DEVELOPMENTAL DUE PROCESS: WAGING A CONSTITUTIONAL CAMPAIGN TO ALIGN SCHOOL DISCIPLINE WITH DEVELOPMENTAL KNOWLEDGE

Josie Foehrenbach Brown[*]

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* Assistant Professor, University of South Carolina School of Law; J.D., Harvard Law School. I would like to thank my colleagues Lisa Eichhorn and Libba Patterson as well as Professor Irene Merker Rosenberg and the participants in the Washington & Lee Law School/Frances Lewis Center Junior Faculty Workshop on Children and the Law for helpful comments as this Article progressed. As always, I want to acknowledge my children, Lucian and Veronica, for the inspiration they provide for my academic exploration of children's rights and needs.

Public schools are critical sites in children's legal socialization. Serving close to ninety percent of our country's elementary and secondary students, public schools imprint better and worse versions of the Constitution-in-practice on children's nascent legal consciousness. The administration of school discipline is the American child's likely first introduction of the government's implementation of law and order, and, regrettably, the question of what the Constitution demands in this context has received too little sustained attention.

Since the Supreme Court articulated a minimum of constitutionally required process in school suspension proceedings in *Goss v. Lopez*[1] in 1975 and rejected an Eighth Amendment challenge to the imposition of corporal punishment in school in *Ingraham v. Wright*[2] in 1977, the Court has not squarely revisited the question of what due process demands in the domain of school discipline.[3] However, in a variety of

1. 419 U.S. 565 (1975).

2. 430 U.S. 651 (1977).

3. The Court has tackled First and Fourth Amendment questions generated out of disciplinary encounters. *See* Morse v. Frederick, 551 U.S. 393, 403–10 (2007) (finding First Amendment did not bar school from suspending student for display of what appeared to be pro-drug sign at school event); Bd. of Educ. v. Earls, 536 U.S. 822, 837–38 (2002) (finding school requirement that participants in extracurricular activities submit to random drug tests did not violate Fourth Amendment); Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 664–65 (1995) (rejecting claim that random drug testing of student athletes violated Fourth Amendment); Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 685–86 (1986) (rejecting First Amendment claim of student

school cases members of the Court have repeatedly posited a characterization of the relationship between child and school officials as one marked not by adversariness but only by benevolence.[4] This description seems sadly anachronistic with the ascendance of zero tolerance approaches and the increasingly prevalent use of the juvenile criminal justice system to address student misbehavior at school.

More recently, outside the school context, in *Roper v. Simmons*,[5] the Supreme Court illuminated a potential developmental dimension to the due process inquiry as it assessed the constitutionality of imposing the death penalty on adolescents. Informed by an already extensive body of psychological observations as well as by the growing scientific literature on how the processes of adolescent brain development often significantly compromise teens' decision-making capacities, the *Roper* majority identified adolescent deficits in the ability to assess consequences and to control their behavior as a predicate for invalidating juvenile death penalty statutes. *Roper*'s implicit recognition of the specific attention required by the distinct character of a child's constitutional claim has enormous constructive potential in other conflicts between child and state.

This Article examines the potential transferability of *Roper*'s recognition of the relevance of developmental psychology and neurobiology to a constitutional assessment of prevalent school disciplinary practices. It proceeds in six parts. Part I examines the *Roper* decision and its acknowledgment of the constitutional relevance of developmental psychology and neurobiology to appraisals of the fairness of the punishment of youth. This section charts how advocates laid the legal and scientific groundwork for *Roper*'s result, provides a review of the growing body of medical literature on adolescent brain development and its behavioral implications, and documents *Roper*'s migrating influence as a developmentally sensitive approach to the handling of youthful offenders has gained currency among legal scholars.

punished for vulgar speech at school assembly); New Jersey v. T.L.O., 469 U.S. 325, 341–42 (1985) (finding Fourth Amendment applicable to search by school officials, whose conduct would be judged by reasonableness standard); Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503 (1969) (holding First Amendment barred suspension of students wearing anti-war armbands when such expression did not cause substantial disruption of school operations).

4. *See T.L.O.*, 469 U.S. at 349–50 (Powell, J., concurring) (contrasting teacher-student relationship with law enforcement officer–suspect relationship for purposes of discerning applicable Fourth Amendment search standard, describing "commonality of interests between teachers and their pupils," and characterizing typical teacher as acting out of a sense of "personal responsibility for the student's welfare as well as for his education"); *Goss*, 419 U.S. at 594 (Powell, J., dissenting) (describing "reality of the normal teacher-pupil relationship" as "one in which the teacher must occupy many roles—educator, adviser, friend, and, at times, parent-substitute" but noting that relationship between teacher and "the chronically disruptive or insubordinate pupil" could become adversarial); *see also Acton*, 515 U.S. at 664 (citing description of teacher-student relationship from Powell dissent in *Goss*).

5. 543 U.S. 551 (2005). *Roper* was decided on the basis of the application of the Eighth Amendment prohibition of cruel and unusual punishment to the execution of persons between the ages of sixteen and eighteen. *Roper*, 543 U.S. at 578. The Eighth Amendment is applied to the states through the Due Process Clause of the Fourteenth Amendment. *See* Robinson v. California, 370 U.S. 660, 666–67 (1962) (applying Eighth Amendment through the Fourteenth Amendment to state law criminalizing drug addiction). The substantive content of its prohibitions can be understood as the elaboration of what fundamental fairness—the fulcrum of all due process analysis—requires in the punishment context.

Prior to addressing how a constitutional argument for school discipline reform could be constructed, Part II surveys the historical antecedents of contemporary calls for school discipline reform and identifies the analytical components of earlier school disciplinary reform efforts. Further, Part II assesses the perceived and actual shortcomings of prior reforms in order to explain the necessity of examining the substantive content of disciplinary practices rather than scrutinizing only the procedural facets of disciplinary protocols. Part III demonstrates the timeliness of *Roper*'s arrival in an era in which school disciplinary policies have become increasingly punitive and rigid. These changes represent school officials' response to public fears about potentially deadly school violence and to legally imposed performance requirements that heighten the perceived urgency of eliminating disciplinary situations that compromise the learning environment. Schools' use of zero tolerance policies as a response to a wide spectrum of student behavior has drawn mounting opposition. Critics have identified significant tension between such practices and basic principles of fairness while also casting doubt on the educational effectiveness of such approaches. Recently, groups such as the National Institute of Child Health and Human Development, the National Association for the Accreditation of Teacher Education, and the American Psychological Association have joined the chorus of criticism, urging that school disciplinary practices be aligned with the current knowledge about child and adolescent development.

Using *Roper* as an analytical springboard, Part IV attempts to fashion a new theoretical engine for the constitutional appraisal of school disciplinary policies and practices. To define what the constitutional trajectory of school discipline policy and practice should be, this Article revisits the work of seminal theorists who have examined both the nature of administrative due process generally and the application of due process norms to schools in particular, exploring how the enforcement of adherence to due process principles in the administration of government programs simultaneously advances instrumental and dignitary objectives. Having demonstrated that current disciplinary practices in many public schools are not anchored in the best available knowledge about the behavioral implications of child and adolescent brain development, this Article contends that the assertion that educators need autonomy and consequently deserve deference in the realm of school discipline unwisely elides an appropriately rigorous examination of whether such deference has been earned. Instead, this Article contends that such institutional departures from relevant professional and scientific norms should be treated as prima facie evidence that the demands of due process are not satisfied. Aware that this Article argues for the invocation of a variant of perennially disquieting and often amorphous substantive due process analysis, it seeks to deflect the familiar and often legitimate critiques of this mode of constitutional argument by weaving together theoretical recommendations for the reorientation of substantive due process analysis and connecting my argument to the techniques of faithful but modernizing constitutional interpretation proffered by leading constitutional theorists.

Part V explores the strategic implementation of due process theorizing. My approach incorporates the growing awareness among academic commentators that constitutionally grounded institutional reforms may often be most effectively pursued by campaigning for internally generated and voluntarily adopted program

modifications rather than relying exclusively or predominantly on externally imposed change. Although this Article does not exclude the utility of litigation as one productive dimension of a reform strategy, it recognizes the limitations of such an approach and therefore emphasizes a course that concentrates on generating a consciousness of what due process demands among educators within schools, capitalizing on a policy trend that can already be detected in several major school systems. By documenting that developmentally calibrated school discipline alternatives are available and in use, this Article sets the stage for the first wave of advocacy for developmentally appropriate discipline reform aimed at school systems, legislative bodies, and the public. This Article also explains how such an advocacy campaign can represent an exercise in democratic constitutionalism, the effort by nonjudicial actors to illuminate the content and implications of constitutional principles.

To underscore the importance of the reform enterprise, Part VI incorporates the insights from scholarship examining youths' legal socialization through encounters with the criminal justice system and addresses the connection between children's school disciplinary experience and their sense of both the legitimacy of law and their place with the legal order. The over-utilization of disciplinary strategies that remove children from school while overlooking the causes of their behaviors cannot be reconciled with either schools' functional objectives or their normative commitments. If uncorrected, such an approach threatens to alienate the targeted youth from governmental authority and to deflate their faith in constitutional values. This Article seeks to chart a path away from such a future.

I. *ROPER*, PUNISHMENT, AND THE CONSTITUTIONAL RELEVANCE OF THE SCIENCE OF ADOLESCENT DEVELOPMENT

A. The Road to Roper

In *Roper v. Simmons*,[6] the Court faced an Eighth Amendment challenge to the imposition of the death penalty in cases in which the defendant was over fifteen but under eighteen years of age.[7] *Roper* required the Court to revisit its 1989 decision in *Stanford v. Kentucky*[8] in which a narrow majority had rejected a challenge to the imposition of capital punishment on sixteen- and seventeen-year-olds. *Stanford* declined to extend the logic of *Thompson v. Oklahoma*,[9] which, only one year earlier, had invalidated the imposition of capital punishment when the defendant was under sixteen at the time of the offense.

In *Thompson*, only a plurality of Justices had been willing to find that a survey of state legislative enactments and jury determinations revealed a consensus to prohibit the execution of offenders under sixteen.[10] The plurality found that the views of relevant professional organizations (such as the American Society for Adolescent

6. 543 U.S. 551 (2005).

7. *Roper*, 543 U.S. at 555–56.

8. 492 U.S. 361 (1989).

9. 487 U.S. 815 (1988) (plurality opinion).

10. *Thompson*, 487 U.S. at 829–30.

Psychiatry and the American Orthopsychiatric Association), the teachings of major religious groups, and the laws of other Western nations—all of which found the execution of a fifteen-year-old unjustifiable—confirmed this conclusion.[11]

Although Justice O'Connor hesitated to find that the record in the case provided sufficient evidence of a changed societal consensus,[12] she concurred in *Thompson*'s result on narrower grounds. She concluded that Oklahoma's legislature had not explicitly contemplated the application of the death penalty to persons below sixteen when it enacted a death penalty statute with no specified minimum age while enacting separate criminal provisions that would permit juveniles to be tried as adults in certain circumstances. Justice O'Connor therefore concluded that the imposition of the death penalty would be inappropriate because a state should have addressed the question of death eligibility for persons under sixteen deliberately and explicitly.[13]

When *Stanford* reprised the question of whether the Constitution required the exclusion of youthful offenders from a death penalty regime, a majority of Justices rejected the claim that the execution of persons who committed crimes at age sixteen or seventeen contravened evolving standards of decency and constituted cruel or unusual punishment.[14] The focal point of the constitutional analysis was the assessment of states' practices to discern the existence of a sufficient national consensus that such executions were unacceptable.[15] To Justice Scalia, there was no place for an independent judicial appraisal of the proportionality of the punishment, a point sharply contested by Justice O'Connor's concurring opinion.[16] The Scalia plurality opinion specifically rejected the opinions of professional associations, including the American Society for Adolescent Psychiatry, as irrelevant to the constitutional inquiry at hand.[17]

The *Roper* Court's receptivity to arguments rejected in *Stanford* can be explained by several interrelated legal and extralegal developments. *Stanford* had been decided on the same day as *Penry v. Lynaugh*,[18] which rejected a categorical constitutional

11. *Id.* at 830–32 nn.32–34.

12. Although acknowledging that eighteen states imposed a minimum age of sixteen for capital punishment and fourteen other states had abandoned the practice entirely, Justice O'Connor questioned the plurality's inference of a firm and sufficient consensus against the execution of offenders younger than sixteen. *Id.* at 850–51 (O'Connor, J., concurring). Justice O'Connor asserted that the declaration of a national consensus should be deferred until more state legislatures had directly addressed the issue. Moreover, she found that the available data did not conclusively establish either that all fifteen-year-olds lacked the moral culpability to justify the use of capital punishment or that fifteen-year-olds as a class would not be deterred by the possible application of the death penalty. *Id.* at 848–53, 857–58.

13. *Id*. at 857–58.

14. *See* Stanford v. Kentucky, 492 U.S. 361, 380 (1989) (plurality opinion) (holding by four justices that Eighth Amendment does not protect against execution of sixteen- and seventeen-year-olds); *id.* at 381–82 (O'Connor, J., concurring) (concurring in that holding).

15. *Id.* at 370–72.

16. *Id*. at 382 (O'Connor, J., concurring).

17. *Id*. at 377–78 (plurality opinion). Justice Kennedy, who would write for the Court in *Roper*, joined this opinion. In dissent, Justice Brennan defended the value of the views expressed by professionals with relevant expertise in assessing juveniles' capacities. *Id.* at 388–89 (Brennan, J., dissenting).

18. 492 U.S. 302 (1989). In *Penry*, Justice O'Connor authored the majority opinion but wrote separately to underscore that, although a jury must be given the opportunity to consider retardation as a mitigating factor in sentencing, the then-available clinical understanding of mental retardation could not support the categorical conclusion that the application of capital punishment to mentally retarded offenders violated the Eighth

prohibition of the use of capital punishment for mentally retarded offenders. In 2002, however, the Court revisited the question of the constitutionality of imposing capital punishment on persons who met the medical diagnostic criteria for mental retardation in *Atkins v. Virginia*[19] and discerned a significant shift in social consensus regarding the application of capital punishment to the mentally retarded. After surveying relevant changes in state law and practice, the *Atkins* majority applied its independent judicial judgment and concluded that the retributive and deterrent objectives of the death penalty could not be reconciled with the best available understanding of the functional and social limitations accompanying mental retardation, writing:

> [C]linical definitions of mental retardation require not only subaverage intellectual functioning, but also significant limitations in adaptive skills such as communication, self-care, and self-direction that became manifest before age 18. Mentally retarded persons frequently know the difference between right and wrong and are competent to stand trial. Because of their impairments, however, by definition they have diminished capacities to understand and process information, to communicate, to abstract from mistakes and learn from experience, to engage in logical reasoning, to control impulses, and to understand the reactions of others. There is no evidence that they are more likely to engage in criminal conduct than others, but there is abundant evidence that they often act on impulse rather than pursuant to a premeditated plan, and that in group settings they are followers rather than leaders. Their deficiencies do not warrant an exemption from criminal sanctions, but they do diminish their personal culpability.[20]

Going on to address deterrence, the majority opinion observed:

> With respect to deterrence—the interest in preventing capital crimes by prospective offenders—"it seems likely that 'capital punishment can serve as a deterrent only when murder is the result of premeditation and deliberation.'" Exempting the mentally retarded from that punishment will not affect the "cold calculus that precedes the decision" of other potential murderers. Indeed, that sort of calculus is at the opposite end of the spectrum from behavior of mentally retarded offenders. The theory of deterrence in capital sentencing is predicated upon the notion that the increased severity of the punishment will inhibit criminal actors from carrying out murderous conduct. Yet it is the same cognitive and behavioral impairments that make these defendants less morally culpable—for example, the diminished ability to understand and process information, to learn from experience, to engage in logical reasoning, or to control impulses—that also make it less likely that they can process the information of the possibility of execution as a penalty and, as a result, control their conduct based upon that information.[21]

Amendment's proportionality requirement by applying a punishment that exceeded such offenders' culpability. *Id.* at 338.

19. 536 U.S. 304 (2002).

20. *Id.* at 318 (footnotes omitted).

21. *Id.* at 319–20 (citation omitted).

To support its conclusion, the Court drew on post-*Penry* medical literature addressing the mentally retarded offender's suggestibility and limited capacity for self-regulation.[22]

The *Atkins* approach created new momentum for a renewed constitutional attack on the juvenile death penalty, mobilizing advocacy groups, scholars, and the American Bar Association.[23] Given its framing of the *Atkins* rationale, the Court could now be seen as increasingly receptive to arguments couched in terms of how an appropriate legal understanding of the nature of adolescence must incorporate medical developmental perspectives on adolescent functioning when the Court considered the legitimacy of asserted retributive and deterrent justifications for juvenile death sentences.

Medical advancements, particularly the application of magnetic resonance imaging ("MRI") technology to the study of brain development,[24] offered juvenile death penalty opponents a critical supplement to arguments previously couched in terms of general principles drawn from the observation of adolescent behavior and the corollary imposition of legal restrictions on adolescents' actions. New medical documentation of significant differences between adolescent and adult brain functioning appeared influential in legislatures even before becoming part of legal filings in new constitutional challenges to the juvenile death penalty.[25]

Prior to *Roper*, the Supreme Court had recognized that adolescence was a time of vulnerability: "[Y]outh is more than a chronological fact. It is a time and condition of life when a person may be most susceptible to influence and to psychological damage. . . . Particularly 'during the formative years of childhood and adolescence,

22. *Id.* at 318 nn.23–24.

23. *See* Jay D. Aronson, *Brain Imaging, Culpability and the Juvenile Death Penalty*, 13 PSYCHOL. PUB. POL'Y & L. 115, 127–29 (2007) (describing testimony of medical researchers and child and adolescent psychiatrists before state legislative committees considering how to address juvenile offenders post-*Atkins*). Scholars such as Elizabeth Scott, Laurence Steinberg, and Thomas Grisso, who were affiliated with the MacArthur Foundation Research Network on Adolescent Development and Juvenile Justice, were also active during this period, disseminating the legal and scientific bases for reform of the American juvenile justice system so as to redress inequities in the handling of adolescent offenders. See MacArthur Foundation Research Network on Adolescent Development & Juvenile Justice, Bringing Research to Practice in the Juvenile Justice System, http://www.adjj.org (last visited July 11, 2010) for a description of the Network's agenda. *See* Jeffrey Fagan, Atkins, *Adolescence, and the Maturity Heuristic: Rationales for a Categorical Exemption for Juveniles from Capital Punishment*, 33 N.M. L. REV. 207, 248 (2003) (advocating for extension of *Atkins* to juveniles); Barry C. Feld, *Competence, Culpability, and Punishment: Implications of* Atkins *for Executing and Sentencing Adolescents*, 32 HOFSTRA L. REV. 463, 463 (2003) (same).

24. *See, e.g.*, Jay N. Giedd, *Structural Magnetic Resonance Imaging of the Adolescent Brain*, 1021 ANNALS N.Y. ACAD. SCI. 77, 78 (2004) (noting that "MRI can also be used to assess brain function"); Elizabeth R. Sowell et al., In Vivo *Evidence for Post-Adolescent Brain Maturation in Frontal and Striatal Regions*, 2 NATURE NEUROSCIENCE 859, 859 (1999) (describing how MRI technology allowed researchers to observe brain development processes rather than having to derive developmental information from study of infrequently available teenager cadaver brains).

25. Aronson, *supra* note 23, at 127–28 (describing campaign against juvenile death penalty in the states). Professor Aronson quoted Northwestern law professor Steven Drizin's comments about the impact of medical testimony on adolescent brain development's relevance to an assessment of juveniles' legal culpability as follows: "When a medical doctor or psychiatrist testifies in front of a legislature, they get [sic] a level of respect that advocates generally will not get. They're talking about hard science. . . . Legislators stand up and listen." *Id.* at 128.

minors often lack the experience, perspective, and judgment' expected of adults."[26] This sympathetic portrayal of the adolescent could be drawn from the ordinary but sustained observations of teenagers, reflecting what "any parent knows."[27] However, as medical understanding of adolescent brain functioning grew through advances in the use of brain imaging technology, such as the functional MRI,[28] such information could be integrated with psychological studies and observations, and a richer and more scientifically grounded understanding of the origins of the familiar, but often problematic, adolescent behavior patterns materialized.[29]

Problematic adolescent behavior frequently stems from judgment deficits now understood to be attributable to the incomplete maturation of the brain. The capacity to regulate and manage one's behavior reflects the completion of several key steps in brain development, a process that is not usually concluded until the mid-twenties.[30] Effective self-regulation requires a variety of capabilities: impulse control, the calculation of the costs and benefits of one's actions, resistance of social or peer influences, and the mediation of emotional responses to events. As a group, adolescent brains essentially lack the structural supports that make possible the complex process of exercising what would be objectively considered good judgment. The prefrontal cortex constitutes the most influential component of the brain's decision-making apparatus. Often characterized as the "executive center" of the brain,[31] the fully developed prefrontal cortex appears to make it possible to plan ahead, to compare the merits and hazards of available alternatives,[32] to resist impulses to act, and to filter emotion-driven reactions through a prism of rationality.[33] The prefrontal cortex, "the area of sober

26. Eddings v. Oklahoma, 455 U.S. 104, 115–16 (1982) (quoting Bellotti v. Baird, 443 U.S. 622, 635 (1979)); *see also* Ashcroft v. Free Speech Coal., 535 U.S. 234, 248 (2002) ("Our society, like other cultures, has empathy and enduring fascination with the lives and destinies of the young. Art and literature express the vital interest we all have in the formative years we ourselves once knew, when wounds can be so grievous, disappointment so profound, and mistaken choices so tragic, but when moral acts and self-fulfillment are still in reach.").

27. Roper v. Simmons, 543 U.S. 551, 569 (2005).

28. *See generally* Arthur W. Toga et al., *Mapping Brain Maturation*, 29 TRENDS IN NEUROSCIENCES 148 (2006). Functional MRI technology offers depictions of the brain in action. *See generally id.*

29. *Cf. id.* at 154–56 (analyzing MRI results from various developmental disorders found in children and adolescents).

30. *See* Sowell et al., *supra* note 24, at 860 (noting that several aspects of brain development, including processes responsible for "response inhibition, emotional regulation, planning and organization," continue to develop into one's mid-twenties").

31. Shintaro Funahashi, Neuronal Mechanisms of Executive Control by the Prefrontal Cortex, 39 NEUROSCIENCE RES. 147, 148 (2001).

32. *See* Abigail A. Baird & Jonathan A. Fugelsang, *The Emergence of Consequential Thought: Evidence from Neuroscience*, 359 PHIL. TRANSACTIONS ROYAL SOC'Y LONDON B 1797, 1798 (2004) (discussing the brain's ability to form counterfactuals of events and potential outcomes).

33. Several studies have documented that, with age, the inhibitory capacity of the prefrontal cortex becomes better able to modulate the emotional responses driven by the brain's amygdala and limbic system. *E.g.*, Neir Eshel et al., *Neural Substrates of Choice Selection in Adults and Adolescents: Development of the Ventrolateral Prefrontal and Anterior Cingulate Cortices*, 45 NEUROPSYCHOLOGIA 1270, 1270–71 (2007); Ahmad R. Hariri et al., *Modulating Emotional Responses: Effects of a Neocortical Network on the Limbic System*, 11 NEUROREPORT 43, 43 (2000); William D.S. Killgore et al., *Sex-Specific Developmental Changes in Amygdala Responses to Affective Faces*, 12 NEUROREPORT 427, 427–33 (2001); K. Rubia et al., *Functional*

second thought,"[34] acquires these functional capacities only after several physical brain maturation processes have been completed.[35] One such process is synaptic pruning, which increases the efficiency with which the brain handles information.[36] Another vital component of prefrontal cortex maturation is the completion of myelination, the process by which the brain's wiring becomes insulated by a white fatty covering that improves the speed with which information can be transmitted throughout the brain.[37] Proceeding from back to front in the brain,[38] myelination of the areas of the dorsal brain, which are responsible for the higher cognitive tasks associated with complex decision making, continues well into adolescence.[39]

The adverse impact of these structural deficiencies in the teen brain is exacerbated by psychosocial aspects of adolescence that further impair the exercise of judgment.[40] Adolescents lack the breadth of experiences that inform the decision-making process, and they find it difficult to assess a range of possible options.[41] Stress further hampers adolescent decision making.[42] Teens experience more mood volatility than adults[43] and

Frontalisation with Age: Mapping Neurodevelopmental Trajectories with fMRI, 24 NEUROSCIENCE & BIOBEHAVIORAL REVS. 13, 13 (2000).

34. Sarah Spinks, *Adolescent Brains Are Works in Progress*, FRONTLINE, http://www.pbs.org/wgbh/pages/frontline/shows/teenbrain/work/adolescent.html (last visited July 12, 2010) (internal quotation marks omitted).

35. *See* Nitin Gogtay et al., *Dynamic Mapping of Human Cortical Development During Childhood Through Early Adulthood*, 101 PROC. NAT'L ACAD. SCI. 8174, 8175–77 (2004) (distinguishing between brain functions earlier to develop, such as motor and sensory skills, and brain functions later to develop, such as those involved in "executive function, attention, and motor coordination"); Michael C. Stevens et al., *Functional Neural Networks Underlying Response Inhibition in Adolescents and Adults*, 181 BEHAV. BRAIN RES. 12, 19 (2007) (suggesting that brain development differences between adolescents and adults "could underlie age-related differences in functional connectivity").

36. Children's brains consist of more gray matter volume than young adults' brains, a finding linked to a shift in brain composition as white matter increases through myelination. Toga et al., *supra* note 28, at 149. The brain undergoes a gray matter growth spurt in the frontal lobe, the locus of planning and impulse control, just prior to puberty and then gray matter begins to thin. Nat'l Inst. of Mental Health, Teenage Brain: A Work in Progress, http:/www.nimh.nih.gov/publicat/teenbrain.cfm (last visited July 12, 2010). Between the ages of thirteen and eighteen, a person loses one percent of his or her gray matter each year. Spinks, *supra* note 34. Excessive thinning of gray matter in this region has been documented in the brains of teens with a form of childhood onset schizophrenia, a disorder producing severe impairments of reasoning, self-control, and planning. Nat'l Inst. of Mental Health, *supra*.

37. *See* Baird & Fugelsang, *supra* note 32, at 1800 (describing prefrontal cortex maturation).

38. Sowell et al., *supra* note 24, at 859.

39. The process of myelination is not usually completed until the third decade of life. Francine M. Benes et al., *Myelination of a Key Relay Zone in the Hippocampal Formation Occurs in the Human Brain During Childhood, Adolescence, and Adulthood*, 51 ARCHIVES GEN. PSYCHIATRY 477, 481 (1994).

40. *See generally* Laurence Steinberg & Elizabeth Cauffman, *Maturity of Judgment in Adolescence: Psychosocial Factors in Adolescent Decision Making*, 20 LAW & HUM. BEHAV. 249 (1996).

