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ARTICLES

Policing School Discipline

Catherine Y. Kim[†]

INTRODUCTION

Notwithstanding the frequent admonishment that "students [do not] shed their constitutional rights . . . at the schoolhouse gate,"[1] courts routinely defer to school officials in cases involving the investigation and punishment of youth in schools.[2] Consequently, youth accused of school misconduct are not entitled to the same procedural protections to which they would be entitled outside the school context[3]: school officials may search their belongings or persons without a warrant or probable cause,[4] and officials may question them without first providing *Miranda* warnings.[5] Courts and scholars alike defend such

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[1] Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 506 (1969).

[2] *See, e.g.*, Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 656 (1995) (holding that the scope of constitutional rights for public school students is limited by "what is appropriate for children in school").

[3] *See generally* William G. Buss, *Procedural Due Process for School Discipline: Probing the Constitutional Outline*, 119 U. PA. L. REV. 545, 640-41 (1971) (comparing procedural rights of student accused of misconduct with those of an adult suspected of a crime); Stephen J. Schulhofer, *On the Fourth Amendment Rights of the Law-Abiding Public*, 1989 S. CT. REV. 87, 115 (same).

[4] New Jersey v. T.L.O., 469 U.S. 325, 340 (1985) (sustaining student search where school officials have a reasonable suspicion that the search will uncover evidence of criminal activity or a violation of school rules).

[5] Although the Supreme Court has not directly ruled on this issue, lower courts consistently find no custodial interrogation where a youth is questioned by a

restrictions on students' constitutional rights on the ground that school discipline, unlike law enforcement, serves the educational interests of youth.[6] Under this view, the educational value of discipline and consequent alignment of interests between official and student render the constitutional protections guaranteed outside of the school context inapposite in schools.[7]

Recent observations of a "school-to-prison pipeline" resulting in the increased criminalization of student misbehavior, however, cast doubt on this characterization of school discipline.[8] Today, police officers routinely patrol public school hallways on a full-time basis as "school resource officers"; and school officials refer a growing number of youth to the juvenile and criminal justice systems for school-based misconduct.[9] These developments call for a critical reassessment

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school official. *See, e.g.*, Commonwealth v. Snyder, 597 N.E.2d 1363, 1369 (Mass. 1992); State v. Tinkham, 719 A.2d 580, 583 (N.H. 1998); *In re* Harold S., 731 A.2d 265, 268 (R.I. 1999); *see also* Paul Holland, *Schooling* Miranda*: Policing Interrogation in the Twenty-First Century Schoolhouse*, 52 LOY. L. REV. 39, 59 n.90 (2006) (discussing cases); *cf.* J.D.B. v. North Carolina, 131 S. Ct. 2394 (2011) (holding that determination of whether youth interrogated at school by police officer is in custody for *Miranda* purposes requires consideration of youth's age).

[6] *See infra* Part I.A; *see also* Buss, *supra* note 3, at 570 (describing judicial deference to the "mystique of the educational institution"); Anne Proffitt Dupre, *Should Students Have Constitutional Rights? Keeping Order in the Public Schools*, 65 GEO. WASH. L. REV. 49, 64 (1996) (conceptualizing debate over restrictions on students' constitutional rights as a debate over competing educational goals); James A. Ryan, *The Supreme Court and Public Schools*, 86 VA. L. REV. 1335, 1340-41 (2000) (analyzing limits to students' constitutional rights as measured against academic function of schools).

[7] *See* Schulhofer, *supra* note 3, at 118 (analyzing restriction of probable cause requirement for student searches as based on the view that Fourth Amendment protections "reflect[] a balance appropriate mainly to cases in which private activity and public controls are posed in conflict," which is not the case when students are searched for wrongdoing); *see also* Debra Livingston, *Police, Community Caretaking, and the Fourth Amendment*, 1998 U. CHI. LEGAL F. 261, 294-96 (arguing that alignment of individual and collective government interests renders criminal procedural protections, such as warrant requirement, unnecessary). *But see* Laurence Tribe, *Structural Due Process*, 10 HARV. C.R.-C.L. L. REV. 269, 312 n.28 (1975) (critiquing assumption that interests of school official and punished student are aligned rather than in conflict for purposes of school discipline).

[8] *See* CATHERINE Y. KIM ET AL., THE SCHOOL-TO-PRISON PIPELINE: STRUCTURING LEGAL REFORM (2010); MARTHA MINOW, IN *BROWN*'S WAKE: LEGACIES OF AMERICA'S EDUCATIONAL LANDMARK 28 (2010) (utilizing term "school-to-prison pipeline" to refer to the way in which "school systems, police, and juvenile justice programs combine in a process that removes students from mainstream schools and puts them in separate programs that often involve lockup, searches, and little educational value"); Lisa H. Thurau & Johanna Wald, *Controlling Partners: When Law Enforcement Meets Discipline in Public Schools*, 54 N.Y.L. SCH. L. REV. 977, 981 (2010) (noting that "the term school-to-prison pipeline" has become "part of our national lexicon," used to describe "the growing trend of school officials to refer students to law enforcement for acts committed while in school, and the increasing deployment of police in schools").

[9] *Infra* Part II.B; *see also, e.g.*, Ben Brown, *Understanding and Assessing School Police Officers: A Conceptual and Methodological Comment*, 34 J. CRIM. JUST. 591, 599 (2006) (discussing emerging prevalence of police officers in schools); Philip J.

of the extent to which contemporary school discipline practices advance the educational goals that historically justified their insulation from judicial scrutiny.[10]

This article evaluates empirical evidence on contemporary discipline practices and finds that, in a growing number of jurisdictions that rely on law enforcement to maintain order in schools, it can no longer be said that the investigation and punishment of school misconduct serves the accused student's educational interests, or even the interests of the larger student body.

These changes in the operation of school discipline parallel the changes to the juvenile justice system addressed in the landmark case of *In re Gault*.[11] Traditionally, youth in juvenile court were not entitled to the procedural protections guaranteed to adults in criminal court, on the ground that juvenile courts, unlike criminal courts, were assumed to be nonadversarial institutions designed to further the best interests of the youth; young people would receive the benevolent protection of court officials in exchange for giving up their procedural rights.[12] Accumulating evidence of juvenile courts' failure to achieve those beneficent goals, however, led the U.S. Supreme Court in *Gault* to reconsider prior doctrine and extend to youth at least some of the procedural rights

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Cook, Denise C. Gottfredson & Chongmin Na, *School Crime Control and Prevention*, 39 CRIME & JUST. 313 (2010) (observing "greater recourse to arrest and the juvenile courts rather than school-based discipline"); Paul Hirschfield, *Preparing for Prison? The Criminalization of School Discipline in the USA*, 12 THEORETICAL CRIMINOLOGY 79 (2008) (analyzing criminalization of student misconduct); Michael P. Krezmien et al., *Juvenile Court Referrals and the Public Schools: Nature and Extent of the Practice in Five States*, 26 J. CONTEMP. CRIM. JUST. 273 (2010) (examining data on rising incidence of school-based arrest); Matthew T. Theriot, *School Resource Officers and the Criminalization of Student Behavior*, 37 J. CRIM. JUSTICE 280 (2009) (analyzing role of police officers in schools).

[10] *See* Holland, *supra* note 5 (arguing for consideration of increased policing in schools in determining *Miranda* rights for youth questioned at school); Josh Kagan, *Reappraising* T.L.O.*'s "Special Needs" Doctrine in an Era of School-Law Enforcement Entanglement*, 33 J.L. & EDUC. 291, 304, 321 (2004) (contending that probable cause should be required for student searches in schools where police officers are permanently staffed at school, security cameras are prevalent, and school officials are required to report criminal incidents to police); Michael Pinard, *From the Classroom to the Courtroom: Reassessing Fourth Amendment Standards in Public School Searches Involving Law Enforcement Authorities*, 45 ARIZ. L. REV. 1067, 1070-71 (2003) (arguing that student searches should require probable cause if search could result in criminal liability); Jacqueline A. Stefkovich & Judith A. Miller, *Law Enforcement Officers in Public Schools: Student Citizens in Safe Havens?*, 1999 BYU EDUC. & L.J. 25 (exploring doctrinal issues arising from police involvement in public schools).

[11] 387 U.S. 1 (1967). This parallel between juvenile justice and school discipline was presciently drawn as early as 1971 by William G. Buss. Buss, *supra* note 3.

[12] *In re* Gault, 387 U.S. at 14-17.

formerly limited to adults in criminal court.[13] Courts today likewise should evaluate evidence of school discipline's achievement of its beneficent goals, and modify accordingly the procedural protections available to youth in public schools.

