_e1e8c658-ac45-11e6-9eec-8b10a9322d88.html](http://www.stlamerican.com/news/local_news/black-ladue-students-protest-racist-incidents-assault-charges-filed-over/article_e1e8c658-ac45-11e6-9eec-8b10a9322d88.html) [https://perma.cc/ZX9D-GT5T] (reporting that after recent racial incidents at a local high school, involving a child burning another child with a hot glue gun, a district spokesperson said, the “district has had ‘a lot of piecemeal things’ on diversity and equity and will now pursue a more ‘concerted effort.’”).

220. See, e.g., *Resources for Trauma-Informed Schools and Traumatic Situations*, TRAUMA AWARE SCHOOLS, <http://traumaawareschools.org/tsaResources/resourcecenter> [https://perma.cc/R9PZ-LRKZ] (explaining that recent research in the area has led to increased utility of trauma-informed training in various areas).

221. Samantha Buckingham, *Trauma Informed Juvenile Justice*, 53 AM. CRIM. L. REV. 641, 688–89 (2016).

222. Susan Dominus, *An Effective but Exhausting Alternative to High-School Suspensions*, N.Y. TIMES MAG. (Sept. 7, 2016), [https://www.nytimes.com/2016/09/11/magazine/an-effective-ut-exhausting-alternative-to-high-school-suspensions.html?\\_r=0](https://www.nytimes.com/2016/09/11/magazine/an-effective-ut-exhausting-alternative-to-high-school-suspensions.html?_r=0) [https://perma.cc/9JLY-8LVU].

223. *Id.*

224. *Id.*

225. *Id.*

Recent events in Missouri can further serve to show the limits of a change in rhetoric alone. A national report found that Missouri had the highest suspension rates for elementary level students in the nation, with a “disturbing” disparity between discipline given to black and white children in schools.<sup>226</sup> In the reaction since, people have started to talk much more openly about school discipline and voice a commitment to progress.<sup>227</sup> A wide variety of school districts in the Saint Louis area, urged in part by activists, have stated their commitment to limiting use of out-of-school suspensions.<sup>228</sup> Accordingly, the Missouri state legislature recently passed funding for training certifying schools as “trauma-informed.”<sup>229</sup>

Yet most policy remains unchallenged and undiscussed. The Missouri Safe Schools Act remains on the books.<sup>230</sup> This law, originally passed in 1996, mandates expulsions for certain offenses and increases the chances the police will become involved in a school dispute.<sup>231</sup> Even the school districts who have publicly voiced a commitment to decrease school suspensions have done so on limited terms. Although twenty school districts in the Saint Louis area participated in public events about lessening the use of school suspensions, only three districts agreed to change policies to reduce suspensions. Even then, those districts only agreed to limit suspensions and expulsions for children *third grade and below*.<sup>232</sup> Seventeen districts couldn’t even agree to that, and only committed publicly to study the issue.<sup>233</sup>

Even more concerning, districts who have previously decreased suspensions are actually increasing the use of cyber “alternative education”—providing suspended students with a log-in to an online credit recovery program, but forbidding access to district buildings.<sup>234</sup> Yet to many, it is obvious this is simply a suspension by another name.

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226. DANIEL LOSEN ET AL., CTR. FOR CIVIL RIGHTS REMEDIES, ARE WE CLOSING THE SCHOOL DISCIPLINE GAP?, 7, 17 (2015), [https://www.civilrightsproject.ucla.edu/resources/projects/center-for-civil-rights-remedies/school-to-prison-folder/federal-reports/are-we-closing-the-school-discipline-gap/AreWeClosingTheSchoolDisciplineGap\\_FINAL221.pdf](https://www.civilrightsproject.ucla.edu/resources/projects/center-for-civil-rights-remedies/school-to-prison-folder/federal-reports/are-we-closing-the-school-discipline-gap/AreWeClosingTheSchoolDisciplineGap_FINAL221.pdf) [https://perma.cc/6447-XAGQ].