41. *See* Bonnie L. Halpern-Felsher & Elizabeth Cauffman, *Costs and Benefits of a Decision: Decision-Making Competence in Adolescents and Adults*, 22 J. APPLIED DEVELOPMENTAL PSYCHOL. 257, 268 (2001) (concluding that "adults outperform adolescents on decision-making competence, as defined by their spontaneous considerations of options, risks, long-term consequences, and benefits associated with each decision").

42. *See* Elizabeth S. Scott & Thomas Grisso, *The Evolution of Adolescence: A Developmental Perspective on Juvenile Justice Reform*, 88 J. CRIM. L. & CRIMINOLOGY 137, 144 (1997) (discussing

often grapple with more anxiety and self-consciousness.[44] In addition, adolescents undergo a process of social reorientation that makes peer approval increasingly important.[45] Adolescents exhibit an often overpowering attraction to risk taking and sensation seeking even when they understand cognitively that such pursuits are hazardous.[46] As described by Scott and Steinberg, "[t]his gap in time, between the increase in sensation seeking around puberty and the later development of 'regulatory competence,' may combine to make adolescence a time of inherently immature judgment."[47]

This reality of neurobiological and psychological development must be incorporated into legal responses to adolescent misconduct if such responses are to be considered fair and proportionate. Despite being affected by these physical processes and attendant functional deficits, most adolescents "age out" of antisocial behavior.[48] Thus, although adolescents have increasingly become the objects of adults' fear and hostility[49]—as manifested in legal and social policy—the expanding body of psychological observations and medical knowledge about brain development justifies approaching adolescents with a sympathetic appreciation of their vulnerability. Such an approach would seek to address their errors in judgment with a response that mitigates the potential consequences of their impaired condition.[50] The translation of this understanding may differ depending on the nature of the behavior at issue and the context in which it occurs; however, principles of fundamental fairness and

malleability of juveniles); L.P. Spear, *The Adolescent Brain and Age-Related Behavioral Manifestations*, 24 NEUROSCI. & BIOBEHAV. REVS. 417, 423 (2000) (discussing impact of stress on risky behaviors).

43. *See generally* Jeffrey Jensen Arnett, *Adolescent Storm and Stress, Reconsidered*, 54 AM. PSYCHOLOGIST 317 (1999).

44. *See* Christy Miller Buchanan et al., *Are Adolescents the Victims of Raging Hormones: Evidence for Activational Effects of Hormones on Moods and Behavior at Adolescence*, 111 PSYCHOL. BULL. 62, 90–91, 96 (1992) (indicating that evidence suggests higher anxiety in adolescence than in childhood).

45. *See* Laurence Steinberg & Kathryn C. Monahan, *Age Differences in Resistance to Peer Influence*, 43 DEVELOPMENTAL PSYCHOL. 1531, 1531–33 (2007) (discussing both normative regulation and "way station" peer influence theories).

46. Although potentially dangerous, an adolescent's attraction to risk may be a necessary and even constructive part of development that allows the youngster to explore, experiment, attain self-esteem, and acquire informative experience. *See* Spear, *supra* note 42, at 421 (identifying positive consequences of risk taking, such as exploring adult behavior and gaining self-esteem).

47. ELIZABETH S. SCOTT & LAURENCE STEINBERG, RETHINKING JUVENILE JUSTICE 48–49 (2008).

48. *See* Terrie E. Moffitt, *Adolescence-Limited and Life-Course-Persistent Antisocial Behavior: A Developmental Taxonomy*, 100 PSYCHOL. REV. 674, 674–77 (1993) (discussing curve of delinquency rates with age). *See generally* John H. Laub & Robert J. Sampson, *Understanding Desistance from Crime*, 28 CRIME & JUST. 1 (2001).

49. *See, e.g.*, John J. Dilulio, Jr., *The Coming of the Super-Predators*, WKLY. STANDARD, Nov. 27, 1995, at 23 (LEXIS) (positing that "severely morally impoverished juvenile super-predators" threatened to create deadly and destructive crime wave and arguing for punishment policy that would neutralize threat posed by such youths).

50. The recognition of adolescent immaturity of judgment has historically been reflected in legal rules that work to mitigate the potential harms flowing from teens' flawed decisions. *See* Elizabeth Cauffman & Laurence Steinberg, *The Cognitive and Affective Influences on Adolescent Decision-Making*, 68 TEMP. L. REV. 1763, 1763 (1995) (noting variety of rules reflecting an effort to protect adolescents from their decisional limitation in areas such as health care decision making, contract enforcement, consent to marriage, and legal emancipation).

proportionality demand recognition that the physical process of brain development makes adolescents vulnerable to mistakes in judgment, and the disciplinary response to problematic behavior must reflect recognition of that vulnerability.

B. The Roper *Decision*

Justice Kennedy rooted *Roper* in the essential principles of Eighth Amendment death penalty jurisprudence. Capital punishment could be utilized to achieve two goals: retribution for the harm inflicted by the defendant and deterrence of similar behavior by future offenders.[51] As the Court had explained in *Enmund v. Florida*,[52] the invocation of retribution as a justification for the selected punishment "very much depends on the degree of [the offender's] culpability."[53] Thus, if their developmental immaturity impaired adolescents' capacity to control their behavior or to appreciate their behavior's consequences, the imposition of the ultimate sanction would amount to "nothing more than the purposeless and needless imposition of pain and suffering,"[54] an illegitimate and disproportionate use of the state's power.

The Court's ability to draw on scientific literature on adolescent brain development—material unavailable in 1989—eroded *Stanford*'s durability as a precedential barrier to the categorical rejection of the death penalty for juveniles.[55] The nation's most influential medical and mental health organizations as well as the American Bar Association and civil rights and human rights advocacy organizations filed amicus briefs supporting the juvenile defendant's assertion that the imposition of capital punishment for offenses committed by persons under eighteen should be considered an Eighth Amendment violation.[56] The so-called "medical brief" was drafted through a process in which an advisory panel of research scientists, including specialists focused on adolescent physiology, gathered essential relevant research and identified significant new findings.[57] This material would suggest that the foundational

51. *See* Roper v. Simmons, 543 U.S. 551, 571 (2005).

52. 458 U.S. 782 (1982).

53. *Enmund*, 458 U.S. at 800.

54. Coker v. Georgia, 433 U.S. 584, 592 (1977).

55. *See* Aliya Haider, Roper v. Simmons*: The Role of the Science Brief*, 3 OHIO ST. J. CRIM. L. 369, 370–76 (2006) (describing process of writing amicus brief in *Roper* on behalf of collection of medical and professional organizations, including American Medical Association, American Psychiatric Association, American Society for Adolescent Psychiatry, American Academy of Child and Adolescent Psychiatry, American Academy of Psychiatry and the Law, National Association of Social Workers, and National Mental Health Association, and recounting how medical information presented by amici occupied prominent place in *Roper* oral argument and, more subtly, in the eventual opinion).

56. *E.g.*, Brief Amicus Curiae of the American Bar Ass'n in Support of the Respondent, *Roper*, 543 U.S. 551 (No. 03-633), 2004 WL 1617399; Brief of Amici Curiae President James Earl Carter, Jr. et al. in Support of Respondent, *Roper*, 543 U.S. 551 (No. 03-633), 2004 WL 1636446; Brief of the NAACP Legal Defense and Educational Fund, Inc. et al. as Amici Curiae in Support of Respondent, *Roper*, 543 U.S. 551 (No. 03-633), 2004 WL 1636450.

57. *See generally* Brief of the American Medical Ass'n et al. as Amici Curiae in Support of Respondent, *Roper*, 543 U.S. 551 (No. 03-633), 2004 WL 1633549. The amicus brief filed by the American Psychological Association and the Missouri Psychological Association also addressed the relevant developmental literature. Brief for the American Psychological Ass'n, and the Missouri Psychological Ass'n as Amici Curiae Supporting Respondent, *Roper*, 543 U.S. 551 (No. 03-633), 2004 WL 1636447.

link between an apprehension of culpability and the advancement of capital punishment's retributive objective—a link found missing in *Atkins*—was also missing for adolescent offenders. The medical amici directed the Court's attention to the latest data on how the brain's anatomical structure changes in adolescence and how the capacity to interpret events, predict consequences, and react with a consistent modicum of rationality is seriously compromised until these changes have been completed, usually in the early to mid-twenties.[58] Although individual variations in adolescent capacity exist, the general course of brain development reflects the identified deficits and limitations.

Discussion of this medical information and its import for the Court's constitutional analysis occupied much of the oral argument in *Roper*.[59] Former Solicitor General Seth Waxman, the attorney for the juvenile defendant, skillfully drew the Court's attention to the parallels between the temporary but real deficits in brain functioning in adolescence and the functional limitations exhibited by the mentally retarded, thereby suggesting that *Atkins*'s recognition of the untenability of the culpability and deterrence rationales for the use of capital punishment should also be acknowledged in juvenile death penalty cases.[60] Waxman was able to deflect questions about the controlling effect of *Stanford*'s precedent and the defendant's failure to introduce such medical information at trial by explaining that the now critical information about adolescent brain development and functioning had not existed at the time of the *Stanford* decision in 1989 or even at the time of Simmons's trial in 1997.[61] This medical research could, however, now be brought to bear on the analysis of the constitutional validity of the administration of Simmons's death sentence.[62]

Despite the unquestionably chilling record in *Roper*, which included evidence that the young defendant anticipated more lenient treatment because of his age and used that forecast as part of his pitch to persuade two other juveniles to join his murderous plan,[63] the majority was willing to reconsider its holding in *Stanford*. This openness to a revision of its constitutional appraisal of the juvenile death penalty reflected deep concern about the validity of the use of the ultimate criminal sanction in the face of

58. Brief of the American Medical Ass'n et al. as Amici Curiae in Support of Respondent, *supra* note 57, at 9-20.

59. Haider, *supra* note 55, at 375 (reporting that sixteen of slightly more than twenty questions directed at lawyer arguing for Christopher Simmons addressed scientific evidence).

60. *Id.*

61. *Id.*

62. *Id.*

63. The majority opinion described seventeen-year-old Simmons as the instigator of the robbery and murder of the victim, who was bound and blindfolded in her bedroom at 2 a.m., driven to a state park and thrown from a bridge into the river below, where she drowned. Roper v. Simmons, 543 U.S. 551, 556 (2005). The recitation of the facts of the crime noted both that Simmons had described his desire and plan to murder someone in "chilling, callous terms" as he tried to enlist two friends' participation and that Simmons had "assured his friends they could 'get away with it' because they were minors." *Roper*, 543 U.S. at 556. Simmons would later boast about the crime, leading to his arrest. *Id.* at 557. At the police station, Simmons waived his right to an attorney and, within two hours of the initiation of questioning, had confessed and performed a reenactment of the crime. *Id.*

medical evidence that supported and likely influenced the consistent shift in the states away from the imposition of death sentences for juveniles.[64]

As it had in *Atkins*, the Court in *Roper* acknowledged how relevant scientific and medical data informed and reinforced the emerging societal consensus against particular applications of the death penalty, thereby activating the Court's duty to revisit its earlier constitutional determination. The Court noted, for example, that the American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders ("DSM") prohibited psychiatrists from diagnosing a patient under eighteen with antisocial personality disorder, also labeled psychopathy or sociopathy and characterized by cynicism and extreme insensitivity to and contempt for others.[65] The DSM rule reflected the medical determination that such a diagnosis could not be reliably made despite the application of clinical expertise, testing, and observation. The *Roper* majority found that, as a matter of constitutional law, a lay jury could not be entrusted with the determination that a juvenile's act reflected "irreparable corruption" sufficient to justify a death sentence.[66] While upholding the state's authority to require the forfeiture of liberty in response to serious criminal conduct by a juvenile, the majority could not offer constitutional sanction to the state's extinguishment of the juvenile's "life and his potential to attain a mature understanding of his own humanity."[67]

Anchoring the decision in what was described as the Eighth Amendment's expression of a constitutional duty to "respect the dignity of all persons"[68] through adherence to principles of proportionality in punishment, Justice Kennedy sensitively surveyed the situation of the adolescent offender. The majority opinion focused on three significant differences between adolescent offenders and adults, differences observed for generations and now linked to specific, documented processes of brain development. First, juveniles exhibit a lack of responsibility linked to an immaturity that precipitates "impetuous and ill-considered actions and decisions" and that explains the recklessness that too frequently endangers teenagers.[69] Secondly, juveniles' susceptibility to influence and to psychological trauma undermines their capacity to exert control over themselves and to extricate themselves from dangerous and/or illegal

64. The influence of the invocation of relevant medical data to support both legislative change and litigation arguments may be detectable in the divergent outcomes in *Roper* and *Yarborough v. Alvarado*, 541 U.S. 652 (2004). In *Alvarado*, Justice Kennedy, writing for the majority, rejected a juvenile defendant's claim for habeas relief under AEDPA. Justice Kennedy concluded that the state court had not acted unreasonably in declining to take the boy's age into account when performing *Miranda* custody analysis. 541 U.S. at 668. In *Alvarado*, the defendant offered a general appeal for cognizance of the relevance of youthful immaturity and did not draw on how medical knowledge of the specific functional deficits affecting the adolescent brain might have to be incorporated into the applicable legal standard. *Id.* at 667. The Court's recent grant of certiorari in *J.D.B. v. North Carolina* offers a new opportunity to examine such evidence as the basis for the claim that a juvenile's age must be part of the assessment of whether a reasonable person in the juvenile's position would have felt free to terminate police questioning and leave. The Court's Order granting certiorari in *J.D.B.* appears at http://www.supremecourt.gov/orders/courtorders/110110zor.pdf (last visited Nov. 21, 2010).

65. *Roper*, 543 U.S. at 573.

66. *Id.* at 573–74.

67. *Id.* at 574.

68. *Id.* at 560.

69. *Id.* at 569 (quoting Johnson v. Texas, 509 U.S. 350, 367 (1993)).

situations.[70] Finally, citing Erik Erikson's influential, but no longer cutting edge, work on identity in youth, the Court observed in very general terms that the juvenile personality and character are not well formed and are susceptible to modification.[71] This account of the differentiated status of juveniles for purposes of an Eighth Amendment inquiry reinforced longstanding perceptions of the vulnerabilities of youth reflected in a variety of common law doctrines.[72] Interestingly, the majority opinion does not discuss the specific relevant neurobiological data in detail, instead citing materials that rely on these medical findings to support constitutional challenges to the juvenile death penalty.[73] This approach may reflect anxiety about the broader implications of these neuroscientific findings for a wider array of criminal justice practices and a hesitancy to provoke new litigation on such issues.[74]

The *Roper* majority rejected the contention that the cognitive deficits and psychological vulnerabilities of youth could be most appropriately considered as mitigating factors in sentencing. The prosecutor in *Roper* had in fact used the defendant's age as an argument for the imposition of a death sentence, describing the commission of such a crime at seventeen as "scary,"[75] telegraphing the idea that the defendant's age increased his potential for future violence and heightened the need to execute him. The majority concluded that the structure of the sentencing process could not reliably ensure that jurors would consider the developmental deficits that vitiated the retributive and deterrent rationales for the death penalty.[76]

Considering the cumulative analytical consequences of these empirically documented differences between juvenile and adult mental functioning, the majority projected a portrayal of adolescent criminals that was simultaneously scientifically sound and sympathetic. Citing juveniles' susceptibility to "immature and irresponsible behavior," the *Roper* majority reiterated the *Thompson* plurality's determination that adolescents' "irresponsible conduct is not as morally reprehensible as that of an

70. *Id.*

71. *Id.* at 570 (citing Erik H. Erikson, IDENTITY: YOUTH AND CRISIS (1968)).

72. *See* Larry Cunningham, *A Question of Capacity: Towards a Comprehensive and Consistent Vision of Children and Their Status Under Law*, 10 U.C. DAVIS J. JUV. L. & POL'Y 275, 287–94, 317–19, 350–53 (2006) (reviewing limitations imposed on children's capacity to act independent of adult supervision in areas such as contracting and medical decision making as well as limitations on minor's responsibility for harms inflicted on others, such as torts).

73. *Roper*, 543 U.S. at 569 (citing Laurence Steinberg & Elizabeth S. Scott, *Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty*, 58 AM. PSYCHOLOGIST 1009, 1014 (2003)).

74. *See* Deborah W. Denno, *The Scientific Shortcomings of* Roper v. Simmons, 3 OHIO ST. J. CRIM. L. 379 (2006) (arguing that Court could have enhanced its analysis in *Roper* by relying more explicitly on latest psychological and physiological research presented by amici rather than citing older and less scientifically grounded sources). The Court may have hesitated to take that course precisely because of the wider reform-generating implications of the emerging findings about the course of brain development, findings which potentially call into question the propriety of the use of age eighteen as the dividing line between the juvenile and the adult in criminal law. See Jeffrey Rosen, *The Brain on the Stand*, N.Y. TIMES MAG., Mar. 11, 2007, at 49, for a broader exploration of the potential of neuroscience to significantly alter legal standards and practices.

75. *Roper*, 543 U.S. at 558.

76. *Id.* at 573.

adult."[77] Returning to themes underscored in Justice Brennan's *Stanford* dissent,[78] *Roper* emphasized that adolescents' "vulnerability and comparative lack of control over their immediate surroundings mean juveniles have a greater claim than adults to be forgiven for failing to escape negative influences in their whole environment."[79] Invoking juveniles' "struggle to define their identity," Justice Kennedy's opinion for the *Roper* majority concludes:

> [I]t is less supportable to conclude that even a heinous crime committed by a juvenile is evidence of irretrievably depraved character. From a moral standpoint it would be misguided to equate the failings of a minor with those of an adult, for a greater possibility exists that a minor's character deficiencies will be reformed. Indeed, "[t]he relevance of youth as a mitigating factor derives from the fact that the signature qualities of youth are transient; as individuals mature, the impetuousness and recklessness that may dominate in younger years can subside."[80]

Given the incomplete state of the adolescent's biological and psychological development, Justice Kennedy linked such an offender's potential for character reformation and personal redemption to a consequent moral and constitutional imperative to differentiate the punishment of adolescent and adult criminals.[81] Here the opinion taps an undercurrent of emerging understanding that appears to motivate the states' trend away from the use of the death penalty as well as shape independent judicial judgment.

Beyond the protection it offers to juveniles previously facing a death sentence, Justice Kennedy's opinion for the *Roper* majority has the potential to facilitate more far-reaching changes in governmental activities that affect adolescents. *Roper*'s logic suggests the need to align legal standards and institutional policies affecting juveniles with the best available medical and developmental knowledge about adolescent behavior. More broadly, *Roper*'s reasoning could generate a more sensitive and supportive approach to the regulation of adolescent behavior, a shift from the propagation of images of adolescents as objects of fear and hostility to a recognition that the challenges and vulnerabilities endemic to this stage of development should prompt greater solicitude and constructive assistance.

C. The First Wave of Roper*'s Migrating Influence*

Roper reenergized calls for a wide array of juvenile justice reforms. Legal scholars quickly demonstrated how *Roper*'s recognition of the legal significance of the biology of adolescent development could be used to justify the reconsideration of the constitutional acceptability of a variety of practices in the juvenile justice system, such

77. *Id.* at 570 (quoting Thompson v. Oklahoma, 487 U.S. 815, 835 (1988) (plurality opinion)).

78. Stanford v. Kentucky, 492 U.S. 361, 393–405 (1989) (Brennan, J., dissenting) (emphasizing that Eighth Amendment analysis must address punishment's disproportionality to the blameworthiness of offender).

79. *Roper*, 543 U.S. at 570.

80. *Id.* (quoting Johnson v. Texas, 509 U.S. 350, 368 (1993)); *see also* Steinberg & Scott, *supra* note 73, at 1014 (noting that relatively few adolescents who engage in illegal activity persist with such conduct as adults).

81. *Roper*, 543 U.S. at 570–74.

as the increasingly frequent transfer of juveniles to adult court,[82] the consideration of juvenile offenses in the application of recidivist statutes,[83] and the use of particular forms of punishment, such as life without parole, for juvenile offenses.[84] The decision also prompted questions about the constitutionality of other aspects of the prolonged confinement of juveniles,[85] and renewed calls for the greater judicial receptivity to challenges to the admissibility of juveniles' confessions and to questions about the necessary content of *Miranda* warnings communicated to adolescents.[86] *Roper* further spurred calls to reconsider fundamental questions about the administration of the juvenile justice system,[87] renewing interest in the assessment of juveniles' competency to participate in delinquency and criminal proceedings,[88] and redirecting attention to the complexity of providing adequate legal representation to children.[89] Debates about

82. *See generally* Donna M. Bishop & Hillary B. Farber, *Joining the Legal Significance of Adolescent Developmental Capacities with the Legal Rights Provided by* In re Gault, 60 RUTGERS L. REV. 125 (2007); Ellen Marrus & Irene Merker Rosenberg, *After* Roper v. Simmons*: Keeping Kids Out of Adult Criminal Court*, 42 SAN DIEGO L. REV. 1151 (2005); Vanessa L. Kolbe, Note, *A Proposed Bar to Transferring Juveniles with Mental Disorders to Criminal Court: Let the Punishment Fit the Culpability*, 14 VA. J. SOC. POL'Y & L. 418 (2007); Enrico Pagnanelli, Note, *Children as Adults: The Transfer of Juveniles to Adult Courts and the Potential Impact of* Roper v. Simmons, 44 AM. CRIM. L. REV. 175 (2007).

83. *See generally* Heather Hruby, Digest, *Recidivist Statutes and the Use of Prior Juvenile Adjudications*, 27 J. JUV. L. 166 (2006); Alissa Malzman, Note, *Juvenile Strikes: Unconstitutional Under* Apprendi *and* Blakely *and Incompatible with the Rehabilitative Ideal*, 15 S. CAL. REV. L. & WOMEN'S STUD. 171 (2005).

84. *See generally* Barry C. Feld, *A Slower Form of Death: Implications of* Roper v. Simmons *for Juveniles Sentenced to Life Without Parole*, 22 NOTRE DAME J.L. ETHICS & PUB. POL'Y 9 (2008); Victor Streib & Bernadette Schrempp, *Life Without Parole for Children*, CRIM. JUST., Winter 2007, at 4; Hillary J. Massey, Note, *Disposing of Children: The Eighth Amendment and Juvenile Life Without Parole After* Roper, 47 B.C. L. REV. 1083 (2006). Deciding that the Eighth Amendment prohibits sentencing a juvenile to life without parole for a non-homicide offense, *Graham v. Florida*, 130 S. Ct. 2011 (2010), recognized the relevance of developmental status in the determination of constitutional rights and confirmed *Roper*'s generative potential. *Cf.* Dan Markel, *May Minors Be Retributively Punished After* Panetti *(and* Graham*)?*, 23 FED. SENT'G REP. 62 (2010) (reading *Graham* as reflecting Court's emerging understanding that offenders' competency deficits can make application of retributive punishments constitutionally disproportionate).

85. *See generally* Amanda M. Kellar, Note, *They're Just Kids: Does Incarcerating Juveniles with Adults Violate the Eighth Amendment?*, 40 SUFFOLK U. L. REV. 155 (2006); Moira O'Neill, Note, *Delinquent or Disabled? Harmonizing the IDEA Definition of "Emotional Disturbance" with the Educational Needs of Incarcerated Youth*, 57 HASTINGS L.J. 1189 (2006).

86. *See generally* Tamar R. Birckhead, *The Age of the Child: Interrogating Juveniles After* Roper v. Simmons, 65 WASH. & LEE L. REV. 385 (2008); Hillary B. Farber, *Constitutionality, Competence, and Conflicts: What Is Wrong with the State of the Law When It Comes to Juveniles and* Miranda*?*, 32 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 29 (2006); Kenneth J. King, *Waiving Childhood Goodbye: How Juvenile Courts Fail to Protect Children from Unknowing, Unintelligent, and Involuntary Waivers of* Miranda *Rights*, 2006 WIS. L. REV. 431; Ellen Marrus, *Can I Talk Now?: Why* Miranda *Does Not Offer Adolescents Adequate Protections*, 79 TEMP. L. REV. 515 (2006); David Wagner, Case Note, *Thirteen Going on Thirty: The Relevance of Age in the* Miranda *Custody Test*, Yarborough v. Alvarado*, 124 S. Ct. 2140 (2004)*, 5 WYO. L. REV. 695 (2005).

87. *See generally* Mark R. Fondacaro et al., *Reconceptualizing Due Process in Juvenile Justice: Contributions from Law and Social Science*, 57 HASTINGS L.J. 955 (2006).

88. *See generally* David R. Katner, *The Mental Health Paradigm and the MacArthur Study: Emerging Issues Challenging the Competence of Juveniles in Delinquency Systems*, 32 AM. J.L. & MED. 503 (2006).

89. *See generally* Laura Cohen & Randi Mandelbaum, *Kids Will Be Kids: Creating a Framework for Interviewing and Counseling Adolescent Clients*, 79 TEMP. L. REV. 357 (2006).

the attribution of criminal responsibility to youth generally[90] and in relation to especially problematic offense categories[91] were also reignited.

D. Discerning Roper*'s Potential Implications for School Discipline*

The first wave of post-*Roper* scholarship reiterated the longstanding call from eminent authorities in law and psychology for the initiation of juvenile justice reform that would be guided by the best available understanding of adolescent development and functioning.[92] The logic of these calls for reform in the wake of *Roper* should reverberate into America's classrooms and prompt a parallel movement aimed at the remediation of the alarming inadequacies and injustices that too frequently plague the administration of school discipline.

As will be addressed in Part III below, an inventory of the content of current critiques of school disciplinary practices underscores the urgency of reform initiatives that reexamine what due process should demand in this domain. Such critiques also reveal that important common strands can be detected in the articulation of constitutionally resonant objections to the administration of the juvenile death penalty and to prevalent school disciplinary practices. Such common elements include the gap between the challenged practice and the kind of action the best available developmental knowledge would recommend, the consequent likely failure of the government action to achieve its asserted objectives, and the potential for the government action to undermine the legitimacy of the relevant institutions. If school officials act without the guidance that can be gleaned from familiarity with developmental data, discipline may be at best ineffective and at worst harmful. Adolescents experience some of the most difficult developmental struggles and currently face the greatest likelihood of incurring the most severe school disciplinary sanctions. From 2005 to 2006, 408 children were expelled from primary school settings, 1,347 from middle school, and 3,012 from high school. In the same period, 6,282 were suspended for five or more days at the primary level, 9,942 at the middle school level, and 10,131 at the high school level.[93] It is therefore particularly urgent that school officials learn more about adolescent development and adapt disciplinary practice to reflect such knowledge.

90. *See generally* Andrew M. Carter, *Age Matters: The Case for a Constitutionalized Infancy Defense*, 54 U. KAN. L. REV. 687, 696 (2006); Elizabeth S. Scott, *Keynote Address: Adolescence and the Regulation of Youth Crime*, 79 TEMP. L. REV. 337 (2006).