Part I explores the development of the educational theory of school discipline in legal doctrine, focusing on the role that social science has played to restrict the procedural rights of students. The Supreme Court has reasoned that school discipline—in stark contrast to law enforcement—serves the educational interests of the student who is investigated and punished; for this reason, constitutional rights that would be available to youth outside of school are not available to them in the context of school discipline. In the early foundational cases establishing these restrictions, members of the Court relied on personal intuitions about school discipline, even when those intuitions conflicted with empirical evidence properly presented before them. More recent cases, however, suggest an increased willingness to scrutinize the impact of school discipline practices in determining whether the deference traditionally afforded to school officials remains warranted.

Part II analyzes empirical findings on contemporary school discipline practices and their pedagogical impact, focusing on school-based arrests and other forms of referral to law enforcement. Analyzing a number of recent empirical studies, this part finds that schools increasingly rely on law enforcement to maintain order, although the extent to which they do varies. It then explores scholarship from related disciplines in education, sociology, and criminology to conclude that the use of law enforcement in schools has a negative impact on educational outcomes, not only for the investigated youth, but also for the larger student body. These findings suggest that the investigation and punishment of students in at least some jurisdictions no longer serves the pedagogical interests that traditionally justified exempting students from procedural protections.

Part III sets forth a framework for courts and nonjudicial actors to take such social science evidence into account. It proposes that courts engage in a factual assessment of school discipline practices to determine whether the traditional rationale for denying youth in schools constitutional

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[13] *Id.* at 18-24.

procedural rights remains warranted.[14] Given the significant variance across jurisdictions in school discipline practices, the analysis employed should be location-specific. The presumption that school discipline serves pedagogical goals would be preserved, but could be rebutted with evidence showing that disciplinary practices in the particular school or district at issue do not further the educational interests of accused youths. Where a court finds that school discipline operates primarily to further law enforcement goals rather than pedagogical goals, investigations of student misconduct should be presumed to be adversarial and thus subject to the full scope of constitutional protections that would be available to youth outside the school context. By contrast, where school discipline practices are found to adhere to the traditional model of discipline in furtherance of pedagogical goals, doctrinal restrictions on students' constitutional rights would remain in place. Part III then considers the role of nonjudicial actors, arguing that those who make the substantive determination as to whether certain forms of conduct should be criminalized in the first instance will play a critical part in any reform effort.

I. DOCTRINAL RESTRICTIONS ON STUDENTS' PROCEDURAL RIGHTS

Courts routinely defer to school officials in cases involving the investigation and punishment of students.[15] A schoolchild accused of bringing a water pistol to school or tearing a page out of a book does not enjoy the same constitutional rights as an adult or child suspected of a criminal act on the street.[16] School officials may search the

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[14] *See* Tamar Birckhead, *Toward a Theory of Procedural Justice for Juveniles*, 57 BUFF. L. REV. 1447, 1495-98 (2009) (urging judges and lawmakers to review empirical data on impact of school discipline practices). *See generally* DAVID L. FAIGMAN, CONSTITUTIONAL FICTIONS: A UNIFIED THEORY OF CONSTITUTIONAL FACTS 97 (2008) (arguing courts should revisit precedent that is based on outmoded empirical beliefs); John O. McGinnis & Charles W. Mulaney, *Judging Facts Like Law*, 25 CONST. COMMENT. 69, 91 (2008) (prescribing litigation process for social fact finding within courts); Richard A. Posner, *The Role of the Judge in the Twenty-First Century*, 86 B.U. L. REV. 1049 (2006) (critiquing judicial failure to consider impact of changed circumstances on doctrine).

[15] *See, e.g.*, Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 656 (1995) (holding that scope of constitutional rights for public school students is limited by "what is appropriate for children in school").

[16] *See* Buss, *supra* note 3, at 640-41 (discussing constitutional rights of a student accused of tearing a page out of a book); Schulhofer, *supra* note 3, at 115 (comparing the rights of a "student with a water pistol" with those of an adult suspected of a crime).

youth's backpack without a warrant or probable cause[17] and question the youth without first providing *Miranda* warnings.[18] Moreover, courts impose these restrictions on rights regardless of the relative seriousness of the offense or even the prospect of criminal prosecution.[19] Indeed, some courts have denied these criminal procedural guarantees to youth in schools even where a uniformed police officer participated in the investigation.[20]

While there has always been substantial disagreement within the scholarly literature over the extent to which constitutional rights should be restricted in the public school context, both sides of the debate share a common starting point: such restrictions must be justified, if at all, by pedagogical goals.[21] For example, James E. Ryan has argued that courts grant special deference to school officials when—and only

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[17] *See supra* note 4 and accompanying text.

[18] *See supra* note 5 and accompanying text.

[19] *See* Wofford v. Evans, 390 F.3d 318, 326-27 (4th Cir. 2004) (rejecting requirement for probable cause where student was suspected of bringing firearm to school); Commonwealth v. Snyder, 597 N.E.2d 1363, 1369 (Mass. 1992) (rejecting *Miranda* warnings for questioning by school official where principal intended to turn over incriminating evidence of the student's drug dealing to police); State v. Tinkham, 719 A.2d 580, 583 (N.H. 1998) (holding that school officials need not provide *Miranda* warnings prior to questioning student suspected of dealing drugs); *In re* Harold S., 731 A.2d 265, 268 (R.I. 1999) (concluding school principal who conferred with police was not required to provide *Miranda* warnings prior to questioning the student).

[20] The Supreme Court has expressly reserved the question of the standard for student searches conducted "in conjunction with or at the behest of law enforcement agencies." New Jersey v. T.L.O., 469 U.S. 325, 341 n.7 (1985). Absent such guidance, lower courts have split. *Compare* People v. Dilworth, 661 N.E.2d 310, 317 (Ill. 1996) (holding search conducted by school resource officer subject to reasonable suspicion standard rather than ordinary probable cause requirements), *and In re* Josue T., 989 P.2d 431 (N.M. Ct. App. 1999) (same), *and* R.D.S. v. State, 245 S.W.3d 356, 368 (Tenn. 2008) (same), *and In re* Angelia D.B., 564 N.W.2d 682 (Wis. 1997) (rejecting probable cause requirement for search by police officer at the request of and in conjunction with school officials), *with* A.J.M. v. State, 617 So. 2d 1137, 1138 (Fla. Dist. Ct. App. 1993) (applying probable cause standard to search by school resource officer), *and* Patman v. State, 537 S.E.2d 118 (Ga. Ct. App. 2000) (applying probable cause to search by police officer on special detail to the school).

With respect to students' right to *Miranda* warnings prior to school interrogation, compare *State v. Schloegel*, 769 N.W.2d 130, 133-34 (Wis. Ct. App. 2009) (finding no custodial interrogation during questioning of student at school by police because if the student was "in custody at all, [he] was in the custody of the school and was not being detained by the police at the time"), with *In re T.A.G.*, 663 S.E.2d 392, 396 (Ga. Ct. App. 2008) (concluding that involvement of school resource officer transforms interrogation by school principal into custodial interrogation requiring *Miranda* warnings). *But see* J.D.B. v. North Carolina, 131 S. Ct. 2394 (2011) (rejecting argument that interrogation of youth at school by police never qualifies as custodial interrogation).

For scholarly discussion of the procedural rights applicable to school-based investigations involving police officers, see Holland, *supra* note 5, at 45-58; Kagan, *supra* note 10, at 316-20; Pinard, *supra* note 10, at 1080-90; Peter Price, *When Is a Police Officer an Officer of the Law?: The Status of Police Officers in Schools*, 99 J. CRIM. L. & CRIMINOLOGY 541, 560-67 (2009).

[21] *See supra* note 6.

when—they are acting in their privileged role as educators and transmitters of knowledge.[22] Similarly, Ann Proffitt Dupre has characterized the Supreme Court's jurisprudence in school discipline cases as reflective of a larger debate about competing educational goals.[23]

Central to this defense of restrictions on students' rights is the assumed alignment of interests between students and school officials.[24] Procedural protections guaranteed in the criminal context have been deemed unnecessary in the school context to the extent that the investigation and punishment of student misconduct—in stark contrast to the investigation and punishment of ordinary crime—is for the youth's own educational benefit, teaching the importance of respect for others and acceptance of responsibility. Therefore, the standard calculus applicable outside the school discipline context—balancing the tradeoff between the individual interest and the competing collective or state interest—has been deemed inapplicable in schools. Analyzing restrictions on students' privacy rights during school searches, Stephen Schulhofer has reasoned that "[b]oth the investigating authority and the person searched are participants in a shared mission," rendering inapposite ordinary constitutional protections that "reflect[] a balance appropriate mainly to cases in which the private activity and public controls are poised in conflict."[25] Under this view, the convergence of interests between school official and student, unlike the adversarial interests of the adult criminal suspect and law enforcement, obviates the need for the robust protections guaranteed in the law enforcement context.

