

# ARTICLE: A TALE OF TWO SYSTEMS: HOW SCHOOLS AND JUVENILE COURTS ARE FAILING STUDENTS

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## LexisNexis Summary

... Two and a half months after the incident, and after Mario had already been expelled and forced to transfer schools, Mario had his first appearance in court and his first opportunity to meet the lawyer who would represent him. ... Many children with cases in juvenile delinquency court are there because of issues that arose in public school; instead of sending children to the principal's office for misbehavior, students are now removed from the educational environment entirely, arrested, and sent to juvenile courts. ... The double punishment due to school referrals to juvenile delinquency court can backfire because they may function to stigmatize children and teach them that life is unfair rather than effectively conveying societal expectations. ... Many students, parents, and communities perceive school exclusionary punishments, such as those which stem from zero tolerance policies, as overly harsh. ... School Response and the Imagined Role of an Educational Advocate for Mario One could imagine a more developmentally productive and fair consequence to the padlock incident that involved a meeting with a school social worker or counselor, Mario, Jorge, and their parents to deal with the underlying issues in the boys' relationship and forge a path forward. ... Conclusion The sheer number of delinquency court referrals coupled with the disproportionate impact that court referrals have on youth of color and the disabled requires that schools, prosecutors, and courts examine and revise their court referral practices.

## Text

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### I. Introduction

Children are prosecuted in juvenile delinquency court based on their misconduct at school. This double punishment by both school and court is developmentally unsound. Double punishment of school-children backfires because it is untimely, stigmatic, and unresponsive to the behavior. Harsh punishment in school and court appears unfair to children, families, and communities when these punishments are disproportionately applied to marginalized groups of students, like those students who are disabled and belong to racial and ethnic minority groups. Ultimately, double punishment disincentivizes students to respect the law, perpetuating delinquency.

As a former high school teacher and a juvenile defender, I have taught and represented many children caught in what has been termed the school-to-prison pipeline.<sup>1</sup> As a public defender and now [\*180] as the co-director of a juvenile justice clinic, I have represented my juvenile clients' penal interests in delinquency court in collaboration with education attorneys using a holistic model of representation.<sup>2</sup> Through these experiences, I have become sensitized to the considerations and inquiries that the school and juvenile court systems should be making into the individualized circumstances of the youth in their care.

I have come to believe that addressing student misbehavior in school is the best, and should be the only official response to most offenses students commit at school. Schools are best poised to address and correct student behavior problems with developmentally appropriate responses that teach and promote good citizenship. Unfortunately, far too often schools are excluding students for misbehavior rather than utilizing developmentally appropriate, evidence-based practices.<sup>3</sup> Further, schools are referring students who experience behavior problems to juvenile delinquency courts for prosecution. This article examines ways in which court referrals can [\*181] do more harm than good,<sup>4</sup> undermining the government's goal of creating responsible and law-abiding citizens.<sup>5</sup>

Children are ushered into the delinquency and criminal systems through both the condition of their schools and the official responses to their behavior at school. This paper will focus on a direct pathway through which children enter the court system - delinquency court referrals of students for misconduct committed at school. School-based court referrals are the largest source of the growing prosecution of youth for low and mid-level juvenile offenses.<sup>6</sup> Many of the students sanctioned by school are doubly punished when they are then arrested in school and referred to the juvenile court system.

In Part II, this Article will address two important developmental problems with referrals to courts for students' misbehavior at school: timing delays and double punishment. The students who are most frequently disciplined in school and in court are the most vulnerable among us--socio-economically disadvantaged, minority, and learning

<sup>1</sup> The NAACP has said of the School-to-Prison Pipeline that "the punitive and overzealous tools and approaches of the modern criminal justice system have seeped into our schools, serving to remove children from mainstream educational environments and funnel them onto a one-way path toward prison ... ." Nancy A. Heitzeg, Education or Incarceration: Zero Tolerance Policies and the School to Prison Pipeline, Forum on Public Policy 1, 1 (2009), available at <http://files.eric.ed.gov/fulltext/EJ870076.pdf>. I do not use this term much throughout this piece aside from describing a broad phenomenon. Using the term "school-to-prison pipeline" does not do much to further a discussion of the underlying or precipitating problems nor does it describe solutions.

<sup>2</sup> Holistic representation is a best practices model of juvenile representation, incorporating social workers and education advocates as a part of the juvenile defense team. It is a model of representation that we use at the Center for Juvenile Law and Policy at Loyola Law School. See generally Holistic Representation, Loyola L. Sch., <http://www.lls.edu/academics/centersprograms/centerforjuvenileawpolicy/holisticrepresentation/> (last visited Nov. 7, 2013); Role of Juvenile Defense Counsel in Delinquency Court, Nat'l Juv. Defender Center, [http://www.njdc.info/pdf/role\\_of\\_juvenile\\_defense\\_counsel.pdf](http://www.njdc.info/pdf/role_of_juvenile_defense_counsel.pdf) (last visited Nov. 16, 2013); Beyond Lawyering, <http://www.courts.state.ny.us/ip/partnersinjustice/Beyond-Lawyering.pdf> (last visited Nov. 16, 2013); Innovative Approaches to Juvenile Indigent Defense, U.S. Dep't of Just. <http://www.youthadvocacydepartment.org/about/ojjdp-innovative-approaches.pdf> (last visited Nov. 16, 2013).

<sup>3</sup> See *infra* Part IV. C.

<sup>4</sup> See David R. Arredondo, Child Development, Children's Mental Health and the Juvenile Justice System: Principles for Effective Decision-Making, *14 Stan. L. & Pol'y Rev.* 13, 17 n.22 (2003) (discussing the importance of taking the "potential harm done" by particular sanctions into consideration when choosing a developmentally appropriate response to misbehavior).

<sup>5</sup> Education is perhaps the most important function of state and local governments ... It is the very foundation of good citizenship ... It is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education." *Brown v. Bd. Of Educ.*, 347 U.S. 483, 493 (1954). Furthermore, the overarching goal of the juvenile delinquency system is to rehabilitate the youth under its care. See Kristin Henning, What's Wrong with Victims' Rights in Juvenile Court?: Retributive Versus Rehabilitative Systems of Justice, *97 Calif. L. Rev.* 1107, 1118-1119 (2009).

<sup>6</sup> See Kristin Henning, Criminalizing Normal Adolescent Behavior in Communities of Color: The Role of Prosecutors in Juvenile Justice Reform, *98 Cornell L. Rev.* 383, 403 (2013) (discussing how the increase in low and mid-level offenses for juvenile court prosecutions is due to schools referrals); see also *id.* at 410 (stating that in North Carolina for instance, 40% of juvenile court referrals were from schools and that the increase in school-based court referrals correlates with an increased presence of school police and has a disproportionate impact on minority youth)(internal citation omitted).

disabled students.<sup>7</sup> Part III will examine the [\*182] impact of delays and multiple punishments through the lens of adolescent development and will draw lessons from the failure of zero tolerance policies. Official responses by juvenile delinquency court backfire when those sanctions are viewed as unfair and overly harsh by children, their families, and their communities.

In Part IV, this Article will make several key observations and recommendations. To protect the rights of students, education attorneys should be involved at the earliest point of student contact and collaboration between education attorneys and juvenile court defenders should be fostered. To reduce juvenile delinquency court referrals, schools, prosecutors, and courts should institute policies to disfavor delinquency referrals when a student's misconduct has been addressed at school or is a manifestation of his or her disability.

## II. The Problems of Time Delay & Double Punishment

### A. Mario's Story

Mario<sup>8</sup> was eleven and three months old when he walked through the metal detector at the Inglewood juvenile courthouse. The alarm sounded. Mario's backpack set off the courthouse metal detector. Mario had brought with him every trophy he had ever earned in school. Mario was a very bright young man and tried hard in school. Mario earned good grades and liked to follow the school rules. He looked up to his teachers. Mario was proud of his achievements.

Mario was also a sensitive young boy. Before the age of eleven, Mario had already seen doctors for his depression. For Mario, the hallmark of his sixth grade year was the repeated harassment Mario experienced at the hands of Jorge, the class bully. Jorge would make fun of Mario for being overweight. Mario would later describe that he was embarrassed and did not want other people [\*183] to know that Jorge "scooped" him. Scooping, Mario explained, is when Jorge would grab Mario's "tits" and pull on them. When Jorge scooped him, Mario cried.

One day in particular, Jorge was making fun of Mario during class. The teacher, who knew that Jorge bullied Mario, noticed that Mario was crying. The teacher told the two boys to stop talking and went back to teaching her lesson. Jorge, who was seated directly in front of Mario, was talking about scooping Mario. Mario became increasingly frustrated and upset. He wanted Jorge to stop. Mario reached into his school bag, grabbed the padlock he used for his locker, and he hit Jorge over the head with it. Jorge suffered a gash on his head which required a few stitches. This was Mario's first disciplinary infraction. Mario was expelled. He had to transfer schools mid-year. Jorge remained in school and was not disciplined.

After the event, Mario was escorted out of school and to the police station where he was interrogated. Mario was also referred to juvenile delinquency court by the school. The prosecutor who reviewed Mario and Jorge's case charged Mario, a first-time offender, an eleven year-old, with felony assault with a dangerous weapon, an offense which in California could not be sealed and would be a strike if Mario had been over sixteen years old. Jorge was not charged with anything. Jorge and his family did not want Mario to face charges in court. The charging prosecutor never spoke with Jorge, his family, the teacher, or anyone at the school before filing the charges against Mario.

Two and a half months after the incident, and after Mario had already been expelled and forced to transfer schools, Mario had his first appearance in court and his first opportunity to meet the lawyer who would represent him. Mario was represented by the juvenile justice clinic at Loyola Law School's Center for Juvenile Law and Policy. It was on this day, the day of his first court appearance, that Mario brought his trophies to court.

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<sup>7</sup> See Russel J. Skiba, Policy Research Report #SRS2: Zero Tolerance, Zero Evidence, 11-12 (2000), <http://www.indiana.edu/~safeschl/ztze.pdf>; The Advancement Project & The Civil Rights Project, Opportunities Suspended: The Devastating Consequences of Zero Tolerance and School Discipline 7-9 (June 15-16, 2000), <http://civilrightsproject.ucla.edu/research/k-12-education/school-discipline/opportunities-suspended-the-devastating-consequences-of-zero-tolerance-and-school-discipline-policies/crp-opportunities-suspended-zero-tolerance-2000.pdf>; Russel J. Skiba et al., The Color of Discipline: Sources of Racial and Gender Disproportionality in School Punishment, 34 Urb. Rev. 317, 318 (2002); David Osher et al., How Can We Improve School Discipline?, 39 Educ. Res. 48, 48 (Feb. 11, 2010), <http://edr.sagepub.com/content/39/1/48>.