91. *See, e.g.*, Suzanne Meiners-Levy, *Challenging the Prosecution of Young "Sex Offenders": How Developmental Psychology and the Lessons of* Roper *Should Inform Daily Practice*, 79 TEMP. L. REV. 499, 499–504 (2006). Professor Meiners-Levy's critique of prosecutorial charging decisions that equate the acts of children and youth in the same manner as what may frequently be the dramatically more serious behavior of adult sex offenders finds corroboration in the opinions of many clinicians who work with sex offenders. *See* Maggie Jones, *How Can You Distinguish a Budding Pedophile From a Kid With Real Boundary Problems?*, N.Y. TIMES MAG., July 22, 2007, at 33, 34 (noting research showing that "juveniles who commit sex offenses are in several ways very different from adult sex offenders").

92. *See generally* YOUTH ON TRIAL: A DEVELOPMENTAL PERSPECTIVE ON JUVENILE JUSTICE (Thomas Grisso & Robert G. Schwartz eds. 2000) [hereinafter YOUTH ON TRIAL].

93. KACEY LEE NOLLE ET AL., U.S. DEP'T OF EDUC., CRIME, VIOLENCE, DISCIPLINE, AND SAFETY IN U.S. PUBLIC SCHOOLS: FINDINGS FROM THE SCHOOL SURVEY ON CRIME AND SAFETY: 2005–06, at tbl. 6 (NCES, Inst. of Educ. Sciences, U.S. Dep't of Educ., 2007) (presenting data showing that suspensions and expulsions increase significantly as students move from primary grades to middle and high school).

As the next section shows, sustained local advocacy can sensitize both educators and courts to the constitutionally defective quality of school disciplinary practices that alienate and injure students. Such efforts have set the stage for the recalibration of the constitutional standards applied to school discipline before. Perhaps *Roper*'s migrating influence can fuel a new effort to bring disciplinary practices into harmony with constitutional values and institutional objectives.

II. SURVEYING THE HISTORICAL AND LEGAL TERRAIN: DRAWING CONSTITUTIONAL ATTENTION TO SCHOOL DISCIPLINE

A. The Antecedents of Contemporary Calls for School Discipline Reform

Calls for the application of constitutional scrutiny to school discipline as well as pleas for teachers and school administrators to take a hard look at the fairness and efficacy of disciplinary practices have accompanied larger social movements in which schools inevitably played a vital part. In school systems seeking to resist desegregation in the 1970s, school discipline was frequently manipulated to effect the "pushout" of black students arriving in previously white schools.[94] Such misconduct by school officials produced a profound sense of alienation and mistrust among the targeted children and their parents and tragically led to the premature end of many black students' education.[95] Disproportionate rates of expulsion and suspension for black students signaled the misuse of the disciplinary process.[96] Black students faced harsher sanctions for incidents such as fighting in which both black and white students were involved. Black students were also repeatedly disciplined with suspension or expulsion for minor infractions or under vaguely defined policies that left too much room for teachers' or administrators' biased application of discretion.[97] Observers identified lack of experience with black children as contributing to incidents in which white teachers erroneously ascribed disrespect and dangerousness to black students' conduct.[98] Others

94. SOUTHERN REGIONAL COUNCIL & ROBERT F. KENNEDY MEMORIAL, THE STUDENT PUSHOUT: VICTIM OF CONTINUED RESISTANCE TO DESEGREGATION, at ix (1973) [hereinafter THE STUDENT PUSHOUT].

95. *See id.* at vi, 9 (presenting data reflecting correspondingly high rates of expulsion and dropping out for black students in several large southern school systems that implemented first wave of school desegregation).

96. *See id.* at 1, 6 (noting that expulsion rates of minority students were three times those of white students in districts in which ninety percent of minority children were enrolled and reporting that OCR data revealed expulsion rates of minority children that ranged from double to more than ten times the rates of nonminority youth); *see also* Nancy L. Arnez, *Implementation of Desegregation as a Discriminatory Process*, 47 J. NEGRO EDUC. 28, 30–37 (1978) (using data from multiple sources to document disproportionate suspension and expulsion of minority students, poor students, and students from single-parent families).

97. *See* THE STUDENT PUSHOUT, *supra* note 94, at 17–22 (observing that racial, cultural and generational differences impaired educators' judgment and led to misuse of discipline in desegregating schools); *see also id*. at 13–14 (chronicling repeated harsh punishment of black students for minor infractions).

98. *Id.* at 20. How a lack of prior contact, stereotypical thinking, and ignorance of cultural norms of expression can predispose white female teachers to misinterpret black students' behavior, particularly the behavior of black boys, has been provocatively explored by Professors Theresa Glennon and Pamela Smith. Theresa Glennon, *Race, Education, and the Construction of a Disabled Class*, 1995 WIS. L. REV. 1237, 1250–59, 1319–21 (positing that "unconscious and structural racism" may explain the fact that black students are diagnosed as special education at a significantly higher rate than white students); Pamela J. Smith, *Looking*

detected a tendency among both white and black teachers to enforce rules more harshly against black students and to regard black students as troublemakers.[99] The use of school disciplinary sanctions to obstruct school integration prompted litigation by the NAACP and the U.S. Department of Justice,[100] an investigation by the U.S. Commission on Civil Rights,[101] and the issuance of guidance for the correction of flawed and inequitable school disciplinary practices by the Department of Health, Education, and Welfare's ("HEW") Office of Civil Rights.[102]

Influential reports, such as those produced by the Massachusetts Task Force on Children Out of School[103] and the Children's Defense Fund[104] exposed the misuse of school discipline to exclude or isolate children with greater needs due, for example, to their lack of English proficiency, physical or mental disabilities, or pregnancy. These investigations uncovered the inappropriate placement of children in special education programs as an outgrowth of teachers' frustration about how to handle behavioral issues without assistance from trained mental health professionals who could identify the origins of the child's conduct.[105] In other instances, children whose behavioral problems did not abate as they were shuffled through a series of classroom placements, often without any provision of diagnostic services, would simply be suspended from school "for good," in a manipulation of the relevant rules governing suspension of students.[106] Children would also be suspended indefinitely pending a clinical evaluation, which could take weeks or even months to obtain due to barriers to access

Beyond Traditional Educational Paradigms: When Old Victims Become New Victimizers, 23 HAMLINE L. REV. 101, 124–26 (1999) (using statistical analyses to demonstrate that female white teachers are responsible for implementing school discipline and grading policies and tend to do so in manner that negatively impacts black students, specifically black boys); Pamela J. Smith, *Our Children's Burden: The Many-Headed Hydra of the Educational Disenfranchisement of Black Children*, 42 HOW. L.J. 133, 211–17, 235 (1999) (explaining that "modern systemic and systematic educational disenfranchisement of Black children is attributed primarily, if not wholly, to transracial hostility and indifference").

99. A pattern of reports revealed apparent leniency for white students and severe punishments for black students involved in the same incident or in parallel behavior. THE STUDENT PUSHOUT, *supra* note 94, at 14–15. Some school districts seemed to target black student leaders for expulsion. *Id.* at 11, 14.

100. *Id.* at 7 (recounting serious problem with racially discriminatory administration of discipline in numerous Florida school districts); *id.* at 11 (reporting use of expulsion to remove black student leaders).

101. U.S. COMM'N ON CIVIL RIGHTS, FULFILLING THE LETTER AND SPIRIT OF THE LAW: DESEGREGATION OF THE NATION'S PUBLIC SCHOOLS 47–50 (1976) (detailing discriminatory imposition of discipline in desegregating Louisville, Kentucky, school system and finding that teachers and administrators relied too heavily on punishment to manage classroom behavior).

102. Memorandum, Office for Civil Rights, Task Force Statement on In-School Discrimination (July 14, 1970), *reprinted in* THE STUDENT PUSHOUT, *supra* note 94, at 78–81.

103. MASS. TASK FORCE ON CHILDREN OUT OF SCH., THE WAY WE GO TO SCHOOL: THE EXCLUSION OF CHILDREN IN BOSTON (1970) [hereinafter THE WAY WE GO TO SCHOOL].

104. CHILDREN'S DEFENSE FUND OF THE WASHINGTON RESEARCH PROJECT, CHILDREN OUT OF SCHOOL IN AMERICA (1974) [hereinafter CHILDREN OUT OF SCHOOL].

105. *See* THE WAY WE GO TO SCHOOL, *supra* note 103, at 38–41 (describing schools' use of classes for students designated mentally retarded as "dumping ground[s]" for "troublemakers" and finding that placement decisions were guided more by what was convenient for ill-equipped teaching staff rather than by what was responsive to child's needs).

106. *Id.* at 46.

to mental health services, especially in poor communities.[107] Teachers and administrators repeatedly failed to treat children's behavior as a cry for help and instigated responses that may have exacerbated rather than ameliorated the child's situation.[108] In addition, responses to children's behavior often ignored the possibility that school practices, such as inappropriate placement, poor instruction, and hostile, exaggerated responses to minor incidents, were aggravating or even precipitating behavior problems.[109] The District of Columbia's suspension and expulsion of physically and mentally handicapped children without appropriate hearings or consideration of alternative placements was found to be a violation of due process even before *Goss v. Lopez*[110] and was linked to a larger pattern of denial of educational services to poor, black children with disabilities.[111]

The Children's Defense Fund's ("CDF") "Children Out of School" report set the stage for *Goss* by documenting a wide range of disciplinary abuses in school systems that had unconstrained discretion with regard to both the substance and procedure of school discipline.[112] CDF documented the widespread use of suspensions for behavior that was not dangerous, noting the heavy and dubious use of suspension as a penalty for truancy and the use of suspension for verbal conflicts.[113] School officials also reportedly explained their use of suspension as "a tool to get parents in" but often no meeting with parents actually occurred after suspension.[114] CDF's review of disciplinary statistics gathered by HEW's Office of Civil Rights revealed that school districts across the United States were routinely suspending from school 4.7% to 15.7% of secondary school students. This practice resulted in exclusion from instructional opportunities and often propelled troubled children toward delinquency.[115] This pattern of exclusion disproportionately affected black and Latino children as well as poor children.[116]

Although CDF acknowledged the necessity of expanding the procedural protections afforded to students targeted for discipline, their report underscored that

107. *Id.* Mental health services for children were not seen as a service priority by state health officials or school officials. *Id.* at 63–67, 75 (noting specific deficiencies in allocation of resources and provision of qualified personnel); CHILDREN OUT OF SCHOOL, *supra* note 104, at 117.

108. *See* THE WAY WE GO TO SCHOOL, *supra* note 103, at 44 (noting how both inadequate and excessive responses to student behavior could provoke emotional disturbance in originally "normal" children).

109. See *id.* (noting that combination of school response to behavioral problems, poor practices, and boring classrooms can create or exacerbate behavioral problems among students).

110. 419 U.S. 565 (1975).

111. Mills v. Bd. of Educ., 348 F. Supp. 866 (D.D.C. 1972).

112. CHILDREN OUT OF SCHOOL, *supra* note 104, at 118–20. Significantly, the report identified the use of mechanisms other than formal suspension that effectively removed children from school and rendered them invisible to any system to protect children's rights to continuing instruction. *Id.* at 119–20. For example, one Iowa school district used "drop cards" as a mechanism to evade whatever procedural protections attached to formal suspensions and expulsions. *Id.* at 119. School officials would condition the readmission of a suspended student on their parents' signing a card, which waived possible challenges to future disciplinary action against a returning student. *Id.*

113. *Id.* at 120.

114. *Id.* at 121.

115. *Id.* at 123–25, 135–37.

116. *Id.* at 130–34.

substantive redress of the causes of students' behavioral problems was essential.[117] Schools could eliminate the harms of inappropriate discipline only if they undertook a range of reforms, including reformulating and clarifying disciplinary policies, improving curriculum and instruction, offering greater teacher training about disciplinary strategies, and undertaking systematic data gathering about disciplinary practices to identify persistent inequities.[118]

During this same period, student protests about perceived racial inequities in school operations and in the wider community led to disciplinary incidents across the country.[119] Legal challenges to heavy-handed school responses to student protest activities would eventually culminate in two Supreme Court decisions: *Tinker v. Des Moines Independent Community School District*,[120] which established that administrators could not use disciplinary sanctions to stymie students' constitutionally protected personal speech when such speech did not substantially disrupt school operations or invade the rights of others, and *Goss*, which prescribed the procedural due process minimum applicable to the short-term suspensions of students.[121]

B. The Constitutional Components of Earlier School Disciplinary Reform Efforts

1. Victory in *Goss*

In *Goss v. Lopez*, the Supreme Court articulated in broad terms what procedural due process required when schools imposed suspensions of ten days or fewer.[122] Finding that the suspended students had a protectable interest in attending school under Ohio state law,[123] the majority rejected the school board's contention that a suspension of ten days or fewer was too minimal a deprivation to merit constitutional protection.[124] The *Goss* majority found that an erroneous exclusion from school could compromise a child's educational progress, injure his or her reputation in the school community, and limit a student's pursuit of employment or admission to higher education.[125]

To avoid errors in the imposition of discipline and to maximize the effectiveness of the disciplinary encounter when punishment was warranted, *Goss* prescribed the

117. *Id.* at 144–50.

118. *Id.*

119. *See, e.g.*, THE STUDENT PUSHOUT, *supra* note 94, at 3 (reporting large-scale suspensions of students taking part in school civil rights protests in several Louisiana school systems); Burnside v. Byars, 363 F.2d 744, 746, 748–49 (5th Cir. 1966) (invalidating suspension of high school students wearing "One Man, One Vote" buttons where there was no evidence of buttons' disrupting school activities); Blackwell v. Issaquena Cnty. Bd. of Educ., 363 F.2d 749, 750, 753–54 (5th Cir. 1966) (upholding suspension of Mississippi high school students who disrupted class and displayed hostile and discourteous behavior while wearing "SNCC" freedom buttons).

120. 393 U.S. 503 (1969).

121. *See* Goss v. Lopez, 419 U.S. 565, 574–79 (1975) (concluding that Due Process Clause applies to school suspensions, that even short suspensions are not de minimis, and that due process requires, at minimum, that students facing suspension be given notice and hearing).

122. *Id.* at 579.

123. *Id.* at 573.

124. *Id.* at 576.

125. *Id.* at 574–75.

procedures that would satisfy due process demands in this particular institutional context.[126] Differentiating the short suspension scenario from other more serious forms of discipline that could require more formality,[127] the Court held that prior to suspending a student, the school should take the following "rudimentary" steps: "oral or written notice of the charges against him and, if he denies them, an explanation of the evidence the authorities have and an opportunity to present his side of the story."[128] The Court preserved latitude for school officials to remove a child immediately and convene an encounter as soon as subsequently practical if the situation indicated that the child posed "a continuing danger to persons or property or an ongoing threat of disrupting the academic process."[129] This approach was characterized as "if anything, less than a fair-minded school principal would impose upon himself in order to avoid unfair suspensions."[130] That appraisal of the reasonableness of the required pre-suspension process would find validation in the record before the Court.

After the *Goss* suit had been filed, the Columbus Public Schools had revised the suspension process and circulated a series of memoranda to administrators mandating a process quite similar to what the Court itself would ultimately require.[131] Further corroboration that such a pre-suspension process represented what the Constitution required and what educational best practice would recommend could be found in the fact that the nation's largest teachers organization, the National Education Association ("NEA"), had joined several other education groups in an amicus brief urging affirmance of the district court opinion,[132] which would have imposed a slightly more demanding pre-suspension protocol.[133] Although a collection of Ohio educator and administrator groups filed briefs attacking the informal notice and hearing process as

126. *Id.* at 581–84.

127. *See id.* at 584 (emphasizing that opinion only addressed short suspension of ten days or fewer and indicating that longer suspensions or expulsions could require more formal process).

128. *Id.* at 581. This formulation was less precise than what had been ordered by the three-judge district court below. *See id.* at 571–72 (describing district court's formulation, which required immediate removal of student, notice to parents within twenty-four hours, and hearing within seventy-two hours).

129. *Id.* at 582.

130. *Id.* at 583.

131. The revised policy required that, prior to the student's departure, the principal explain the basis for and term of the suspension to the student and notify a parent, preferably through a phone call, of the school's action. Lopez v. Williams, 372 F. Supp. 1279, 1282 n.1 (S.D. Ohio 1973). Within twenty-four hours, the family was to be sent a written explanation of the suspension. Documentation of the basis for the action, such as a summary of the incident, had to be prepared and added to the student's file. *Id.* This set of required steps exceeded what was imposed by the relevant state statute, which required only that the principal notify the student's parents of the reasons for the action within twenty-four hours of the suspension. *Goss*, 419 U.S. at 567.

132. Brief of the National Committee for Citizens in Education et al. as Amici Curiae Supporting Appellees, *Goss*, 419 U.S. 565 (No. 73-898), 1974 WL 185917, at *2 [hereinafter NEA Amicus Brief]. The NEA described itself as "the nation's oldest and largest organization of educators" with over 1.4 million members "dedicated to the protection of the constitutional rights of both teachers and students." *Id.* at 2–3.

133. *Id.* at 24. The district court would have required supplying written notice of the reason for suspension to both student and parent with an opportunity for student and parent to be present at a hearing with a school administrator within seventy-two hours of the suspension. *Lopez*, 372 F. Supp. at 1302. The school administrator would have to communicate the ruling on the suspension to student and parent in letter form within twenty-four hours of the hearing. *Id.*

unworkable and burdensome,[134] the NEA refuted these contentions by presenting data from school systems around the country, including several far larger than the Columbus system, showing that such procedures were already in use in many districts and were regarded as helpful.[135] Such practices conformed to the guidelines for the handling of student suspensions presented in the NEA's 1971 code of student rights and responsibilities.[136]

As would be true in the later evaluation of what the Fourth Amendment required in the school search context in *New Jersey v. T.L.O.*,[137] the *Goss* Court did not make any attempt to investigate the substantive basis for the suspension or to gauge whether unjustifiable disparities existed in the imposition of punishments. Also omitted from the *Goss* Court's account were the details of what had transpired to precipitate the challenged discipline. Columbus, Ohio, was in the throes of an acrimonious desegregation process.[138] In 1971, conflicts between black and white students and between black students and school officials were escalating.[139] Among the plaintiffs in *Goss* were black students involved in protests, including a student walkout, that appear to have been sparked by administrators' cancellation of previously approved Black History Week events organized by students.[140] Facing mounting racial tension after an off-campus incident in which two black students were reportedly shot by white students, school officials came to view the content of the Black History Week events as potentially too incendiary.[141]

The suspended black students had either received no explanation for their suspension or faced allegations of conduct they vehemently disputed but had no opportunity to contest before their removal.[142] One—a football star with no prior disciplinary history who had served on the series of committees formed to address racial conflict in his high school—was suspended by the principal after urging other students to boycott classes as an expression of outrage over the school officials' curtailment of the students' Black History Week program.[143] These omitted details underscore how complaints about disciplinary practices often reveal deeper dysfunction within a school or district. As will be discussed in Part III, the specter of racial

134. Brief by The Buckeye Ass'n of School Administrators et al. as Amici Curiae Supporting Appellee, *Goss*, 419 U.S. 565 (No. 73-898), 1974 WL 185913, at 11–12.

135. NEA Amicus Brief, *supra* note 132, at 25–27. The NEA Amicus Brief specifically detailed the contents of Seattle suspension procedure regulations, which imposed obligations on school officials that far exceeded those set out by the *Goss* district court and were ostensibly well tolerated in this large urban school system. *Id.* at 25–27 n.5. Seattle's regulations prescribed the exhaustion of conciliation mechanisms, which, if unsuccessful, would be followed by written notice of charges and a hearing at which the parent, child, and their counsel could be present and at which the child's representative could question and offer witnesses. *Id*. at 26 n.5.

136. *Id*. at 3.

137. 469 U.S. 325 (1985).

138. NEA Amicus Brief, *supra* note 132, at 5.

139. *Id.*

140. *See id.* at 5–10 (detailing specific students' accounts of suspensions not of record in lower court's opinion).

141. *Id.* at 5.

142. Goss v. Lopez, 419 U.S. 565, 580–81 n.9 (1975); NEA Amicus Brief, *supra* note 132, at 10.

143. *Goss*, 419 U.S. at 569–71 (recounting events precipitating challenged suspensions).

disparity and discrimination continues to cast a shadow over contemporary school discipline in an era of zero tolerance and the criminalization of school offenses.

2. Defeat in *Ingraham*

The Court's only exploration of the nature of potential constitutional limits on the severity of school sanctions produced the much maligned ruling in *Ingraham v. Wright*.[144] Students in a Dade County, Florida, junior high school had sued to challenge the repeated infliction of painful physical injuries, including hematomas and broken bones, when they were "paddled" with a wooden implement after being accused of, at most, minor misbehavior.[145] The students asserted that school officials' actions constituted cruel and unusual punishment as prohibited by the Eighth Amendment, and they further argued that the officials' use of corporal punishment violated the students' substantive and procedural due process rights.[146] After hearing the students' evidence in a one-week trial, the federal district judge granted the school officials' motion to dismiss all of the students' claims, finding no basis for relief.[147] On appeal, a Fifth Circuit panel reversed the trial judge's decision. The panel majority found that the school officials' use of paddling amounted to the kind of excessive punishment prohibited by the Eighth Amendment, a conclusion supported by consideration of the age of the students, the nature of their alleged misconduct, the risk of bodily and psychological harms stemming from paddling, and the availability of alternative forms of punishment that promised greater efficacy with less potential for abuse.[148] These factors also supported the court's determination that the kind of punishment used violated substantive due process by imposing harm in an arbitrary manner that was unlikely to achieve any legitimate objective.[149] In addition, the panel held that even less harsh corporal punishment would have to be preceded by an appropriate procedural encounter between the student and a school administrator in order to satisfy the demands of due process.[150] Reviewing the panel ruling en banc, the Fifth Circuit rejected all of the plaintiffs' claims,[151] prompting the students' petition for certiorari.

144. 430 U.S. 651 (1977).

145. Ingraham v. Wright, 498 F.2d 248, 255–59 (5th Cir. 1974). As the panel opinion recounted, students at Charles Drew Junior High School were held down by administrators and struck on the buttocks with a paddle as many as twenty to fifty times. *Id.* at 256, 258. Groups of boys were lined up against the urinals and hit on the buttocks, legs, arms, and neck. *Id.* at 256–57. Some students were paddled while "hook[ed] up," or bent over the back of a chair. *Id.* at 258. One student was hit multiple times on the head and back and then whipped with a belt. *Id.* These beatings produced injuries requiring medical treatment, including in one case an operation to address a head injury, and necessitated some absences as long as ten days. *Id*. The students were punished for failing to sit in an assigned seat, anticipated lateness to class, lack of appropriate footwear for gym (because the student's shoes had been stolen), and allegedly making an obscene call to a teacher, an offense to which a different student later confessed. *Id.* at 256 & n.14, 257–59.

146. Ingraham v. Wright, 525 F.2d 909, 911–15 (5th Cir. 1976) (en banc), *aff'd*, 430 U.S. 651 (1977).

147. *Id.* at 912–16.

148. *Ingraham*, 498 F.2d at 264–65.

149. *Id.* at 268–69.

150. *Id*. at 267–68.

151. *Ingraham*, 525 F.2d at 912, 915.

In a five-to-four decision, the Supreme Court upheld the en banc ruling, concluding that the Eighth Amendment did not apply to corporal punishment in schools.[152] Although the use of such disciplinary methods on prisoners had been found to be subject to the Amendment's prohibition of cruel and unusual punishment,[153] the *Ingraham* majority found that the tradition of using physical punishment on children refuted any contention that a school's use of such methods offended contemporary standards of decency or amounted to the kind of grossly disproportionate sanction that the Eighth Amendment would prohibit.[154] The majority went on to reject the students' assertion that, in the absence of a constitutional bar against paddling, they were at least entitled to some prepunishment opportunity to challenge the allegations against them via a *Goss*-type hearing.[155] Despite the unrebutted evidence presented to the district court that school officials had failed to follow statutory and regulatory guidelines on the use of paddling[156] and that a persistent pattern of abuse had gone unchecked, the majority found that any improprieties in the administration of physical punishment could be corrected through the use of state tort remedies.[157]

In dissent, Justice White harshly criticized the majority for evading the substantive due process implications of the punishment inflicted.[158] This claim had been addressed by the Fifth Circuit and presented in the students' petition for certiorari, but the Court had declined to address it in the grant. Consequently, the students' briefs to the Supreme Court only obliquely addressed substantive due process concerns.[159] However, Justice White chided the Court for failing to amend the grant of certiorari and order reargument so that the Court could address what he considered a potentially viable mode of analyzing the constitutionality of the officials' conduct.[160]

The Court's refusal to consider the substantive due process infirmities of the challenged corporal punishment regime became a critical focal point of Irene Merker

152. Ingraham v. Wright, 430 U.S. 651, 683 (1977).

153. *See, e.g.*, Jackson v. Bishop, 404 F.2d 571, 579–80 (8th Cir. 1968) (finding Arkansas prisons' use of strap on inmates violated Eighth Amendment and noting that only two states still permitted this type of punishment as means of enforcing prison discipline).

154. *Ingraham*, 430 U.S. at 669.

155. *Id.* at 680–82.

156. *Id.* at 656–57 nn.6–7. The Florida statute that authorized the use of corporal punishment in schools required that the principal be consulted prior to using the technique and prescribed that such punishment not be "degrading or unduly severe." FLA. STAT. ANN. § 233.27 (1961). Dade County School Board policy authorized the use of corporal punishment only after other responses had been exhausted as ineffective and required that a teacher or other official apply such punishment only if another adult was present and under circumstances that would not subject the student to "shame or ridicule." *Ingraham*, 430 U.S. at 656 n.7. The school board policy also specified the type of paddle to be used and the number of "licks" to be applied, and it required that the student be told the reason for the punishment, with the parents to be notified afterward. *Id.* at 656–57.

157. *Ingraham*, 430 U.S. at 677 n.45, 683.

158. *Id.* at 689 n.5 (White, J., dissenting).

159. Brief for Petitioners, *Ingraham*, 430 U.S. 651 (No. 75-6527), 1978 WL 206892, at 44–45 (noting existence of students' liberty interests in protection from bodily harm and reputational injury as part of argument that some process had to precede imposition of corporal punishment by school officials).

160. *Ingraham*, 430 U.S. at 689 n.5 (White, J., dissenting).