227. See, e.g., Kristen Takata, 3 *St. Louis-Area Districts Will Stop Suspensions for Preschoolers Through 3rd Grade*, ST. LOUIS POST DISPATCH (Nov. 14, 2016), [http://www.stltoday.com/news/local/education/st-louis-area-districts-will-stop-suspensions-for-preschoolers-through/article\\_4551f435-9ce7-5f17-9fa7-6986338f6677.html](http://www.stltoday.com/news/local/education/st-louis-area-districts-will-stop-suspensions-for-preschoolers-through/article_4551f435-9ce7-5f17-9fa7-6986338f6677.html) [https://perma.cc/FV38-LQ2D].

228. *Id.*

229. H.R. 2565 & 2564, 98th Gen. Assemb., Reg. Sess. (Mo. 2016).

230. MO. REV. STAT. § 160.261 (2017).

231. *Id.*; MPACT, MISSOURI SAFE SCHOOLS ACT 1–2 (2004), <http://missouriparentsact.org/wp-content/uploads/2015/11/SafeSchoolsAct-FS-7.2014.pdf> [https://perma.cc/9ZYJ-LABA].

232. Takata, *supra* note 227.

233. *Id.*

234. Heather Vogell & Hannah Fresques, ‘Alternative’ Education: Using Charter Schools to Hide Dropouts and Game the System, PRO PUBLICA (Feb. 21, 2017), <https://www.propublica.org/>

The approach of the Missouri legislature in appropriating new funds for training could be seen as encouraging but is also completely insufficient. Research on bias shows that even once a person is convinced to change beliefs, the new perspective is essentially layered on top of older ways of thinking.<sup>235</sup> When forced to react quickly, people are still likely to respond in accordance with their old beliefs.<sup>236</sup> It takes dedicated habit breaking as well as a situation that allows for deeper thought to truly shift perspective.<sup>237</sup> Training historically has had mixed results, with people reporting bursts of changed perspective but without long-term effects.<sup>238</sup> The more successful programs work on a longitudinal basis with extensive cognitive re-training.<sup>239</sup>

Many “trauma-aware” programs also primarily concern issues that youth may be facing at home but completely ignore issues in the school environment.<sup>240</sup> Emphasizing youth’s status as *previously* traumatized without forcing the responsible adult to examine the *current* situation the youth is in

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article/alternative-education-using-charter-schools-hide-dropouts-and-game-system [https://perma.cc/FH22-BA58]; St. Louis Public Schools just settled with a high school student claiming he had been denied the right to an education as what the district called “alternative education placement” was actually discipline imposed without due process. Jessica Karins, *SLPS Settles with Family of Suspended Student*, ST. LOUIS AM. (Mar. 31, 2018), [http://www.stlamerican.com/news/local\\_news/slps-settles-with-family-of-suspended-student/article\\_00f2febe-3445-11e8-9a08-ebda33fecf48.html](http://www.stlamerican.com/news/local_news/slps-settles-with-family-of-suspended-student/article_00f2febe-3445-11e8-9a08-ebda33fecf48.html) [https://perma.cc/K3LN-B4WY]. In the case, after L.W. and another student allegedly stole Metro bus tickets from a teacher’s desk, he was barred from entering any school buildings for a year’s time but given access to an online program. *Id.* L.W., who did not have a computer at home, was told to complete his courses on a computer at the public library. *Id.* Not only did this mean he was unsupervised by a teacher and expected to teach himself the material, but the library computers had enforced time limits on computer use and a truancy officer, believing he should have been in school, ejected him from the library on multiple occasions. *Id.* L.W. was given no chance of appeal, and ultimately earned no credits toward graduation for a year, delaying him considerably. *Id.*

235. Timothy Wilson, Samuel Lindsey & Tonya Y. Schooler, *A Model of Dual Attitudes*, 107 PSYCHOL. REV. 101, 104 (2000).

236. *Id.* at 114–15.

237. John F. Dovidio, Kerry Kawakami & Samuel L. Gaertner, *Reducing Contemporary Prejudice: Combating Explicit and Implicit Bias at the Individual and Intergroup Level*, in REDUCING PREJUDICE AND DISCRIMINATION 137, 143–44 (Stuart Oskamp ed., 2000).

238. Patricia Devine et al., *Long-Term Reduction in Implicit Race Bias: A Prejudice Habit-Breaking Intervention*, 48 J. EXPERIMENTAL SOC. PSYCHOL., 1267, 1267–68 (2012).