<sup>8</sup> Mario is not the client's real name. Although Mario is not his real name, all details of his story are real and unchanged.

In the over two months between the incident and the first court appearance, Mario's parents, concerned about their son's mental health, education, and behavior, sought out counseling for their son. The counseling helped Mario to cope with the bullying he experienced, his depression, the humiliation he felt, Mario's response to Jorge, and the disruption caused by changing schools.

[\*184] Mario's second court hearing took place two months after the first, now four and a half months after the incident. On behalf of Mario, we asked the juvenile court to dismiss his case in the interests of justice.<sup>9</sup> Mario's parents had proactively dealt with his emotional needs. He had been punished by the school when he was immediately expelled. Further, the victim and his family did not want to prosecute Mario.<sup>10</sup> The prosecutor vigorously objected; the Court denied the motion. Mario ultimately admitted a misdemeanor offense and served probation for a period of six months. There was no counseling ordered by the court because it was deemed superfluous to what Mario had already done at that point.<sup>11</sup> When he is eighteen, Mario will be eligible to have his record sealed. Until then, he must answer truthfully on job applications that he was arrested for a felony.

#### B. Timing Delay

In Mario's case, his first appearance in court was two months after the incident. That first court appearance was non-substantive; it was an arraignment--a brief hearing where the child's attorney enters a denial to the charges. There was an additional delay of two months before the next court hearing--the first hearing at which anything substantive occurred. At that second hearing, four months after the padlock incident with Jorge, the court denied the defense motion to dismiss, Mario pled to a misdemeanor, and received his disposition of informal probation. This timing is typical of a non-detained juvenile case in Los Angeles.<sup>12</sup>

[\*185] To an eleven year old, the passage of four months feels much longer than it does to an adult. Moreover, the responsiveness of the court to the underlying problems Mario was experiencing was compromised by this significant delay. Fortunately, the most critical intervention had occurred outside the court process - Mario's parents had already gotten him into counseling before he ever stepped foot into court. The court case was hanging over Mario's head for almost one year; in the context of his life, the case lasted for one twelfth of Mario's existence.

#### C. Double Punishment

Mario was punished twice - once by his school when he was expelled and again by the juvenile delinquency court. Like Mario, large numbers of public school students in the United States experience harsh punishment - including school exclusion - as a result of misconduct at school. During the 2009-2010 academic year, more than three million

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<sup>9</sup> See [Cal. Welfare & Inst. Code § 782](#) (West 1971).

<sup>10</sup> We investigated the case by talking to the victim and his family. They all expressed that they did not want Mario to be punished nor did they wish for Mario's case to go through the court system.

<sup>11</sup> Mario was ordered to obey a curfew, to attend school, and to follow the standard conditions of probation. None of these conditions had a real impact on Mario because they were things he was already doing.

<sup>12</sup> From September 2011 through October 2013, in 78 representative delinquency cases where clients were represented by the Center for Juvenile Law and Policy's juvenile justice clinic, the average length of time between the date of the offense and the first court appearance (arraignment) was 117 days, or just about four months. For the same number of cases, the length of time between the date of arrest and the first court appearance (arraignment) is 82 days, or just about three months. Of the 78 cases, 68 cases were ones where the minor child was on release status in the community and 10 were cases where the child was detained. When children are detained, the time between arrest and arraignment is statutorily mandated to be swift (48 hours). This data demonstrates that the timing delay in processing a juvenile case through court exists whether or not there is a delay between the date of the offense and the arrest. For cases where there was a date range for the date of the offense in the charging document, the time delay was calculated using the median date. These statistics are for both offenses which occurred in school and those which occurred outside of school. Police contact with youth is often swift because the presence of police in schools is commonplace. Once the case is in the hands of law enforcement, it is referred to the prosecution. The prosecution will then decide upon the charges to be brought. There may be large lags of time between the referral to the prosecution and the child's first appearance in court. Unfortunately, those lags of time may be greater for instances when the child's offense is less serious and the child remains in the community.

students were suspended from school at least once.<sup>13</sup> There is also reason to believe that school exclusionary tactics are getting worse: in the 2011-2012 academic year, the New York City School-Justice Partnership Task Force found that the city's schools had 70,000 suspensions, which represents a forty percent increase over a six year period.<sup>14</sup>

[\*186] Increases in exclusionary disciplinary sanctions are linked to the expansion of zero tolerance policies in the last thirty years.<sup>15</sup> Indeed, Mario's expulsion was the result of just such a policy that disallowed discretion. Zero tolerance policies dictate predetermined punishments for violations of school rules regardless of individual circumstances and without the opportunity for educators who know the child to exercise their judgment.<sup>16</sup> As an example of the expansion of harsh zero tolerance punishments to relatively minor infractions: forty-eight percent of the 710,000 suspensions in California during the 2011-2012 academic year were for disobeying a teacher, a violation termed "willful defiance."<sup>17</sup> The broad categories of zero tolerance offenses allow for subjectivity and contribute to the disproportionate treatment of children from already marginalized groups.<sup>18</sup>

School exclusionary punishments are applied disproportionately. Black males who have diagnosed disabilities are the group most often suspended.<sup>19</sup> In California, nearly twenty-eight [\*187] percent of African American students with disabilities are suspended at least once.<sup>20</sup> Nationwide, one in five African American male students received an out-of-school suspension according to the most recent data from the Department of Education's Office of Civil Rights.<sup>21</sup> African American students are over 3.5 times more likely to be suspended or expelled than white students.<sup>22</sup> When the impact of zero tolerance policies are examined, Latino and African American students account for only forty-five percent of the student body, yet those same students suffer fifty-six percent of the zero tolerance

<sup>13</sup> Department of Education's Office for Civil Rights, Civil Rights Data Collection (March 2012), <http://www2.ed.gov/about/offices/list/ocr/docs/crdc-2012-data-summary.pdf> (last visited Nov. 8, 2013).

<sup>14</sup> The Editorial Board, The School-to-Prison Pipeline, N.Y. Times (May 29, 2013), <http://www.nytimes.com/2013/05/30/opinion/new-york-citys-school-to-prison-pipeline.html>.

<sup>15</sup> Zero tolerance policies, which originated in response to the 1997 GFSA, have expanded over the years to apply to more than just weapons offenses and can include minor infractions such as truancy and verbal disrespect to teachers. See Heitzeg, *supra* note 2, at 8-9 (stating a study found 100% of schools have zero tolerance policies for weapons, 80% for gang activity, and 90% for alcohol, drugs, and tobacco). Today, bringing a weapon to campus may account for less than 2% of the offenses for which students are suspended or expelled. Kathleen DeCataldo & Toni Lang, Keeping Kids in School and Out of Court, 83 N.Y. St. B. J. 26, 27 (2011).

<sup>16</sup> Zero tolerance policies are school or district-wide and the punishments are often harsh exclusionary punishments such as suspension, expulsion, or transfer. Kathleen DeCataldo & Toni Lang, Keeping Kids in School and Out of Court, 83 N.Y. St. B. J. 26, 26-27 (2011).

<sup>17</sup> Findings of prevalence and racial disparity in application of the sanction of suspension for willful defiance during the 2011-2012 academic year prompted Los Angeles Unified School District to consider disallowing suspensions for willful defiance. Teresa Watanabe, LAUSD Board Could Ban Suspensions for 'Willful Defiance,' L.A. Times (May 12, 2013), <http://articles.latimes.com/2013/may/12/local/la-me-adv-laUSD-discipline-20130513>. See also Dignity in Schools, Fact Sheet: School Discipline and the Pushout Problem 1 (2010), available at [http://www.dignityinschools.org/files/DSC\\_Pushout\\_Fact\\_Sheet.pdf](http://www.dignityinschools.org/files/DSC_Pushout_Fact_Sheet.pdf).

<sup>18</sup> Public Counsel Law Ctr., Fix School Discipline: How We Can Fix School Discipline Toolkit 5 1, 5 (2012).

<sup>19</sup> See David Osher, Darren Woodruff & Anthony E. Sims, Schools Make a Difference: The Overrepresentation of African American Youth in Special Education and the Juvenile Justice System, in Racial Inequity in Special Education 93, 97 (Daniel J. Losen & Gary Orfield eds., 2002). Nationwide, twelve percent of students have recognized disabilities, and of those students, eighteen percent are African American boys. Department of Education's Office for Civil Rights, *supra* note 13, at 3.

<sup>20</sup> Daniel J. Losen, Tia Martinez & Jon Gillespie, Suspended Education in California, The Civil Rights Project (Apr. 10, 2012 10:57 AM), <http://civilrightsproject.ucla.edu/resources/projects/center-for-civil-rights-remedies/school-to-prison-folder/summary-reports/suspended-education-in-california/SuspendedEd-final3.pdf>.

<sup>21</sup> Department of Education's Office for Civil Rights, *supra* note 13, at 3.

<sup>22</sup> *Id.* at 2.

expulsions.<sup>23</sup> Further, experts attribute the overly harsh application of exclusionary sanctions to marginalized students to unconscious biases, lack of teacher preparation, inadequate training in culturally competent practices, and racism.<sup>24</sup>

In addition to his punishment at school, Mario was also arrested and referred to delinquency court. The punishment Mario [\*188] received by the delinquency court was not merely the sentence of informal probation; it was also every consequence which stemmed from the school's referral of Mario to the police and delinquency system.<sup>25</sup> Mario was interrogated at a police station, he was made to appear repeatedly in juvenile court, and he was labeled a delinquent. Many children with cases in juvenile delinquency court are there because of issues that arose in public school; instead of sending children to the principal's office for misbehavior, students are now removed from the educational environment entirely, arrested, and sent to juvenile courts.<sup>26</sup> These referrals have wide-ranging impact on the student, family, and community.<sup>27</sup>

School-based arrests and court referrals, like school exclusionary policies, have a disproportionate impact. Nationwide, seventy percent of the students arrested for an event arising at school were African American or Latino.<sup>28</sup> African American students in [\*189] New York City public schools are fourteen times more likely than a white peer to be

<sup>23</sup> Id.