Rosenberg's incisive account of *Ingraham*'s deficiencies.[161] Rosenberg saw alarmingly little to justify the majority's refusal to confront how the use of severe physical punishment in school simultaneously intruded on children's rights to physical integrity and personal security and parents' rights to direct their offspring's upbringing, especially when the challenged school officials were unable to tether their conduct to any foundation in educational or psychological expertise.[162]

Contemporary critics of the use of corporal punishment in schools continue to assert that such practices violate substantive due process guarantees. Such critics can now invoke a voluminous body of psychological and educational literature to document the absence of a legitimate pedagogical purpose for the use of physical punishment and the probability that such disciplinary methods are far more likely to harm both individual students and the learning enterprise overall.[163] Professor Sacks's formulation of a substantive due process attack on corporal punishment is predicated on gauging the constitutionality of governmental conduct based on its conformity with the best available professional practices in the relevant field.[164]

C. The Perceived and Actual Shortcomings of Goss*-Driven Reforms*

Although an examination of *Goss*'s modest application of constitutional scrutiny to school disciplinary practices highlights some avenues of redress when school officials use punishment for illegitimate ends, these earlier efforts to discern the constitutional dimensions of disciplinary practice also reveal a critical commonality with today's situation: the absence of adequate training, which is needed if teachers and administrators are expected to respond appropriately to student behavior amidst surrounding social and institutional struggles. Many desegregating school systems failed to undertake teacher training efforts that could have inhibited the disciplinary manifestations of white teachers' fears and stereotypes about black students entering formerly white schools.[165] Likewise, schools had not anticipated the arrival of antiwar and civil rights protests inside the schoolhouse gate. Their sometimes draconian and repressive responses to such events reflected mounting anxiety that the chaotic protest atmosphere on some college campuses would infect American high schools.

161. Irene Merker Rosenberg, Ingraham v. Wright*: The Supreme Court's Whipping Boy*, 78 COLUM. L. REV. 75, 103–09 (1978).

162. *Id.* at 107–08.

163. *See, e.g.*, Deana Pollard Sacks, *State Actors Beating Children: A Call for Judicial Relief*, 42 U.C. DAVIS L. REV. 1165, 1194–1209, 1222–23 (2009) (surveying social science and medical research documenting harms of corporal punishment and connecting this data to substantive due process argument that such punishment should not survive rationality review in which arbitrariness is discerned from gross imbalance between government action's evident harms and its lack of efficacy against its announced goal). Professor Sacks's formulation of a substantive due process attack on corporal punishment is predicated on gauging the constitutionality of governmental conduct based on its conformity with the best available professional practices in the relevant field. *Id.* at 1194–96.

164. *Id.* at 1194–96.

165. *See* Gary Orfield, *How to Make Desegregation Work: The Adaptation of Schools to Their Newly-Integrated Student Bodies*, 39 LAW & CONTEMP. PROBS. 314, 317–19 (1975) (discussing emotions, frustrations, and problems of teachers in newly desegregated schools).

Moreover, the *Goss* ruling's focus on process may itself have had significant negative effects on the administration of school discipline, although not necessarily those most frequently catalogued by its most outspoken critics. The *Goss* prescription came under immediate sharp fire from the dissenting Justices in the case. Writing for the dissenters, Justice Powell cast the ruling as an "unprecedented intrusion" by the federal judiciary into the historically local domain of public education.[166] Justice Powell asserted that the majority had failed to recognize the qualified character of a student's right to education under Ohio law[167] and had exaggerated the severity of any loss imposed by an erroneous suspension.[168] Justice Powell contended that such procedural requirements would undermine what the Court itself had affirmed in *Tinker*, the necessarily "comprehensive authority" of school officials to control students' conduct.[169] This necessary authority should include, in Justice Powell's view, the discretionary power to suspend unfettered by fear of judicial oversight.[170] Justice Powell believed that *Goss* would invite challenges to teachers' authority and make the application of appropriate and needed sanctions less likely, a result that would impair schools' capacity to deliver instruction about both academic subjects and the content of the social compact.[171]

Subsequent commentators also decried *Goss*. One of the most pointed attacks came from J. Harvie Wilkinson III,[172] now serving on the Fourth Circuit. Writing immediately after *Goss*'s arrival and echoing the concerns voiced in Justice Powell's dissent, then-Professor Wilkinson bemoaned the "inflation in the Supreme Court's supervision of our public schools."[173] However, he acknowledged that the due process outcome in *Goss* resonated with ideals of fair and humane individual treatment that had been embraced and effectuated in much of the Court's body of then-recent precedents,[174] and therefore found that the decision alone did not effect a dramatic change of course in the balance of power between local school authorities.[175] Wilkinson also connected the *Goss* ruling to apprehensions that unchecked disciplinary abuses could thwart the realization of *Brown*'s educational equality aspirations, making

166. Goss v. Lopez, 419 U.S. 565, 585 (1975) (Powell, J., dissenting).

167. *Id.* at 586–87.

168. *Id.* at 589.

169. *Id.* at 590 (quoting Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 507 (1969)) (internal quotation marks omitted).

170. *See id*. (arguing that judiciary should have limited role in its supervision of public education).

171. *Id.* at 593–94.

172. J. Harvie Wilkinson III, Goss v. Lopez*: The Supreme Court as School Superintendent*, 1975 SUP. CT. REV. 25.

173. *Id.* at 28. This theme would subsequently appear in Judge Wilkinson's judicial opinions rejecting challenges to school administrators' decisions as violations of student or teacher First Amendment rights. *See, e.g.*, Boring v. Buncombe Cnty. Bd. of Educ., 136 F.3d 364, 371–72 (4th Cir. 1998) (Wilkinson, J., concurring) (emphasizing criticism of dissenting judges' recommended analysis of teacher's constitutional claim as threatening to make education a "federal judicial enterprise").

174. Wilkinson saw *Goss* as a small but corrosive addendum to a roster of cases in which the Court exhibited an infatuation with what he characterized as the "indiscriminate constitutionalization" of government action, a trend reflecting the influence of the theories of "New Property" theorist Charles Reich. Wilkinson, *supra* note 172, at 56–57.

175. *Id*. at 28.

judicial action necessary.[176] However, for the *Goss* dissenters, the ruling was a mistake that threatened to allow anxieties about lingering racial tensions in desegregating schools to undermine administrators' need to punish behavior that threatened the educational enterprise.[177]

Crediting the hypothesis that the *Goss* process requirements would accelerate the erosion of school officials' authority, Wilkinson asserted that such a consequence more than outweighed the benefits that the new procedural formula conferred on students.[178] Wilkinson noted the limited reach of *Goss*, which said nothing about constitutional constraints on the substantive standards that created the basis for school discipline.[179] In addition, he emphasized that *Goss* delivered only the most minimal procedural protections which, if implemented in a threadbare manner, could make the promised check on arbitrary or wrongful discipline a charade.[180] He therefore questioned whether the Court's edict would achieve its main objective, the prevention of mistaken imposition of short suspensions, a risk Wilkinson conceded to be "not slight."[181] Thus, Wilkinson projected a future in which the *Goss* mandate was simultaneously ineffective against its putative objective, the elimination of erroneous ejections of students, and yet toxically potent in undermining school officials' capacity to control the school environment and deliver effective academic instruction. He foresaw school personnel embroiled in time-consuming hearings or, worse still, abandoning reasonable efforts to enforce order.[182] Wilkinson warned: "Given the climate of today's schools, it would seem an inappropriate moment for the Court to risk creating such inhibitions on the part of disciplinarians and to arm alleged offenders with enhanced prospects for judicial recourse."[183]

Wilkinson concluded his critique of *Goss* by assailing what he considered to be the majority's ill-advised venture into child psychology. In his view, the *Goss* majority rather naively accepted the notion that mistaken discipline harmed students and alienated them from our system of democratic education while implausibly discounting the ruling's potential to fuel students' sense of entitlement and to nudge them toward the abandonment of a sense of obligation to others.[184] To him, the limited procedural constraints on the administration of school discipline that *Goss* deemed constitutionally required were likely to prevent the school from guiding a child to self-mastery. This result would ultimately foil the social mission of the public school while depriving the child of the lesson that his dignity might be more powerfully affirmed by rendering him subject to necessary restraint rather than by abandoning him to his own immature inclinations.[185]

176. *Id.* at 32.

177. *Id.*

178. *Id.*

179. *Id.* at 29.

180. *Id.* at 30, 42.

181. *Id.* at 43.

182. *Id.* at 60.

183. *Id.* at 69.

184. *Id.* at 73–75.

185. Bruce C. Hafen, *Schools as Intellectual and Moral Associations*, 1993 BYU L. REV. 605, 616 (characterizing "civil liberties-based jurisprudence" as "abandoning children to their 'rights'").

Hostility toward *Goss* and apprehension about its effects on school operations, particularly on the ability to maintain order, has continued to animate the work of critics of school discipline, such as Richard Arum.[186] Arum's book, *Judging School Discipline*, presents the thesis that *Goss*'s process mandate "had a significant role in contributing to the decline in moral authority and the erosion of effective disciplinary practices in American public schools."[187] Surveying the volume of actions filed by students and their parents in state and federal courts to challenge disciplinary sanctions before and after *Goss*, Arum documents a marked increase in such filings and concludes that this litigation wave reflected students' "sense of legal entitlement" and spurred a problematic "skepticism about the legitimacy of school disciplinary practices."[188] Arum further argues that schools responded to *Goss* and the litigation he asserts it spawned by disciplining students less.[189]

Other scholars' findings regarding the volume and outcome of students' litigated challenges to discipline since *Goss* have cast serious doubt on Arum's hypothesis that *Goss* robbed educators of the authority they needed to maintain classroom control. These scholars have instead documented a relatively stable and modest record of litigated challenges and an overwhelmingly favorable set of outcomes for school authorities, a pattern consistent with judicial deference toward school authorities. For example, a recent analysis by Perry Zirkel and Youssef Chouhoud shows that in the period from 1986 to 2005 there were 165 cases presenting discipline challenges and producing 191 issue rulings.[190] Out of those rulings, twelve percent were conclusive victories for the student and seven percent were in favor of the student but did not represent substantive vindication of the student's claims, but seventy-four percent gave the school district a conclusive victory.[191] Zirkel and Chouhoud conducted further analysis of available discipline litigation data and found that the pattern of school-favorable outcomes was generally consistent whether the student pursued federal or

186. Arum is a former high school teacher and now a professor of sociology and education at New York University. *Curriculum Vitae* of Richard Arum, http://steinhardt.nyu.edu/scmsAdmin/uploads/005/136/arum-cv0110.pdf (last visited Aug. 1, 2010).

187. RICHARD ARUM, JUDGING SCHOOL DISCIPLINE: THE CRISIS OF MORAL AUTHORITY 4 (2003).

188. *Id.* at 6.

189. *Id*. at 13. Arum acknowledges that businesses have often responded to legislation or litigation by manifesting only "symbolic compliance," but he contends, without being able to document his claim empirically, that schools actually changed their responses to student misconduct by simply doing nothing in order to avoid anticipated legal challenges. *Id.* at 13–14. Arum frequently draws support for his hypothesized retreat from discipline from surveys of teachers and administrators who agree with proffered statements to the effect that schools face "too much interference from courts," that such "interference" was a "very important" factor in "school disciplinary problems" and that "teachers and administrators ha[d] been hampered by court decisions in their application of discipline." *Id*. at 128. Arum does not compare the actual incidence of discipline in any form during the time periods relevant to the survey responses to evaluate if the responses are distorted perceptions of *Goss*-related effects or actual changes in practice.

190. Youssef Chouhoud & Perry A. Zirkel, *The* Goss *Progeny: An Empirical Analysis*, 45 SAN DIEGO L. REV. 353, 363, 369 (2008). This study's findings confirmed patterns identified in earlier studies showing a decline in procedural due process decisions after *Goss* and an increase in outcomes favoring school officials.

191. *Id.* at 369–70.

state law claims[192] with one exception: state law claims challenging student suspensions or expulsions did have a greater likelihood of success.[193]

Arum's thesis that school discipline became more ineffective after *Goss* ignores an alternative component of what is likely a multifaceted explanation of any perceived or actual deterioration of schools' ability to manage students' behavior. He fails to acknowledge that many schools may be using ineffective disciplinary techniques that reflect little, if any, effort to use available developmental knowledge or that ignore the student's needs or skills deficits that create behavioral problems. Arum does, however, recognize that school discipline's legitimacy will be undercut by sanctions that are too lenient or too harsh, thereby implicitly conceding that the content of schools' disciplinary policies could contribute to a decrease in discipline's effectiveness and a diminution of school officials' capacity to command students' respect for their claimed authority.[194]

The *Goss* protocol may have had the potential to produce particular correctives and benefits, ensuring the accuracy of allegations that are the basis for discipline and enhancing a student's sense of having been treated fairly even if the outcome is not exoneration.[195] However, *Goss* may well have diverted attention away from the substantive content of disciplinary policy, allowing compliance with "skeletal"[196] procedural obligations to deflect attention away from larger issues of fairness and efficacy. As David Kirp presciently feared, the procedural demands of *Goss* can too readily drift toward nothing more than "prepunishment ceremonies"—empty, mechanically executed rituals that produce no meaningful exchange between school officials and students.[197] Thus, the need to explore and revise the substantive content of disciplinary policies emerges as a neglected object of constitutional scrutiny.[198]

192. Perry A. Zirkel & Youssef Chouhoud, *The* Goss *Progeny: A Follow-Up Outcomes Analysis*, 13 U.C. DAVIS J. JUV. L. & POL'Y 333, 342–47 (2009).

193. *Id.* at 347.

194. ARUM, *supra* note 187, at 33.

195. Arum concedes that *Goss* actually gave students little real substantive protection against discipline that was arbitrary or discriminatory. *Id.* at 208. He posits that the decision propagated a widespread misconception among school personnel that any disciplinary act was likely to precipitate a legal challenge. *Id.* Arum never addresses why school systems did not make more of an effort to give teachers and administrators more accurate information about the legal terrain on which they operated.

196. Wilkinson, *supra* note 172, at 40.

197. David L. Kirp, *Proceduralism and Bureaucracy: Due Process in the School Setting*, 28 STAN. L. REV. 841, 842 (1976). Kirp expressed the fear that organizational constraints on school operations would thwart any opportunity for *Goss* hearings to reshape the disciplinary encounter in a way that advanced mutual understanding and improved the fairness and efficacy of the disciplinary process. Kirp's pessimism reflected the disappointing results of discipline reform efforts predating *Goss*. *See id*. at 853 (noting results of 1972 New York Civil Liberties Union study finding that New York City school officials consistently failed to comply fully with hearing requirements voluntarily adopted by Board of Education). Kirp retained the hope that school officials would come to recognize the value of going beyond the limits of the *Goss*-prescribed encounter and undertake exchanges of a more open and wide-ranging character, exchanges that would establish a mutual empathetic connection between official and student. *Id.* at 865.

198. Recognition of the limited capacity of process-oriented change to eliminate inequities in the application of discipline or to produce more humane and effective disciplinary practices echoes what has been learned from the assessment of the constitutional course of criminal justice reform. The unfortunate diversionary consequences of adopting a procedurally focused constitutional reform agenda to redress the

III. DISCIPLINARY PRACTICES TODAY: APPRECIATING THE NEED FOR REFORM

Roper arrived in an era in which school disciplinary policies have become increasingly punitive and rigid as school officials respond to public fears about potentially deadly school violence and to legally imposed performance demands that heighten the perceived urgency of eliminating disciplinary situations that compromise the learning environment.[199] Zero tolerance disciplinary policies prescribe expulsion or suspension for a wide swath of offenses, including many formerly addressed through in-school punishment and/or counseling.[200]

To demonstrate the urgency of a reform effort to redress the harms of prevalent disciplinary regimes, this Article will examine two bodies of literature. It will look first at the litany of abusive practices chronicled by student advocates and scholars. The Article will then review the recent chorus of calls for discipline reform that have been issued by constituencies both within and outside the education establishment, groups such as the National Institute of Child Health and Human Development ("NICHD"), the National Association for the Accreditation of Teacher Education ("NCATE"), the Education Schools Project, and the American Psychological Association.

A. Documenting the Harms of Misguided School Disciplinary Practices

In a series of important reports, advocacy groups, including the Advancement Project, the Harvard Civil Rights Project, and the American Civil Liberties Union, have documented how school disciplinary practices hurt students by needlessly removing them from the classroom and often propelling them into what has become known as "the school to prison pipeline."[201] Students increasingly face suspension and even

injustices of the adult criminal justice system has been examined in the scholarship of William Stuntz. *See generally, e.g.*, William J. Stuntz, *The Political Constitution of Criminal Justice*, 119 HARV. L. REV. 781 (2006); William J. Stuntz, *Substance, Process, and the Civil-Criminal Line*, 7 J. CONTEMP. LEGAL ISSUES 1 (1996).

199. *See* David N. Figlio, *Testing, Crime and Punishment*, 90 J. PUB. ECON. 837 (2006) (examining disciplinary records from set of Florida school districts during 1996–1997 school year through 1999–2000 school year and finding that increase in length of suspensions imposed on low-performing students during testing period suggested that schools used selective discipline to affect aggregate accountability testing results). The ways in which the penalty structure of No Child Left Behind creates a temptation for schools to use disciplinary sanctions to exclude low-performing students and artificially boost school performance have been widely documented. *E.g.*, Elisa Hyman, *School Pushouts: An Urban Case Study*, 38 CLEARINGHOUSE REV. 684 (2005); Maureen Carroll, Comment, *Educating Expelled Students After No Child Left Behind: Mending an Incentive Structure That Discourages Alternative Education and Reinstatement*, 55 UCLA L. REV. 1909, 1927–33 (2008); Tamar Lewin & Jennifer Medina, *To Cut Failure Rate, Schools Shed Students*, N.Y. TIMES, July 31, 2003, at A1.

200. Eric Blumenson & Eva S. Nilsen, *One Strike and You're Out? Constitutional Constraints on Zero Tolerance in Public Education*, 81 WASH. U. L.Q. 65, 66 (2003). The zero tolerance approach has been extended far beyond its origins in the 1994 Gun-Free Schools Act's requirement that school systems receiving federal aid must impose a mandatory one year expulsion on any student found to have a firearm in school. Gun-Free Schools Act, 20 U.S.C. § 7151(b)(1) (2006). The Act also required that schools refer students found with firearms to law enforcement authorities. *Id.* § 7151(h)(1). The statute did, however, permit applicable state law to authorize the local education agency's chief administrative officer to modify the expulsion sanction on a case-by-case basis as long as the modification was in writing. *Id.* § 7151(b)(1).

201. *See, e.g.*, ADVANCEMENT PROJECT ET AL., EDUCATION ON LOCKDOWN: THE SCHOOLHOUSE TO JAILHOUSE TRACK (2005) [hereinafter LOCKDOWN], *available at* http://www.advancementproject.org/sites/

arrest for behaviors once dealt with less harshly and within the school setting. Nonviolent behaviors such as insubordination, tardiness, absenteeism, and "disrupting class" can trigger exclusion and criminal consequences under zero tolerance regimes.[202] Minor fights between students producing no serious injuries and involving no weapons also increasingly prompt at least temporary ejection from school and may be referred for prosecution.[203] Students can also face prolonged suspensions when a conflict with a teacher or other official escalates.[204] Such student behavior should not be considered acceptable, but school personnel's inappropriate handling of conflicts with students can foreseeably exacerbate rather than diffuse tension and hostility.[205] Such disciplinary responses are traumatic for children and families[206] and result in a detrimental loss of learning time.[207] This mishandling of events is often traceable to a lack of training on how to deal with students in a developmentally appropriate way.[208]

default/files/publications/FINALEOLrep.pdf; ADVANCEMENT PROJECT & THE HARVARD CIVIL RIGHTS PROJECT, OPPORTUNITIES SUSPENDED: THE DEVASTATING CONSEQUENCES OF ZERO TOLERANCE AND SCHOOL DISCIPLINE (2000) [hereinafter OPPORTUNITIES SUSPENDED], *available at* http://www.advancementproject.org/sites/default/files/publications/opsusp.pdf; AM. CIVIL LIBERTIES UNION ET AL., DIGNITY DENIED: THE EFFECT OF "ZERO TOLERANCE" POLICIES ON STUDENTS' HUMAN RIGHTS (2008), *available at* http://www.aclu.org/pdfs/humanrights/dignitydenied_november2008.pdf; AM. CIVIL LIBERTIES UNION & THE ACLU OF CONN., HARD LESSONS: SCHOOL RESOURCE OFFICER PROGRAMS AND SCHOOL-BASED ARRESTS IN THREE CONNECTICUT TOWNS (2008) [hereinafter HARD LESSONS], *available at* http://www.aclu.org/pdfs/racialjustice/hardlessons_november2008.pdf; AM. CIVIL LIBERTIES UNION OF MICH., RECLAIMING MICHIGAN'S THROWAWAY KIDS: STUDENTS TRAPPED IN THE SCHOOL-TO-PRISON PIPELINE (2009), *available at* http://aclumich.org/sites/default/files/file/reclaimingmichigansthrowawaykids.pdf; JUDITH A. BROWNE, ADVANCEMENT PROJECT, DERAILED: THE SCHOOLHOUSE TO JAILHOUSE TRACK (2003) [hereinafter DERAILED], *available at* http://www.advancementproject.org/sites/default/files/publications/Derailerepcor_0.pdf; FLA. STATE CONFERENCE NAACP ET AL., ARRESTING DEVELOPMENT: ADDRESSING THE SCHOOL DISCIPLINE CRISIS IN FLORIDA [hereinafter ARRESTING DEVELOPMENT] (2006), *available at* http://www.advancementproject.org/sites/default/files/full%20report.pdf; NAT. ECON. & SOC. RIGHTS INITIATIVE, DEPRIVED OF DIGNITY: DEGRADING TREATMENT AND ABUSIVE DISCIPLINE IN NEW YORK CITY & LOS ANGELES PUBLIC SCHOOLS [hereinafter NESRI], *available at* http://www.nesri.org/Deprived%20of%20Dignity%2007.pdf.

202. *See, e.g.*, ARRESTING DEVELOPMENT, *supra* note 201, at 7–8, 16, 21, 34 (noting minor infractions that can and have led to arrests under zero tolerance policies, including five-year-old girl arrested for having temper tantrum in class); DERAILED, *supra* note 201, at 9, 16 (describing minor infractions from Baltimore, Houston, and Palm Beach, including arrest of teenager for carrying egg in his pants on Halloween); OPPORTUNITIES SUSPENDED, *supra* note 201, at 4–5 (noting nationwide incidents, including expulsion of female student for carrying sparklers in her backpack).

203. *See, e.g.*, ARRESTING DEVELOPMENT, *supra* note 201, at 8 (noting that one Florida county public school district referred 1,616 cases to local law enforcement during a single school year).

204. *See, e.g.*, NESRI, *supra* note 201, at 20 (reporting suspensions of two weeks to a month for cursing or yelling at a teacher).

205. Liz Bowie, *Attack on City Teacher Highlights Training Gaps, Educators Lack Skills to Defuse Clashes, Some Say*, BALT. SUN, Apr. 11, 2008, at 1B.

206. RUSSELL SKIBA ET AL., AM. PSYCHOLOGICAL ASS'N, ARE ZERO TOLERANCE POLICIES EFFECTIVE IN THE SCHOOLS? AN EVIDENTIARY REVIEW AND RECOMMENDATIONS 82–84 (2006) [hereinafter APA REPORT], *available at* http://www.texasappleseed.net/pdf/ZTTF%20Report%20Final%20approved%20by%20BOD.pdf.

207. Even when schools use the less drastic but increasingly common sanction of in-school suspension ("ISS"), students may be hurt academically. *See* Brent E. Troyan, Note, *The Silent Treatment: Perpetual In-School Suspension and the Education Rights of Students*, 81 TEX. L. REV. 1637, 1656–58 (2003) (describing schools' failure to provide academic materials and instruction to students in ISS). In-school suspension is a

Zero tolerance policies also often require or authorize referring students for possible criminal prosecution in addition to the school sanction, leading to what has been termed the "criminalization of the classroom."[209] Such policies can ensnare students accused of relatively minor offenses and have been applied even in elementary schools. Broadly worded statutes prescribing the punishment of offenses such as "terroristic threats" and "offensive touching" have been used to arrest and criminally charge children as young as six.[210]

Although zero tolerance policies remove discretion, they have not eliminated racial disproportionality in discipline.[211] The overrepresentation of black and Latino students, particularly boys, among those suspended and expelled continues unabated in zero tolerance systems. Examinations of zero tolerance regimes consistently reflect significant racial disproportionality in the imposition of punishment, including the referral of students into the criminal justice system for misconduct at school.[212] In a

sanction that does not trigger reporting under mandated civil rights data reporting guidelines, and its use may mask the full extent of racial disproportionality in discipline.

208. *See* LOCKDOWN, *supra* note 201, at 10 (emphasizing need for specialized training for school resource officers ("SRO") in how to understand and deal with adolescents); HARD LESSONS, *supra* note 201, at 47 (recommending that minimum required training for SROs include information about child and adolescent psychology); *id.* at 20 (reporting decline in arrests by SROs in Bridgeport schools after officers received training addressing adolescent psychology as well as mediation and problem-solving techniques). Involvement of SROs in handling discipline also raises the specter of students facing charges such as resisting arrest and assault on a police officer if they react angrily during the incident. HARD LESSONS, *supra* note 201, at 17 (recounting one such escalating incident in Stratford, Connecticut, school).

209. ELORA MUKHERJEE ET AL., N.Y. CIVIL LIBERTIES UNION, CRIMINALIZING THE CLASSROOM: THE OVER-POLICING OF NEW YORK CITY SCHOOLS (2007), *available at* http://www.nyclu.org/pdfs/criminalizing_the_classroom_report.pdf. The increasing use of police and prosecutors to address student behavior has been decried as an abdication of educators' responsibility and an abandonment of the troubled youth most in need of the help schools could provide. *See* KIM BROOKS ET AL., SCHOOLHOUSE HYPE: TWO YEARS LATER 15–16 (2000), *available at* http://www.justicepolicy.org/images/upload/00-04_REP_SchoolHouseHype2_JJ.pdf (noting additional problems schools face for disciplinary actions against children with special educational needs); Bernadine Dohrn, *The Schools, the Child, and the Court*, *in* A CENTURY OF JUVENILE JUSTICE 267 (Margaret K. Rosenheim et al. eds., 2002).

210. *See, e.g.*, DERAILED, *supra* note 201, at 11 (listing incidents in which elementary school children as young as six were arrested and charged criminally for behavior such as talking during an assembly, pushing another student, and playing cops and robbers with paper gun); *id.* at 39 (describing use of "terroristic threats" and "offensive touching" statutes).

211. Disabled students also face disproportionately frequent and severe discipline. As was likely true in prior eras, minority and disabled children are at heightened risk in defective disciplinary regimes because officials' overt or subconscious bias compounds the problems posed by school personnel's failure to understand what constitutes appropriate disciplinary measures.