This part traces the development of this pedagogical theory in the three foundational cases in school discipline—*Goss v. Lopez*, involving school suspension; *Ingraham v. Wright*, involving corporal punishment; and *New Jersey v. T.L.O.*, involving student searches. Each of these cases relied on the view that school discipline educationally benefits the punished youth to justify restrictions on students' rights. Interestingly, although the Court frequently relies on social science evidence in determining educational rights in other contexts, most famously in footnote eleven of *Brown v. Board of*

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[22] Ryan, *supra* note 6, at 1341. He continues, "the further a policy moves away from the core academic function of schools, the more likely the Court will apply traditional constitutional rules to judge the policy and strike it down." *Id.*

[23] Dupre, *supra* note 6, at 64.

[24] *See supra* note 7 and accompanying text.

[25] Schulhofer, *supra* note 3, at 117-18.

Education,[26] these foundational school discipline cases are notable for the conspicuous absence of social science support for their conclusions. Rather, in these cases, members of the Court relied almost exclusively on personal intuitions regarding the operation of school discipline, even when those intuitions conflicted with empirical evidence properly before the Court. However, more recent cases demonstrate an increased willingness to factually assess the operation of school discipline to determine whether the judicial deference traditionally afforded to school officials remains warranted.

A. The Foundational Cases

Judicial reliance on the perceived educational value of school discipline to impose limits on students' procedural rights dates at least to *Goss v. Lopez*,[27] decided in 1975, the first time the Supreme Court addressed the scope of these rights. During race-related tensions at a high school, lead plaintiff Dwight Lopez was in the school lunchroom when a group of black students entered and began overturning tables.[28] Lopez claimed he immediately left the lunchroom and did not participate in any of the disruptive activities.[29] After he was suspended for this incident, he filed a class action lawsuit arguing that the refusal to provide students with any opportunity to assert innocence and challenge a school suspension violated procedural due process rights.[30]

On certiorari, a majority of the Court held that school discipline proceedings are subject only to minimal due process protections. Suspensions of up to ten days require only an "informal give-and-take" between the principal and the student, which need not occur prior to the suspension.[31] Acknowledging that these limitations provide individuals facing a denial of education with fewer procedural protections than those afforded to individuals facing a denial of, for example, welfare benefits or a driver's license, the Court emphasized that unlike other forms of state sanctions, school

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[26] 347 U.S. 483, 494 n.11 (1954); *see* Michael Heise, Brown v. Board of Education*, Footnote 11, and Multidisciplinarity*, 90 CORNELL L. REV. 279 (2005) (discussing influence of footnote eleven in use of empiricism in education cases).

[27] 419 U.S. 565 (1975).

[28] Lopez v. Williams, 372 F. Supp. 1279, 1284-85 (S.D. Ohio 1973), *aff'd sub nom.* Goss v. Lopez, 419 U.S. 565 (1975).

[29] *Id.* at 1285.

[30] *Id.* at 1281.

[31] *Goss*, 419 U.S. at 584.

discipline serves a pedagogical purpose designed for the benefit of the child: "Suspension is considered not only to be a necessary tool to maintain order but a valuable educational device."[32] The Court expressed concern that imposing additional due process requirements on school discipline would "destroy its effectiveness as part of the teaching process."[33]

Justice Powell's dissent would have gone further, reasoning that the educational value of school discipline justifies the denial of *any* procedural due process protections.[34] His position expressly emphasized what the majority had only implied: both the punished student and the disciplining school official have a shared interest in swift and informal punishment, rendering traditional due process protections inappropriate. Justice Powell stated, "When an immature student merits censure for his conduct, he is rendered a disservice if appropriate sanctions are not applied or if procedures for their application are so formalized as to invite a challenge to the teacher's authority."[35] Accusing the majority of "misapprehending the reality of the normal teacher-pupil relationship," the dissent insisted that "[u]nlike the divergent and even sharp conflict of interests usually present where due process rights are asserted, the interests here implicated—of the State through its schools and of the pupils—are essentially congruent."[36]

Importantly, neither opinion cited any social science support for its assumptions about the benefits of school discipline—nor could it. The record before the Court—far from validating the educational value of school suspensions—was replete with facts indicating that school suspensions harm students. Students testified at trial to the negative impact that the suspension and subsequent loss of instruction time had on their academic progress, and two prominent psychologists gave expert testimony regarding the adverse consequences of suspensions.[37] Based on this evidence, the district court entered factual findings that school suspensions are harmful to students and may compromise academic achievement.[38] On

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[32] *Id.* at 580.

[33] *Id*. at 583.

[34] *Id.* at 585-86 (Powell, J., dissenting).

[35] *Id*. at 593.

[36] *Id*. at 591, 594.

[37] Appellees' Brief on the Merits at 12-13, 33-34, *Goss*, 419 U.S 565 (No. 73-898), 1974 WL 185915 (citing testimony from trial record).

[38] Lopez v. Williams, 372 F. Supp. 1279, 1292 (S.D. Ohio 1973) (finding, as a matter of fact, that "[m]ost students respond [to suspensions] in one or more of the following ways: (1) The suspension is a blow to the student's self-esteem. (2) The

appeal, the student-appellees cited numerous scholarly articles further demonstrating the educational harms associated with suspensions, and amicus briefs filed by the NAACP, the Children's Defense Fund, and the ACLU likewise cited studies describing the negative repercussions of school suspensions on children, including reputational harm to the student, loss of instructional time, exacerbation of deviant behavior, lower high school graduation rates, and fewer future employment opportunities.[39] Yet the majority ignored these facts altogether. Justice Powell's dissent acknowledged them, but dismissed them with little discussion as "generalized opinion evidence."[40] With no mention of the clearly erroneous standard applicable to the trial court's findings of fact,[41] Justice Powell summarily reached the contrary factual conclusion, that "[f]or average, normal children—the vast majority—suspension for a few days is simply *not* a detriment; it is a commonplace occurrence . . . it leaves no scars; affects no reputations; indeed, it often may be viewed by the young as a badge of some distinction and a welcome holiday."[42] In this way, restrictions on procedural due process rights in public schools rested on the unsupported factual contention that school discipline furthers the educational interests of the suspended student.

Two years later in *Ingraham v. Wright*[43] the Court again invoked the perceived educational value of school discipline, this time to reject a constitutional challenge to abuse in the administration of corporal punishment. In *Ingraham*, a student who was slow to respond to a teacher's instructions was hit

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student feels powerless and helpless. (3) The student views school authorities and teachers with resentment, suspicion and fear. (4) The student learns withdrawal as a mode of problem solving. (5) The student has little perception of the reasons for the suspension. He does not know what offending acts he committed. (6) The student is stigmatized by his teachers and school administrators as deviant. They expect the student to be a troublemaker in the future. A student's suspension may also result in his family and neighbors branding him as a troublemaker. Ultimately repeated suspension may result in academic failure."), *aff'd sub nom. Goss*, 419 U.S. 565.

[39] Appellees' Brief on the Merits at 34-36, *Goss*, 419 U.S 565 (No. 73-898); Brief for the Children's Defense Fund of the Washington Research Project et al. as Amici Curiae Supporting Appellees at 65-68, *Goss*, 419 U.S. 565 (No. 73-898), 1974 WL 185919; Brief of the National Association for the Advancement of Colored People et al. as Amici Curiae Supporting Appellees at 14-15, *Goss*, 419 U.S. 565 (No. 73-898), 1974 WL 185916; Brief of the American Civil Liberties Union as Amici Curiae Supporting Appellees at 6, *Goss*, 419 U.S. 565 (No. 73-898), 1974 WL 185918.

[40] *Goss*, 419 U.S. at 597-98 & n.18 (Powell, J., dissenting).

[41] 9C CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2583 (3d ed. 2010).

[42] *Goss*, 419 U.S. at 598 n.19 (Powell, J., dissenting).

[43] 430 U.S. 651 (1977).

twenty times with a paddle, resulting in a hematoma requiring medical attention, while another student lost use of his arm for a week because of a teacher's paddling.[44] Rejecting the students' Eighth Amendment and due process claims, the Court reasoned that "since before the American Revolution," corporal punishment has been viewed as necessary for the "moderate correction" of a child's misbehavior and "for the proper education of the child."[45] The Court acknowledged that its holding meant that youth in schools enjoyed fewer protections than convicted criminals, as criminals subjected to corporal punishment would clearly be entitled to raise a constitutional challenge to that punishment.[46] Nonetheless, the Court imposed a categorical distinction between punishment in the law enforcement context and punishment in the school discipline context, concluding that the "prisoner and the schoolchild stand in wholly different circumstances"[47] with respect to the constitutional rights to which they are entitled.