<sup>24</sup> Eric S. Hall & Zorka Karanxha, *School Today, Jail Tomorrow: The Impact of Zero Tolerance on the Over-Representation of Minority Youth in the Juvenile System*, 4(1) *Power Play* 1, 4 - 5 (2012), [http://www.emich.edu/coe/powerplay/documents/vol\\_04/no\\_01/ppj\\_vol\\_04\\_no\\_01\\_hall\\_karanxha.pdf](http://www.emich.edu/coe/powerplay/documents/vol_04/no_01/ppj_vol_04_no_01_hall_karanxha.pdf) (last visited Nov. 15, 2013). "Emerging professional opinion, qualitative research findings, and a substantive empirical literature from social psychology suggest that the disproportionate discipline of students of color may be due to lack of teacher preparation in classroom management, lack of training in culturally competent practices, or racial stereotypes." American Psychological Association Zero Tolerance Task Force, *Are Zero Tolerance Policies Effective in the Schools?*, 63 *Am. Psychol.* 852, 854 (2008) (internal citation omitted), available at <http://www.apa.org/pubs/info/reports/zero-tolerance.pdf>. Furthermore, images on television and in the news of blacks as criminals. Blacks are four times as likely as whites to be seen in mugshots. Nancy A. Heitzeg, *Education or Incarceration: Zero Tolerance Policies and the School to Prison Pipeline*, *Forum on Public Policy* 1, 3 (2009), available at <http://files.eric.ed.gov/fulltext/EJ870076.pdf>. See generally, by Jennifer L. Eberhardt, et al., *Seeing Black: Race, Crime, and Visual Processing*, 87 *J. Personality & Soc. Psychol.* 876, 887 (2004).

<sup>25</sup> It is a basic tenet of psychology that punishment can impact self-esteem. See, Elaine Wilson, *Guiding Young Children Series: Discipline Without Punishment*, Okla. St. Univ., Okla. Coop. Extension Serv., Div. of Agric. Sci. and Natural Res., T-2329 - 2329-4.

<sup>26</sup> See, Rachel Wilf, *Disparities in School Discipline Move Students of Color Toward Prison*, Center for American Progress (Mar. 13, 2012), [http://www.americanprogress.org/issues/race/news/2012/03/13/113\\_50/disparities-in-school-discipline-move-students-of-color-toward-prison/](http://www.americanprogress.org/issues/race/news/2012/03/13/113_50/disparities-in-school-discipline-move-students-of-color-toward-prison/) (last visited Nov. 8, 2013). Nancy A. Heitzeg, *Education or Incarceration: Zero Tolerance Policies and the School to Prison Pipeline*, *Forum on Public Policy* 1, 3 (2009), available at <http://files.eric.ed.gov/fulltext/EJ870076.pdf>. See also, Tamar Birkhead, *Towards a Theory of Procedural Justice For Juveniles*, 57 *Buff. L. Rev.* 1447, 1497 - 99 (2009) (internal citation omitted) (discussing how school discipline was once handled in school and referring to schools as "'direct feeders' of youth into juvenile and adult criminal courts"). See also, Kristin Henning, *Criminalizing Normal Adolescent Behavior in Communities of Color: The Role of Prosecutors in Juvenile Justice Reform*, 98 *Cornell L. Rev.* 383, 386 (2013).

<sup>27</sup> Once students have been through the delinquency system, they experience structural problems reintegrating into a school. Kristin Henning, *Criminalizing Normal Adolescent Behavior in Communities of Color: The Role of Prosecutors in Juvenile Justice Reform*, 98 *Cornell L. Rev.* 383, 456 (2013). Also, when a child is referred to juvenile court, his or her chances of being a high school dropout are quadrupled. Kathleen DeCataldo & Toni Lang, *Keeping Kids in School and Out of Court*, 83 *N.Y. St. B. J.* 26, 27 (2011). Further, African American youth are fifty percent more likely to drop out than are their white peers. Mae C. Quinn, *The Fallout from our Blackboard Battlegrounds: A Call for Withdrawal and a New Way Forward*, 15 *J. Gender Race & Just.* 541, 562 - 63 (2012).

<sup>28</sup> Department of Education's Office for Civil Rights, *Civil Rights Data Collection* (March 2012), <http://www2.ed.gov/about/offices/list/ocr/docs/crhc-2012-data-summary.pdf> (last visited Nov. 8, 2013). Furthermore, the disproportionate application of exclusionary policies to children of color does not correlate to the representation of those minority children in the overall public school population. Nationally, in the 2001-2002 academic year white students represented 62 % of the population and accounted for 49 % of the expulsions while Black students represented 17 % of the population and accounted for 31 % of the expulsions. Chauncey Smith, *Deconstructing the Pipeline: Evaluating School-to-Prison Pipeline Equal Protection Cases Through a Structural Racism Framework*, 36 *Fordham Urb. L.J.* 1009, 1013 (2009). In California, African Americans are three times as likely as whites to be suspended; in L.A. Unified School District, though African American comprise only 9% of the

arrested and Latino students are five times more likely to be arrested than their white peers.<sup>29</sup> Nationwide, African American students represent forty-two percent of referrals to law enforcement, while Latinos represent twenty-nine percent and whites only twenty-five percent.<sup>30</sup> Furthermore, research has shown that African Americans are much more likely to be suspended, expelled, and arrested than white students are, even for the same kind of behavior.<sup>31</sup> [\*190] In context, this treatment of minority students, and particularly of African American boys, parallels a larger trend within the United States of incarcerating adult African American men at disproportionately high rates.<sup>32</sup>

#### D. Labeling

As a result of his punishment by school and court, Mario experienced various negative labels. Mario was labeled a misbehaving student who was banished from school. Mario was also labeled a juvenile delinquent who was so bad that he had to be sanctioned in court. Further, all youth of color are portrayed as prone to violence and anti-social behavior.<sup>33</sup> Because of his race, Mario was confronted with these same stereotypes.

Just stepping through the doors of juvenile delinquency court was enough to undermine Mario's view of himself as a good kid, an achieving student, and a respectful rule-follower. The complexity of this attack - or "stereotype threat"<sup>34</sup> - on Mario's self-conception was intensified by Mario's racial and ethnic identity. Mario is Latino, and as a youth of color he is a representative of the disproportionate impact of school and court discipline on marginalized groups in American [\*191] society. Mario was also now a delinquent, someone who had done something bad and was being labeled as such.

Once a youth has been categorized as a delinquent, often a self-fulfilling prophecy is set in motion. Unable to break free of the stigma, he may begin to structure his identity around this label. The effect is frequently future criminal

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student population, their suspensions account for 26% of the total number of students suspended. Teresa Watanade, LAUSD Board Could Ban Suspensions for 'Willful Defiance', L.A. Times, May 12, 2013. See, Nancy A. Heitzeg, Education or Incarceration: Zero Tolerance Policies and the School to Prison Pipeline, Forum on Public Policy 1, 1-2, 4 (2009), available at <http://files.eric.ed.gov/fulltext/EJ870076.pdf> (stating that the school-to-prison pipeline and cycles of poverty and violence most directly impacts Black and Latino males).

<sup>29</sup> Editorial, The School-to-Prison Pipeline, N.Y. Times, May 30, 2013, A.22.

<sup>30</sup> Department of Education's Office for Civil Rights, Civil Rights Data Collection (March 2012), <http://www2.ed.gov/about/offices/list/ocr/docs/crdc-2012-data-summary.pdf> (last visited Nov. 8, 2013). Disturbingly, African American students represent only about 16 % of the population, even though they account for 45 % of juvenile arrests. NAACP Legal Defense and Educational Fund Inc., Dismantling the School-to-Prison Pipeline, [http://www.naacpldf.org/files/publications/Dismantling\\_the\\_School\\_to\\_Prison\\_Pipeline.pdf](http://www.naacpldf.org/files/publications/Dismantling_the_School_to_Prison_Pipeline.pdf) (last visited Nov. 8, 2013). See, Kristin Henning, Criminalizing Normal Adolescent Behavior in Communities of Color: The Role of Prosecutors in Juvenile Justice Reform, 98 Cornell L. Rev. 383, 408 (2013) (internal citations omitted) (describing the over-representation of African American youth in particular throughout every stage of juvenile and criminal courts: from 2002-2004, African American youth were 16 % of the overall population and yet 30% of juveniles arrested, 37 % of those detained, 30% of juvenile court referrals, and 35% of those waived to adult court).

<sup>31</sup> NAACP Legal Defense and Educational Fund Inc., Dismantling the School-to-Prison Pipeline, [http://www.naacpldf.org/files/publications/Dismantling\\_the\\_School\\_to\\_Prison\\_Pipeline.pdf](http://www.naacpldf.org/files/publications/Dismantling_the_School_to_Prison_Pipeline.pdf) (last visited Nov. 8, 2013).

<sup>32</sup> The American criminal justice system treats offenders of different races and socio-economic statuses differently. See Michelle Alexander, *The New Jim Crow: Mass Incarceration in the Age of Colorblindness* 209 - 48 (The New Press) (2010). Perhaps one of the bleakest statistics is that one in three Black men in America today are under some form of court supervision - whether that is incarceration in prison or jail, probation or parole. *Id.* at 9. In the school context, African American students experienced a suspension rate of 6% in the 1970s and as of just a few years ago have a rate of 15%. Daniel J. Losen and Russel J. Skiba, *Suspended Education: Urban Middle Schools in Crisis*, S. Poverty Law Ctr 2 - 3 (Sept. 2010).

<sup>33</sup> Kristin Henning, *Criminalizing Normal Adolescent Behavior in Communities of Color: The Role of Prosecutors in Juvenile Justice Reform*, 98 Cornell L. Rev. at 419 - 20 (internal citations omitted) ("Pervasive stereotypes suggest that youth of color are prone to violence and crime, are not in school, are unwilling to work, and are likely to be incarcerated at some point in their lives"); Tamar Birkhead, *Towards a Theory of Procedural Justice For Juveniles*, 57 Buff. L. Rev. 1447, 1498 (2009) (discussing the image of the juvenile super-predator).