212. *See, e.g.*, LOCKDOWN, *supra* note 201, at 9 (noting that of 1,105 arrests of students for school related behavior in Palm Beach County, Florida, schools in 2003, black students comprised sixty-four percent of arrestees but only twenty-nine percent of student population); HARD LESSONS, *supra* note 201, at 25–26 (finding that black and Latino students together were sixty-nine percent of student population in East Hartford, Connecticut but made up eighty-five percent of school arrests; black and Latino students in West Hartford were twenty-four percent of student population, but made up sixty-three percent of those arrested); *see also generally* Avarita L. Hanson, *Have Zero Tolerance School Discipline Policies Turned into a Nightmare? The American Dream's Promise of Equal Educational Opportunity Grounded in* Brown v. Board of Education, 9 U.C. DAVIS J. JUV. L. & POL'Y 289 (2005); Frances P. Solari & Julienne E.M. Balshaw, *Outlawed and Exiled: Zero Tolerance and Second Generation Race Discrimination in Public Schools*, 29 N.C. CENT. L.J. 147 (2007); Heather Cobb, Note, *Separate and Unequal: The Disparate Impact of School-Based Referrals to*

major study of the disciplinary practices of an urban Midwestern school system, psychologist Russell Skiba, a leading authority on zero tolerance practices and their effects, has used multiple regression analysis to demonstrate that no factor other than race could explain this disparity in a major study of the disciplinary practices of an urban Midwestern school system.[213]

Another troubling deficiency of the zero tolerance approach to student misbehavior is its questionable effectiveness. Research has shown that such policies appear counterproductive, igniting student hostility toward school officials and eroding the sense of school connectedness critical to a student's academic success and behavioral improvement.[214] School connectedness is defined as "the belief by students that adults in the school care about their learning as well as about them as individuals."[215] A school's psychosocial environment creates the foundation for such connectedness, and the quality of that environment is revealed by disciplinary practices and classroom management strategies as well as through the mechanisms the school provides for students to participate in decision making and present their concerns about school operations.[216] Thus, schools exhibiting a harsh and punitive disciplinary approach diminish the likelihood that students will view the school as supportive. When teachers demonstrate respect for students through their classroom exchanges about behavioral and academic expectations and through the development and implementation of behavioral consequences that the affected students perceive as fair, they can expect better compliance.[217] Teachers' capacity to cultivate such a classroom climate depends on their access to relevant training and professional support structures in the school.[218] High rates of suspension and expulsion often reveal a broader problem

Juvenile Court, 44 HARV. C.R.-C.L. L. REV. 581 (2009); Adira Siman, Note, *Challenging Zero Tolerance: Federal and State Legal Remedies for Students of Color*, 14 CORNELL J.L. & PUB. POL'Y 327 (2005). Racial disparities in the severity and frequency of discipline have continued for over three decades without effective redress through litigation. *See, e.g.*, Mark G. Yudof, *Suspension and Expulsion of Black Students from the Public Schools: Academic Capital Punishment and the Constitution*, 39 LAW & CONTEMP. PROBS. 374, 396–404 (1975) (examining early litigation challenging racial imbalance in discipline).

213. Russell J. Skiba et al., *The Color of Discipline: Sources of Racial and Gender Disproportionality in School Punishment*, 34 URBAN REV. 317, 323, 338 (2002).

214. *See* CTR. FOR DISEASE CONTROL & PREVENTION, U.S. DEP'T OF HEALTH & HUM. SERVS., SCHOOL CONNECTEDNESS: STRATEGIES FOR INCREASING PROTECTIVE FACTORS AMONG YOUTH 3 (2009) [hereinafter SCHOOL CONNECTEDNESS], *available at* http://www.cdc.gov/HealthyYouth/AdolescentHealth/pdf/connectedness.pdf (citing recent studies on greater health benefit from enhancing positive aspects of community life, rather than only focusing on intervention in problem areas). School connectedness serves as a protective factor that inhibits risky behaviors and enhances educational outcomes for individual students. *Id.* at 7.

215. *Id.* at 3.

216. ROBERT WILLIAM BLUM ET AL., IMPROVING THE ODDS: THE UNTAPPED POWER OF SCHOOLS TO IMPROVE THE HEALTH OF TEENS 16–17 (2002); Clea A. McNeely et al., *Promoting School Connectedness: Evidence from the National Longitudinal Study of Adolescent Health*, 72 J. SCH. HEALTH 138 (2002). Such decision-making opportunities should, of course, be scaled to the children's developmental capacities. SCHOOL CONNECTEDNESS, *supra* note 214, at 14.

217. *See infra* Part VI for a discussion of the importance of aligning school discipline with developmental knowledge.

218. SCHOOL CONNECTEDNESS, *supra* note 214, at 9.

of school dysfunction,[219] and the flawed character of current disciplinary practices may well weigh heavily in the mix of factors pushing up high school dropout rates for American schools overall and large urban school systems in particular.[220]

Schools' use of zero tolerance policies in response to a wide spectrum of student behavior has been consistently and persuasively criticized in legal scholarship.[221] However, with few exceptions, reviewing courts have not been receptive to challenges that expose the essential irrationality and brutal excess of zero tolerance disciplinary practices.[222] Recently, dissatisfaction with zero tolerance approaches' overuse of

219. LOCKDOWN, *supra* note 201, at 15 (citing Russell Skiba, *Zero Tolerance: The Assumptions and the Facts*, EDUC. POL'Y BRIEFS, Summer 2004, at 2). Correlations have been noted between higher suspensions rates and high student-teacher ratios, lower quality of academic instruction, poor school governance, and inattention to school climate.

220. *See generally* CTR. FOR LABOR MKT. STUDIES, NORTHEASTERN. UNIV. & THE ALTERNATIVE SCHOOL NETWORK, LEFT BEHIND IN AMERICA: THE NATION'S DROPOUT CRISIS (2009), *available at* http://www.clms.neu.edu/publication/documents/CLMS_2009_Dropout_Report.pdf; CHRISTOPHER B. SWANSON, EDITORIAL PROJECTS IN EDUC. RESEARCH CTR., CITIES IN CRISIS: A SPECIAL ANALYTIC REPORT ON HIGH SCHOOL GRADUATION (2008), *available at* http://www.americaspromise.org/Our-Work/Dropout-Prevention/~/media/Files/Our%20Work/Dropout%20Prevention/Cities%20in%20Crisis/Cities_In_Crisis_Report_2008.ashx.

221. *E.g.*, AUGUSTINA H. REYES, DISCIPLINE, ACHIEVEMENT, AND RACE: IS ZERO TOLERANCE THE ANSWER? (2006); Blumenson & Nilsen, *supra* note 200; Kevin P. Brady, *Zero Tolerance or (In)Tolerance Policies? Weaponless School Violence, Due Process, and the Law of Student Suspensions and Expulsions: An Examination of* Fuller v. Decatur Public School Board of Education School District, 2002 BYU EDUC. & L.J. 159; Nora M. Findlay, *Should There Be Zero Tolerance for Zero Tolerance School Discipline Policies?*, 18 EDUC. & L.J. 103 (2008); Marsha B. Freeman, *Bringing Up Baby (Criminals): The Failure of Zero Tolerance and the Need for a Multidisciplinary Approach to State Actions Involving Children*, 21 QLR 533 (2002); Alicia C. Insley, Comment, *Suspending and Expelling Children from Educational Opportunity: Time to Reevaluate Zero Tolerance Policies*, 50 AM. U. L. REV. 1039 (2001); Sheena Molsbee, Comment, *Zeroing Out Zero Tolerance: Eliminating Zero Tolerance Policies In Texas Schools*, 40 TEX. TECH L. REV. 325 (2008); Christopher D. Pelliccioni, Note, *Is Intent Required? Zero Tolerance, Scienter, and the Substantive Due Process Rights of Students*, 53 CASE W. RES. L. REV. 977 (2003); Jill Richards, Comment, *Zero Room for Zero Tolerance: Rethinking Federal Funding For Zero Tolerance Policies*, 30 U. DAYTON L. REV. 91 (2004).

222. *Seal v. Morgan*, 229 F.3d 567 (6th Cir. 2000), represents the rare instance of a court taking a constitutional challenge to zero tolerance policies seriously. In *Seal*, a student faced expulsion after another person's knife had been found in his car although the student did not know the weapon had been placed there. *Seal*, 229 F.3d at 570–72. Applying rationality review, the Sixth Circuit found that punishing a student without considering whether his violation of the weapons ban was knowing could not satisfy the due process standard that governmental action be reasonably related to a legitimate state interest. *Id.* at 575. Notably, litigated challenges to racial disparities in discipline have had little success. *See, e.g.*, Fuller v. Decatur Pub. Sch. Bd. of Educ. Sch. Dist. 61, 78 F. Supp. 2d 812 (C.D. Ill. 2000) (finding that evidence of overall statistical disparity in the number and severity of disciplinary sanctions imposed on African Americans and whites did not establish evidence of intentional discrimination when a group of African American students were expelled for fighting in stands during a football game), *aff'd*, 251 F.3d 662 (7th Cir. 2001); Lee v. Butler County Bd. of Educ., 183 F. Supp. 2d 1359 (M.D. Ala. 2002) (granting motion seeking declaration of unitary status and crediting district's explanation that data on racial disparities in discipline created misleading impression because it failed to note that multiple sanctions could be imposed on small number of students). Civil rights advocates have, however, pressed for the persistent use of mechanisms like the filing of OCR complaints with the Department of Education in order to document, draw the attention of relevant local and national authorities to the problem, and lay the groundwork for possible future redress of this severe ongoing problem. Daniel J. Losen & Christopher Edley, Jr., *The Role of Law in Policing Abusive Disciplinary Practices: Why School Discipline is a Civil Rights Issue*, *in* ZERO TOLERANCE: RESISTING THE DRIVE FOR PUNISHMENT IN OUR SCHOOLS 230, 239 (William Ayers et al. eds., 2001).

suspension and expulsion has prompted political and legislative action to reorient schools' policies.[223]

B. Calls for Change from Relevant Professional Communities

In late 2005, the National Institute of Child Health and Human Development ("NICHD") and the National Council for the Accreditation of Teacher Education ("NCATE") convened a series of meetings in which experts from both the education and child development fields exchanged ideas about how principles of child and adolescent development and their classroom application could be better integrated into teacher preparation programs.[224] In sessions chaired by eminent child psychiatrist James Comer,[225] participants worked to develop an agenda for the improvement of teacher education, guided by the following premise: "If educators are to empower all individuals to learn, they must know and be able to apply information from human development and cognitive science within their own professional practice."[226]

The recommendations drawn from these discussions interject insights with the potential to reorient both teacher training and classroom practices. First, the knowledge from developmental psychology and neuroscience that would enhance teacher performance must be presented in an accessible, comprehensible form and in a manner that gives teachers in training both the information and sustained opportunities to apply it in instructional settings.[227] This unification of theory and practice will require the modification of both the curriculum of American education schools and the laws and standards that prescribe their operations. In addition, more attention must be directed to how developmental research can be quickly transmitted to educators in usable form. As NCATE's survey of its accredited institutions revealed, middle school and high school teachers would benefit from greater familiarity with the characteristics and

223. See *infra* Part V for a discussion of the shift in disciplinary policies in school districts across the nation. *See also Has 'Zero Tolerance' in Schools Gone Too Far? Some States' Lawmakers Move in That Direction on Violence, Drugs Policies*, ASSOCIATED PRESS, June 15, 2007, http://www.msnbc.msn.com/id/19249868/ (recounting perceived growing backlash against zero tolerance disciplinary policies). Teacher discomfort with zero tolerance regimes has also been detected. Kim Fries & Todd A. DeMitchell, *Zero Tolerance and the Paradox of Fairness: Viewpoints from the Classroom*, 36 J.L. & EDUC. 211 (2007). In his recent dissent from the Court's ruling that the strip search of a female middle school student accused of having prescription strength ibuprofen violated the Fourth Amendment, Justice Thomas, a staunch opponent of judicial imposition of limits on school administrators' authority, cited the recent upsurge in popular opposition to zero tolerance and the legislative responses the opposition has produced as the appropriate, nonjudicial means of redressing disciplinary excesses. Safford Unified Sch. Dist. No. 1 v. Redding, 129 S. Ct. 2633, 2656–57 (2009) (Thomas, J., dissenting).

224. NAT'L INST. OF CHILD HEALTH & HUMAN DEV. & NAT'L COUNCIL FOR ACCREDITATION OF TEACHER EDUC., CHILD AND ADOLESCENT DEVELOPMENT RESEARCH AND TEACHER EDUCATION: EVIDENCE-BASED PEDAGOGY, POLICY, AND PRACTICE [hereinafter NICHD/NCATE REPORT] (2006), *available at* http://www.ncate.org/documents/research/ChildAdolDevTeacherEd.pdf.

225. Dr. James Comer, an influential force in education, has previously called for adding efforts to increase teacher training on child development to the education reform agenda. Mark F. Goldberg, *An Interview with Dr. James P. Comer: Maintaining a Focus on Child Development*, 78 PHI DELTA KAPPAN 557–59 (1997).

226. NICHD/NCATE REPORT, *supra* note 224, at 1 (emphasis omitted).

227. *Id.* at 27–28.

vulnerabilities of middle childhood and adolescence.[228] Currently, teacher education programs do a better job at familiarizing teachers with the needs and capacities of young children than those of middle and high school students, a deficiency which likely contributes to the escalation of teacher-student conflict and disciplinary incidents in middle and high schools.[229]

In some of its most striking passages, the NICHD/NCATE Report built on the work of Dr. Margaret Spencer, a professor at the University of Pennsylvania Graduate School of Education. Dr. Spencer's contributions to the roundtable meetings emphasized "the importance of care and competence in teacher education and practice" and focused on the too often neglected relationship between a child's affective state and his or her capacity for learning.[230] Teachers must cultivate an awareness that each child comes to school with specific individual protective factors and vulnerabilities rather than applying group-oriented stereotypes.[231] In addition, the teacher attuned to the affective dimensions of learning can then appreciate how the teacher-student interaction can favorably or unfavorably affect the child's capacity for and receptivity to learning.[232] The cultivation of such an informed and sympathetic orientation on the part of the teacher becomes particularly important for the instruction of adolescents, who readily apprehend when teachers are treating students unfairly or callously and who then experience a loss of confidence and motivation.

The roundtable emphasizes how teachers can avoid creating emotional obstacles to student learning if they utilize developmentally appropriate and psychologically informed instructional and disciplinary methods. For example, the roundtable report stresses how classroom management can become more effective if teachers recognize that a child's behavioral problems often signal an inability to regulate his or her emotions and then utilize techniques that can assist such a child in acquiring a capacity to self-regulate and adapt to conflict or stress.[233] This insight leads the teacher to focus on the identification of external influences or internal (psychological or physical) conditions that could be compromising the child's self-regulatory capacity. The teacher then formulates individualized remedial strategies. In such situations, a teacher familiar with the process of child development will be able to observe a child and discern possible deviations from appropriate developmental patterns, prompting an exploration of why the child's development may not be progressing at the expected pace. Such an

228. *Id.* at 11 (finding that teacher training should be flexible to accommodate various student vulnerabilities).

229. *See* Elissa Gootman, *For Teachers, Middle School Is Test of Wills*, N.Y. TIMES, Mar. 17, 2007, at A1, *available at* http://www.nytimes.com/2007/03/17/education/17middle.html (describing how middle school teachers' lack of knowledge of adolescent psychology poses major obstacle to effective instruction and classroom management).

230. NICHD/NCATE REPORT, *supra* note 224, at 12.

231. *Id.* at 12–13.

232. Dr. Spencer's research has explored how teachers' misinterpretation of adolescent boys' display of hyper-bravado, particularly in neighborhood settings where significant dangers exist, alienates such boys from school and from their teachers. Margaret Beale Spencer, et al., *Understanding Vulnerability and Resilience from a Normative Developmental Perspective: Implications for Racially and Ethnically Diverse Youth*, *in* 1 DEVELOPMENTAL PSYCHOPATHOLOGY 627, 644–45 (Dante Cicchetti & Donald J. Cohen eds., 2d ed. 2006).

233. NICHD/NCATE REPORT, *supra* note 224, at 15.

investigation, which would utilize the expertise of other relevant school system professionals, such as social workers and school psychologists, would examine conditions both at home and school in order to discover possible risk factors or unmet needs that contribute to the child's difficulties.

Significantly, a child's development of self-regulatory capacities can be enhanced or inhibited by the social ecology of the classroom, particularly by the teacher's beliefs about and responses to problematic behavior.[234] The teacher, the classroom experience, and the surrounding school climate all powerfully influence a child's emotional state and capacity for learning. Although teachers may correctly identify the home as the primary and perhaps best site for cultivating a child's capacity for self-control,[235] the school logically becomes a necessary, auxiliary source of guidance when parents or caretakers are unable to assist a child.

The NICHD/NCATE Report's findings and recommendations are echoed in other recently issued calls for the reform of teacher preparation in the United States. In his recent highly critical examination of the state of teacher education in the United States,[236] Arthur Levine, former Dean of Columbia University's Teachers College, asserts that American teacher education "is a troubled field, characterized by curricular confusion, a faculty disconnected from practice, low admission and graduation standards, wide disparities in institutional quality, and weak quality control enforcement."[237] Levine systematically catalogues the deficiencies in current teacher preparation programs that must be promptly remedied in order to produce "the teachers America needs."[238] Finding the clinical components of teacher education programs generally inadequate,[239] Levine recounts that education school alumni and principals in the field believe teacher training programs do an unsatisfactory job in equipping graduates to manage their classrooms and to work with diverse student populations.[240]

234. *Id.* at 14.

235. *See id.* at 15–16 (citing research identifying home as primary influence on child's acquisition of emotional regulation skills).

236. ARTHUR LEVINE, THE EDUCATION SCHOOL PROJECT, EDUCATING SCHOOL TEACHERS (2006), *available at* www.edschools.org/pdf/Educating_Teachers_Report.pdf. Levine decries U.S. teacher education as "principally a mix of poor and mediocre programs." *Id*. at 111. However, Levine contends that the flaws in teacher education do not represent the primary cause of current teaching quality problems, placing the larger share of responsibility on the acts and omissions of state governments and school system administrators. *Id.* at 111–14.

237. *Id.* at 21.

238. *Id*. at 103.

239. *Id.* at 28, 39–40. Although graduates rated student teaching experience as the most valuable component of their training, this field experience represented a very small part of their curricular time, often lasting only one term or less. Moreover, potential benefits were often diluted by lax supervision, limited feedback on classroom performance, and scant exposure to urban teaching environments.

240. *Id*. at 31. These neglected facets of the standard education school curriculum could enable teachers to avoid the ineffective and inequitable disciplinary practices described in Part III. Levine reports that sixty-two percent of alumni polled agreed that education schools do not prepare graduates for classroom realities. *Id.* at 32 tbl.4. Among principals, the level of satisfaction with teacher preparation is alarmingly low. Only thirty-three percent of surveyed principals rated education schools as doing "very well" or "moderately well" in preparing teachers to maintain order and discipline in the classroom. *Id*. at 32 tbl.5. Only fifty-four percent of surveyed principals agreed that teacher training schools did "very well" or "moderately well" in conveying an understanding of how students learn, and gave dramatically low appraisals of education schools' success in

While recognizing that improvements in teacher education programs represent only one component of a comprehensive solution to the current crisis in teacher quality,[241] Levine's report emphasizes the need to reorient teacher training toward preparing future teachers for classroom realities and measuring success by the resulting enhancement of student achievement.[242] Education schools must provide a curriculum that will give their students a firm grasp of how children develop and learn.[243] Levine, citing the content of exemplary teacher education programs like those at Stanford and the University of Virginia, would require a curriculum that included courses in child development and adolescent learning, arguing that such courses would allow teachers to understand what their students are "capable of learning and which pedagogies might be most effective in enabling them to learn it."[244]

In considering the legal implications of his diagnosis, Levine notes that states will need to redefine the standards imposed on schools of education by state laws and accrediting agencies.[245] Specifically, states should fund and collect research data on the relationship between teacher education and student performance and reshape the curriculum requirements for teacher education programs accordingly.[246] This redefinition of teacher training standards would include steps acknowledging NICHD's imperative to redress current gaps in teachers' knowledge about child and adolescent

readying graduates to respond to the needs of children with disabilities or from diverse cultural backgrounds. *Id*. Only thirty percent of principals polled agreed that education schools did "moderately well" or "very well" preparing education students to serve disabled students, and only twenty-eight percent of principals saw education school graduates as "very well" or "moderately well" prepared to work with students from diverse cultural backgrounds. This dissatisfaction with teacher preparation in these areas stands in sharp contrast with a survey of education school deans, who overwhelmingly agreed that education schools were the most appropriate place to teach the specific competencies principals saw as lacking. Among the deans asked if education schools were the most appropriate place to teach techniques and particular skill sets, such as how to maintain discipline and order and how students learned, eighty-one percent and ninety-six percent respectively agreed. *Id.* at 34 tbl.6. Similar high rates of agreement were recorded when the deans were asked if education schools should equip graduates to address the needs of students with disabilities (ninety-two percent), students with limited English proficiency (eighty-three percent), and students from diverse cultural backgrounds (ninety-six percent). *Id.*

241. Levine also recommends dramatic changes in teacher compensation, the adoption of policies to facilitate the assignment of highly qualified teachers to schools with the neediest student populations, the expanded creation of professional development schools, which he describes as the educational analog to teaching hospitals, and the inauguration of what would amount to a Rhodes Scholarship for teaching. *Id.* at 104–05, 112.

242. *Id.* at 104.

243. Because an effective teacher education curriculum must not neglect subject matter competence while ensuring pedagogical proficiency, developmental knowledge, and cultural literacy, Levine recommends shifting to five-year teacher education programs. *Id.* at 106. This would allow teacher education programs to offer a more complete array of needed experiences and courses while addressing the reality that many education majors may enter programs with underlying academic skills deficits. *See id.* at 62 (citing assessment of proficiency in reading and mathematics of entering students at public university studied in preparation of Levine's report). Steps such as states' redefinition of accreditation standards and designation of a new accrediting agency are also suggested. *Id.* at 66–70.

244. *Id*. at 108.

245. *See id*. at 50 (noting education school deans' and faculty members' attribution of significant influence to state governments and accrediting agencies in determining curriculum taught).

246. *Id.* at 109.

development[247] and require the provision of opportunities for student teachers to test their developmental knowledge in realistic settings under vigilant supervision.[248] In addition, to redress preparation deficits of teachers trained under earlier inadequate regimes, teacher licensure protocols may need to be revised to require periodic performance evaluation and license renewal.[249]

In yet another recent reform effort, the American Psychological Association ("APA") commissioned a task force to evaluate the effect of zero tolerance policies on children's well-being and school functioning. The task force issued its findings in 2006.[250] After reviewing ten years of research on zero tolerance, the panel found that such policies actually appear to increase the incidence of behavior problems in school while simultaneously perpetuating the disproportionate exclusion of minority students and students with disabilities.[251] The task force recommended sharply curtailing their use and implementing available alternative disciplinary methods that are more attuned to principles of child development and oriented more toward assessment and guidance than punishment and exclusion.[252]

In its report, the APA Task Force stressed the developmental inappropriateness of the use of zero tolerance responses to student misconduct:

> There is no doubt that many incidents that result in disciplinary infractions at the secondary level are due to poor judgment on the part of the adolescent involved. But if that judgment is the result of developmental or neurological immaturity, and if the resulting behavior does not pose a threat to safety, it is reasonable to weigh the importance of a particular consequence against the long-term negative consequences of zero tolerance policies, especially when such lapses in judgment appear to be developmentally normative.[253]

The APA report expressed particular concern about the potential for zero tolerance policies to "create, enhance, or accelerate negative mental health outcomes for youth"[254] by isolating and alienating students who may already be at risk psychologically. Exclusion from school often separates the student from potential sources of professional help and deprives the school of the opportunity to form an accurate understanding of why the child has misbehaved.[255] In addition, the student's

247. *See id*. at 107–08 (noting that education in child development would be component of teacher education curriculum). Levine underscores that programs to prepare middle and secondary school teachers are often particularly weak and outdated. *See id.* at 90 (noting this shortcoming in otherwise exemplary Emporia State University program).

248. *Id.* at 64. Levine praises programs like Stanford's STEP (Stanford Teacher Education Program) master's curriculum for its attention to ensuring student teachers are placed in settings where they can observe skilled teachers and obtain feedback from site visits by supervising education school faculty. This model reflects the leadership of eminent scholar Linda Darling-Hammond. *Id.* at 95–97.

249. *Id.* at 110.

250. APA REPORT, *supra* note 206.

251. *Id.* at 7.

252. *Id.* at 13–16.

253. *Id*. at 68.

254. *Id*. at 81.

255. *See id.* at 82 (citing research supporting notion that zero tolerance and other punitive measures are less effective at addressing root causes of student misbehavior than instructive approach that "foster[s] community, positive identification between students and teachers, and enhanced school bonding").

removal from school aggravates stress within the family, possibly worsening a student's already difficult home situation.[256]

To eliminate disciplinary techniques that harm and alienate students, the APA recommended improving the training of teachers and staff on effective behavior management practices[257] as well as requiring that police officers assigned to schools receive training on adolescent development.[258] The Task Force noted that available research suggested that schools that offered their staff more training on classroom management practices tended to have lower suspension rates than other schools.[259] The APA specifically urged legislators to impose restrictions on the use of zero tolerance, exclusion-oriented disciplinary policies in all but the most severe circumstances and to direct school officials to exhaust prevention-oriented interventions and therapeutic approaches prior to removing children from school.[260]

The NICHD/NCATE findings as well as the Levine report and the APA's recommendations should prompt greater recognition of the challenges of teaching as a profession. Reform of both instructional and disciplinary practices should proceed from an earnest appreciation of children as complex individuals whose strengths and vulnerabilities can be apprehended and addressed only if teachers are equipped with training and resources commensurate to the task. Such appreciation could reorient public policy and financial commitments as well as individual career calculations. Casting elementary and secondary school teaching as a vital and rigorous professional undertaking should lead to conferring greater status on teaching as a career with corollary provision of competitive compensation and adequate institutional support.

Thus, from within these professional communities of educators and psychologists, we see a deepening consensus supporting immediate abandonment of zero tolerance, exclusion-focused disciplinary techniques in favor of more individualized instruction and therapeutically oriented responses. As will be explained below, courts should draw on this reservoir of relevant professional knowledge and experience when evaluating whether challenged disciplinary practices meet the demands of substantive due process.

IV. *ROPER* AS INSPIRATION FOR INNOVATION: ARTICULATING A SUBSTANTIVE DUE PROCESS CRITIQUE OF SCHOOL DISCIPLINARY PRACTICES

Informed by a growing body of psychological and medical knowledge, *Roper* reflects recognition of adolescents as a category of persons who, despite significant vulnerabilities and limitations, too often elicit only hostility as such deficits are ignored in government responses to their behavior. Although articulated as an application of

256. *Id.*

257. *See id.* at 109–10 (noting need for pre-service and in-service training to remediate deficiencies in teachers' classroom-management skills and cultural competence).