239. Dovidio et al., *supra* note 237, at 143.

240. See, e.g., *Helping Families Protect Themselves from Recurring Trauma*, NAT’L CLEARINGHOUSE ON FAMILIES & YOUTH (Aug. 4, 2014), [https://ncfy.acf.hhs.gov/news/2014/08/qa-helping-families-protect-themselves-recurring-trauma?utm\\_source=youth.gov&utm\\_medium=Federal%20Links&utm\\_campaign=Reports-and-Resources](https://ncfy.acf.hhs.gov/news/2014/08/qa-helping-families-protect-themselves-recurring-trauma?utm_source=youth.gov&utm_medium=Federal%20Links&utm_campaign=Reports-and-Resources) [https://perma.cc/HBB5-S9PT].

could actually worsen bias. By priming adults to treat youth as damaged, these programs seem to perpetuate a self-fulfilling prophecy of child-trauma.<sup>241</sup>

What we know about confirmation bias and self-serving bias also shows individuals have a tremendous ability to rationalize decisions that are advantageous for their needs as the right decision all around.<sup>242</sup> The teacher or principal in the Muskegon school tasked with appropriately resolving 6065 suspensions each school year<sup>243</sup> will not be able to internalize or use an alternative, less punitive perspective if removing the troubled youth from the school is an option and will create what that adult sees as a calmer and better system. Training has to be accompanied by more resources and by real limits to be effective.

### *B. Reform Which Will Create Change*

If we know and believe biased decision making flourishes in situations with few resources, high stress, immense pressure to be right, and little accountability, then our solutions must attack that exact situation. The way to a less punitive and more racially equitable system of discipline is two-fold. In the short-term, we need to shelter youth from being subjected to exclusion or carceral involvement as much as possible. Over the long-term, we will have to provide more resources and more accountability for adults to make better decisions.

Part of the rationale in advocating for these increased procedural protections, which limit adult decisions, comes from the vastly different law governing students with disabilities. In 1991, Congress updated the Education for All Handicapped Children Act of 1975 into the Individuals with Disabilities Education Act (“IDEA”). The IDEA mandates a variety of actions public school officials have to take, which is intended to ameliorate the historic lack of adequate services for disabled students.<sup>244</sup> The legislation contains two central requirements: (1) each child has a right to a “free appropriate public education” where public schools have to provide instruction and services designed to meet the unique needs of a child;<sup>245</sup> and (2) each child has the right to be educated in the “least restrictive environment” which requires schools educate students with disabilities alongside non-disabled peers to the “maximum extent

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241. See e.g., YOUTH VIOLENCE, *supra* note 55. Its “Introduction to Risk and Protective Factors” section provides a discussion of “risk assessment” underpinning adult understanding of youth misbehavior. *Id.*

242. See Babcock et al., *supra* note 102, at 915–16.

243. Moore, *supra* note 185.

244. U.S. OFF. SPECIAL EDUC. PROGRAMS, HISTORY: TWENTY-FIVE YEARS OF PROGRESS IN EDUCATING CHILDREN WITH DISABILITIES THROUGH IDEA (2000), <https://www.ed.gov/policy/spced/leg/idea/history.pdf> [<https://perma.cc/NX3H-JWP4>].

245. 20 U.S.C. § 1412(a)(1) (2015).

appropriate.”<sup>246</sup> IDEA mandates that schools draft an “Individualized Education Program” (“IEP”) for each youth in collaboration with the youth’s parents, teachers, attorneys for each side, and other interested parties.<sup>247</sup>

The IDEA provides procedural and substantive protections for disabled youth from school discipline far and above what non-disabled youth experience. Any suspensions or expulsions of a youth with an IEP beyond an initial ten-day threshold are subject to review.<sup>248</sup> If a school wants to go beyond the ten-days, the entire IEP team must gather, review the student’s file and other relevant information, and make a group decision to determine whether the behavior was a manifestation of the student’s disability or school’s failure to implement the individualized education program.<sup>249</sup> If so, then the schools *cannot* remove the youth unless the school can show the case is abnormally serious, and even then the removal is limited to forty-five days.<sup>250</sup> In upholding this limitation on a school’s ability to remove a youth with a disability without a more thorough review, the Supreme Court wrote, “Congress very much meant to strip schools of the *unilateral* authority they had traditionally employed to exclude disabled students, particularly emotionally disturbed students, from school.”<sup>251</sup>