As in *Goss*, the *Ingraham* Court made little effort to garner factual support for its assumptions about corporal punishment. At the trial level, plaintiff-schoolchildren submitted evidence of repeated physical abuse in the administration of corporal punishment, which would destroy whatever educational value might otherwise inhere in its use. The district court did not enter any factual findings about the credibility of testimony regarding these allegations, but concluded that—even if the testimony were credible—no relief would be granted.[48] The Supreme Court, rather than engaging with the evidence of abuse, simply assumed this abuse was infrequent, thereby obviating the need for the requested procedural protections. Instead of invoking factual support, the majority relied on its "common-sense judgment that excessive corporal punishment is exceedingly rare in the public schools."[49] Criticizing the lack of evidentiary support for the majority's claims, the dissenting four Justices accused the majority of relying on "mere armchair speculation" to justify denials of constitutional rights to schoolchildren.[50]

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[44] *Id.* at 657.
[45] *Id.* at 661-62, 664.
[46] *Id.* at 669.
[47] *Id.* at 664-71.
[48] *Id.* at 658.
[49] *Id.* at 677 n.45.
[50] *Id.* at 690 n.7 (White, J., dissenting).

Finally, in *New Jersey v. T.L.O.*, the Court relied on the purported educational value of school discipline and consequent alignment of interests between student and school official to limit the scope of Fourth Amendment protections available in public schools.[51] In *T.L.O.*, a school principal searched the purse of a student accused of smoking cigarettes; smoking was a violation of school rules but not of any criminal law. During the course of the search, the principal found items implicating the student in drug dealing, which he turned over to the police to be used against the student in subsequent delinquency proceedings.[52]

Holding that school officials may search a student's person or belongings absent the warrant or probable cause that would be required outside of the school context, the Court reasoned that to hold otherwise would compromise "the value of preserving the informality of the student-teacher relationship."[53] Justice Powell's concurrence repeated his insistence from *Goss* that the alignment of interests presented in school discipline cases "make[s] it unnecessary to afford students the same constitutional protections granted adults and youths in a nonschool setting."[54] This alignment, he reasoned, sharply distinguished the teacher-student relationship from that of citizens and law enforcement officers:

> Law enforcement officers function as adversaries of criminal suspects. These officers have the responsibility to investigate criminal activity, to locate and arrest those who violate our laws, and to facilitate the charging and bringing of such persons to trial. Rarely does this type of adversarial relationship exist between school authorities and pupils.[55]

Similarly, Justice Blackmun's concurrence reasoned that the educational role of teachers excused them from ordinary Fourth Amendment standards: "A teacher's focus is, and should be, on teaching and helping students, rather than on developing evidence against a particular troublemaker."[56]

Again, the Court in *T.L.O.* appeared to rely on common-sense intuitions about what is good for the child, rather than engaging in a fact-based inquiry. Indeed, the contention

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[51] 469 U.S. 325 (1985).
[52] *Id*. at 328-29.
[53] *Id*. at 340.
[54] *Id.* at 348 (Powell, J., concurring).
[55] *Id*. at 349-50.
[56] *Id.* at 353 (Blackmun, J., concurring).

regarding an alignment of interests between student and school official, purported to distinguish the relationship from that between police officer and suspect, was undercut by the facts of *T.L.O.* itself: the school official ultimately referred the student to law enforcement and the juvenile court.[57] Yet, rather than performing any empirical inquiry into the frequency with which the interests of accused students conflict with those of school officials, the Court deemed that rate to be sufficiently "rare" to justify restricting students' rights. Underscoring the absence of evidentiary support for the majority's claims, Justice Brennan's dissenting opinion characterized the majority's rationales as "brief nods by the Court in the direction of a neutral utilitarian calculus while the Court in fact engages in an unanalyzed exercise of judicial will" designed to "reach[] a predetermined conclusion acceptable to this Court's impressions of what authority teachers need."[58]

In these foundational cases, then, the Court has relied on the assumed educational value of school discipline and the purported convergence of interests between school official and student to conclude that ordinary procedural protections are inapplicable in schools.

It is true, however, that these cases did not rely exclusively on these premises to justify limits on students' procedural rights. Rather, the Court has suggested an additional justification for such restrictions—the weighty interests of *other* students in maintaining an environment conducive to learning.[59] *Goss* emphasized that the maintenance of order and discipline is "essential if the educational function is to be performed,"[60] and *T.L.O.* underscored the heavy weight

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[57] *Id.* at 372 (Stevens, J., concurring in part and dissenting in part) (challenging the assumption that law enforcement and school discipline categorically differ by pointing out that T.L.O. herself was subject to prosecution as a delinquent as a result of the search); *see also* Tribe, *supra* note 7, at 312 ("[E]ven if one concedes that there is no *inherent* clash in the interest of teacher and student, does it not remain possible for them to clash in fact . . . ?").

[58] *T.L.O.*, 469 U.S. at 367, 369 (Brennan, J., concurring in part and dissenting in part).

[59] *See* Ryan, *supra* note 6, at 1341, 1411-14 (interpreting limits to constitutional rights in school discipline cases as resting on the view that they are necessary to "preserve an atmosphere that is safe and conducive to learning" and "to maintain discipline in order to transmit academic knowledge"); *see also* Tribe, *supra* note 7, at 312 ("[E]ven if in general the teachers' and child's interest truly converge, at the moment of suspension convergence must surely turn into clash: the teacher is saying that the best interests of *other students* will be served by this particular student's suspension.").

[60] Goss v. Lopez, 419 U.S. 565, 580 (1975).

of the "[s]chool's interest in maintaining an environment where learning can take place."[61]

As a purely doctrinal matter, however, this alternative justification proves less than satisfactory. While few would contest that the state interest in providing a functional educational environment is significant, the Court has not attempted to explain why this interest would outweigh the individual student's interest if those interests are in fact in conflict. Outside the school context, the state interest in preventing violent street crimes is of course significant, yet it does not outweigh the individual interest in receiving full procedural protections. It is not at all clear why this calculus balancing competing interests between state and individual should not apply in the school context as well. Perhaps recognizing this deficiency, the Court has relied on this alternative argument only to buttress its more primary assumptions regarding the perceived educational value to the investigated or punished student and the purported absence of adversarial interests in the context of school discipline.

B. Recent Cases and the Consideration of Evidentiary Support

Notwithstanding the Supreme Court's earlier reluctance to engage with empirical evidence in this area, more recent cases suggest an increased willingness to assess the actual operation of school discipline in particular jurisdictions to determine whether the traditional deference remains warranted. In these opinions, the Court has begun to consider the purpose and impact of the investigation and punishment of students.[62] Moreover, where evidence suggested that a particular disciplinary practice negatively impacts the education of students, the Court has concluded that judicial interference is warranted.

Vernonia School District v. Acton[63] and *Board of Education v. Earls*[64] examined suspicionless drug testing in

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[61] 469 U.S. at 326. More recently, in sustaining the suspicionless drug testing of student-athletes, the Court in *Vernonia School District v. Acton* emphasized that schools routinely require students to submit to invasions of their privacy not only "for their own good," but also for "that of their classmates." 515 U.S. 646, 656 (1994).

[62] *See generally* Rachel R. Moran, *What Counts as Knowledge? A Reflection on Race, Social Science, and the Law*, 44 LAW & SOC'Y REV. 515 (2010) (discussing historical changes in the Supreme Court's willingness to consider empirical evidence to support factual suppositions).

[63] 515 U.S. 646 (1995).

public schools. In *Acton*, the Court sustained such tests for student athletes, but only after conducting a factual assessment of how the search policy operated in the particular school at issue and the actual impact of the policy on students. Rather than simply assume, as it had done in prior cases, that the investigation of students for drug use benefited students, the Court analyzed empirical evidence of the dangers of drug use to students, and then sustained the policy only after it satisfied itself that the particular drug tests at issue were "undertaken for prophylactic and distinctly *non*-punitive purposes," as school policy dictated that the results of any positive tests would not be turned over to law enforcement authorities.[65] Thus, the Court engaged in a factual, school-specific inquiry before concluding that the interests of the student and school officials were aligned, rendering unnecessary the individualized suspicion that would be required outside of the school context.[66] Similarly, in *Earls*, the Court sustained suspicionless drug testing of students participating in extracurricular activities only after engaging in a factual inquiry regarding the operation of the drug testing policy in the particular school and concluding that the drug tests benefited rather than harmed the tested student in large part because under school policy the results were not turned over to law enforcement or used to punish the student.[67]

Even more explicitly, in *Safford v. Redding*, the Court engaged in a factual inquiry to test the long-held categorical assumption that the investigation and punishment of student wrongdoing benefits the student.[68] In *Redding*, school officials strip searched a thirteen-year-old student accused of bringing prescription-strength ibuprofen to school. Although the Court affirmed *T.L.O.*'s holding that the school setting requires only a reasonable suspicion to justify a student search, it nonetheless considered the actual impact of the search on the student and concluded that the student's Fourth Amendment rights had been violated. Rather than assuming, as it had in *T.L.O.*, that school searches categorically advance the educational interests

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[64] 536 U.S. 822 (2002).