<sup>34</sup> See generally, Claude Steele, *Whistling Vivaldi: and Other Clues to How Stereotypes Affect Us* 5 (W.W. Norton & Co.) (2010).

behavior, diminished employment and educational opportunities, and the receipt of a new label - one of society's "undesirables."<sup>35</sup>

Essentially, individuals all have social identities. We also have pretty accurate notions of what other people in American society think about each of us based on certain major aspects of our identities - [\*192] white, poor, rich, immigrant, criminal, or mentally ill.<sup>36</sup> This is true even for young children.<sup>37</sup> One or more of these labels or identities could function as a stereotype threat, or stigma pressure, that causes an individual to worry about conforming to expected negative norms for an aspect of one's social identity.<sup>38</sup> Psychologist Claude Steele found that, for instance, gender and racial stigma about poor intellectual performance of women and African Americans as groups impacted the intellectual performance of individuals in those groups when other factors were controlled.<sup>39</sup> By analogy, one can understand the stereotype threats that Mario experienced from his school, society, and the juvenile court. Those threats caused him to assert his achieving identity by bringing his trophies to court.

The label - youth of color - has further implications for how Mario's expulsion and juvenile court case were perceived by Mario and his family. Many students in Mario's position observe that youth of color are disproportionately punished by and excluded from school and are over-represented in juvenile court.<sup>40</sup> Thus, the stereotype threat of delinquent is an even more dangerous threat to a youth's positive self-conception when that child is a part of a marginalized group in American society.<sup>41</sup>

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<sup>35</sup> Carol S. Taylor, *Growing Up Behind Bars: Confinement, Youth Development, and Crime*, 3 *OCJRC* 1, 10 (1996). Youth who are labeled delinquent may have more fears about their futures than they do hopes. See, Kristin Henning, *Criminalizing Normal Adolescent Behavior in Communities of Color: The Role of Prosecutors in Juvenile Justice Reform*, [98 \*Cornell L. Rev.\* 383, 386 \(2013\)](#) (citing Laurence Steinberg et al., *Reentry of Young Offenders from the Justice System: A Developmental Perspective*, 2 *Youth Violence & Juv. Just.* 21, 29 - 30 (2004)). This threat is even greater for children who are incarcerated. Incarceration of children is associated with increased risk of suicide, compromised physical health, detachment from school, inadequate opportunities for quality education, reduced chances of high school graduation, and reduced opportunities for future employment. Barry Holman & Jason Ziedenberg, *The Dangers of Detention: The Impact of Incarcerating Youth in Detention and Other Secure Facilities*, *Just. Pol'y Inst.* 1, 2, 8 - 9, available at [http://www.justicepolicy.org/images/upload/06-11\\_REP\\_DangersOfDetention\\_JJ.pdf](http://www.justicepolicy.org/images/upload/06-11_REP_DangersOfDetention_JJ.pdf) (describing detention centers as an "unhealthy environment" and explaining that "incarcerated youth experience double to four times the suicide rate of youth in the community"). Police contact alone has been linked to increased delinquency, increased identity with a deviant self-conception, and the reduction of positive peer relationships. As youth progress through the stages of the justice system, the impact of labeling on them is amplified. Studies have found that the impact of appearing in court is associated with higher levels of future delinquency. Indeed, whenever a label is applied publicly, an individual is more likely to experience an impact on his or her identity. Stephanie A. Wiley & Finn-Aage Esbensen, *The Effect of Police Contact: Does Official Intervention Result in Deviance Amplification*, *Crime & Delinquency* 1, <http://cad.sagepub.com/content/early/2013/05/23/001112871349249> 6 (last visited Nov. 15, 2013) (internal citations omitted) (discussing in addition public degradation ceremonies which further lead to increased involvement with deviant peers and social exclusion). See also, Kristin Henning, *What's Wrong with Victims' Rights in Juvenile Court?: Retributive Versus Rehabilitative Systems of Justice*, [97 \*Calif. L. Rev.\* 1107, 1162 - 63 \(2009\)](#) (describing some of the barriers to children expressing themselves in court due to the stress and pressure of that environment).

<sup>36</sup> Claude Steele, *Whistling Vivaldi: and Other Clues to How Stereotypes Affect Us* 5 (W.W. Norton & Co.) (2010).

<sup>37</sup> *Id.* at 170.

<sup>38</sup> *Id.* at 52 - 53.

<sup>39</sup> *Id.*

<sup>40</sup> See Tamar Birkhead, *Towards a Theory of Procedural Justice For Juveniles*, [57 \*Buff. L. Rev.\* 1447, 1500 \(2009\)](#) (describing the disproportionate application of extreme punishments like expulsion and delinquent court referrals to youth of color and the dangerous message sent to students by dealing with misbehavior through "the perspective of crime control"). Students who are repeatedly disciplined begin to view themselves as future criminals or prisoners on the "criminal justice "track." *Id.* See also Stephanie A. Wiley & Finn-Aage Esbensen, *The Effect of Police Contact: Does Official Intervention Result in Deviance Amplification*, *Crime & Delinquency* 1, <http://cad.sagepub.com/content/early/2013/05/23/001112871349249> 6 (last visited Nov. 15, 2013) (internal citations omitted) (citing numerous studies).

<sup>41</sup> These children are at risk of what Steele termed a "diffuse threat" - one that is preoccupying and invades or takes over one's whole identity, shaping how one functions and conceives of oneself. Claude Steele, *Whistling Vivaldi: and Other Clues to How Stereotypes Affect Us* 71 (W.W. Norton & Co.) (2010). According to Steele, people often see themselves through the lens of

### III. Developmentally Constructive Sanctioning: The Limited Efficacy of Harsh Punishment at School and Through the Juvenile Justice System

#### A. Overview of Adolescent Development

Developmental psychology and neuroscience inform contemporary understanding of how children behave and why children behave as they do.<sup>42</sup> Adolescent development should also inform how adults in school and in court interact with young people to make the most of every teaching opportunity. The Supreme Court has repeatedly affirmed that children are different from adults in three fundamental ways that make young people “categorically less culpable.”<sup>43</sup> First, children are less mature than adults.<sup>44</sup> They are impetuous, impulsive, and fail to consider the consequences of their actions before they act.<sup>45</sup> When adolescents do consider the future [\*194] implications of a course of action, they do not accurately weigh pros and cons.<sup>46</sup> Instead, young people tend to minimize or underestimate the potential of dangerous, risky, or undesirable consequences while overestimating potential rewards, especially where those rewards relate to recognition from their peers.<sup>47</sup> Neuroscience instructs that there are biological causes which universally impact adolescents and young adults, and that biological maturity persists into the mid-twenties.<sup>48</sup> Second, young people are particularly vulnerable to pressure.<sup>49</sup> Their already impaired decision-making is further compromised in response to stress and peer pressure.<sup>50</sup> Third, young [\*195] people possess the potential to

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whichever identity is most under attack. Id. at 72. Steele describes that “the threat of something bad happening to you because you have an identity” is damaging whether or not anything actually ever happens. Id. at 75. “It is enough that it could happen. It’s the possibility that requires vigilance and that makes the identity preoccupying.” Id. at 75. The strength of this pressure tends to depend on the extent of the cues. Id. at 172. In Mario’s case, he had three types of threats attacking his identity in a negative way at the same time.

<sup>42</sup> Terry A. Maroney, The False Promise of Adolescent Brain Science in Juvenile Justice, [85 Notre Dame L. Rev. 89, 95 - 96 \(2009\)](#).

<sup>43</sup> [Roper v. Simmons, 543 U.S. 551, 571 \(2005\)](#); [Graham v. Florida, 130 S. Ct. 2011, 2016 \(2010\)](#); [Miller v. Alabama, 132 S. Ct. 2455, 2464 \(2012\)](#).

<sup>44</sup> Brief for the Am. Psychol. Ass’n et al., as Amici Curiae Supporting Petitioners at 8 - 9, [Graham, 130 S.Ct. 2011](#) (No. 08-7412, No. 08-7621) See, Emily Buss, Rethinking the Connection between Developmental Science and Juvenile Justice, [76 U. Chi. L. Rev. 493, 495 \(2009\)](#) (reviewing Elizabeth S. Scott & Laurence Steinberg, Rethinking Juvenile Justice (Harvard University Press 2008)) (stating that adolescents are psychosocially immature which makes them lack the ability to control their emotions and more likely to be attracted to risky behavior).

<sup>45</sup> Brief for the Am. Med. Ass’n et al., as Amici Curiae in [Support of Neither Party at 6, Miller, 132 S. Ct. 2455 2012](#) (No. 10-9646, No. 10-9647; [Brief for the Am. Psychol. Ass’n et al., as Amici Curiae Supporting Petitioners at 11, Graham, 130 S.Ct. 2011](#) (No. 08-7412, No. 08-7621) (discussing a study showing adolescents weigh risks and rewards differently than adults and therefore are more likely to engage in risky behavior); L.P. Spear, The Adolescent Brain and Age-Related Behavioral Manifestations, 24 *Neuroscience & Biobehavioral Revs.* 417, 421 - 23 (2000) (arguing adolescents are greater risk takers and discussing studies supporting the theory); Jeffrey Arnett, Reckless Behavior in Adolescence: A Developmental Perspective, 12 *Developmental Rev.* 339, 343 - 44 (1992) (stating that reckless behavior is a normative part of adolescent actions).

<sup>46</sup> Brief for the Am. Psychol. Ass’n et al., as Amici Curiae Supporting Petitioners at 8 - 9, 11 - 12, [Graham, 130 S.Ct. 2011](#) (No. 08-7412, No. 08-7621). See also, Elizabeth Cauffman et al., Age Differences in Affective Decision Making as Indexed by Performance on the Iowa Gambling Task, 46 *Developmental Psychol.* 193, 204 (2010) (discussing study showing that adolescents are less able to weigh choices and make better decisions)..

<sup>47</sup> [Brief for the AMA et al. at 6-7, 12, Miller, 132 S. Ct. 2455](#) (No. 10-9646, No. 10-9647); [Brief for the APA et al. at 8-9, Graham, 130 S. Ct. 2011](#) (No. 08-7412, No. 08-7621); see Elizabeth S. Scott & Laurence Steinberg, Rethinking Juvenile Justice 40-41 (2008) (explaining cognitive control and discussing a study showing adolescents have less cognitive control and instead choose immediate rewards); see also Emily Buss, Rethinking the Connection Between Developmental Science and Juvenile Justice, [76 U. Chi. L. Rev. 493, 495 \(2009\)](#) (stating that adolescents are psychosocially immature which makes them lack the ability to control their emotions and more likely to be attracted to risky behavior); Lucy C. Ferguson, The Implications of Developmental Cognitive Research on “Evolving Standards of Decency” and the Imposition of the Death Penalty on Juveniles, [54 Am. U. L. Rev. 441, 457 \(2004\)](#) (stating that adolescents are more “susceptible to peer influence when making decisions and conducting cost-benefit analyses, lack realistic risk-assessment abilities, and are not as future-oriented as are adults.”).