The IDEA is far from a perfect law, and both schools, parents, disability advocates, and others rightly have critiques of how it could be improved. For example, patterns in disability diagnosis reveal racial disparities in what youth are diagnosed with before services are even brought up.<sup>252</sup> But the IDEA has had a great deal of success in getting schools to provide services to youth who were previously excluded.<sup>253</sup> The core of that success is the statutory limitations placed on school discretion. Schools did not choose to start educating youth with disabilities based on better training or individual teachers who decided to commit to fairness – it took a statutory private right of action opening the school to lawsuits to really create the incentive to change.

The lesson from twenty-five years of the IDEA is that states can reduce bias and achieve better outcomes if states are willing to extend these safeguards to all youth. This can be accomplished in part through mandating procedures school officials must take prior to subjecting youth to punishment or exclusion.

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246. 20 U.S.C. § 1412(a)(5)(A) (2015).

247. 20 U.S.C. § 1414(d)(1)(B) (2015).

248. 20 U.S.C. § 1415(k)(1)(B) (2015).

249. 20 U.S.C. § 1415(k)(1)(E)(i) (2015).

250. 20 U.S.C. § 1415(k)(1)(G) (2015).

251. *Honig v. Doe*, 484 U.S. 305 (1988).

252. Paul L. Morgan & George Farkas, *Is Special Education Racist?*, N.Y. TIMES (June 24, 2015), <https://www.nytimes.com/2015/06/24/opinion/is-special-education-racist.html> [<https://perma.cc/7T64-AU7Z>].

253. U.S. OFF. SPECIAL EDUC. PROGRAMS, *supra* note 244. In the early 1970s, only one in five students with a disability was able to receive a public education – currently, more than six million children are receiving specialized services. *Id.*

Although the Supreme Court is unlikely to recognize more Constitutional due process protections, states can create a statutory right to continue education without schools undertaking certain rigorous procedures.

Specifically, this should include ‘bias aware’ elements such as forcing responsible school officials to state specific and articulable facts behind the decision to suspend, with specific requirements that the official have explicitly considered counterfactuals and other arguments.<sup>254</sup> Rather than having another employee of the district review the suspension, the state could create a body with independent review power, who can evaluate a situation without the goal of confirming the decision.<sup>255</sup> States could create ‘pre-decisional accountability’<sup>256</sup> by requiring principals and teachers to do a yearly review in which each employee has to justify discipline decisions and explain inequities. Finally, states and localities could create a private right of action where families have an avenue other than due process rights to sue districts for violations of process.<sup>257</sup>

Of course, this is all only accomplishable with a dramatic increase in school and juvenile system funding. Substantial evidence, in addition to common sense, shows that better funded schools have better outcomes for youth.<sup>258</sup> Better funding means reduced caseloads and additional programs to use as alternatives to the more punitive options. Asking school officials—whether teachers, principals, administrators, or even just school security officers—to access more controlled thought processes will be almost futile without providing the time and space for them to do so.

We also need to re-examine the idea of substantive protections for youth. Data shows exclusion from school rarely serves a positive purpose for youth,<sup>259</sup> but has directly negative results in actually facilitating entry into criminal behaviors and the juvenile system.<sup>260</sup> Contact with the juvenile justice system and even short periods of detention can be damaging to a youth’s well-being, expose the youth to the risk of sexual and physical assault, and is “inherently

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254. Richardson, *supra* note 131, at 291.

255. Gupta-Kaga, *supra* note 136, at 1245, 1248.

256. Fraidin, *supra* note 27, at 955.

257. This has already been done quite successfully for students with disabilities—parents who suspect their child is not being treated fairly due to a disability can force schools to comply with both procedural and substantive requirements through bringing a suit against the school. See Alyssa Kaplan, *Harm Without Recourse: The Need For A Private Right Of Action In Federal Restraint And Seclusion Legislation*, 32 CARDOZO L. REV. 581, 605–07 (2010) (arguing the private right of action is essential to protect students with disabilities and must be extended to decisions by schools to restrain and seclude children).