[65] 515 U.S. at 658 & n.2.

[66] By focusing on the operation of a school discipline practice in a particular school, the Court appeared to treat the impact of school discipline on youth as an adjudicative fact rather than a legislative one. *See* Kenneth Culp Davis, *An Approach to Problems of Evidence in the Administrative Process*, 55 HARV. L. REV. 364, 402-03 (1942).

[67] 536 U.S. at 833.

[68] 129 S. Ct. 2633 (2009).

of the searched student, the Court cited the amicus brief for the National Association of Social Workers and an article from the *Journal of School Psychology* to emphasize the negative psychological impact of a strip search on youth.[69] *Redding* thus suggests an increased willingness by the Court to evaluate—rather than simply assume—the impact of investigations and punishments on students in determining whether the rights of those students warrant restriction.

II. EMERGING MODES OF SCHOOL DISCIPLINE

As set forth in the previous part, doctrinal restrictions on the rights of youth accused of school-based misconduct rest on a series of factual assumptions about the manner in which school discipline operates and the educational value of this discipline. Specifically, the Supreme Court has limited these rights in public schools on the ground that the investigation and punishment of students is intended for the students' educational benefit. Thus, it has reasoned, the adversarial relationship characteristic of law enforcement encounters outside of the school context simply does not apply to investigations of student misconduct to necessitate the same level of procedural protections. Recently, the Court has appeared willing to assess the facts underlying these assumptions. Based on this development, this part evaluates empirical evidence of contemporary school discipline practices and their educational impact on students.[70]

As others have observed, the past two decades witnessed a dramatic shift in public discourse, with an increasing focus on school safety and crime prevention.[71] This part evaluates how that shift has manifested in the operation of school discipline. It first provides an overview of policy developments that led to a convergence of school discipline and law enforcement. Next, it reviews a series of recently published studies measuring the extent to which school officials rely on law enforcement to maintain order. Finally, it analyzes social science research

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[69] *Id.* at 2641-42 (citations omitted).

[70] *See* Linda Hamilton Krieger & Susan T. Fiske, *Behavioral Realism in Employment Discrimination Law: Implicit Bias and Disparate Treatment*, 94 CALIF. L. REV. 997, 1007 (2006) (discussing value of empirical research to measure legal doctrines' progress toward expressed normative goals).

[71] *See generally* JONATHAN SIMON, GOVERNING THROUGH CRIME: HOW THE WAR ON CRIME TRANSFORMED AMERICAN DEMOCRACY AND CREATED A CULTURE OF FEAR 207-31 (2007).

examining the likely impact of law enforcement referrals on educational outcomes. Based on these findings, this part concludes that, at least in some jurisdictions, school discipline no longer serves the educational interests that traditionally justified insulating it from ordinary constitutional requirements.

A. The Shift Toward School Crime Control

Following a series of school shootings in the 1990s, a widespread sense of panic descended on public schools across the nation. A year after the shooting at Columbine High School in 1999, almost two-thirds of Americans reported feeling it was somewhat likely or very likely that a school-shooting spree would occur in their community.[72] As one scholar put it, "policy makers reacted abruptly to what they perceived to be a huge swing in public opinion: a moral panic swept the country as parents and children suddenly feared for their safety at school."[73] Importantly, this fear extended to predominantly white suburban and rural areas; school violence was no longer contained in the predominantly minority, low-income, inner-city neighborhoods traditionally associated with crime. Republican Senator Ben Nighthorse Campbell of Colorado, for example, stated,

> These recent school shootings have occurred in suburbs, small towns, and major metropolitan areas all across our nation. They have shattered the myth that school violence is a problem solely confined to the inner cities. Events now clearly show that the potential for serious and deadly school violence is everywhere.[74]

Indeed, a poll conducted in 1999 found that suburban and rural parents were more likely than minority parents to feel a school shooting was somewhat likely or very likely to occur in their communities.[75]

This fear resulted in the deployment of large numbers of police officers to patrol public school hallways. Today, nearly

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[72] Mark Gillespie, *One in Three Say It Is Very Likely that Columbine-Type Shootings Could Happen in Their Community*, GALLUP (Apr. 20, 2000), http://www.gallup.com/poll/2980/One-Three-Say-Very-Likely-ColumbineType-Shootings-Could.aspx.

[73] ELIZABETH DONOHUE ET AL., SCHOOL HOUSE HYPE: SCHOOL SHOOTINGS AND THE REAL RISKS KIDS FACE IN AMERICA 3 (1998).

[74] 144 CONG. REC. 14, 187 (1998) (statement of Sen. Ben Campbell).

[75] Mark Gillespie, *School Violence Still a Worry for American Parents*, GALLUP (Sept. 7, 1999), http://www.gallup.com/poll/3613/School-Violence-Still-Worry-American-Parents.aspx.

half of all public schools have assigned police officers,[76] and 60 percent of high school teachers report armed police officers stationed on school grounds.[77] Often with the help of federal funding, school-based police officers, frequently referred to as "school resource officers," are the fastest-growing segment of law enforcement.[78] These officers' roles vary significantly across schools, with some charged primarily with enforcement of criminal laws, while others are focused on mentoring, counseling, and teaching duties.[79]

The reliance on law enforcement to maintain school order is not limited to jurisdictions with school resource officers. Jurisdictions lacking the resources to hire full-time police personnel nonetheless may regularly summon the local police department through calls for service. Indeed, rapidly spreading "zero-tolerance" policies mandate that school officials call the police any time certain predetermined infractions are committed. In Rhode Island, a statewide policy requires school principals to report all school fights to the police for criminal prosecution.[80] Alabama requires all principals to notify law enforcement any time a person violates district policies regarding physical harm or threats of harm.[81]

Similar mandates have been adopted at the local district level as well. The Atlanta Public School System, for example, maintains a zero-tolerance policy requiring school officials to immediately report to the police any student involved in drug-related offenses or gang activity.[82] Chicago Public Schools began requiring school officials to notify police of all burglary, aggravated assault, and gang activity offenses, while providing administrators with discretion to refer students to the police for

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[76] BARBARA RAYMOND, U.S. DEP'T OF JUSTICE, OFFICE OF CMTY. POLICING SERVS., ASSIGNING POLICE OFFICERS TO SCHOOLS (2010).

[77] Hirschfield, *supra* note 9, at 82.

[78] David Snyder, *A New Generation of School Safety Patrol: Officers Boost Security, Community Connection*, WASH. POST, Dec. 11, 2003, at T8 (quoting executive director of the National Association of School Resource Officers).

[79] PETER FINN & JACK MCDEVITT, NATIONAL ASSESSMENT OF SCHOOL RESOURCE OFFICER PROGRAMS 43 (2005).

[80] 140 CONG. REC. 10281 (1994).

[81] ALA. CODE § 16-1-24.1 (2010); *see also* ARIZ. REV. STAT. ANN. § 15-341 (West 2009); ARK. CODE ANN. § 6-17-113 (2007); 14 DEL. CODE. ANN. tit. 14 § 4112 (2007); FL. STAT. ANN. § 1006.13 (West 2009); GA. CODE ANN. § 20-2-1184 (2009); 105 ILL. COMP. STAT. ANN. 5/10-21.7 (LexisNexis 2007).

[82] ATLANTA PUB. SCH., 2010-2011 STUDENT HANDBOOK 22-23 (2010), *available at* http://www.atlanta.k12.ga.us/cms/lib/GA01000924/Centricity/Domain/94/StudentHandbook.pdf.

lesser offenses such as gambling, forgery, or petty theft.[83] The Houston Independent School District requires school principals to notify the police any time there are reasonable grounds to believe that a student has engaged in any criminal offense at school.[84] The East Carroll Parish School System in Louisiana, a small, rural district, requires that law enforcement remove and file charges against any student age twelve or over who is an aggressor in a fight.[85] Guilford County Schools system in North Carolina requires that school officials call the police every time an aggravated assault, sexual offense, weapons offense, or drug possession is suspected.[86] Nelson County Public Schools system in Virginia requires schools to refer to the police all instances of drug offenses, violence, interference with school authorities, and driving without a license on campus.[87]

As the scope of these zero-tolerance policies suggests, the infractions for which students are referred to law enforcement have expanded considerably. Numerous states criminalize the offense of disrupting school activities[88] or

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[83] CHI. PUB. SCH., STUDENT CODE OF CONDUCT FOR THE CHICAGO PUBLIC SCHOOLS FOR THE 2010-2011 SCHOOL YEAR 8, 13-16 (2010), *available at* http://policy.cps.k12.il.us/documents/705.5.pdf.