<sup>48</sup> Terry A. Maroney, The False Promise of Adolescent Brain Science in Juvenile Justice, [85 Notre Dame L. Rev. 89, 152 \(2009\)](#) (“Developmental neuroscience consistently indicates that structural brain maturation is incomplete at age eighteen. Though estimates vary, many scientists have opined that structural maturation is not complete until the mid-twenties.”); B.J. Casey et

change and grow.<sup>51</sup> They have the capacity to learn from their mistakes.<sup>52</sup> As the brains of biologically maturing adolescents develop greater capabilities to enhance good decision-making and planning, young people need feedback and support to help them learn from their mistakes and improve in the future.<sup>53</sup> Indeed, teenagers need attention from adults because "attention is necessary for brain development."<sup>54</sup> Without reliable, predictable, and consistent attention from adults, adolescents become "less and less discriminate toward how they go about getting the attention that they need."<sup>55</sup> Thus, it is the job of the adults in their lives - especially those in school - to help young people understand their mistakes, the consequences of their actions, and how they might change their behavior to avert misconduct in the future.

#### B. How Adolescent Development Informs Constructive Responses to Misbehavior

An understanding of adolescent development should inform education professionals about the cause of problems at school. A developmental perspective towards school discipline means that the school should craft its response to address a specific underlying root problem that caused behavior. Schools are better-poised to take this approach than courts are. There are instances where a student's behavior is related to a specific developmental cause that has to do [\*196] with that individual child.<sup>56</sup> Children who have been victims of repeated trauma, chronic stress, abuse, and neglect may act out themselves to have a sense of control over the chaos and violence that they have come to expect will naturally occur.<sup>57</sup> Developmentally constructive responses should be "offender-driven" rather than "offense-driven."<sup>58</sup>

A developmentally informed perspective requires that educators and disciplinarians understand how teen behavior relates to others at that school, and to what extent the individual misbehaving is doing so with peers, in reaction to

al., *The Adolescent Brain*, 28 *Developmental Rev.* 62, 65 (2008) (discussing the increased risk taking and impulsive behavior among young adolescents due to underdeveloped parts of the brain).

<sup>49</sup> Margo Gardner & Laurence Steinberg, *Peer Influence on Risk Taking, Risk Preference, and Risky Decision Making in Adolescence and Adulthood: An Experimental Study*, 41 *Developmental Psychol.* 625, 626-34 (2005) (discussing study finding that peer influence has a much greater effect on the risky behavior of adolescents and young adults than it does on mature adults).

<sup>50</sup> [Brief for the AMA et al. at 13, Miller, 132 S. Ct. 2455](#) (No. 10-9646, No. 10-9647); see L.P. Spear, *The Adolescent Brain and Age-Related Behavioral Manifestations*, 24 *Neuroscience & Biobehavioral Revs.* 417, 423 (2000) (arguing that adolescents may perform worse in stressful situations based upon scientific studies).

<sup>51</sup> [Roper v. Simmons, 543 U.S. 551, 570 \(2005\)](#); Frank Zimring proposes that the best response to juvenile crime is to let adolescents grow up and grow out of it. See generally Franklin E. Zimring, *The Changing Legal World of Adolescence* (1982).

<sup>52</sup> See, e.g., [Graham, 130 S. Ct. 2011; Miller, 132 S. Ct. 2455; Roper, 543 U.S. 551.](#)

<sup>53</sup> Emily Buss, *What the Law Should (and Should Not) Learn from Child Development Research*, [38 Hofstra L. Rev. 13, 60-61 \(2009\).](#)

<sup>54</sup> David E. Arredondo, *Child Development, Children's Mental Health, and the Juvenile Justice System: Principles for Effective Decision-Making*, [14 Stan. L. & Pol'y Rev. 13, 16 \(2003\)](#); see Cathy S. Widom & Michael G. Maxfield, *An Update on the "Cycle of Violence," U.S. Dep't of Justice, Nat'l Inst. of Justice, Research in Brief*, 3 (February 2001), available at <https://www.ncjrs.gov/pdffiles1/nij/184894.pdf>.

<sup>55</sup> Arredondo, *supra* note 54, at 16.

<sup>56</sup> Children with behavior problems may suffer from mental illness, a learning disability, intellectual challenges, and neurological damage. *Id.* at 15, 17.

<sup>57</sup> See Henry R. Cellini, *Child Abuse, Neglect, and Delinquency: The Neurological Link*, 55 *Juv. & Fam. Ct. J.* 1, 7 (2004) (describing how children who have been victims of chronic trauma in their lives, for instance growing up amidst abuse and violence, may seek to provoke violence so as to have some control over the chaos of their lives. For example, a school bully, like Jorge, who provokes fights with other students may have a personal history of abuse and neglect); James Garbarino, *Lost Boys: Why Our Sons Turn Violent and How We Can Save Them* 80-82 (1999).

<sup>58</sup> Arredondo, *supra* note 54, at 14.

their peers, or to gain the admiration of their peers.<sup>59</sup> In essence, each instance of unwanted student behavior is a teaching opportunity for that student and for others. Schools and courts should adopt policies with a pro-social approach, involving more teaching and less punishment.<sup>60</sup> Adults should encourage and teach self-discipline to students whose maturing brains have placed them at a biological and experiential disadvantage to [\*197] know how to control themselves in response to stress, pressure, and impulsive urges.<sup>61</sup>

At the same time, adolescent development also cautions policy-makers that punishment has a limited deterrent value with adolescents.<sup>62</sup> While originally intended to set clear expectations and deter students from misbehavior, zero tolerance policies have been criticized for failing to produce the desired deterrent effect of preventing misbehavior. Researchers explain that harsh, unfair, and discriminatorily-applied punishments like zero tolerance backfire by teaching students that their actions do not matter and that life is just unfair.<sup>63</sup> As a result, harsh punishment does not provide the intended specific or general deterrent effect on the offending student or others in the school community. The medical, pediatric, and psychological communities have denounced harsh punishment and encouraged more developmentally-conscious and appropriate teaching responses.<sup>64</sup>

[\*198] Developmentally-competent consequences must be communicated to the offender in a clear and timely fashion.<sup>65</sup> When there is a delay in response, the child, the family, and the other children and families in the community may perceive the delinquency system as unfair, undermining the effectiveness of the consequence.<sup>66</sup> Children experience time moving more slowly, and the younger the child the more slowly time is perceived as passing.<sup>67</sup> When cases are referred to juvenile delinquency court, there is a delay in the court's ability to respond to the behavior

<sup>59</sup> Public Counsel Law Ctr., *Fix School Discipline: How We Can Fix School Discipline Toolkit 16-18* (2012) (explaining how Garfield High School in Los Angeles has been able to successfully address student interpersonal conflicts with conferences and meetings between students facilitated by trained adult professionals at the school).

<sup>60</sup> Consequences that do not teach the behavior wanted are punishment. Punishment conveys unpleasantness to stop the unwanted behavior and it may stop the behavior for a short period of time. Punishment teaches children to avoid being caught; punishment alone does not teach a child about how to behave appropriately in the next situation. See Elaine Wilson, *Guiding Young Children Series: Discipline Without Punishment*, Okla. St. Univ., Okla. Coop. Extension Serv., Div. of Agric. Sci. and Natural Res., T-2329-2329-4 (last accessed Nov. 15, 2013, 11:09am EST), <http://pods.dasnr.okstate.edu/docushare/dsweb/Get/Document-2420/T-2329web.pdf>.

<sup>61</sup> See [Brief for the AMA et al. at 36, \*Miller v. Alabama\*, 132 S. Ct. 2455 \(2012\)](#) (No. 10-9646, No. 10-9647) (citing Laurence Steinberg, *Adolescent Development and Juvenile Justice*, 16:3 *Ann. Rev. Clinical Psychol.* 47, 54 (2009)).

<sup>62</sup> The Supreme Court has recognized the limited deterrent value of punishment for maturing adolescents and emerging adults. [Brief of the Am. Med. Ass'n et al. as Amici Curiae Supporting Respondent at 12-15, \*Roper v. Simmons\*, 543 U.S. 551 \(2005\)](#) (No. 03-633); see [Brief of the Am. Bar Ass'n as Amicus Curiae Supporting Petitioners at 18, \*Miller v. Alabama\*, 132 S. Ct. 2455 \(2012\)](#) (No. 10-9646, No. 10-9647); [Brief of the Am. Bar Ass'n as Amicus Curiae Supporting Petitioners at 11-13, \*Graham v. Florida\*, 130 S. Ct. 2011 \(2010\)](#) (No. 08-7412, No. 08-7621) (supporting the idea that deterrence would not be served by punishing juveniles so harshly); see also, *Graham*, 130 S. Ct. at 2016; *Miller*, 132 S. Ct. at 2565; *Roper*, 543 U.S. at 553 (all adopting this rationale as one of the bases for the Court's decision).

<sup>63</sup> See *supra* Part II.C.

<sup>64</sup> Research continues to demonstrate that so-called zero-tolerance policies and out-of-school suspension and expulsion that are used too readily are ineffective deterrents to inappropriate behavior and are harmful and counterproductive to the student, the family, the school district, and the community as a whole, both short-and long-term. The AAP does not support the concept of zero tolerance for the developing child. The AAP maintains that out-of-school suspensions and expulsions are counterproductive to the intended goals, rarely if ever are necessary, and should not be considered as appropriate discipline in any but the most extreme and dangerous circumstances, as determined on an individual basis rather than as a blanket policy." Council on School Health, *Out-of-School Suspension and Expulsion*, 131:3 *Pediatrics*, e1000, e1005 (2013). See *supra* Part II.C.

<sup>65</sup> See *Arredondo*, *supra* note 54, at 22 (describing developmentally competent consequences as "...clear, firm, and timely.>").

<sup>66</sup> Children perceive procedural laxness as unfair and it discourages them. See *Birckhead*, *supra* note 26, at 1458-59 (discussing sociologists Wheeler and Cottrell).

<sup>67</sup> *Arredondo*, *supra* note 54, at 19.

that makes the delinquency system vulnerable to a child's perception that the punishment is capricious.<sup>68</sup> For many children and their parents, the length of the court's involvement in supervising them negatively impacts their perception of fairness and proportionality of the system's--and therefore society's - response.<sup>69</sup> Because time passes more slowly for children, while the court system oversees cases until the completion of a set of court orders, the child risks being involved with the court system for what feels to the child like an eternity (even cases like Mario's, which resolve quickly and with minimal court supervision, may have a duration of a year).