258. *Id.* at 102–03; *see also* CATHERINE Y. KIM & I. INDIA GERONIMO, AM. CIVIL LIBERTIES UNION, POLICING IN SCHOOLS: DEVELOPING A GOVERNANCE DOCUMENT FOR SCHOOL RESOURCE OFFICERS IN K-12 SCHOOLS 25 (2009), *available at* http://www.aclu.org/pdfs/racialjustice/whitepaper_policinginschools.pdf (recommending that all school resource officers receive pre-service and in-service training on child and adolescent development and psychology).

259. APA REPORT, *supra* note 206, at 44.

260. *Id.* at 15.

Eighth Amendment doctrine, *Roper*'s reasoning demonstrates adherence to the principles of "dignitary appropriateness"[261] that have repeatedly shaped substantive due process analysis. A governmentally constructed system of consequences can reliably effectuate its legitimate objectives only if it proceeds from an accurate assessment of the person or category of persons on whom such consequences will be imposed. A reviewing court can use relevant professional expertise as a guidepost in its assessment of the "dignitary appropriateness" of exclusion-oriented disciplinary practices that ignore the origins of student behavior and make no effort to fulfill school discipline's central function: teaching students the skills they need to regulate their conduct.

To demonstrate why a course correction in school disciplinary practice is constitutionally required, this Article revisits the work of seminal theorists who have examined both the nature of administrative due process generally and the application of due process norms to schools in particular. This review illuminates that an imperative to acknowledge personal dignity in the conduct of governmental operations is central to due process theory. *Roper*'s animating ethic, recognition that a constitutional duty to respect the dignity of children and youth can be effectuated only through attention to their developmental status, points the way toward a substantive due process attack on school discipline practices that diverge radically from what the best available knowledge about adolescent development would recommend.

A. Due Process Premises and the Nature of Substantive Due Process Analysis

Due process protections effectuate two fundamental values: the recognition of the dignity of those subject to the exercise of governmental power and the pursuit of efficacy as a hallmark of governmental operations. Fidelity to these values secures the legitimacy of government. As explained by Laurence Tribe, procedural due process analysis has "[i]ntrinsic and [i]nstrumental [a]spects."[262] The hearing afforded as the rendition of due process presents an opportunity for an interchange between citizen and governmental representative. This interchange acknowledges the citizen's dignity by soliciting his contribution to and participation in the governmental action at issue. Affording the citizen an opportunity for "revelation"[263]—the presentation of his self and his understanding of his situation—demonstrates that the government regards him respectfully and takes seriously its responsibility to deliver fair and accurate decisions. This interchange also has a utilitarian aspect as the citizen's input could alter the course of governmental action, producing a result that is more accurate and more consistent with the relevant program's objectives.[264]

261. See *infra* note 267 and accompanying text for a discussion of the meaning of "dignitary appropriateness."

262. LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 10-7, at 663 (2d ed. 1988).

263. Frank I. Michelman, *Formal and Associational Aims in Procedural Due Process*, *in* DUE PROCESS: NOMOS XVIII, at 126, 128 (J. Roland Pennock & John W. Chapman eds., 1977).

264. TRIBE, *supra* note 262, at 666–67. Tribe's elaboration of the constitutional principles vindicated by procedural due process draws heavily on the work of Frank I. Michelman on this subject. *See generally* Frank I. Michelman, *The Supreme Court and Litigation Access Fees: The Right to Protect One's Rights—Part I*, 1973 DUKE L.J. 1153.

Eminent due process scholar Jerry Mashaw has repeatedly emphasized the centrality of dignitary concerns to due process analysis.[265] Mashaw argues that, as a constitutional concept, due process installs expectations that government action will be appropriate and competent, expectations expressed through standards of performance that demonstrate necessary regard for those who entrust the government with its power and who become subject to the exercise of its authority.[266] This conceptualization of due process leads Mashaw to argue that governmental conduct should aspire to meet a standard he describes as "dignitary appropriateness."[267]

Although Tribe and Mashaw address the implications of the dignity and efficacy dimensions of due process in relation to the jurisprudence of procedural due process, these underlying values also shape substantive due process analysis as elements of the varied formulations of a substantive due process standard demonstrate. Seminal early descriptions of the nature of what became known as substantive due process violations framed the criticism of the government's behavior in terms of action that lacked reasonable justification and exceeded the competence of government.[268] The more closely the affected individual interest is tied to what is understood as the dignitary core of personhood, the more searching will be the judicial examination of the governmental action's basis and effectiveness in the pursuit of its asserted goals.

As Richard Fallon has explained, "substantive due process review is both more differentiated and pervasive than is ordinarily recognized," extending well beyond the Supreme Court's familiar but controversial fundamental rights jurisprudence.[269] Through a variety of techniques, substantive due process doctrine seeks to advance an overarching, anti-arbitrariness principle.[270] This precept, as Fallon describes it, demands that "government officials must act on public spirited rather than self-interested or invidious motivations, and there must be a 'rational' or reasonable

265. *See* JERRY L. MASHAW, DUE PROCESS IN THE ADMINISTRATIVE STATE 162–67 (1985) (discussing appeal of dignitary theory of due process); Jerry L. Mashaw, *Administrative Due Process: The Quest for a Dignitary Theory*, 61 B.U. L. REV. 885, 886–87 (1981) [hereinafter Mashaw, *Administrative Due Process*] (outlining merit of dignitary approach for administrative due process); Jerry L. Mashaw, *The Supreme Court's Due Process Calculus for Administrative Adjudication in* Mathews v. Eldridge*: Three Factors in Search of a Theory of Value*, 44 U. CHI. L. REV. 28, 49–52 (1976) (criticizing Supreme Court for not considering dignitary concerns in *Mathews v. Eldridge*).

266. Mashaw, *Administrative Due Process*, *supra* note 265, at 866–87.

267. MASHAW, DUE PROCESS IN THE ADMINISTRATIVE STATE, *supra* note 265, at 170. Mashaw goes on to discuss how this performance standard might best emerge from a "non-constitutional common law of administrative procedure" in order to secure its political legitimacy. *Id.* at 173.

268. Meyer v. Nebraska, 262 U.S. 390, 399–400 (1923) ("The established doctrine is that this liberty may not be interfered with, under the guise of protecting the public interest, by legislative action which is arbitrary or without reasonable relation to some purpose within the competency of the State to effect.").

269. Richard H. Fallon, Jr., *Some Confusions About Due Process, Judicial Review, and Constitutional Remedies*, 93 COLUM. L. REV. 309, 310 (1993).

270. This anti-arbitrariness core of due process doctrine has been traced to courts' and scholars' understanding of how the Constitution's commitments were informed by the Magna Carta's expression of the necessary and natural limits on governmental power. See Christine N. Cimini, *Principles of Non-Arbitrariness: Lawlessness in the Administration of Welfare*, 57 RUTGERS L. REV. 451, 459–60, 463–70 (2005), and Frederick Mark Gedicks, *An Originalist Defense of Substantive Due Process: Magna Carta, Higher-Law Constitutionalism, and the Fifth Amendment*, 58 EMORY L.J. 585, 596–654 (2009), for descriptions of the origins of contemporary doctrine.

relationship between government's ends and its means."[271] This approach yields specific, contextualized judgments about the acceptability of challenged government action, judgments in which irreducibly moral considerations are weighed with pragmatic operational concerns.

The purpose of a governmental program guides the translation of what due process requires, informing the procedural aspects of program operations but potentially reaching beyond the definition of the notice and hearing process used to resolve disputes between an agency and an individual client. As Mashaw has explained in the context of social welfare programs such as Aid to Families with Dependent Children ("AFDC"), the process due must be that "which responds to the supportive purposes of the program involved when viewed in the light of realistic assumptions about its dependent clients."[272] Mashaw argued that ensuring the achievement of essential program objectives, the core of the government's due process obligation, could require much broader examination of agency operations, leading to the recognition, in the AFDC context, of the need for in the installation of management-oriented reforms, such as quality control systems.[273] The substantive content of agency policy would also be properly subjected to interrogation in order to ensure fidelity to the dignitary and efficacy values that underlie due process, and such an evaluation would necessarily be guided by the standards of professional practice in the relevant field.[274]

Although education is guaranteed as a state-created property right,[275] such a right, once created, should not be beyond the reach of substantive due process protection if

271. Fallon, *supra* note 269, at 310, 310 n.8 (citing definition of term "arbitrary" from WEBSTER'S NEW NINTH COLLEGIATE DICTIONARY 99 (1983) as "'based on or determined by individual preference or convenience rather than by necessity or the intrinsic nature of something,' or when 'marked by or resulting from the unrestrained and often tyrannical exercise of power'").

272. Jerry L. Mashaw, *The Management Side of Due Process: Some Theoretical and Litigation Notes on the Assurance of Accuracy, Fairness, and Timeliness in the Adjudication of Social Welfare Claims*, 59 CORNELL L. REV. 772, 815 (1974).

273. *Id.* at 815–16.

274. *Id.* at 820 (discussing *Martarella v. Kelley*, 359 F. Supp. 478 (S.D.N.Y. 1973)). The *Martarella* court used "minimally good professional practice" as the guidepost in prescribing remediation plan for New York City Juvenile Detention Centers. *Id.* at 819. The plan included training standards for personnel and procedures for the evaluation of children in detention and for the formulation of individual treatment plans. *Id.*

275. The constitutions of all fifty states provide for some form of public education: ALA. CONST. art. XIV, § 256; ALASKA CONST. art. XI, § 1; ARIZ. CONST. art. XIV, § 1; CAL. CONST. art. IX, § 5; COLO. CONST. art. IX, § 2; CONN. CONST. art. VIII, § 1; DEL. CONST. art. X, § 1; FLA. CONST. art. IX, § 1; GA. CONST. art. VIII, § 1, para. 1; HAW. CONST. art. X, § 1; IDAHO CONST. art. IX, § 1; ILL. CONST. art. X, § 1; IND. CONST. art. 8, § 1; IOWA CONST. art. 9, 2d, § 3; KAN. CONST. art. VI, § 1; KY. CONST. § 183; LA. CONST. art. VIII, § 1; ME. CONST. art. VIII, pt. 1, § 1; MD. CONST. art. VIII, § 1; MASS. CONST. pt. 2, ch. 5, § 2; MICH. CONST. art. VIII, § 2; MINN. CONST. art. XIII, § 1; MISS. CONST. art. VIII, § 201; MO. CONST. art. IX, § 1(a); MONT. CONST. art. X, § 1; NEB. CONST. art. VII, § 1; NEV. CONST. art. XI, § 2; N.H. CONST. pt. 2, art. LXXXIII; N.J. CONST. art. VIII, § 4, ¶ 1; N.M. CONST. art. XII, § 1; N.Y. CONST. art. XI, § 1; N.C. CONST. art. IX, § 2; N.D. CONST. art. VIII, § 2; OHIO CONST. art. VI, § 2; OKLA. CONST. art. XIII, § 1; OR. CONST. art. VIII, § 3; PA. CONST. art. III, § 14; R.I. CONST. art. XII, § 1; S.C. CONST. art. XI, § 3; S.D. CONST. art. VIII, § 1; TENN. CONST. art. XI, § 12; TEX. CONST. art. VII, § 1; UTAH CONST. art. X, § 1; Vt. CONST. ch. 2, § 68; VA. CONST. art. VIII, § 1; WASH. CONST. art. IX, § 2; W. VA. CONST. art. XII, § 1; WIS. CONST. art. X, § 3; WYO. CONST. art. VII, § 1.

adequate checks on governmental conduct are to be enforced.[276] Thus, when procedural reform may be insufficient to achieve compliance with the demands of due process, necessary substantive corrections will require consultation of relevant professional standards as part of appropriate due process analysis. In the school discipline context, the limited ability of *Goss*'s procedural reforms to address the harms inflicted on students by exclusion-oriented disciplinary practices should prompt recognition of a widening path toward constitutionally required correction.[277] This path would make its touchstone the emerging professional consensus among educators and psychologists that zero tolerance must be replaced by developmentally calibrated discipline, an approach that concentrates on identifying the origins of a student's behavior and formulating responses designed to bolster the student's capacity for self-regulation or risk avoidance. If, in essence, substantive due process doctrine "asks whether there is a sufficient justification for the government's action,"[278] school officials' imposition of forms of discipline that are detached from a grounding of expertise should no longer be viewed as presumptively satisfying the demands of substantive due process.

B. Substantive Due Process Methodology: Evolution and Refinement

1. A Promising Variant: Using "Emerging Community Standards" as a Substantive Due Process Metric

Confronting the deep skepticism about the use of substantive due process analysis as a basis for the invalidation of government practices, Daniel Conkle has recently proffered a set of theoretical recommendations for the reorientation of substantive due process analysis.[279] By restructuring the methodology of substantive due process decision making, Conkle seeks to establish a foundation of credibility and legitimacy for such decisions through techniques that return to the core of due process analysis, an evaluation of the basis for governmental action. Conkle surveys the patterns in modern substantive due process precedents and describes the two dominant modes of analysis: the theory of historical tradition and the theory of reasoned judgment.[280] The historical tradition model, used by the Court in *Bowers v. Hardwick*[281] and *Washington v.*

276. *See* Michael L. Wells & Alice E. Snedeker, *State-Created Property and Due Process of Law: Filling the Void Left by* Engquist v. Oregon Department of Agriculture, 44 GA. L. REV. 161, 167 (2009), (elaborating on necessity, as matter of federal constitutional law, of substantive protection of state created rights).

277. Forecasting that *Goss*'s procedural regime was unlikely to bring about the kind of transformative effect on the administration of school discipline its proponents aimed for, David Kirp observed that courts would continue to be reluctant to enforce more far-reaching reform, such as the change of substantive policies, due to concerns about their competence and their capacity to secure compliance. Kirp, *supra* note 197, at 844–45, 849–51 (1976); *see also* William G. Buss, *Procedural Due Process for School Discipline: Probing the Constitutional Outline*, 119 U. PA. L. REV. 545, 549–50 (1971) (noting that, although procedural regularity is critical to ensuring fairness of school discipline, substance of school policies will often be even more important).

278. ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 546 (3d ed. 2006).

279. Daniel O. Conkle, *Three Theories of Substantive Due Process*, 85 N.C. L. REV. 63, 66–68 (2006).

280. *Id.* at 82.

281. 478 U.S. 186 (1986).

Glucksberg,[282] considers whether the nature of the claimed protection corresponds to rights previously recognized under the Constitution.[283] Under the reasoned judgment model, the Justices undertake a process of independent political-moral reasoning in which they weigh the asserted liberty interest against identified governmental justifications to discern if a constitutional entitlement to protection exists.[284] Conkle presents *Planned Parenthood of Southeastern Pennsylvania v. Casey*[285] as representative of the reasoned judgment model at work.

Conkle then generates a template for the evaluation of the validity of substantive due process decisional methodologies. His evaluative rubric considers three questions: (1) Can the analytical approach be reconciled with a commitment to majoritarian self-government? (2) Does the method of decision making conform to expectations of judicial objectivity and competence? and (3) Does the mode of analysis have the potential to advance or improve contemporary American governance or policy making?[286] Conkle then gauges the comparative merits of the two most familiar substantive due process methodologies under this recommended rubric. He finds that the historical tradition model operates in "*relative* harmony" with a commitment to majoritarian self-government[287] and provides an objective basis for decision making, thereby enhancing consistency and competency.[288] However, from a functional perspective, this method threatens to apply a "deadening force" that prevents potentially needed experimentation and insulates much governmental behavior from invalidation.[289] The reasoned judgment model permits a more active judicial role in achieving liberty-maximizing objectives and creates more opportunities to produce substantial changes in governmental practices. However, the reasoned judgment model does little to constrain judicial subjectivity and poses a significant risk of error by offering little external reinforcement of judicial competence.[290]

After assessing the dominant doctrinal formulations, Professor Conkle notes approvingly the emergence of what he perceives to be a potentially more satisfying third approach: the use of a theory of emerging national values.[291] In Professor Conkle's view, this third analytical variant animates the Court's decision in *Lawrence v. Texas*,[292] and he recognizes an analog in the majority's Eighth Amendment analysis in *Roper*.[293] Conkle describes this third mode of analysis as guided by an effort to

282. 521 U.S. 702 (1997).

283. Conkle, *supra* note 279, at 66, 91.

284. *Id.* at 66–67.

285. 505 U.S. 833 (1992).

286. Conkle, *supra* note 279, at 80–82.

287. *Id.* at 91.

288. *Id.* at 92–93.

289. *Id.* at 97.

290. *Id.* at 107–15.

291. *Id.* at 128.

292. 539 U.S. 558 (2003).

293. Conkle, *supra* note 279, at 128–31. As Corinna Lain has recently shown, the Supreme Court's use of a survey of state practices to gauge the content of constitutional protections extends beyond the Eighth Amendment context and is part of the Court's analysis in a broad array of civil liberties cases. Corinna Barrett Lain, *The Unexceptionalism of "Evolving Standards"*, 57 UCLA L. REV. 365, 368–69 (2009).

identify whether broad contemporary support exists for an asserted rights claim. If such consensus exists, the Court uses its independent judgment to confirm that constitutional protection should be extended.[294]

Professor Conkle finds judicial invocation of an emerging shift in national values preferable to the recourse to tradition or the exclusive reliance on independent judicial judgment.[295] Conducting constitutional adjudication by seeking to discern and then harness "emerging national values" as the basis for the enunciation of a new form of substantive due process protection shares with the reasoned judgment method the capacity to be liberty-maximizing as it resists replication of potentially archaic traditional practices.[296] However, like the tradition method, the third alternative has the virtue of potentially exerting a disciplining influence on the judiciary, only permitting the innovative judicial pronouncement if it can be connected to a current of popular consensus, thereby harmonizing judicial review with a foundational commitment to the legitimacy of majoritarian self-government.[297] Such an approach also holds the promise of successfully overcoming local resistance by offering validation of judicial conclusions from both the weight of relevant professional expertise and successful institutional experience with prescribed change.[298]

2. Refining the Variant: Using Relevant Professional Expertise to Gauge the Contextual Demands of Due Process

As *Roper* illustrates, legislative action most decisively reflects an emerging social consensus about the contemporary translation of broadly framed constitutional principles. Such a consensus may also be manifested less formally in the underenforcement or nonenforcement of government policies that can no longer be squared with the community's understanding of constitutional values.[299] As was true with regard to the declining social tolerance for the imposition of the death penalty on juveniles, a shift away from previously accepted practices can reflect how specialized knowledge from relevant experts has permeated the legislative, executive, and popular consciousness.[300] Thus, popular support for constitutional change that is tethered to a body of professional knowledge offers a more substantial and credible foundation for constitutional conclusions than reliance on popular opinion that may reflect only uniformed emotive or faddish inclinations.

Consulting reservoirs of professional expertise is especially appropriate in cases assessing constitutional claims arising in specialized institutions. The Court has already emphasized the need to tailor the content of constitutional protections to the contours of

294. Conkle, *supra* note 279, at 128–29.

295. *Id.* at 133.

296. *Id.* at 139–41.

297. *Id.* at 133–136.

298. *Id.* at 138.

299. *See* Roper v. Simmons, 543 U.S. 551, 564–65 (2005) (noting as relevant to survey of evolving consensus how infrequently juveniles were executed even in states that had not formally prohibited such punishment).

300. See *supra* notes 12–19 and accompanying text for a discussion of how groundwork was laid for success in *Roper*.

specific institutional environments, such as prisons, where a body of accumulated professional expertise can, in the Court's view, be tapped to offer an experience-tested distillation of what constitutes necessary and effective operating procedure in a daily domain unfamiliar to the Justices.[301] The Court has repeatedly demonstrated this inclination toward institutional tailoring of constitutional analysis in the educational context,[302] most notably, for present purposes, in the articulation of the "reasonably related to legitimate pedagogical concerns" standard in *Hazelwood School District v. Kuhlmeier*.[303]

The *Hazelwood* Court addressed a principal's decision to censor student expression in the high school newspaper because of cited concerns that the excised articles reflected poor journalistic standards and could be misconstrued as an official endorsement of the behavior and comments presented in the articles.[304] As Justice Brennan lamented in his *Hazelwood* dissent, the "reasonably related to legitimate pedagogical concerns" standard could easily degenerate in practice into uncritical acceptance of any rationale voiced by school officials.[305] However, this hazard could be mitigated if the presumptive integrity of an articulated educational objective could be challenged by showing a significant disparity between the school's position and a standard supplied by relevant professional consensus.

In a recent article calling for reconsideration of how substantive due process principles should be applied to executive action,[306] Rosalie Berger Levinson criticizes judicial resistance to the invocation of substantive due process as a source of protection against executive rather than legislative action.[307] Professor Berger Levinson catalogues how serious harms and injuries inflicted by executive actors are left unredressed as a matter of constitutional law under the currently dominant approach.[308] She then productively highlights how *Youngberg v. Romeo*[309] could support the argument that the Supreme Court and lower federal courts have erred in discounting the relevance of substantive due process principles when the governmental act being challenged is executive rather than legislative.[310] In *Youngberg*, the mother of an involuntarily committed mentally retarded adult successfully asserted that the state of Pennsylvania had violated her son's substantive due process rights by failing to provide him with safe conditions of confinement and such minimally adequate training as was necessary to curb the aggressive behavior that posed a danger to his safety while

301. *See* Turner v. Safley, 482 U.S. 78, 89 (1987) (applying "reasonably related to legitimate penological interests" standard to invalidate ban on prisoner marriage).

302. *See, e.g.*, Grutter v. Bollinger, 539 U.S. 306, 327–28 (2003) (noting that "[c]ontext matters when reviewing race-based governmental action under the Equal Protection Clause" and considering specific relevance of student diversity to higher educational objectives).

303. 484 U.S. 260, 273 (1988).

304. *Hazelwood School Dist.*, 484 U.S. at 262–64.

305. *Id.* at 286–88 (Brennan, J., dissenting).

306. Rosalie Berger Levinson, *Reining in Abuses of Executive Power through Substantive Due Process*, 60 FLA. L. REV. 519, 523–34 (2008).

307. *Id.* at 555–58.

308. *Id.* at 560–87.

309. 457 U.S. 307 (1982).

310. Levinson, *supra* note 306, at 579.

institutionalized.[311] Addressing the standard to be applied to assess the plaintiff's claim that the denial of minimally adequate training rendered the conditions of his confinement a violation of substantive due process, Justice Powell adopted the mode of reasoning articulated in a concurring opinion below and focused on this determinative inquiry: did the evidence presented provide the basis for the reviewing court to be "certain that professional judgment in fact was exercised" with regard to the administrative determination of what services were to be provided to civilly committed persons.[312] The reviewing court's assessment of a plaintiff's substantive due process claim would turn on whether the challenged governmental conduct represented "such a substantial departure from accepted professional judgment, practice, or standards in the care and treatment of this plaintiff as to demonstrate that the defendants did not base their conduct on a professional judgment."[313] Measured against this yardstick, the services rendered by the Pennhurst State School and Hospital, the Pennsylvania state institution in which Nicholas Romeo was confined, were constitutionally deficient.

3. Using Relevant Professional Knowledge to Gauge Proportionality

Although cast too often only as punishment, school discipline should also be judged by what amounts to an educational standard of care, a standard drawn from relevant instructional and therapeutic norms. That standard, in constitutional translation, will represent what is essentially a proportionality inquiry. The application of a proportionality principle marks the intersection between the Eighth Amendment jurisprudence of *Roper* and one strand within substantive due process analysis. *Weems v. United States*,[314] the progenitor of both modern cruel and unusual punishment analysis under the Eighth Amendment and the proportionality prong of modern substantive due process jurisprudence, recognized proportionality in punishment as a fundamental "precept of justice."[315] The concept of proportionality later gained traction in the Court's punitive damages decisions as the awards under attack were measured against indicia that the monetary sanctions imposed were grossly excessive.[316] Such excessiveness may be traced in a particular case to what is deemed to be a mismatch between the applicable criminal sanctions or other pertinent civil penalties and the size of the punitive damage award,[317] to the effective geographic scope of the tort judgment's reach,[318] or to a disjunction between the harm inflicted on the persons present before the court—harms that the tortfeasor can, in the view of a majority of

311. *Youngberg*, 457 U.S. at 316.

312. *Id.* at 321–22.

313. Romeo v. Youngberg, 644 F.2d 147, 178 (3d Cir. 1980) (Seitz, C.J., concurring).

314. 217 U.S. 349 (1910).

315. *Weems*, 217 U.S. at 367. In *Weems*, the defendant, an officer of the Bureau of Coast Guard and Transportation Authority of the U.S. Government of the Philippine Islands, successfully challenged as cruel and unusual the imposition of a sentence of fifteen years of hard labor for falsifying a public document, a cash book of the Manila port captain. *Id.* at 357–59.

316. BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 574–76 (1996).

317. *Id.* at 583–84.

318. *See* State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 421 (2003) (finding state does not have legitimate interest in using punitive damages to punish conduct that may have been lawful where it occurred or to punish acts committed outside of state's jurisdiction).

Justices, expect to set the scale of damages—and the harms felt by other victims outside the operative jurisdictional boundaries of the present case.[319]

To root such a proportionality assessment in something other than judicial policy preferences, the Court has looked for referents or comparators to gauge the fit between punishment and conduct. The focal point of the Court's disproportionality concern may be what is deemed an unacceptable deviation between the punishment imposed under the challenged regime and the lesser punishment that would be imposed for functionally indistinguishable conduct dealt with under a parallel sanction regime of the same sovereign.[320] However, another trigger for a finding of disproportionality may be the nature of the person being subjected to the challenged sanction insofar as the capacities of such a person are insufficient to allow the punishment regime to fulfill its legally legitimate purposes.[321] This latter set of concerns drives the Court's rulings in *Thompson*, *Atkins*, and *Roper*, and represents the essential infirmity of a school disciplinary system that ignores or contradicts the best available developmental understanding of children's behavior.

Measuring proportionality against standards that reflect the expertise of relevant professional communities would track what Jody Freeman and Adrian Vermeule have identified as an "expertise-forcing" trend manifested in a number of the Court's recent rulings,[322] most notably *Massachusetts v. EPA*.[323] In Freeman and Vermeule's reading of *Massachusetts v. EPA*, the decision reflects the Court's growing aversion to the perceived escalation of effort by political actors in the executive branch to displace agencies' technical knowledge and experience in the execution of statutory directives, a trend that delegitimizes a posture of judicial deference to agency determinations.

Rather than yielding to the assertion that educators need autonomy and consequently deserve deference in the realm of school discipline, a court faced with a

319. Philip Morris USA v. Williams, 549 U.S. 346, 352–54 (2007).

320. *See BMW*, 517 U.S. at 583–84 (comparing amount of challenged punitive damage award to potential penalties under state Deceptive Trade Practices Act).