[84] HOUS. INDEP. SCH. DIST., CODE OF STUDENT CONDUCT 14 (2010), *available at* http://www.houstonisd.org/HISDConnectEnglish/Images/PDF/2010Code_Eng_online.pdf.

[85] EAST CARROLL PARISH SCH. SYST., A COMPACT FOR STUDENT SUCCESS/STATEMENT OF COMPLIANCE 45-47, *available at* http://www.e-carrollschools.org/docs/codeofconduct.pdf.

[86] GUILFORD CNTY. SCH., 2010-2011 STUDENT HANDBOOK 8 (2010), *available at* http://www.gcsnc.com/education/school/school.php?sectionid=33789 (follow "Student Handbook" hyperlink).

[87] NELSON CNTY. PUB. SCH. DIV., STUDENT CONDUCT 2-3 (2011), *available at* http://www.nelson.k12.va.us/District/Policy/Section%20J/JFC.pdf.

[88] *See* ARIZ. REV. STAT. ANN. § 13-2911 (2009) (defining crime of "Interference with or disruption of an educational institution"); CAL. PENAL CODE § 415.5 (West 2010) (defining crime of "Disturbance of peace of school, community college, university or state university"); FLA. STAT. ANN. § 871.01 (West 2000) (defining crime of "Disturbing schools and religious and other assemblies"); MASS. GEN. LAWS ch. 272, § 40 (West 2000) (defining crime of "Disturbance of schools or assemblies"); NEV. REV. STAT. ANN. § 392.910 (2008) (defining as unlawful misdemeanor "Disturbance of school"); S.C. CODE ANN. § 16-17-420 (2003) (defining crime of "Disturbing schools"); S.D. CODIFIED LAWS § 13-32-6 (2004) (defining "Disturbance of school" as a misdemeanor); TEX. EDUC. CODE ANN. § 37.123 (West 2006) (defining "Disruptive Activities" at a public school as a misdemeanor); UTAH CODE ANN. § 76-8-710 (LexisNexis 2009) (criminalizing "Disruption of activities in or near school building"); WASH. REV. CODE ANN. § 28A.635-030 (West 2009) (defining crime of "Disturbing school, school activities or meetings"); W. VA. CODE ANN. § 61-6-14 (LexisNexis 2010) (defining crime of "Disturbance of schools"); *see also* Julius Menacker & Richard Mertz, *State Legislative Responses to School Crime*, 85 EDUC. L. REP. 1 (1993) (reviewing statutes in thirty-six states relating to school crime specifically).

talking back to teachers.[89] In 1994, the South Carolina Attorney General issued an opinion stating that students who fight in school, fail to leave school grounds upon request, or use foul or offensive language toward a principal or teacher are subject to criminal prosecution.[90]

As a result of these policy developments, schoolchildren today are more likely to be arrested and prosecuted for school-based misconduct than they were a generation ago.[91] According to the Federal Advisory Committee on Juvenile Justice, the number of referrals to the juvenile justice system for relatively minor school-based conduct is on the rise.[92] Given this shift toward criminalization, the administration of school discipline appears to be increasingly adversarial.

B. Rates of School-Based Referrals to Law Enforcement

Simply acknowledging that law enforcement intersects with school discipline more often than it did in the past does not fully resolve the issues posed by current doctrine. Even *T.L.O.* conceded that law enforcement sometimes overlaps with school discipline; it concluded, however, that the incidence of convergence is sufficiently rare to warrant treating the two institutions distinctly. The key issue, then, is the scope of the convergence. This section examines empirical studies measuring school-based student referrals to law enforcement to assess the extent to which school discipline remains discrete from law enforcement. A school-based referral to law enforcement may take several forms. I use the term "school-based law enforcement referral" to refer to incidents in which a youth is arrested at school or for school-related conduct, which sometimes but not always results in the youth being processed through the juvenile or criminal court system. It also includes incidents in which the youth is not arrested, but is processed

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[89] ARIZ. REV. STAT. ANN. § 15-507 (2008); ARK. CODE ANN. § 6-17-106(a) (2007); IDAHO CODE ANN. § 18-916 (2004); MONT. CODE ANN. § 20-4-303 (2009); N.D. CENT. CODE § 15.1-06-16 (2003).

[90] 1994 S.C. Op. Att'y Gen. 62 (No 94-25).

[91] *See, e.g.*, DAVID E. GROSSMANN & MAURICE PORTLEY, NAT'L COUNCIL OF JUVENILE & FAMILY COURT JUDGES, JUVENILE DELINQUENCY GUIDELINES: IMPROVING COURT PRACTICE IN DELINQUENCY CASES 150-51 (2005) (expressing concern over use of juvenile court to handle school misconduct); Bob Herbert, *School to Prison Pipeline*, N.Y. TIMES, June 9, 2007, at A15; Krezmien et al., *supra* note 9, at 275; Gara LaMarche, *The Time Is Right to End "Zero Tolerance" in Schools*, EDUC. WEEK, Apr. 6, 2011, at 35.

[92] FED. ADVISORY COMM. ON JUVENILE JUSTICE, ANNUAL REPORT 9 (2010) ("[S]chool discipline problems (even minor ones) are increasingly being handled by law enforcement rather than by schools.").

through the juvenile or criminal justice systems or is required to respond to a criminal citation.

The analysis draws from several recently published studies. None of these studies purports to determine why some schools rely on law enforcement to maintain discipline while others do not. A wide range of causal factors may be at play, ranging from attitudes of school officials to limits on funding for traditional classroom management techniques. Determining the underlying causes for differing rates of referrals is beyond the scope of this article. Rather, this article seeks to provide a descriptive assessment of school officials' reliance on law enforcement.

The studies examined here differ somewhat in methodology and jurisdictions examined. Nonetheless, collectively, they provide useful guides to assess the degree of intersection between school discipline and law enforcement. Specifically, the studies provide data on three important indicators, namely: (1) the share of juvenile law enforcement referrals that stem from school-based misconduct, (2) the number of school-based law enforcement referrals per one thousand enrolled students per year, and (3) the types of offenses for which students are referred to law enforcement.

Percentage of law enforcement referrals resulting from school-based misconduct*:* The percentage of youth referrals to law enforcement stemming from school-based misconduct provides a useful empirical measure of the extent to which school discipline and law enforcement converge. A finding that school-based referrals represent a large share of the overall number of law enforcement referrals would challenge the doctrinal view that school discipline is categorically discrete from law enforcement. In addition, it would suggest that a relatively large share of juvenile arrests and investigations occurs without the guarantees of *Miranda* warnings and probable cause, since these protections generally are not constitutionally required for school-based investigations.[93]

According to a recent assessment of the National Incident Based Reporting System, which maintains records of crime incidents from 20 percent of the nation's police agencies, approximately one in six (17 percent) juvenile arrests stems from school-based misbehavior.[94] This figure casts doubt on the doctrinal contention that the investigation and punishment of

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[93] *See supra* notes 4-5 and accompanying text.

[94] Cook, Gottfredson & Na, *supra* note 9, at 319, 332.

school misconduct categorically differ from investigation and punishment for law enforcement purposes.

Moreover, data from jurisdiction-specific studies suggest an extremely high degree of variance across jurisdictions. State-level data show that the share of juvenile court cases that originate from school-based misconduct ranges from a low of 4 percent to a high of 43 percent.[95] These data, limited to formal referrals to juvenile court, do not provide a precise measure of the share of youth law enforcement referrals that are school-based. They omit incidents in which a youth is referred to law enforcement through an arrest at school, but charges are dropped before a case is filed in juvenile court. They also omit school-based law enforcement referrals that result in charges being filed in adult criminal court rather than in juvenile court.[96]

The Annual Report for the North Carolina Department of Juvenile Justice indicates that 43 percent (16,140 out of 37,584) of offenses that result in referral to the juvenile justice system are school based.[97] A recently published survey by education scholar Michael Krezmien and colleagues finds far lower rates in the five states for which it was able to obtain data: Arizona, Hawaii, Missouri, South Carolina, and West Virginia.[98] Among those states, West Virginia exhibited the highest share of court referrals that were school based, with approximately 17 percent of juvenile cases originating in schools, while Hawaii exhibited the lowest share, with only 4 percent originating in schools.[99] While it is not clear that the North Carolina report and the multistate study employed a sufficiently similar methodology to permit precise comparison, the results of the two reports suggest wide variance across states in the extent to which law enforcement is used to maintain school order.[100]

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[95] *See infra* notes 97-100 and accompanying text.

[96] The number of school-based law enforcement referrals that result in charges being filed in adult criminal court is likely to be particularly large in jurisdictions such as North Carolina, where youth aged sixteen or older are automatically processed through the adult criminal courts, regardless of the offense. N.C. GEN. STAT. ANN. § 7B-1604 (West 2004).