In sum, developmentally conscious and constructive sanctioning should be individually based to assist adolescents to understanding consequences, promoting their acceptance of their responsibility, helping them to figure out how to resolve conflicts, teaching them how to respond in a tense situation to deescalate it, and providing them with tools for dealing with peer pressure. These responses should be timely and should model and encourage the behavior the educator wants the students to emulate in the future.

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### C. A Developmentally Informed Perspective on Double Punishment

The double punishment from both school and the juvenile delinquency system is overly harsh. Severe consequences are problematic for two fundamental reasons: (1) they stigmatize children who internalize messages that they are "bad" and (2) they appear unfair to a child, discouraging the child to behave as desired in the future. Further, harsh punishments hinder the entire school population, the child's family, and the community as a whole, particularly when these punishments are applied disproportionately to poor youth of color and those with disabilities.

The double punishment due to school referrals to juvenile delinquency court can backfire because they may function to stigmatize children and teach them that life is unfair rather than effectively conveying societal expectations.<sup>70</sup> The stigma conveyed by double punishment has a negative and unintended emotional impact on a child's feelings of self worth and own vision for her or his future. In other words, if children see that others treat them as "bad," "unimportant," and "criminal," they will adopt those views of themselves.<sup>71</sup> Youth are stigmatized by schools, by poor school quality, and by school disciplinary tactics.<sup>72</sup> If children are told that they do not deserve the same access to education as other children, they will see themselves as "less than" those other children - less worthy, less capable, and less successful.<sup>73</sup> If children are told that [\*200] they are "delinquent," they will see themselves as destined for a life of crime.<sup>74</sup> Therefore, if children are punished twice for a problem that arose in school - once by

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<sup>68</sup> Id. (describing a delay between the unwanted behavior and the court's response to that behavior: "It is unreasonable to come down on a child six months after she has stopped complying with an order.").

<sup>69</sup> See Birkhead, *supra* note 26, at 1458-59 (citing [Wheeler and Cottrell, and In re Gault, 387 U.S. 1, 21 \(1967\)](#), on the importance of perceived procedural fairness).

<sup>70</sup> See *id.* at 1471-72 (describing the procedural theory of justice as advancing "the notion that people are more likely to comply with law and policy when they believe that the procedures utilized by decision-makers are fair, unbiased, and efficient" (citation omitted)).

<sup>71</sup> See Wiley, *supra* note 35, at 4.

<sup>72</sup> See *id.* at 17-18 (discussing how increased police presence in schools means that officers are more likely to deal with discipline problems and those interventions by police are more likely to lead to arrests, even for minor infractions).

<sup>73</sup> Often children who present behavior problems are expelled, subjected to out-of-school suspensions, or forced to transfer to another school, usually a continuation school or a special school for children with behavior problems. Ghettoizing children who experience difficulties in school and preventing them from receiving the same access to education as other children with fewer challenges has a negative stigmatizing impact. Research shows that segregating children with anti-social peers can increase antisocial behavior. David Osher et al., *How Can We Improve School Discipline?*, 39 *Educ. Researcher* 48, 48 (2010); Ironically, in Washington, D.C., the "alternative" school for the suspended, expelled, or disciplinarily transferred students is called "CHOICE Academy." *Alternative High Schools*, District of Columbia Public Schools, <http://dcps.dc.gov/DCPS/In+the+Classroom/How+Students+Are+Suppo> rted/Alternative+High+Schools (last visited Nov. 20, 2013).

<sup>74</sup> There are a number of problems associated with labeling children and creating self-fulfilling prophecies. To this end, some states have responded by renouncing the label of delinquent or criminal. See Alicia N. Harden, *Rethinking Shame: The Intersection of Shaming Punishments and American Juvenile Justice*, 16 *U.C. Davis J. Juv. L. & Pol'y* 95, 135-37 (noting in part how

the education system and again by the juvenile or criminal court - their double punishment may actually increase, rather than decrease, anti-social behavior.<sup>75</sup>

Suspensions, expulsions, and mandatory transfers can have adverse impacts on student mental health, including an association with depression, drug addiction, and problems at home.<sup>76</sup> Disciplinary exclusion from school can cause students to feel ashamed, alienated, rejected, and can damage healthy bonds with adults.<sup>77</sup> Being suspended or expelled can cause damage to a young person's psyche.<sup>78</sup> [\*201] As demonstrated by Mario's story, youth associate their identity with a sense of achievement.<sup>79</sup> The shame and embarrassment a student feels when he or she is excluded from his or her school can be detrimental to a conception of his or her identity.<sup>80</sup> Exclusion from school may predispose those students to risky and problematic behavior and even suicide.<sup>81</sup> Exclusionary and punitive measures taken by schools in response to student disciplinary problems set those students up to underperform academically, contribute to the student's disengagement with school, and may ultimately culminate in high school drop-out.<sup>82</sup>

Many students, parents, and communities perceive school exclusionary punishments, such as those which stem from zero tolerance policies, as overly harsh. Severe punishments can backfire when the application of these policies is experienced as unfair by the entire school population, the child's family, and the larger community. Students experience school exclusion as unfair and ineffective, while communities surrounding schools react negatively when they

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Vermont sought to remove the label of criminality from juvenile court and Wyoming sought to remove the "taint of criminality" from delinquency proceedings).

<sup>75</sup> Punitive approaches to discipline problems have been linked to antisocial behavior. David Osher et al., How Can We Improve School Discipline?, 39 Educ. Researcher 48, 48 (2010).

<sup>76</sup> Jane Sundius & Molly Farneth, Putting Kids Out of School: What's Causing High Suspension Rates and Why They Are Dangerous to Students, Schools, and Communities, Advocates for Children and Youth, [http://www.acy.org/upimages/OSI\\_Suspensions.pdf](http://www.acy.org/upimages/OSI_Suspensions.pdf) (Jan. 2008) (citing Out-of-School Suspension and Expulsion, 131 Am. Acad. of Pediatrics e1000 (2013), <http://pediatrics.aappublications.org/content/131/3/e1000.full.pdf>).

<sup>77</sup> Jane Sundius & Molly Farneth, Putting Kids Out of School: What's Causing High Suspension Rates and Why They Are Dangerous to Students, Schools, and Communities, Advocates for Children and Youth, [http://www.acy.org/upimages/OSI\\_Suspensions.pdf](http://www.acy.org/upimages/OSI_Suspensions.pdf) (Jan. 2008); see also Public Counsel Law Ctr., Fix School Discipline: How We Can Fix School Discipline Toolkit 1, 5 (2012) (explaining how students who are suspended and expelled are more likely to feel ashamed, alienated and rejected).

<sup>78</sup> Robyn Gee, Psychiatrist Says Suspensions Cause Psychological Damage (Feb. 28, 2012), <http://www.youthradio.org/news/psychiatrist-says-suspensions-cause-psychological-damage> (stating that school punishment can go so far as to send some students "over the edge."). Indeed, one California court noted: "There is no question that a high school student who is punished by expulsion might well suffer more injury than one convicted of a criminal offense." [Gonzales v. McEuen](#) 435 F. Supp. 460, 471 (1977); To the student who commits an infraction due to lack of judgment or judgment that is simply reflective of someone with the student's age, experience, and development, an overly harsh punishment can be "as psychologically harmful to the affected child as were the segregated schools to African -American children in the Brown era." 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, 326 (2005).

<sup>79</sup> Robyn Gee, Psychiatrist Says Suspensions Cause Psychological Damage (Feb. 28, 2012), <http://www.youthradio.org/news/psychiatrist-says-suspensions-cause-psychological-damage>.

<sup>80</sup> Id.

<sup>81</sup> Jane Sundius & Molly Farneth, Putting Kids Out of School: What's Causing High Suspension Rates and Why They Are Dangerous to Students, Schools, and Communities, Advocates for Children and Youth, [http://www.acy.org/upimages/OSI\\_Suspensions.pdf](http://www.acy.org/upimages/OSI_Suspensions.pdf) (Jan. 2008) (citing Out-of-School Suspension and Expulsion, 131 Am. Acad. of Pediatrics e1000 (2013), <http://pediatrics.aappublications.org/content/131/3/e1000.full.pdf>).

<sup>82</sup> David Osher et al., How Can We Improve School Discipline?, 39 Educ. Researcher 48, 48 (2010); The American Academy of Pediatrics clearly condemned zero tolerance policies as developmentally inappropriate. see Out-of-School Suspension and Expulsion, 131 Am. Acad. of Pediatrics e1000 (2013), <http://pediatrics.aappublications.org/content/131/3/e1000.full.pdf>.

perceive that child's right to an education is being compromised.<sup>83</sup> When [\*202] students perceive school officials, including school police, to treat them unfairly or harshly, they are likely to continue to misbehave because they do not respect their school authority figures.<sup>84</sup> Indeed, schools with higher rates of out-of-school suspension and expulsion are not safer for students or faculty.<sup>85</sup> Further, over-reliance on exclusionary responses and arbitrary punishment policies can damage and prevent the formation of healthy bonds between students and adults, bonds needed for students to thrive.<sup>86</sup> When, as with the application of harsh exclusionary policies at school and referrals to courts, certain groups are disproportionately impacted, the message that the system is unfair is conveyed not only to those directly affected by the sanction - the poor, racial and ethnic minorities, and disabled children - but also to the entire school, families, and communities as a whole.<sup>87</sup> The message conveyed to everyone is that the system is unjust.

[\*203] Children who are referred to the delinquency system for their misbehavior at school are at-risk of perceiving the juvenile court's second punishment of their behavior as unfair and of internalizing negative messages about who they are and what is expected of them. When children perceive their punishment to be unfair because it is overly harsh or procedurally unjust they may distrust the court and resist rehabilitative efforts.<sup>88</sup> One common purpose of both the education and juvenile court systems is to guide young people along the path to becoming mature, law-abiding citizens.<sup>89</sup> Youth are impressed by their experiences with law enforcement and legal actors. Those impressions shape a youth's life-long attitudes towards authority figures, society, and the law.<sup>90</sup> Double punishment surely runs the risk of being perceived as overly harsh, especially when court referrals come on the heels of school exclusion, and especially when these punishments are doled out disproportionately to marginalized groups of students.