258. C. Kirabo Jackson, et al., *The Effects of School Spending on Educational and Economic Outcomes: Evidence from School Finance Reforms*, QUARTERLY J. OF ECON. 18 (Jan. 2015), <http://www.nber.org/papers/w20847> [<https://perma.cc/SE3N-EPXE>].

259. Skiba, *supra* note 12, at 38.

260. Steven Teske Testimony, *supra* note 9, at 2.

criminogenic.”<sup>261</sup> While we can make the process for exclusion or adjudicating more rigorous, and we can work on funding a system with alternatives, we also need to consider simply forbidding adults from utilizing certain practices. Proposals include formally banning the practice of shackling and restraining youth;<sup>262</sup> no longer allowing armed police officers in schools or referring cases to the police;<sup>263</sup> mandating the use of non-punitive practices instead of the wide use of both expulsions and one-day or activity suspensions to control behavior;<sup>264</sup> and, of course, ending mandatory long-term suspensions and expulsions from school.<sup>265</sup>

Ultimately, this is the choice the Supreme Court made in *Roper v. Simmons*.<sup>266</sup> Justice Kennedy wrestled with the compelling evidence that we just don’t know enough about the teenage brain to know when a youth is a true sociopathic killer and when the youth just simply made a huge mistake.<sup>267</sup> Given the lack of certainty, the Court chose the avenue of mercy, and ended the use of the death penalty for those who committed crimes when under the age of eighteen.<sup>268</sup> A powerful message of humility can be taken from this. School officials who work with youth are faced every day with the uncertainty of truly understanding the actions of the young and still growing. But society as a whole is beginning to grapple with evidence that the judgments coming out of that uncertainty are far too often linked to adult convenience and adult bias. It is incumbent upon us to place affirmative restrictions on our adult officials’ ability

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261. Tamar Birckhead, *Closing The Widening Net: The Rights Of Juveniles At Intake*, 46 TEX. TECH. L. REV. 157, 165 (2013).

262. See *Campaign Against Indiscriminate Juvenile Shackling*, NAT. JUVENILE DEFENSE COUNCIL, <http://njdc.info/campaign-against-indiscriminate-juvenile-shackling> [https://perma.cc/CYK8-Q3EE].

263. *First Ever U.S. Senate Hearing on Ending the School to Prison Pipeline*, NAT. JUVENILE JUSTICE NETWORK, Dec. 12, 2012, <http://www.njjn.org/article/school-to-prison-pipeline-us-senate-hearing> [https://perma.cc/V8B6-L925].

264. JENI OWEN ET AL., DUKE CENTER FOR CHILD & FAMILY LAW POLICY, DUKE LAW SCHOOL, *INSTEAD OF SUSPENSION: STRATEGIES FOR EFFECTIVE DISCIPLINE* 3, 6 (2015), [https://law.duke.edu/childedlaw/schooldiscipline/downloads/instead\\_of\\_suspension.pdf](https://law.duke.edu/childedlaw/schooldiscipline/downloads/instead_of_suspension.pdf) [https://perma.cc/SF7M-R9MV].

265. See Russell Skiba et al., *Are Zero Tolerance Policies Effective In The Schools? An Evidentiary Review And Recommendations*, 9 AM. PSYCHOLOGICAL ASS’N ZERO TOLERANCE TASK FORCE 852, 859 (Dec. 2008), <https://www.apa.org/pubs/info/reports/zero-tolerance.pdf> [https://perma.cc/6HMN-4R9Q].

266. *Roper v. Simmons*, 543 U.S. 551, 570–73 (2005).

267. *Id.* at 573 (“If trained psychiatrists with the advantage of clinical testing and observation refrain, despite diagnostic expertise, from assessing any juvenile under 18 as having antisocial personality disorder, we conclude that States should refrain from asking jurors to issue a far graver condemnation—that a juvenile offender merits the death penalty.”).

268. *Id.* at 578.

to inflict lasting punishments if we want to give our youth the chance to outgrow their mistakes.

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