[97] N.C. DEP'T OF JUVENILE JUSTICE & DELINQUENCY PREVENTION, ANNUAL REPORT 21 (2010), *available at* http://www.ncdjjdp.org/resources/pdf_documents/annual_report_2010.pdf.

[98] Krezmien et al., *supra* note 9, at 283.

[99] *See id.*

[100] Similarly, according to a recent study by the Council for State Governments, only 6 percent of youth referrals to the juvenile court system in Texas (5349 out of 85,548 formal referrals) came directly from schools. COUNCIL OF STATE GOV'TS JUSTICE CTR. & PUB. POLICY RESEARCH INST., BREAKING SCHOOLS' RULES: A STATEWIDE STUDY OF HOW

A study of county-level data in Florida suggests that even within a given state, the extent to which law enforcement converges with school discipline varies considerably.[101] According to the Florida Department of Juvenile Justice, the statewide share of juvenile court referrals that stem from conduct on public school grounds, at a school bus stop, or at a school event is approximately 15 percent.[102] The rates for individual counties, however, diverge significantly from this baseline. In Gulf and Dixie Counties the percentage of delinquency referrals for school-based misconduct was only 8 percent, while in other counties more than a quarter of delinquency cases came from schools: Okeechobee (29 percent), St. Lucie (27 percent), Hamilton (27 percent), Jackson (26 percent), and Marion Counties (26 percent).[103] Again, these data are limited to cases resulting in a referral to juvenile court; they omit cases in which students are arrested but released before juvenile court charges are filed, and they omit cases in which youth are processed through the adult criminal justice system.[104]

Although differences in methodology across the studies limit to some degree the comparability of these data, the studies suggest that school discipline practices vary widely across jurisdictions. At the low end, in some jurisdictions as few as 4 percent of juvenile court cases may originate in schools; at the high end, as many as 43 percent may originate from schools.[105] Nonetheless, the data demonstrate that in at least some jurisdictions it has become difficult to defend the claim that school discipline differs categorically from law enforcement, or that school discipline serves educational rather than police purposes. The heavy reliance on law enforcement to maintain school order suggests that one can no longer assume a nonadversarial, benevolent relationship between school disciplinarian and student.

SCHOOL DISCIPLINE RELATES TO STUDENTS' SUCCESS AND JUVENILE JUSTICE INVOLVEMENT xii n.2 (2011) [hereinafter BREAKING SCHOOLS' RULES], *available at* http://justicecenter.csg.org/resources/juveniles. This figure likely understates the actual rate of law enforcement referral by schools because it appears to exclude incidents in which a police officer who is summoned to the school is the one to formally file a delinquency petition, a student is arrested at school but subsequently released without the filing of a juvenile court petition, or a student is processed through municipal rather than juvenile court.

[101] FLA. DEP'T OF JUVENILE JUSTICE, OFFICE FOR PROGRAM ACCOUNTABILITY, DELINQUENCY IN FLORIDA'S SCHOOLS: A SIX-YEAR STUDY (2010) [hereinafter DELINQUENCY IN FLORIDA'S SCHOOLS], *available at* http://www.djj.state.fl.us/research/School_Referrals/FY-2009-10-Delinquency-in-Schools-Analysis.pdf.

[102] In absolute numbers, the data show that there were 18,467 school-related delinquency referrals, out of a total 121,689 delinquency referrals statewide. *Id.* at 3.

[103] *Id.* at 4.

[104] *Id.* at 2.

[105] *See supra* notes 97-100 and accompanying text.

Number of school-based law enforcement referrals per one thousand enrolled students per year: Data showing rates of school-based law enforcement referrals per one thousand students per year likewise permit an evaluation of the claim that school discipline differs categorically from law enforcement. Where the rates of school-based arrest and referral are relatively high, the claim that the investigation and punishment of school misconduct furthers educational rather than law enforcement purposes becomes harder to defend. A number of recently published studies provide data on this measure. These data show that, as with the proportion of juvenile court referrals stemming from school-based misconduct, rates of school-based law enforcement referrals per one thousand enrolled students vary significantly across jurisdictions.[106]

The Florida Department of Juvenile Justice's Annual Report calculates the number of school-related delinquency referrals per one thousand students enrolled in grades six through twelve; statewide, there were thirteen (13) school-related delinquency referrals per one thousand middle and high school students.[107] Rates of school-based delinquency referrals varied dramatically across counties within Florida, though, from a low of only four (4) school-related delinquency referrals per one thousand students in Lafayette and Nassau Counties, to a high of forty-two (42) and fifty (50) referrals per one thousand students in Hamilton and Putnam Counties, respectively.[108] These figures understate the actual incidence of school-based law enforcement referral because they omit instances in which a student is arrested at school but released before charges are filed in juvenile court, and they omit cases referred to adult criminal court.

Even greater variability exists in Texas. The advocacy organization Texas Appleseed recently published its analysis of rates of school-based arrests in seventeen districts where data

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[106] These figures do not purport to estimate the likelihood that a given student will be subject to school-based law enforcement, because some students may have been referred to law enforcement more than once.

[107] DELINQUENCY IN FLORIDA'S SCHOOLS, *supra* note 101, at 5.

[108] The multistate study found a smaller range, from a low of two (2) school-based juvenile court cases per one thousand students enrolled in Hawaii, to a high of nine (9) cases per one thousand students in Missouri. These data, which unlike the Florida report include elementary school students, understate the arrest rate for middle and high school students who are arrested at higher rates than their younger counterparts. Krezmien, *supra* note 9, at 278.

were available.[109] The study, analyzing data from seventeen districts representing 13 percent of the state's student body, found that at the low end of the spectrum there were one-and-a-half (1.5) and two (2) school-based arrests per one thousand enrolled students in Castleberry and Wichita Falls districts, respectively.[110] At the high end of the spectrum, East Central reported fifty-one (51) arrests for every one thousand students.[111] These data also understate the actual incidence of school-based law enforcement referral, as they omit instances in which a student is referred to juvenile court without being arrested at school, such as when the student receives a summons to appear in lieu of arrest. Unlike the figures for Florida, these figures include elementary school students as well as middle and high school students; had the data excluded elementary school students, rates of school-based arrests per one-thousand enrolled middle and high school students would be higher.[112]

The Texas Appleseed study also provides data on the issuance of misdemeanor tickets in public schools.[113] These citations require the recipient to appear in municipal court and may result in fines of up to $500; a failure to appear subjects the individual to a bench warrant for arrest.[114] Data from the twenty-six districts for which data were available again show wide disparities in the administration of punishment.[115] At the lower end of the scale, United and Humble districts each issued fourteen (14) criminal citations per one thousand enrolled students,[116] while at the high end, Galveston issued 109 citations per one thousand enrolled students.[117] In Texas alone, then, there are as few as one-and-a-half (1.5) to as many as fifty-one (51) school-based arrests per one thousand enrolled

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[109] TEX. APPLESEED, TEXAS' SCHOOL-TO-PRISON PIPELINE: TICKETING, ARREST AND USE OF FORCE IN SCHOOLS 101 (2010) [hereinafter TEXAS APPLESEED], *available at* http://www.texasappleseed.net/images/stories/reports/Ticketing_Booklet_web.pdf.

[110] *Id.* at 104-05.

[111] *Id.*

[112] *Id.* at 114 (documenting data showing that majority of school-based arrests are for high school students).

[113] *Id.* at 67-96.

[114] *Id.* at 69.

[115] *Id.* at 67-96.

[116] *Id.* at 77-78 (indicating 522 tickets issued in United Independent School District, which enrolls 37,671 students, and 431 tickets issued in Humble Independent School District, which enrolls 31,144 students).

[117] *Id.* at 77 (indicating 921 tickets issued in the Galveston Independent School District, which enrolls 8,430 students).

students, and as few as fourteen (14) and as many as 109 misdemeanor citations per one thousand of these students.[118]

Types of behaviors for which students are subject to law enforcement referral: An examination of the types of behaviors for which students are referred to law enforcement provides another useful indicator to evaluate the factual supposition that school discipline differs categorically from the criminal process. Where law enforcement is being deployed to address student behavior that traditionally would have been handled more informally—through the imposition of after-school detention or suspension—the resulting adversarial relationship belies the claim that the intervention pedagogically benefits the punished student.

The South Carolina Department of Juvenile Justice's Annual Report indicates that "disturbance of schools" represents the single most frequent offense resulting in a referral to juvenile court.[119] Conduct resulting in a charge of "disturbance of schools" may not amount to conduct that would result in an assault charge or other more serious offenses. These data indicate that South Carolina schools heavily rely on law enforcement and juvenile courts to handle conduct that would not amount to a crime outside of the school context.