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<sup>83</sup> American Psychological Association Zero Tolerance Task Force, Are Zero Tolerance Policies Effective in the Schools?, 63 *Am. Psychol.* 852, 854 (2008), available at <http://www.apa.org/pubs/info/reports/zero-tolerance.pdf>. (citing A. Davis, "Zero Tolerance" Ignites Debate in Hartford: Meeting on Drug Problem Draws Hundreds to School, *Milwaukee Journal Sentinel*, Nov. 18, 1999, at 1; D. Johnson, Jackson Arrested in Protest Over Expulsions of Students, *N.Y. Times*, Nov. 17, 1999, at A16; E. Brantlinger, Social Class Distinctions in Adolescents' Reports Problems and Punishment in School, *Behavior Disorders*, 1991, at 17, 36-46; R. H. Sheets, Urban Classroom Conflict: Student-teach Perception: Ethnic Integrity, Solidarity, and Resistance, *Urban Review*, 1996, at 28, 165-183; S. Thorson, The Missing Link: Students discuss school discipline, *Focus on Exceptional Children*, 1996, at 29(3), 1-12).

<sup>84</sup> Birkhead, *supra* note 26, at 1496 (citing Josh Kagan, Reappraising T.L.O.'s "Special Needs" Doctrine in an Era of School-Law Enforcement Entanglement, 33 *J.L. & Educ.* 291, 314-15 (2004) (suggesting that school discipline policies perceived by students to be unfair ultimately prevent rehabilitation and increase recidivism); Kristen Henning, Eroding Confidentiality in Delinquency Proceedings: Should Schools and Public Housing Authorities be Notified?, 79 *N.Y.U. L. Rev.* 520, 524 (2004) ("School notification statutes and school expulsion policies work together to inhibit rehabilitation and actually increase crime over time.")).

<sup>85</sup> Out-of-School Suspension and Expulsion, 131 *Am. Acad. of Pediatrics* e1000, e1001 (2013), <http://pediatrics.aappublications.org/content/131/3/e1000.full.pdf> (citing Harvard Civil Rights Project, Opportunities Suspended: The Devastating Consequences of Zero Tolerance and School Discipline Policies (2000)).

<sup>86</sup> Dignity in Schools, Fact Sheet: School Discipline and the Pushout Problem 1 (2010), available at [http://www.dignityinschools.org/files/DSC\\_Pushout\\_Fact\\_Sheet.pdf](http://www.dignityinschools.org/files/DSC_Pushout_Fact_Sheet.pdf).

<sup>87</sup> For instance, studies have found that increases in police officers in school disproportionately impact minority youth. Further, those policies decrease impressions of the legitimacy of law enforcement when people feel that they, or others, have been targeted without justification and treated unfairly. Wiley, *supra* note 35, at 18; see also Kristin Henning, Criminalizing Normal Adolescent Behavior in Communities of Color: The Role of Prosecutors in Juvenile Justice Reform, 98 *Cornell L. Rev.* 383, 453 (2013) (discussing the findings of Jeffrey Fagan and Tracey Meares, noting that individual and community dissatisfaction with procedural justice can lead to both cynicism and disrespect for the law, and harsh punishments seem to have the opposite effect of that intended, particularly when it comes to poor communities of color who are disproportionately impacted).

<sup>88</sup> See *In re Gault*, 387 U.S. 1, 26 (1967) (referencing the importance of adhering to principles of due process to a youth's perception of fairness and buy-in to his or her own rehabilitation, a notion advanced in the work of sociologists Wheeler and Cottrell, Jr., *Juvenile Delinquency: Its Prevention and Control* 33 (1966)); see also Birkhead, *supra* note 26, at 1458-59 (discussing the same).

<sup>89</sup> See *supra* Part III.B.

<sup>90</sup> See Birkhead, *supra* note 26, at 1477 (citations omitted); Emily Buss, What the Law Should (and Should Not) Learn from Child Development Research, 38 *Hofstra L. Rev.* 13, 63-64 (2009).

Ultimately, the disproportionate application of exclusionary policies and of court involvement and confinement for certain groups of children only succeed in conveying the message that the education and court systems mistreat the very children whom society should be trying to educate about the value of justice.<sup>91</sup> Unfair application of sanctions seriously impacts a child's moral development and his or her [\*204] respect for society as a whole, particularly authority figures.<sup>92</sup> As children grow up, their lack of respect and buy-in to societal values will morph into "cynicism and with it the belief that injustice, not justice[,] is the lot of people of color in America."<sup>93</sup> When the actions of authorities at school, police, and the players in the juvenile justice system are perceived by the child as "thoughtless, impersonal, or indifferent, ... [the child] will experience precisely the opposite of what he needs to developmentally internalize personal responsibility for [the child's] actions in relation to the society that the court represents."<sup>94</sup>

#### IV. Observations and Recommendations

##### A. School Response and the Imagined Role of an Educational Advocate for Mario

One could imagine a more developmentally productive and fair consequence to the padlock incident that involved a meeting with a school social worker or counselor, Mario, Jorge, and their parents to deal with the underlying issues in the boys' relationship and forge a path forward. This consequence should have occurred immediately following the event.

At the time of the padlock incident, Mario was not recognized as a student in need of special education services, even though he would legally have qualified as one.<sup>95</sup> If Mario had an IEP based on his underlying depression, the school would have been required to hold a manifestation determination to evaluate whether his behavior [\*205] was the result of his underlying disability - his depression.<sup>96</sup> At a minimum, an education attorney would have advocated for Mario that this incident represented an impulsive response to the bullying characteristic of Mario's developmental stage - striking Jorge with a padlock was not something that Mario planned out in advance, but rather something that he did in the moment in a desperate attempt to get Jorge to stop teasing him. Further, an education advocate would explain that the crying the teacher observed just prior to when Mario struck Jorge demonstrated Mario's helplessness in strategizing an appropriate response, that the pattern of bullying Mario suffered from Jorge exacerbated Mario's ability to cope with Jorge's teasing, and that Mario's underlying depression was at the root of his impulsive decision to grab the padlock to try to get Jorge to stop bothering him. All of these factors demonstrate that the incident was indeed a manifestation of Mario's emotional or other health needs. If the incident was deemed a manifestation of depression, the school would not have been able to expel Mario and would have been forced to address the incident in the context of Mario's special needs based on his emotional state.

Ideally, education advocates are involved immediately if there is a school disciplinary incident for a student entitled to special education services and if there is a forthcoming delinquency case. In reality, based on the way defenders and education attorneys come to represent poor youth, the school and juvenile court systems function to deprive children of education advocates at the school stage. Once a child becomes a client of the juvenile justice clinic at the

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<sup>91</sup> Arredondo, *supra* note 4, at 27.

<sup>92</sup> *Id.*; Birkhead, *supra* note 26, at 1478 (stating that "unfair treatment triggers negative reactions, anger, and defiance of the laws norms." (citation omitted)).

<sup>93</sup> Arredondo, *supra* note 4, at 27. See also Birkhead, *supra* note 26, at 1477 (discussing "legal cynicism" leading to an openness to illegal behavior) (internal citations omitted).

<sup>94</sup> Arredondo, *supra* note 4, at 16.

<sup>95</sup> A child is entitled to special education services and an IEP under Individuals with Disabilities Education Act ("IDEA"), a federal law incorporated into state law in all fifty states as well as the District of Columbia. Mario's depression diagnosis would have qualified him for special education services under the categories of emotional disturbance or other health impairment. See [20 U.S.C.A. § 1401](#) (3)(A)(i) (2010); [34 C.F.R. § 300.7](#) (2006). Further, Mario's school was obligated to identify him as a student with a disability pursuant to federal statute. Childfind, [34 C.F.R. § 300.111 \(a\)\(1\)](#) (2006).

<sup>96</sup> Under the 1997 amendments to the IDEA, school personnel seeking to exclude a child for discipline reasons must first determine whether the behavior in question was a manifestation of the child's disability. [20 U.S.C. § 1415\(k\)](#) (2005). The IEP team, which includes parents and other "qualified personnel," makes the disability manifestation determination. *Id.*

Center for Juvenile Law and Policy because of a delinquency case,<sup>97</sup> we vet his or her case for special education services. Through this vetting process, seventy-three percent of juvenile delinquency clients represented by our juvenile justice clinic were determined to be in need of educational advocacy and became dual clients of our Youth [\*206] Justice Education Clinic as well.<sup>98</sup> The true irony is that for these students, if they encountered another disciplinary incident at school, after our education representation had begun, the student is extremely likely to prevail at a manifestation determination or achieve a good result through the process of advocating for the child's educational needs.<sup>99</sup> We have also found that our disabled student clients are highly likely to be arrested for misconduct that was found to be a manifestation of his or her disability or a failure of the school to provide appropriate services as required by an IEP.<sup>100</sup> In this way, school and court systems are structurally dysfunctional and impaired in affording children the best representation for their educational needs.<sup>101</sup> Even collaborative settings providing holistic representation like ours at CJLP are ineffective at combatting the timing challenges to providing effective representation of students at the school level. Children should not have to come through delinquency court to have their educational needs met in school nor should they have to come through court in order for the school to deal with behavior problems at school in a developmentally constructive and educationally beneficial manner.

[\*207]

#### B. Developmentally-Conscious Responses are School and Community-Based Whenever Possible

Evidence-based practices should be utilized in response to misbehavior. These effective practices take place in school, in the community, and at home.<sup>102</sup> Student problems should be addressed in schools and in homes as much as possible. Policy makers in education and juvenile justice have access to evidence-based practices - statistically and clinically meaningful studies to measure the effectiveness of various practices.<sup>103</sup> Evidence-based practices succeed in keeping more children in school and reducing the need for discipline. These practices are developmentally constructive and fairly applied featuring involvement of parents, recognition of the individual child's needs.<sup>104</sup> At

<sup>97</sup> When we have cases referred to us from the public defender - as Mario's was - we do not meet the client until the arraignment.

<sup>98</sup> Out of the 153 clients our juvenile justice clinic has represented from July 2009 through the end of August 2013, 111 became dual clients of our Youth Justice Education Clinic through this vetting process because they were in need of an educational advocate. Of those 111 clients dually represented for delinquency and education by our clinics, 50 have IEPs. Of the 50 students with IEPs, 21 became eligible for special education due to the representation of our educational advocacy and another three received Section 504 plans to accommodate their disability. Section 504 plans provide critical accommodations for students whose disabilities fall outside the scope of the IDEA. Rehabilitation Act of 1973, Pub. L. No. 93 - 112, § 504, 87 Stat. 355 (1973); [42 U.S.C.A. § 12204](#) (1990).