321. Controversially, the Court has repeatedly rebuffed proportionality attacks on antirecidivism statutes. *See, e.g.*, Lockyer v. Andrade, 538 U.S. 63, 77 (2003) (finding sentence of life with no possibility of parole for fifty years for stealing $153 worth of videotapes did not violate Eighth Amendment); Ewing v. California, 538 U.S. 11, 30–31 (2003) (finding sentence of life with no possibility of parole for twenty-five years for stealing three golf clubs worth $1200 did not violate Eighth Amendment). This perplexing contrast between the Court's lack of concern about the potential lack of proportionality in so-called "three strikes" incarceration provisions and their receptivity to challenges to punitive damage awards in tort litigation has rightly drawn sharp criticism. *See generally* Erwin Chemerinsky, *The Constitution and Punishment*, 56 STAN. L. REV. 1049 (2004) (arguing that Supreme Court upholds civil and criminal penalties in manner inconsistent with substantive limits and procedural requirements of these types of punishment); Pamela S. Karlan, *"Pricking the Lines": The Due Process Clause, Punitive Damages, and Criminal Punishment*, 88 MINN. L. REV. 880 (2004) (examining differences in constitutional limits of punitive damages in tort cases and sentencing in criminal cases); Adam M. Gershowitz, Note, *The Supreme Court's Backwards Proportionality Jurisprudence: Comparing Judicial Review of Excessive Criminal Punishments and Excessive Punitive Damages Awards*, 86 VA. L. REV. 1249 (2000) (arguing that both civil and criminal systems generate severely disproportionate punishments).

322. *See* Jody Freeman & Adrian Vermeule, Massachusetts v. EPA, *From Politics to Expertise*, 2007 SUP. CT. REV. 51, 51 (identifying *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006) and *Gonzales v. Oregon*, 546 U.S. 243 (2006) as also exhibiting this motivation).

323. 549 U.S. 497 (2007).

substantive due process challenge to a punishment administered pursuant to wide-ranging zero tolerance protocol can properly question whether such deference has been earned. If a school system cannot demonstrate that it has calibrated its metric of punishment proportionality to the body of the most relevant and empirically grounded professional expertise and validated best practices, its decisions to exclude students from school should no longer be accepted as satisfying the demands of substantive due process.

V. PURSUING SCHOOL DISCIPLINE REFORM: THE STRATEGIC IMPLEMENTATION OF DUE PROCESS THEORIZING

A. Identifying Available Developmentally Calibrated Discipline Models

Advocates seeking to persuade education officials and legislators of the necessity for change in school disciplinary practices can find substantial evidence that promising developmentally calibrated alternatives are available. Such alternative programs aim to accurately identify the origins of behavior, differentiate between behavior that is within the normal developmental range and that which signals a significant departure from the healthy developmental course, and build a student's capacity to regulate his own actions and to acquire—in the case of adolescents—a sense of how the developmental process may create specific tendencies or hazards. Such efforts place children's welfare and needs at the center of disciplinary strategies and recognize that developmentally insensitive responses will likely be ineffective and even counterproductive, alienating a student from school. Such efforts are also animated by vigilant attentiveness to the need to enhance protective factors in children's lives, particularly for children whose family life, economic circumstances, health status, or community environment place them at risk and under stress. For such children a positive and supportive relationship with a caring adult, such as a teacher, could be a vital protective force.

In his recent book, *Lost in School: Why Our Kids with Behavioral Challenges Are Falling Through the Cracks and How We Can Help Them*,[324] Ross Greene, a psychologist and member of the clinical faculty of Harvard Medical School, presents the elements of a school disciplinary plan that rejects the familiar but flawed hypotheses about the origins of student behavior problems.[325] Greene instead adopts an approach which he terms Collaborative Problem Solving ("CPS"), which aims to understand the individual child's situation and cultivate the child's capacity to use more productive means to respond to problems at school.[326] This method seeks to end the frustration, disappointment, and even heartbreak that beset students, parents, teachers, and school administrators as they grapple with persistent disciplinary problems by resorting to a limited repertoire of punishments and rewards.[327]

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324. ROSS W. GREENE, LOST AT SCHOOL: WHY OUR KIDS WITH BEHAVIORAL CHALLENGES ARE FALLING THROUGH THE CRACKS AND HOW WE CAN HELP THEM (2008).

325. Such hypotheses include assertions that students who misbehave are manipulative, attention-seeking, coercive, and unmotivated.

326. GREENE, *supra* note 324, at 55–58.

327. *Id.* at 7.

The CPS approach begins from this premise: "[K]ids do well if they can."[328] This foundation contrasts sharply with the assumptions of those defending the necessity of zero tolerance and exclusion-oriented strategies. CPS aims for teachers and other school staff to respond to discipline problems by undertaking an assessment of why the child misbehaves, probing in particular to identify which skills the child lacks that prevent him from meeting behavioral expectations.[329] Greene describes the origins of student behavior problems in developmental terms, linking such difficulties to a child not yet having the skills to cope with particular school situations.[330] He therefore recommends a school response structured to identify and address the deficit that leads the student to behave in a maladaptive way.[331] This recommendation does not lead to the end of expectations for students, but it aims for relevant school personnel to determine why the child behaves as he does and then work with the child and his family to formulate corrective strategies.[332] Moving beyond often unproductive efforts to simply impose the adult's will on an uncooperative child, the CPS approach requires the teacher to adopt an energetically empathetic posture in speaking to the child, undertaking a sincere and persistent dialogue with the student about his perceptions about his situation, his anxieties and self-perception, and his beliefs about how the teacher and other school officials see him.[333] This will usually entail conducting an evaluation of the student, an Assessment of Lagging Skills and Unsolved Problems ("ALSUP"), which addresses such issues as difficulty handling novelty or uncertainty, impulsivity, misinterpreting others' reactions, difficulty handling frustration, and poor sense of time.[334] A school psychologist may be involved throughout this process. The teacher, student, and parents contribute to this assessment and identify situational triggers that prompt behavioral problems. They then work together on defining the students' difficulties and needs and formulating a plan of responsive action.[335] The collaborative nature of this disciplinary approach would bring to life the now-enervated *Goss* vision of encounter and exchange between school personnel and student and would enhance the potential for efficacy in addressing the relevant behavior by working to use specific incidents as opportunities to understand a student's circumstances and needs. The anticipated dialogues between teacher and student and teacher and parent would also provide opportunities to discern whether a student's behavior may be connected to unmet academic difficulties and to detect signals that the student's behavior calls for more specialized evaluations or assistance.

Dr. Greene seeks to recast the teacher as the guide in a helping relationship,[336] a demanding but ultimately gratifying role that conforms much more closely to the

328. *Id.* at 10.

329. A broader exploration of the quality and reasonableness of specific behavioral expectations would be appropriate in an overhaul of ineffective disciplinary problems but lies beyond the scope of this Article.

330. GRENNE, *supra* note 324, at 25–26.

331. *Id.* at 27–28.

332. *Id.* at 26–28.

333. *Id.* at 48–49.

334. *Id.* at 27.

335. *See id.* at 93 (demonstrating model dialogue showing collaboration between parents, student, and teacher).

336. *Id.* at 74.

aspirations with which many teachers enter the profession.[337] Many teachers are eager to escape the futile and often harmful cycle of repeatedly resorting to the use of consequences that fail to offer the child the skills he lacks and that often alienate him from teacher, peers, and school.[338] This redirection of effort toward cultivating capacities for self-regulation and communication helps the student remain calm and forges a valuable bond between teacher and student.[339] This approach aims to identify strategies tailored to the individual child's situation and emphasizes the acquisition of techniques and skills needed to function in the school environment.[340] Already used in several school settings, Greene's method has demonstrated early success and is the subject of ongoing empirical evaluation.[341] Other discipline models, such as the Positive Behavioral Intervention and Support program[342] and restorative justice practices[343] are also being used productively by educators. Such models offer individualized interventions that focus on helping students learn better behavioral responses. In presenting the Collaborative Problem Solving protocol as well as

337. Greene emphatically eschews characterizations of teachers as uncaring. He acknowledges both that many teachers are themselves dissatisfied by their schools' disciplinary policies and that they are wary of new initiatives that charge them with additional responsibilities while offering no accompanying support or training. *See id*. at 59 (providing example of teacher frustration with school discipline code).

338. *See id.* at 100 (demonstrating conversation between psychologist and school administrator); *see also* M. KAREGA RAUSCH & RUSSELL SKIBA, CTR. FOR EVALUATION & EDUC. POL'Y, DOING DISCIPLINE DIFFERENTLY: THE GREENFIELD MIDDLE SCHOOL STORY (2004), *available at* http://www.iub.edu/~safeschl/ChildrenLeftBehind/pdf/3a.pdf (recounting improvements in school environment and student behavior after principal shifted from use of punishment centered disciplinary approach to use of more supportive policy aimed at promoting behavioral skill development).

339. *See* GREENE, *supra* note 324, at 148 (explaining how CPS approach helps kids relate to others and handle frustrations).

340. *Id*. at 156–57. Greene emphasizes the superiority of an individualized approach to a child's behavioral issues and posits that schools currently overvalue uniformity and consistency in disciplinary responses at the expense of responding effectively to a student's unique needs and circumstances. *Id.* at 185.

341. *See generally* Ross W. Greene et al., *Effectiveness of Collaborative Problem Solving in Affectively Dysregulated Children with Opposition-Defiant Disorder: Initial Findings*, 72 J. CONSULTING & CLINICAL PSYCHOL. 1157 (2004).

342. *See* OFF. OF SPECIAL EDUC. PROGRAMS CTR. ON POSITIVE BEHAVIORAL INTERVENTIONS & SUPPORTS, IMPLEMENTATION BLUEPRINT AND SELF-ASSESSMENT: SCHOOL-WIDE POSITIVE BEHAVIORAL INTERVENTIONS AND SUPPORTS (2010), *available at* http://www.pbis.org/common/pbisresources/publications/SWPBS_Implementation_Blueprint_v_May_9_2010.pdf (detailing implementation of Positive Behavior Support program); *see also* George Sugai & Robert H. Horner, *What We Know and Need to Know about Preventing Problem Behavior in Schools*, 16 EXCEPTIONALITY 67, 67–77 (2008), *available at* http://www.informaworld.com/smpp/content~content=a792648868&db=all (advocating use of school-wide behavior program to encourage academic excellence for entire student-body). In 2007, then-Senator Barack Obama introduced S. 2111, the Positive Behavior for Effective Schools Act, the text of which is available at http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=110_cong_bills&docid=f:s2111is.txt.pdf. The Act would have authorized schools to use Title I funds to implement PBIS disciplinary policies in order to end excessive use of exclusionary disciplinary responses and promote the use of evidence based strategies such as PBIS. *Id.* § 4(a). A similar measure, H.R. 2597, was recently reintroduced in the current Congress. Positive Behavior for Safe and Effective Schools Act, H.R. 2597, 111th Cong. (2009).

343. *See, e.g.*, William Haft, *More Than Zero: The Cost of Zero Tolerance and the Case for Restorative Justice in Schools*, 77 DENV. U. L. REV. 795 (2000) (explaining effective use of restorative justice practices in schools); Cara Suvall, Note, *Restorative Justice in Schools: Learning from Jena High School*, 44 HARV. C.R.-C.L. L. REV. 547 (2009) (same).

identifying other more developmentally sensitive disciplinary approaches, I do not claim the authority to prescribe their adoption but identify them simply to confirm that such alternatives are available, are in use, and are the subject of study to evaluate their efficacy. Mindful that "[d]iscipline is always teaching,"[344] school officials can find and implement developmentally appropriate disciplinary strategies.

B. Detecting a Shift Toward Developmental Discipline in Schools and in the States

A nascent shift away from zero tolerance regimes can be detected. An increasing number of school systems are recognizing that a harsh exclusion-oriented disciplinary approach has failed to promote better educational outcomes for students, and thus aspire to create schools that "[r]each out [i]nstead of [p]ush out."[345] Efforts by advocacy groups like the Advancement Project to document the toll such misdirected and ineffective disciplinary efforts take on children and communities have penetrated the consciousness of educators and elected officials across the country, sparking significant reform initiatives.[346]

1. District of Columbia

In January 2009, D.C. Schools Chancellor Michelle A. Rhee announced proposed changes in discipline policies, changes intended to halt the use of suspension as a sanction in light of its ineffectiveness.[347] Rhee's proposals sought to move toward a discipline model built around "[m]ore conversation, less confrontation" and grounded in an understanding that effective discipline should seek to instruct rather than simply punish.[348] The new program relies on counseling, peer influence, and the use of support strategies to keep students in school and engaged in learning, and noted the need for improved teacher training on effective instructional techniques, effective communication with students, and enforcement of behavioral expectations.[349] The new discipline policy incorporates a progressive sanctions approach, and Rhee's implementing directive to school personnel installs a reporting system that requires the approval of an Instructional Superintendent and the involvement of support service

344. RUSSELL SKIBA ET AL., CTR. FOR EVALUATION & EDUC. POLICY, "DISCIPLINE IS ALWAYS TEACHING": EFFECTIVE ALTERNATIVES TO ZERO TOLERANCE IN INDIANA'S SCHOOLS (2004), *available at* http://ceep.indiana.edu/projects/PDF/PB_V2N3_Discipline_is_Teaching.pdf.

345. *See* OPPORTUNITIES SUSPENDED, *supra* note 201, at 25–32 (describing specific school strategies to develop more constructive and effective disciplinary responses).

346. The Advancement Project has recently launched a new website, Stop the Schoolhouse to Jailhouse Track, http://www.stopschoolstojails.org/, which disseminates information about efforts by school systems around the country to move away from rigid and harshly punitive, exclusion-oriented disciplinary regimes toward more therapeutic alternatives. *See also* ADVANCEMENT PROJECT, KEY COMPONENTS OF A MODEL DISCIPLINE POLICY, http://www.stopschoolstojails.org/content/model-discipline-policies (last visited Aug. 15, 2010) (presenting terms of revised disciplinary policies).

347. Bill Turque, *Discipline Code Under Review As Suspensions Lose Impact*, WASH. POST, Jan. 25, 2009, at C5.

348. *Id.*

349. D.C. PUB. SCH., A NEW APPROACH TO STUDENT DISCIPLINE: PROPOSED DRAFT FOR COMMUNITY RESPONSE 3–4 (2009), http://dcps.dc.gov/DCPS/Files/downloads/COMMUNITY/Chapter%2025%20Forum%20-%20January%202009/DCPS-Chap-25-Overview-Rationale-Jan-2009.pdf.

personnel as the severity of the sanctions mount.[350] Under the new disciplinary code, which incorporates a progressive sanctions approach, and accompanying new teaching guidelines, D.C. teachers will be held accountable for their management of student behavior in ways that minimize the use of suspension.[351]

2. Florida

In July 2009, a Florida statute went into effect to curb schools' use of zero tolerance policies and to direct schools to move away from expelling students or referring them to law enforcement authorities for any conduct other than that which poses a serious threat to school safety.[352] The statute specifically encourages school officials to use techniques such as teen court and neighborhood restorative justice programs rather than ejecting children from school and sending them into the juvenile justice system.[353] The statute further requires schools to consider the particular circumstances of a student's misconduct in determining the sanction to be imposed.[354] The new code prescribes that incidents involving disorderly conduct, disruption of a school function, simple assault or battery, theft of less than $300, trespassing, and vandalism of less than $1,000 do not have to be reported to a law enforcement agency, but weapons offenses and the making of threats still automatically subject a student to a one-year expulsion and referral for prosecution.[355] The enactment of the Florida statute reflected mounting public alarm about the school-to-prison pipeline phenomenon across the state's school districts and about the perceived disproportionality, even irrationality, of punishments under broadening zero tolerance regimes.[356] The enactment of the statute also demonstrates the effectiveness of the Advancement Project's efforts to create momentum for change in disciplinary policy through efforts

350. OFFICE OF THE CHANCELLOR, D.C. PUB. SCH., DIRECTIVE 311.17: STUDENT DISCIPLINE—SUSPENSION PROCEDURES 2 (2008).

351. Bill Turque, *Rhee's 200-Page "Framework" Spells Out Teaching Guidelines*, WASH. POST, Aug. 23, 2009, at C1.

352. Policy of Zero Tolerance for Crime and Victimization, FLA. STAT. § 1006.13 (2009).

353. *Id.* § 1006.13(1). The Florida legislation has two other important features. It specifically identifies the need to avoid inequitable application of zero tolerance policies to students based on their race, income, or disability. *Id.* It also requires that school districts enter into formal agreements with local police departments that set out the respective responsibilities of school and police with regard to specific types of student misconduct. *Id.* § 1006.13(4).

354. *Id.* § 1006.13(7).

355. *Id.* § 1006.13(3)(a)–(4)(c).

356. *See* Kathleen Chapman, *Does Zero Tolerance Deserve an F? State Follows Lead of Local District*, PALM BEACH POST, July 5, 2009, at A1 (noting how Palm Beach school board members' concerns about excesses of zero tolerance based punishments led to district discipline reform in direction similar to that now prescribed under state law). Although the Florida statute represents a particularly significant step forward, other positive initiatives have been percolating in state legislatures. Indiana now requires schools to compile more detailed reports on the precise types of behavior precipitating suspension or expulsion. Legislators in Texas and Virginia have introduced bills to scale back the offenses triggering suspension or expulsion and to require the consideration of mitigating factors in the imposition of such punishments. These measures have not yet been passed but reflect their sponsors' concern about the misuse of disciplinary authority. *See* APA REPORT, *supra* note 206, at 96–97 (describing legislative efforts in Texas, Indiana, and Virginia).

to document and publicize harmful, unfair, and ineffective disciplinary practices in Florida schools.[357]

3. Maryland

The out-of-school suspension rates in the Baltimore schools drew the attention of advocacy organizations such as the Open Society Institute, which documented a number of disturbing aspects of schools' excessively frequent resort to suspension.[358] Suspensions took a heavy toll on African American students and students with disabilities, and this sanction was often imposed for nonviolent offenses of a hazily defined character.[359] After a public outcry about the high suspension rates,[360] the new CEO of the Baltimore City Schools introduced a revised disciplinary code. The new code prescribes that discipline should begin with the use of prevention and student support strategies, including the formulation of a behavioral intervention plan, and makes teaching correct behavior discipline's main objective.[361] The policy makes suspension a last resort in all but a small subset of cases and requires that the system CEO or his designee personally approve any suspension over ten days.[362]

After schools in Prince George's County, Maryland, issued 21,700 suspensions to 13,600 students during the 2007–2008 school year,[363] the school board convened a task force to reduce student suspensions and expulsions.[364] The group produced a draft proposal that would eliminate the use of suspensions in elementary school and limit suspensions to situations in which a danger to school safety exists in middle and high schools.[365] Suspensions for "insubordination" and "disrespect" would be discouraged. In Howard County, Maryland, school officials are shifting to a disciplinary strategy focused on support and counseling to avoid an unproductive use of suspension unaccompanied by efforts to redress underlying behavioral issues.[366] Anne Arundel

357. *See supra* note 201 and accompanying text for a discussion of the Advancement Project's reports.

358. OSI-BALT., SUSPENSION FACT SHEET, MARYLAND AND BALTIMORE CITY, 2006–2007 (2008), *available at* http://www.soros.org/initiatives/baltimore/articles_publications/articles/suspensionfact_20080124/factsheet_suspension_20080123.pdf.

359. *See id.* (noting that 37.2% of out-of-school suspensions in Maryland and 32.9% of out-of-school suspensions in Baltimore were attributed to behavior identified as "Disrespect/Insubordination/Disruption").

360. *See* Lesli A. Maxwell, *Baltimore District Tackles High Suspension Rates: Community Pushes for Positive Approaches to Reduce Nonviolent Incidents in Schools*, EDUC. WEEK, Apr. 25, 2007, at 1 (describing community pressure to reform Baltimore school district suspension policy).

361. BALT. CITY PUB. SCH., CREATING GREAT SCHOOL COMMUNITIES: BALTIMORE CITY PUBLIC SCHOOLS 2009–10 CODE OF CONDUCT 11 (2009), *available at* http://www.baltimorecityschools.org/21671011 2162656613/lib/216710112162656613/PDF/Conduct_Code_09_10.pdf.

362. *Id.* at 13.

363. Nelson Hernandez, *Keeping Discipline In-House: Proposal Tackles Pr. George's Schools' High Rate of Suspensions*, WASH. POST, June 15, 2009, at B1.

364. *See* Press Release, Prince George's Cnty. Sch. Bd. of Educ., Board of Education Announces Task Force to Reduce Student Suspensions, Expulsions (Apr. 27, 2009), *available at* http://www1.pgcps.org/WorkArea/downloadasset.aspx?id=88756 (announcing formulation of task force to reduce student suspensions and expulsions).

365. Hernandez, *supra* note 363, at B1.

366. Liz Bowie, *Discipline's Cost: Thousands of Md. Students Are Suspended Each Year, Often Those Who Most Need to Be in Class*, BALT. SUN, May 11, 2008, at A1.

County schools are also trying to use disciplinary strategies that rely more on intense support and monitoring of students with major behavioral problems.[367]

The Maryland legislature also recently passed a statute that bars school officials from suspending or expelling a student on the basis of chronic lateness or absenteeism alone.[368] Although this is a very modest statewide effort, it does reflect recognition of the need to curtail excessive and ineffective use of suspension as a disciplinary sanction.

4. Denver

The Denver public school system has also revised its disciplinary policies, redirecting staff responses from a sole focus on punishment toward the assessment of students and the delivery of needed instruction and support. The program aims to teach behavioral skills and deliver the targeted or intensive therapeutic interventions needed.[369] The protocol requires teachers and staff to use a progressive series of responses when students misbehave. It restricts the use of out-of-school suspensions but does authorize the imposition of consequences such as detention, brief classroom removal, and in-school suspension.[370] This approach draws on the functional behavioral assessment model used to address behavioral problems experienced by children with an identified disability. In that model, conduct problems lead to the generation of a behavior support plan designed to "build a competing behavior pathway."[371]

5. Los Angeles

Recognizing that the heavy use of suspensions was often ineffective and inconsistent with an ethic of concern for students, the Los Angeles Unified School District has taken steps to create a new "culture of discipline" in its schools. Its revised disciplinary policy emphasizes that consequences for student misconduct must be age appropriate and scaled to the severity of the student's action.[372] The new policy

367. *Id.*; *see also* John-John Williams IV, *Schools Look to Improve Discipline by Going Positive*, BALT. SUN, July 23, 2007, at 1B (reporting on use of Positive Behavioral Interventions and Supports programs in Anne Arundel County schools).

368. MD. CODE ANN., EDUC. §7-305 (West 2009); *see also* Laura Smitherman, *School Suspensions Limited in Md.: Law Eliminates Suspension Just for Being Late or Absent*, BALT. SUN, July 1, 2009, at A3 (noting recognition by legislators and educators that suspension was likely counterproductive response to truancy and lateness and that efforts to address underlying causes of students' attendance problems would be more appropriate and effective).

369. DENVER PUB. SCH., DISCIPLINE POLICY, ATTACHMENT A, http://webdata.dpsk12.org/policy/pdf/Policy_JK-R_Attachment_A.pdf (last visited Aug. 15, 2010).

370. DENVER PUB. SCH., DISCIPLINE POLICY, ATTACHMENT C: DENVER PUBLIC SCHOOLS DISCIPLINE LADDER,http://webdata.dpsk12.org/policy/pdf/Policy_JK-R_Attachment_C.pdf (last visited Aug. 15, 2010) (setting forth progression through levels and punishment).

371. DENVER PUB. SCH., DISCIPLINE POLICY, ATTACHMENT D: FUNCTIONAL BEHAVIORAL ASSESSMENT BEHAVIOR SUPPORT PLAN 5, http://webdata.dpsk12.org/policy/pdf/Policy_JK-R_Attachment_D.pdf (last visited Aug. 15, 2010).

372. L.A. UNIFIED SCH. DIST., POLICY BULLETIN 3638.0: DISCIPLINE FOUNDATION POLICY: SCHOOL-WIDE POSITIVE BEHAVIOR SUPPORT 9 (2007), http://notebook.lausd.net/pls/ptl/docs/PAGE/CA_LAUSD/

mandates that responses to student behavior begin with efforts to support students in learning necessary skills and requires school officials to monitor their disciplinary responses by periodically reviewing their school's discipline profile data.[373] Revised suspension guidelines make suspension a last resort and instead prescribe first using interventions that "result in instruction and guidance (re-teaching and corrective feedback)" and "offer the student an opportunity to have an understanding of, and be motivated to change, his or her behavior."[374] Truancy, tardiness, and attendance problems must now, sensibly, be addressed with alternatives to suspension,[375] and the circumstances triggering law enforcement referrals are limited.[376] A student's ongoing behavior problems may lead to an assessment of possible undetected disabilities and may involve use of a staff team approach. Whether the current California budgetary crisis will allow Los Angeles to maintain the resources and personnel called for by the Positive Behavioral Support program remains to be seen.

6. An Instructive Comparative Example: Ontario, Canada

Responding to the passage of the Education Act Amendment (Progressive Discipline and School Safety)[377] and its accompanying regulations,[378] the Ontario Ministry of Education issued revised guidelines for the administration of school discipline.[379] These guidelines emphasize that a positive school climate, an atmosphere characterized by the demonstration of care and respect for all members of the school community, is crucial to the prevention of disruptive behavior. Within such an atmosphere, school officials should use corrective and supporting disciplinary responses aimed at promoting the acquisition of skills required for positive behavior. When students misbehave, a "continuum of prevention programs, interventions, supports, and consequences" should be used within a progressive discipline regime.[380] In addition, school officials must take mitigating factors into account when determining a disciplinary response.[381] These factors would include the student's inability "to

FLDR_ORGANIZATIONS/STUDENT_HEALTH_HUMAN_SERVICES/SHHS/DISCIPLINE_POLICY/BUL-3638.0.PDF.

373. *Id.* at 1; *see also* Los Angeles Unified School District, Looking at Suspensions Data, http://notebook.lausd.net/portal/page?_pageid=33,914384&_dad=ptl&_schema=PTL_EP (last visited Aug. 15, 2010) (showing required procedures and documents, as well as available data).

374. L.A. UNIFIED SCH. DIST., POLICY BULLETIN 3819: GUIDELINES FOR STUDENT SUSPENSION 1 (2007), http://notebook.lausd.net/pls/ptl/docs/PAGE/CA_LAUSD/FLDR_ORGANIZATIONS/STUDENT_HEALTH_HUMAN_SERVICES/SHHS/DISCIPLINE_POLICY/DISCIPLINE_POLICY_LOCAL_DISTRICTS_SUSPENSION_ALT/BUL-3819.PDF.

375. *Id.* at 3.

376. *See id.* at 5 (limiting required law enforcement referrals to weapon and drug possession offenses).