<sup>99</sup> During the same time frame of July 2009 through August 2013, our clinics had 11 disability manifestation determinations for seven clients. All 11 manifestation determinations found that the behavior was either a manifestation of the disability or a result of the school's failure to implement the IEP. Therefore, none of those clients were removed from their educational setting. I discussed an example of a successful collaboration between clinics for a pre-existing client in oral testimony before a Senate Committee. See Generally, *Ending the School-to-Prison Pipeline*, Before the Subcomm. on the Constitution, Civil Rights, and Human Rights, and the S. Judiciary Committee, 112th Cong. (2012) (statement of Samantha Buckingham).

<sup>100</sup> YJEC clients with disabilities were arrested in eight out of the 11 instances in which our education advocates prevailed at a manifestation determination.

<sup>101</sup> Educational rights belong to parents, and not to the youth until he or she reaches the age of 18. Further, the onus is on a parent to seek out legal representation to protect their child's educational rights, and parents may be overwhelmed or unaware of opportunities for free legal representation.

<sup>102</sup> Arredondo, *supra* note 4, at 22 (stating "Virtually all effective evidence-based practices occur in the community and at home.").

<sup>103</sup> Arredondo, *supra* note 4, at 22; Kristin Henning, *Criminalizing Normal Adolescent Behavior in Communities of Color: The Role of Prosecutors in Juvenile Justice Reform*, [98 Cornell L. Rev. 383, 451-52](#) (2012-13) (discussing developmentally sound and evidence-based practices successful at fostering youth responsibility).

<sup>104</sup> See Arredondo, *supra* note 4, at 15, 15 n.12.

the school-level, out of school suspensions and expulsions should not be employed except for in rare and extreme circumstances.<sup>105</sup>

#### B. The Need for the Exercise of Discretion by Schools, the Prosecution, and Courts

This article proposes that school-based referrals should be (1) reduced at the school level, (2) disfavored by the prosecution, and (3) appropriately dismissed by the juvenile court. This can be achieved by disfavoring prosecution when (A) the student offense has already been sanctioned by school, (B) the student's behavior has been determined to be a manifestation of his or her disability or result of the school's failure to provide appropriate accommodations, or (C) there has been a significant time delay from the time of the offense to the [\*208] commencement of the prosecution, particularly with young children. As Professor Kristin Henning explained, actors in our legal system have an additional responsibility to take into account the prevalence of referrals for youth of color and look to other mechanisms within the community to address youth offending.<sup>106</sup> This is particularly true in the case of school referrals to juvenile court.

There is inherent bias persisting amongst decision-makers in juvenile and criminal court systems, and that bias works to the disadvantage of marginalized groups, including students of color, the socio-economically disadvantaged, and the disabled. Nearly two-thirds of studies on decision-making have documented a "race effect" that suggests that race-neutral criteria cannot alone account for disparities in the treatment of youth in the juvenile justice system.<sup>107</sup> Over-representation of youth of color occurs at every stage of the justice system from stops and arrests to detention, court referral, and incarceration.<sup>108</sup> This article has shown that this over-representation is a problem for offenses occurring both in and out of school.

Some schools have already implemented specific policies to reduce court referrals, and those reforms have been successful.<sup>109</sup> Models in a few towns in Georgia, Alabama, Colorado, and California already exist to provide guidance to schools to reduce referrals, especially for low level offenses, and offer graduated responses to student misbehavior.<sup>110</sup>

The National District Attorney's Association should add the aforementioned factors--A, B, and C, specifically--to their list of charging standards.<sup>111</sup> Given delays associated with initiating a [\*209] formalized court process, prosecutors should actually have the time to figure out what steps have been taken to address the problem before charging a youth and requiring a court hearing. Professor Henning recommends that prosecutors establish a system to keep track of disproportionate referrals for youth of color so that the prosecutors can reach out to the schools and community leaders to address the underlying problems in those neighborhoods without exacerbating disproportionate minority contact.<sup>112</sup>

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<sup>105</sup> American Academy of Pediatrics, Out-of-School Suspension and Expulsion, Am. Acad. of Pediatrics, Nov. 20003, at 1206-07, available at <http://pediatrics.aappublications.org/content/131/3/e1000.full.pdf+html>.

<sup>106</sup> Kristin Henning, Criminalizing Normal Adolescent Behavior in Communities of Color: The Role of Prosecutors in Juvenile Justice Reform, [98 Cornell L. Rev. 383, 430](#) (2012-13).

<sup>107</sup> Perry L. Moriearty & William Carson, Cognitive Warfare and Young Black Males in America, [15 J. Gender Race & Just. 281, 301](#) (2012); Kristin Henning, Criminalizing Normal Adolescent Behavior in Communities of Color: The Role of Prosecutors in Juvenile Justice Reform, [98 Cornell L. Rev. 383, 387](#) (2012-13).

<sup>108</sup> Kristin Henning, Criminalizing Normal Adolescent Behavior in Communities of Color: The Role of Prosecutors in Juvenile Justice Reform, [98 Cornell L. Rev. 383, 386-87](#) (2012-13).

<sup>109</sup> [Id. at 444-45.](#)

<sup>110</sup> [Id.](#)

<sup>111</sup> NAT'L DIST. ATTY'S ASS'N, NATIONAL PROSECUTING STANDARDS § 411, at 64-67 (2010); Kristin Henning, Criminalizing Normal Adolescent Behavior in Communities of Color: The Role of Prosecutors in Juvenile Justice Reform, [98 Cornell L. Rev. 383, 437-38](#) (2012-13).

<sup>112</sup> Kristin Henning, Criminalizing Normal Adolescent Behavior in Communities of Color: The Role of Prosecutors in Juvenile Justice Reform, [98 Cornell L. Rev. 383, 430](#) (2012-13).

Juvenile courts represent the final safety valve in this system. Most courts have a statutory mechanism to dismiss a case in the interests of justice.<sup>113</sup> Cases such as Mario's present an opportunity for the court to exercise its discretion to promote fairness and developmentally sound decision-making. Courts should be willing to dismiss cases, especially when the accused is very young, when there is a significant time delay compromising the effectiveness of the court's response, and when the conduct was addressed in school or the result of a disability.

## V. Conclusion

The sheer number of delinquency court referrals coupled with the disproportionate impact that court referrals have on youth of color and the disabled requires that schools, prosecutors, and courts examine and revise their court referral practices. Today, in an era characterized by fiscally conscious reform<sup>114</sup> and developmentally sound practices [\*210] for youth,<sup>115</sup> the U.S. is positioned to re-evaluate the education and delinquency court policies that created the phenomenon termed the school-to-prison pipeline.

Court referrals for student misconduct at school have created a legal regime with overly harsh sanctions featuring developmentally unsound time delays and the double punishment of youth. Harsh school sanctions such as school exclusion have a negative and stigmatizing impact on youth. Referring children to delinquency courts also has a negative impact on their self-image, self-esteem, and mental health. Further, children's sense of fairness and justice is compromised when they are severely punished by the school and doubly punished by the court, particularly when they see that punishments are disproportionately applied to children from marginalized communities. This impact reaches beyond the child excluded to impact his or her family and community, undermining perceptions of the legitimacy of the legal system.

Responses to misbehavior at school should be informed by adolescent development and should utilize community-based and evidence-based practices implemented at school and with the involvement of the child's family. Knowledge of adolescent development should impact response: developmental stages of adolescence, individual factors such as the impact of the individual child's life outside school, and cultural and school factors. Evidence-based practices are those strategies that have proven effective at achieving the goals of safety in school, student achievement, long-term school success, and reduced future behavior incidents.

Education attorneys should be involved in school discipline cases to protect the rights of disabled students and collaborate with [\*211] delinquency attorneys to reduce juvenile adjudications for disabled students. Far too many youth come to the attention of the delinquency court with unmet educational advocacy needs. Further, referral systems for education attorneys are broken. In instances where a school disciplinary event leads to juvenile court prosecution, even in agencies such as CJLP, that screen for educational advocacy needs in order to provide holistic representation, students who are prosecuted come to the attention of an education advocate far too late for the educational advocacy to affect the school discipline decision for the event leading to prosecution. Our school and juvenile court systems need to work better together to serve our youth.

Schools, prosecuting agencies, and courts should scrutinize school referrals to delinquency court to avoid unnecessary stigma and overly harsh, counter-productive punishment. Each entity should adopt policies which officially disfavor

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<sup>113</sup> See Cal. Code Ann. § 782 (1971). Further, legislatures may reform the law to specifically pronounce the role that factors of time delay, double punishment, educational disability, and age should play in case dismissals.

<sup>114</sup> Eric Holder, Att'y Gen., Dep't of Justice, Addressed American Bar Association in San Francisco (Aug. 12, 2013) (Attorney General Eric Holder's Speech to the American Bar Association emphasized the need for smart and cost-effective policy responses to crime and social problems: "Particularly in these challenging times - when budgets are tight, federal sequestration has imposed untenable and irresponsible cuts, and leaders across government are being asked to do more with less...").

<sup>115</sup> [Roper v. Simmons, 543 U.S. 551 \(2005\)](#); [Graham v. Florida, 130 S. Ct. 2011 \(2010\)](#); [Miller v. Alabama, 132 S. Ct. 2455 \(2012\)](#). The Court also recognized treating children differently from adults based on common sense. [In re J.D.B., 131 S.Ct. 2394 \(2011\)](#). This new era can be contrasted with a previous era of harsher punishment for youth spurred by the myth of the juvenile "super-predator" in the context of mass incarceration as society's response to crime. See Emily Buss, What the Law Should (and Should Not) Learn from Child Development Research, [38 Hofstra L. Rev. 13, 33 \(2009\)](#); 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 UC Davis. J. Juv. L. & Pol'y 289, 300 \(2005\)](#). Mass incarceration has had a disproportionate impact on the poor as well as on racial and ethnic minorities. Jenifer Warren et al., Public Safety Performance Project, One in 100: Behind Bars in America 2008, Pew Ctr. on the States, at 6-7 (Feb. 2008).

charging children under any of the circumstances listed above because the resulting court process is an overly harsh response, vulnerable to the perception it is unfair, and will thus not create a healthy respect for authority and the legal system amongst America's youth.

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