377. Education Amendment Act (Progressive Discipline and School Safety), R.S.O., ch. 14, §§ 306, 310 (2007), *available at* http://www.e-laws.gov.on.ca/html/source/statutes/english/2007/elaws_src_s07014_e.htm.

378. Behaviour, Discipline and Safety of Pupils, O.Reg. 472/07 (2007), *available at* http://www.e-laws.gov.on.ca/html/regs/english/elaws_regs_070472_e.htm.

379. ONTARIO MINISTRY OF EDUC., POLICY/PROGRAM MEMORANDUM NO. 145, PROGRESSIVE DISCIPLINE AND PROMOTING POSITIVE STUDENT BEHAVIOR 1 (2009), http://www.edu.gov.on.ca/extra/eng/ppm/145.pdf.

380. *Id.* at 3.

381. *Id.* at 4.

control his or her behaviour" and the student's inability "to understand the foreseeable consequences of his or her behaviour."[382] The school's failure to use progressive discipline in addressing the student's behavior and its individual origins weighs against the use of suspension or expulsion as a sanction.

The alterations of discipline policy described above reflect school systems' and state governments' recognition of the need for change in the administration of discipline. Such changes could become analytically relevant indicators of the existence of an "emerging community standard" that places broad zero tolerance regimes outside the boundaries of constitutionally acceptable educational practice.

C. Pursuing Effective Institutional Reform: Litigation to Complement or Complete a Broader Advocacy Effort

Today, constitutionally grounded institutional reforms may be most effectively pursued through a campaign for internally generated and voluntarily adopted alteration rather than relying exclusively or predominantly on externally imposed change reminiscent of the heyday of institutional reform litigation and structural injunctions. As Charles Sabel and William Simon have demonstrated, the pursuit of systemic reform of dysfunctional public institutions through "public law litigation" remains a vital route to realizing the rights of disempowered constituencies, including schoolchildren.[383] However, rather than seeking a judicial takeover of a targeted troubled institution, such litigation now often succeeds by pursuing "experimentalist" remedies that operate through a process of stakeholder negotiation, adoption of performance standards grounded in the best available professional expertise, installation of transparent accountability mechanisms to measure improvement, and the availability of judicial oversight.[384] Sabel and Simon posit that this revised litigation strategy presents a vehicle for the vindication of "'destabilization rights'—rights to disentrench an institution that has systematically failed to meet its obligations and remained immune to traditional forces of political correction."[385]

Sabel and Simon's account of the evolution of institutional reform litigation builds on James Liebman and Charles Sabel's examination of how an emerging model

382. *Id.* at 19.

383. Charles F. Sabel & William H. Simon, *Destabilization Rights: How Public Law Litigation Succeeds*, 117 HARV. L. REV. 1016, 1022–28 (2004).

384. *See, e.g.*, Alana Klein, *Judging as Nudging: New Governance Approaches for the Enforcement of Constitutional Social and Economic Rights*, 39 COLUM. HUM. RTS. L. REV. 351, 393–404 (2008) (examining courts' participation in experimentalist process of achieving delivery of social and economic rights, such as rights to education and health care, in United States, Canada, and South Africa). In her examination of potentially more effective mechanisms for prison reform, Susan Sturm had previously identified how some courts were shifting toward what she described as a "catalyst approach" characterized by less judicial imposition of comprehensive and detailed rules and more reliance on the litigants and their experts to negotiate operating standards subject to ongoing revision based on data gathered by outside monitors. Susan Sturm, *Resolving the Remedial Dilemma: Strategies of Judicial Intervention in Prisons*, 138 U. PA. L. REV. 805, 856–59 (1990).

385. Sabel & Simon, *supra* note 383, at 1016. Taking the term "destabilization rights" from Roberto Unger's account of the nature of "empowered democracy" in his book, *False Necessity* (1987), Sabel and Simon present destabilization as a political process that seeks to "induce[] the institution to reform itself" by becoming responsive to the needs of previously ignored and excluded stakeholders. *Id.* at 1056.

of bottom-up, non-court-centric legal reform has increasingly been used to remedy deficiencies in school systems' performance, deficiencies that had not been remedied effectively by prior forms of institutional reform litigation.[386] Liebman and Sabel connect the emergence of this mode of litigation to the growing appeal of governance through democratic experimentalism.[387] In public law litigation aimed at experimentalist interventions, the participants in the litigation formulate remedies that are guided by a "process of disciplined comparison" between the defendant system and more successful institutions.[388] This approach to devising a remedy has greater potential to be effective, a critical attribute if both the judiciary and the challenged governmental institution are to retain or restore their legitimacy.[389] The approach serves to secure a commitment within the defendant institution to continuous self-examination and reconstruction in the pursuit of effective functioning, an ethos that is especially appropriate for school officials. It also enhances the institution's autonomous capacity for introspection and self-improvement.[390]

After accountability mechanisms have revealed significant deficiencies in relevant institutions' performance, litigation in an experimentalist regime prompts "judging as

386. *See* James S. Liebman & Charles F. Sabel, *A Public Laboratory Dewey Barely Imagined: The Emerging Model of School Governance and Legal Reform*, 28 N.Y.U. REV. L. & SOC. CHANGE 183, 192–207, 213–29 (2003) (describing unremediated racial and socioeconomic disparities in educational quality after earlier decades of desegregation and school financing litigation and noting promise of new wave of standards and accountability driven legal action).

387. *See, e.g.*, Michael C. Dorf & Charles F. Sabel, *A Constitution of Democratic Experimentalism*, 98 COLUM. L. REV. 267, 314–23 (1998) (extolling virtues of democratic experimentalism). After describing the practice of democratic experimentalism in a variety of fields, Dorf and Sabel develop a theoretical account of how such practice advances fundamental constitutional principles by adapting their application to the complexity of contemporary governance challenges. *Id.* at 418–19. Broadening the array of contributors to the formulation and assessment of policy, democratic experimentalism makes the constant infusion of new information about the strengths and weaknesses of current performance and about the advances made by peer programs a central feature of government operations. *Id.* at 316–23. This mode of operation often entails enlisting the services of experts from new disciplines as institutions strive to move beyond the limitations of outdated but familiar protocols. *Id.* at 318–19. Under a democratic experimentalism model, the practice of judicial review evolves toward evaluations of government conduct that emphasize the quality of reasons presented in defense of the challenged behavior, demanding that government actors present justifications that document a correspondence between the chosen course and the relevant standard of practice. *Id.* at 389–90. Statutory guidelines could enhance the likelihood of such a correspondence by structuring governmental decision-making processes to ensure the scrupulous evaluation of alternatives and the empirical basis for such options. *See id.* at 395 (discussing how adoption of experimentalism would enhance judicial review by clarifying meaning of statutes and reducing arbitrariness of statutory interpretation). This approach "avoids the extremes of deference and intrusion." *Id.* at 397; *see also* Jamison E. Colburn, *"Democratic Experimentalism": A Separation of Powers for Our Time?*, 37 SUFFOLK U. L. REV. 287, 389–91 (2004) (noting potential for embrace of democratic experimentalism to influence separation of powers doctrine so as to reduce its use to obstruct policy innovation).

388. *Cf.* Sabel & Simon, *supra* note 383, at 1019 (describing how comparison facilitates learning most successful practices used by peer institutions).

389. Sabel and Simon trace the Rehnquist Court's hostility to the district court's detailed and costly remedy in *Missouri v. Jenkins*, 515 U.S. 70 (1995), to, at least in part, the remedial plan's demonstrated ineffectiveness in advancing the academic fortunes of Kansas City's black schoolchildren after decades of racially discriminatory educational deprivation, the core objective of the desegregation suit. *Id.* at 1082–86.

390. Sabel & Simon, *supra* note 383, at 1041.

nudging,"[391] the invocation of judicial power as the catalyst needed to prod other governmental actors and citizens themselves to develop a collaborative reform agenda.[392] In such a regime, judges become part of a collaborative effort that displays fidelity to core constitutional values and optimizes the possibility of actual operational change, reducing potential resistance to judicial involvement as countermajoritarian, undemocratic, and exceeding the range of their competence. Such litigation proceeds as one element in a larger campaign to reinvigorate popular appreciation of the content and implications of constitutional commitments and to mobilize a widening band of citizens to support necessary institutional change. This is an effort that can succeed, as Jules Lobel has explained, despite early courtroom defeats.[393] Intriguingly, defendants in such litigation may actually be sympathetic to plaintiffs' claims and even welcome the plaintiffs' action as a means of removing obstacles to needed reform or obtaining the resources, in the form of both material support and expertise, the defendants know would enhance their performance.

If substantive alteration of school disciplinary policy could in many instances be achieved through the eventual voluntary acceptance of change by school officials or through the enactment of legislation changing the course of disciplinary practice, why is it necessary to plot a doctrinal course aimed at persuading the judiciary to eventually install a principle of developmental due process in constitutional precedent? First, as a practical matter, such an installation would be needed to restrain the outliers who had resisted reform. In addition, a litigated victory would establish a precedential barrier to later retreat from reform at the state and local level.[394] Moreover, achieving judicial recognition of the developmental due process principle in the school disciplinary context would supply a platform of understanding that would support the application of the principle in related domains of governmental activity affecting children and adolescents. I therefore do not exclude litigation as one constructive component of a reform strategy. However, I recognize that the current Court has little appetite for increased judicial oversight of school officials' daily decision making and therefore emphasize a course that concentrates on generating a consciousness of what due

391. *See* Klein, *supra* note 384, at 356 (noting that practical success of reform litigation in experimentalist governance model remains dependent on level of popular commitment to values and principles that litigation seeks to advance).

392. Liebman & Sabel, *supra* note 386, at 282 (elaborating on how new litigation process generates collaboration among courts, government officials, and public to "giv[e] meaning to constitutional principle[s]").

393. Jules Lobel, *Losers, Fools & Prophets: Justice as Struggle*, 80 CORNELL L. REV. 1331, 1336 (1995); *see also* Jules Lobel, *Courts as Forums for Protest*, 52 UCLA L. REV. 477, 489–90 (2004) (noting that recent research has focused more on "bottom-up, decentralized model" that recognizes "'the interdependence' of the courts, … activists, and other branches of government 'to achieve meaningful reform.'" (quoting Susan P Sturm, *The Legacy and Future of Corrections Litigation*, 142 U. PA. L. REV. 639, 655 (1993))).

394. See *infra* Part V.D for further elaboration of this point. Judicial pronouncements of constitutional rights act to ensure the stability and durability of such protections in the face of possible shifts in popular support. *See* Robert Post & Reva Siegel, *Popular Constitutionalism, Departmentalism, and Judicial Supremacy*, 92 CAL. L. REV. 1027, 1038 (2004) (discussing how allowing "political judgment of the Constitution" to dictate constitutional law, as made in decisions by judges, would undermine rights contained in Constitution).

process demands among educators within schools, capitalizing on a policy trend already detected in several major school systems.

D. Campaigning for School Discipline Reform: An Exercise in Democratic Constitutionalism

As a heated debate has arisen among constitutional scholars about the inevitability and propriety of judicial supremacy in constitutional interpretation,[395] Robert Post and Reva Siegel have urged that an accurate description of the process of constitutional development must recognize the polycentric character of constitutional interpretation.[396] Post and Siegel uncover a history of modern constitutional law in which a paradigm of judicial exclusivity in constitutional interpretation fails to capture the reality of how constitutional law is made. Post and Siegel identify constitutional law as the product of the more complex and more legitimate practice of democratic constitutionalism, which they describe as follows:

> Democratic constitutionalism affirms the role of representative government and mobilized citizens in enforcing the Constitution at the same time as it affirms the role of courts in using professional legal reason to interpret the Constitution. Unlike popular constitutionalism, democratic constitutionalism does not seek to take the Constitution away from courts. Democratic constitutionalism recognizes the essential role of judicially enforced constitutional rights in the American polity. Unlike a juricentric focus on courts, democratic constitutionalism appreciates the essential role that public engagement plays in guiding and legitimating the institutions and practices of judicial review. Constitutional judgments based on professional legal reason can acquire democratic legitimacy only if professional reason is rooted in popular values and ideals. Democratic constitutionalism observes that adjudication is embedded in a constitutional order that regularly invites exchange between officials and citizens over questions of constitutional meaning.[397]

Examining the treatment of gender in the Supreme Court's Equal Protection jurisprudence, Professor Siegel has laid out how a feminist campaign conducted outside the courts ultimately influenced the Supreme Court's appreciation of the realities of sex inequality.[398] After relentless feminist advocacy documented how factual misconceptions and biases about women distorted American economic and social life, Congress enacted powerful but limited legislative protections that could be

395. *See generally* LARRY D. KRAMER, THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW 252 (2004); MARK TUSHNET, TAKING THE CONSTITUTION AWAY FROM THE COURTS (1999); Larry Alexander & Frederick Schauer, *On Extrajudicial Constitutional Interpretation*, 110 HARV. L. REV. 1359 (1997); Steven G. Calabresi, *Caesarism, Departmentalism, and Professor Paulsen*, 83 MINN. L. REV. 1421 (1999); Michael Stokes Paulsen, *The Most Dangerous Branch: Executive Power to Say What the Law Is*, 83 GEO. L.J. 217 (1994).

396. Robert C. Post & Reva B. Siegel, *Legislative Constitutionalism and Section Five Power: Policentric Interpretation of the Family and Medical Leave Act*, 112 YALE L.J. 1943, 2026–32 (2003).

397. Robert Post & Reva Siegel, Roe *Rage: Democratic Constitutionalism and Backlash*, 42 HARV. C.R.-C.L. L. REV. 373, 379 (2007).

398. Reva B. Siegel, *Text in Contest: Gender and the Constitution from a Social Movement Perspective*, 150 U. PA. L. REV. 297, 308–10 (2001).

invoked to combat gender discrimination.[399] These statutory advances and the political advocacy that drove them in turn prodded a majority of Justices to acknowledge that Equal Protection doctrine had to be reshaped in order to provide necessary redress for lingering gender inequality imposed by government itself.[400] In this account, social movement activism provoked legislative and judicial reexamination of how the law, including constitutional doctrine, should respond to correct a gap between a constitutional commitment and the experience of mistreated citizens. This history exemplifies what Jack Balkin and Reva Siegel have described as the creative influence social movements exert on constitutional understanding.[401] Through their insistent contestation of the status quo, social movements can, in Balkin and Siegel's words, help constitutional principles to become "unstuck"[402] and create the conditions in which previously ignored constitutional claims can be recognized.[403]

Constitutional doctrine has had limited success in calibrating constitutional principles to the special complexity of children and youth's challenges to their treatment by the state.[404] Governmental practices frequently misapprehend the needs of children and youth as policymakers proceed from outmoded and conveniently reductive understandings of how young lives are affected by the institutions operated to serve them. Zero tolerance school discipline policies exemplify this kind of callous misjudgment and present a worthy focus of political activism. A campaign for the alignment of disciplinary practices with developmental knowledge has the potential to reshape public consciousness of the harms inflicted by ignoring the distinct attributes and vulnerabilities of children and youth, creating an understanding that can then permeate both institutional practice and constitutional doctrine.

By campaigning for the recognition of an imperative to incorporate developmental knowledge into the formulation of school disciplinary policy, nonjudicial actors can collaborate with the judiciary in developing a modernizing interpretation of the Constitution's original commitment to due process, fulfilling what David Strauss has recently described as "The Modernizing Mission of Judicial Review."[405] Strauss sees much of substantive due process doctrine as revealing that the Supreme Court uses judicial review in often controversial cases to perfect rather than overrule political processes, at least insofar as outlier practices defy the popular conclusions shared as a matter of emerging national, if not local, consensus.[406] Not subordinate to popular sentiment but pragmatically cautious, courts can deploy judicial review to correct governmental conduct that fails to conform to the sound translation of constitutional principle that has materialized in emerging practice. As more school districts can be

399. *Id.* at 310–11.

400. *Id.* at 311–12.

401. *See* Jack M. Balkin & Reva B. Siegel, *Principles, Practices, and Social Movements*, 154 U. PA. L. REV. 927, 948 (2006) (stating that social movements "play a crucial creative role in legal ordering").

402. *Id.* at 930.

403. *See id.* at 948 (arguing that social movements "play an important role in reorienting law to shifting social understandings so that legal and social institutions remain in dynamic relation to one another").

404. *See* Emily Buss, *Constitutional Fidelity Through Children's Rights*, 2004 Sup. Ct. Rev. 355, 363–400 (examining deficiencies in Supreme Court's efforts to apply constitutional protections to children).

405. David A. Strauss, *The Modernizing Mission of Judicial Review*, 76 U. CHI. L. REV. 859, 859 (2009).

406. *Id.* at 893–94.

persuaded to align school discipline with developmental knowledge, the groundwork for the recognition of a developmental due process principle can be laid.

VI. THE URGENCY OF ALIGNING SCHOOL DISCIPLINE WITH DEVELOPMENTAL KNOWLEDGE: LEGAL SOCIALIZATION AND THE FORMATION OF CHILDREN'S CONSTITUTIONAL EXPECTATIONS

Legal socialization is the process by which citizens internalize an understanding of the system of law, rules, and principles that govern their community and acquire a sense of the legitimacy of the authority enforcing that system.[407] This process begins in childhood and will shape the trajectory of citizens' orientation toward law and government. Focusing on encounters with police and courts, Jeffrey Fagan and Tom Tyler have argued that a youth's internal process of development should not be considered in isolation from the influence that encounters with the legal system and its representatives exert on a person's willingness to comply with the law.[408] Through their disciplinary practices, schools also play a powerful but largely unexamined role in children's legal socialization.[409]

As Tom Tyler has found, citizens' appraisal of legal authorities' legitimacy depends on whether such authorities' actions are perceived to demonstrate three qualities: "rule-based decisionmaking, respect for rights, and respect for persons."[410] Tyler's research has consistently demonstrated that Americans' assessments of the fairness of the legal system somewhat surprisingly turn less on the outcome of their particular legal claim and more on their sense that the process in which they participated was structured to treat participants fairly and respectfully.[411] Tyler identifies trust as a vital precondition to deference to authority.[412] The cultivation of

407. Jeffrey Fagan & Alex R. Piquero, *Rational Choice and Developmental Influences on Recidivism Among Adolescent Felony Offenders*, 4 J. EMPIRICAL LEGAL STUD. 715, 716 (2007).

408. Jeffrey Fagan & Tom R. Tyler, *Legal Socialization of Children and Adolescents*, 18 SOC. JUST. RES. 217, 218 (2005) (noting that contemporary development theories separate out key developmental process of legal socialization and proposing that process should be part of analysis).

409. Within the literature on legal socialization, there has been little examination of how adolescents or younger children are affected by experiences other than encounters with police and criminal courts. *See* Alex R. Piquero et al., *Developmental Trajectories of Legal Socialization Among Serious Adolescent Offenders*, 96 J. CRIM. L. & CRIMINOLOGY 267, 268 (2005) (noting gap in research on legal socialization in childhood). As I have discussed elsewhere, other school practices, such as the regulation of student expression, also shape and sometimes warp children's translation of constitutional values. *See* Josie Foehrenbach Brown, *Representative Tension: Student Religious Speech and the Public School's Institutional Mission*, 38 J. L. & EDUC. 1, 2–4 (2009) (exploring consequences for child's understanding of nature of constitutional community and reality of religious heterogeneity when schools fail to recognize distinction between private religious speech and speech properly attributable to school).

410. Tom R. Tyler, *Does the American Public Accept the Rule of Law? The Findings of Psychological Research on Deference to Authority*, 56 DEPAUL L. REV. 661, 661 (2007).

411. TOM R. TYLER & YUEN J. HUO, TRUST IN THE LAW: ENCOURAGING PUBLIC COOPERATION WITH THE POLICE AND COURTS 125 (2002); Tom R. Tyler, *Social Justice: Outcome and Procedure*, 35 INT'L J. PSYCHOL. 117, 119 (2000).

412. Tyler, *supra* note 411, at 122.

this sense of trust depends on whether authority figures' actions convey a sincere benevolence and sense of caring toward the person subject to their power.[413]

Trust plays a powerful role in motivating students to abide by teachers' directives.[414] When the basis for students' trust in school officials has been eroded through personal mistreatment or observing the mistreatment of others, little hope for rule compliance exists as their bond with authority has been compromised. Fagan and Tyler's research has shown that adolescents' perceptions about the procedural fairness and respect demonstrated by legal actors, such as the police, school disciplinary staff, and store security guards, affect their reported sense of the legitimacy of legal institutions and officials and their expressions of cynicism about the benefits of compliance with law.[415]

As discussed previously, a central conceptual foundation of the "due process revolution" was recognition of the government's obligation to structure its administrative interactions with citizens so as to affirm the dignity of each individual.[416] The Supreme Court incorporated this understanding in the jurisprudence of this era of procedural reform. Motivated by an appreciation of the dignitary dimensions of the disciplinary encounter, the *Goss* majority likely aspired to enhance the legitimacy of school authorities in the eyes of students and their parents when the Court prescribed the pre-suspension notice and hearing protocol. However, schools' efforts to comply with the decision may have too often devolved into formulaic encounters that fail to develop a better sense of understanding between school officials and students. Mistranslating compliance with *Goss* as the simple installation of a ritual meeting before school officials proceed with an announced disciplinary sanction could aggravate rather than mitigate a student's alienation from school. This potential adverse consequence arises out of two mistakes: resisting the use of the disciplinary encounter as an opportunity to learn about the student so the origins of the problematic behavior could be more fully understood, and avoiding any evaluation of the quality and propriety of the substantive policy of rule and sanction that the school sought to apply.[417] These errors frustrate the communication of genuine respect for students' dignity as individuals and reveal that this critical precondition for legitimacy is missing.

School disciplinary policies marked by zero tolerance approaches or other poorly calibrated sanction regimes leave little or no room for the recognition of either the common vulnerabilities of adolescents as a group or individual extenuating

413. *See id.* (observing that people value the chance to speak to authority only if they believe authority seriously considers their arguments).

414. Kirp, *supra* note 197, at 855 (discussing Charles E. Bidwell, *Students and Schools: Some Observations on Client Trust in Client-Serving Organizations*, *in* ORGANIZATIONS AND CLIENTS: ESSAYS IN THE SOCIOLOGY OF SERVICE 37 (William R. Rosengren & Mark Lefton eds., 1970)).

415. Fagan & Tyler, *supra* note 408, at 228–29, 236.

416. See *supra* Part IV.A for a discussion of the fundamental values underlying due process protections.

417. As Tyler has noted, more than simple rule adherence is necessary for the state to demonstrate genuine respect for human dignity in the exercise of legal power. "[R]ules may themselves be inconsistent with principles of decency and justice. Hence, the content of rules must be evaluated for consistency with ideas of human rights." Tyler, *supra* note 410, at 667 n.27 (citing BLANDINE KRIEGEL, THE STATE AND THE RULE OF LAW (Marc A. LePain & Jeffrey C. Cohen trans., 1995)).

circumstances. Such policies represent governance that is at once too sweeping and too shallow, an indicator that officials may have strayed from the course the Constitution demands.[418] An adolescent facing school discipline is unlikely to experience the exercise of authority as benevolent when a school official's response permits no recognition of the problematic predispositions of adolescence and ignores individual circumstances. As the adolescent is going through the process of individuation and experiencing the emotional tumult that may be a biologically based offshoot of this struggle, an encounter premised on an undifferentiated appraisal of each offender may be particularly wounding. Rather than inspiring a sense of the legitimacy of governmental authority, developmentally insensitive policies characterized by zero tolerance and exclusion-oriented sanctions seem likely to heighten adolescents' feelings of alienation and cynicism about government.[419] Suspended students often see school's action as delivery of a "one-way ticket" out of school, leading them to sever connections to school and ultimately to abandon plans of graduating.[420] Such poor, minority youth are often pushed into the juvenile justice system or into grave danger on the streets.[421]

A constitutional campaign for such reform of school discipline can invigorate educators' adherence to an ethos of sympathy for youth and a capacity-building disciplinary approach that recognizes that a child may require help and guidance in order to acquire a capacity for self-regulation and behavioral control. Making the effort to reconcile disciplinary practices with developmental knowledge should be understood as what both the educational best practice and constitutional principle demand, the fulfillment of schools' educational responsibilities and their constitutional obligation to affirm the dignity of each student. Achieving recognition of this convergence of efficacy and dignity in the courts may require advocates for students to wage a campaign for reform on multiple fronts—in schools, at school board meetings, in legislatures, and in the media. The success of such efforts can energize a broader

418. *See* Romer v. Evans, 517 U.S. 620, 633 (1996) (applying rational basis review to invalidate Colorado's Amendment 2 on equal protection grounds and noting that referendum had created provision that was "at once too narrow and too broad" in its withdrawal of all access to ordinary modes of legal redress for discrimination from targeted subset of citizens, homosexuals).

419. These negative reactions may be most acute for minority students in poor communities, fomenting a belief that school is not a place where they are welcome and where they can succeed. *See* Brenda L. Townsend, *The Disproportionate Discipline of African American Learners: Reducing School Suspensions and Expulsions*, 66 EXCEPTIONAL CHILDREN 381, 382–83 (2000) (arguing that disciplinary pattern in which suspensions and expulsions are routinely and disproportionately imposed on minority students will be interpreted by affected students and broader minority population as message of rejection that communicates that, as a group, they are not considered capable of performing successfully in school).

420. Susan Black, *Locked Out: Why Suspension and Expulsion Should Be Your Course of Last Resort*, AM. SCH. BD. J., Jan 1999, at 34, 36.

421. For example, a study conducted by the City of Baltimore Health Commissioner found that for the 391 out of 520 youth homicide victims whose school records had been located, sixty-seven percent had been suspended or expelled prior to their shooting or homicide, and those suspended had an average 2.2 suspensions or expulsions per school year, missing an average of 14.6 days of school per year because of disciplinary sanctions. Letter from Joshua M. Sharfstein, Balt. City Comm'r of Health, to Andres Alonso, Chief Exec. Officer, Balt. City Pub. Sch. Sys. (May 2, 2008), *available at* http://www.acy.org/upimages/Health_Study.pdf. The disciplinary data review led the Health Commissioner to conclude that suspension and expulsion "place youth at risk not only for school failure, but also for severe injury or death from violence." *Id.*

struggle for constitutional recognition of the distinctive character of children's needs and corresponding legal entitlements, a process fueled by the fusion of expert knowledge about children and the aspiration to prevent children's vulnerabilities from threatening their futures.[422] This change would embody a norm of developmental due process in the domain of school discipline, conveying to American schoolchildren that they can expect their schools to demonstrate respect for students' dignity by treating them with informed concern.

422. *See* Sabel & Simon, *supra* note 383, at 1080–81 (using Albert Hirschman's description of creation of "chains of disequilibria" to suggest how destabilization rights campaigns could extend their effects across diverse institutional settings as new knowledge is acquired and effective reforms implemented (quoting ALBERT O. HIRSCHMAN, THE STRATEGY OF ECONOMIC DEVELOPMENT 64 (1958))).