According to the Florida Department of Juvenile Justice, two-thirds of all school-related delinquency referrals involved misdemeanors, while one-third involved felonies.[120] Misdemeanor assault and battery and disorderly conduct violations represented the largest segment of school-based delinquency referrals, at 21 percent and 15 percent, respectively.[121] Weapons offenses counted for approximately 5 percent of all school-related delinquency referrals.[122]

The Texas Appleseed study found that among the twenty-two districts that disaggregated criminal citations by offense, more than half the tickets were for disorderly conduct (e.g., profanity, offensive gesture, or fighting) or disruption of class or transportation.[123] An additional 10 percent of the tickets

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[118] *See supra* notes 111-19 and accompanying text.

[119] S.C. DEP'T OF JUVENILE JUSTICE, 2009-2010 ANNUAL STATISTICAL REPORT 4 (2010), *available at* http://www.state.sc.us/djj/pdfs/2010%20Annual%20Statistical%20Report.pdf.

[120] DELINQUENCY IN FLORIDA'S SCHOOLS, *supra* note 101, at 8.

[121] *Id.*

[122] *Id.*

[123] TEXAS APPLESEED, *supra* note 109, at 82.

were for violations of curfew or the Student Code of Conduct.[124] Among the eleven school districts that disaggregated data on school-based arrests by offense, 24 percent of school-based arrests were for disorderly conduct[125]

Anecdotal newspaper accounts provide further corroboration that some schools rely on police to handle relatively minor forms of student misbehavior. In Lucas County, Ohio, the majority of school-related referrals to juvenile court were for disruptive conduct, while only approximately 2 percent were for more serious incidents such as assaulting a teacher or taking a gun to school.[126] In Lafayette Parish, Louisiana, 46 percent of school-based arrests were for disturbing the peace or simple assault or battery, while 4 percent were for weapons or drug offenses.[127] According to the presiding family court judge in Birmingham, Alabama, only approximately 7 percent of school-based arrests involved offenses that actually warranted arrest, such as weapons offenses or other felonies.[128] In some jurisdictions, then, school officials appear to have delegated their traditional authority to handle common forms of student misconduct—such as those involving disruptive behavior or fights—to law enforcement.

Data from these studies suggest that in some, but not all, jurisdictions it has become more difficult to claim that students accused of misconduct are investigated and punished for their own educational benefit, or that efforts to maintain school order are justified by pedagogical goals, not law enforcement ones. Rather, at the high end of the range, up to 43 percent of youth referrals to law enforcement involve school misconduct, and there are up to fifty (50) school-based referrals to juvenile court, fifty-one (51) school-based arrests, and 109 criminal citations for every one thousand students enrolled in public schools per year.[129] Nonetheless, these figures are not typical of all jurisdictions. Indeed, in some jurisdictions, as few as 4 percent of juvenile court cases stem from school

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[124] *Id.*

[125] *Id.* at 107.

[126] Sara Rimer, *Unruly Students Facing Arrest, Not Detention*, N.Y. TIMES, Jan. 4, 2004, *available at* http://www.nytimes.com/2004/01/04/us/unruly-students-facing-arrest-not-detention.html?%20pagewanted=al&src=pm.

[127] Marsha Sills, *Parish Schools See Reduced Violence*, BATON ROUGE ADVOC., May 30, 2009, at B1.

[128] Marie Leech & Carol Robinson, *Birmingham City Schools Rely on Arrests to Keep Order*, BIRMINGHAM NEWS (Mar. 22, 2009, 6:19 AM), http://blog.al.com/spotnews/2009/03/city_schools_rely_on_arrests_t.html.

[129] *See supra* notes 97, 109, 113, 119 and accompanying text.

misconduct, and there may only be four (4) school-based court referrals, one (1) or two (2) school-based arrests, and fourteen (14) criminal citations per one thousand students per year.[130]

C. Educational Impact of Law Enforcement Referrals

The increasing reliance on law enforcement referrals to maintain school order challenges the assumption that school discipline furthers educational interests. Whatever might be said about the pedagogical value of suspensions or other more traditional forms of school discipline, the available social science shows that referring a student to law enforcement has

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[130] *See supra* notes 100, 109, 111, 118 and accompanying text. An examination of the causes for these disparities is beyond the scope of this article. Nonetheless, it is worth noting that the disparities are not entirely randomized. As sociologist Paul Hirschfield has observed, "criminalization in middle class schools is less intense and more fluid than in the inner-city, where proximate or immediate crime threats are overriding concerns." Hirschfield, *supra* note 9, at 84; *see also* Maureen Carroll, Comment, *Educating Expelled Students After No Child Left Behind: Mending an Incentive Structure that Discourages Alternative Education and Reinstatement*, 55 UCLA L. REV. 1909, 1934-37 (2008) (discussing racial disparities and discrimination in school discipline); Heather Cobb, *Separate and Unequal: The Disparate Impact of School-Based Referrals to Juvenile Court*, 44 HARV. C.R.-C.L. L. REV. 581, 581 (2009) (same); Elizabeth E. Hall, *Criminalizing Our Youth: The School-to-Prison Pipeline v. the Constitution*, 4 S. REG'L BLACK L. STUDENTS ASS'N L.J. 75 (2010) (same). A qualitative study conducting interviews with law enforcement officers deployed to public schools across Massachusetts concluded that larger, urban school districts rely on arrests to maintain school discipline more heavily than suburban and rural school districts; officers stated that in urban school districts, school officials prioritized sending a "get tough" message, while those in affluent suburban schools with predominantly white populations prioritized preserving the reputation of their students and the school. Thurau & Wald, *supra* note 8, at 988, 1010. Given the disproportionate representation of minority students in urban schools, it may come as no surprise that students of color bear the brunt of the trend toward increased criminalization. According to the multistate study described in the text, the likelihood of school-based law enforcement referrals for Latino students in Arizona is three times higher than for white students; the rate for black students is twice as high as for white students. Krezmien et al., *supra* note 9, at 14. The Advancement Project reports similar trends, finding that black youth are more than two times more likely to be referred to law enforcement at school than white students in Colorado, two-and-a-half times more likely in Florida, and three-and-a-half times more likely in Philadelphia. ADVANCEMENT PROJECT, TEST, PUNISH, AND PUSH OUT: HOW "ZERO TOLERANCE" AND HIGH-STAKES TESTING FUNNEL YOUTH INTO THE SCHOOL-TO-PRISON PIPELINE 19 (2010), *available at* http://www.advancementproject.org/sites/default/files/publications/rev_fin.pdf. Moreover, a report by the American Civil Liberties Union suggests these racial disparities cannot be blamed exclusively on differences across school districts or differences in students' behavior. It found that black students involved in physical altercations are twice as likely to be arrested at school in the same district as white students who commit the same acts; likewise, black and Latino students who commit drug offenses at school are ten times more likely to be arrested than white students who commit drug offenses in the same district. ACLU, HARD LESSONS: SCHOOL RESOURCE OFFICER PROGRAMS AND SCHOOL-BASED ARRESTS IN THREE CONNECTICUT TOWNS 26 (2008), *available at* http://www.aclu.org/files/pdfs/racialjustice/hardlessons_november2008.pdf.

negative educational consequences not only on the youth referred, but also likely on the larger student body.

1. Educational Impact on the Punished Student

Behavioral theories posit three competing models of the relationship between harsh punishments and youth outcomes: deterrence theory, propensity theory, and labeling theory.[131] Deterrence theory, as its name suggests, posits that formal behavioral interventions deter youth from future deviant behavior. Propensity theory suggests that harsh punishments neither encourage nor discourage future deviant conduct; any relationship between the punishment and future behavior is correlative rather than causative, because the same inherent traits that led to the first instance of misconduct will lead to future deviance. Conversely, labeling theory suggests that harsh punishments for youth will actually increase future misconduct by labeling the youth as a deviant and creating a deviant self-concept with potentially life-altering consequences; others may also come to identify the youth as a deviant, thereby foreclosing opportunities that would otherwise have been available. Among the three competing theories, only deterrence theory supports the doctrinal assumption that punitive forms of school discipline such as a school-based arrest or law enforcement referral further the educational interests of the punished youth.

In fact, the available empirical evidence lends no support for the deterrence theory with respect to law enforcement referrals for school-based offenses. On the contrary, social science consistently shows that a law enforcement referral has significant negative consequences on youth educational outcomes. Among the more recent research, a 2006 study by criminologist Gary Sweeten assessed the relationship between law enforcement referral and educational attainment. Using data from the National Longitudinal Survey of Youth, a nationally representative sample, the study found that a first-time arrest during high school years nearly doubles the likelihood of dropping out of high school; an arrest coupled with a court appearance quadruples the likelihood.[132] The magnitude of this effect holds, even after controlling for other factors thought to influence dropout rates including being held

[131] *See* Gary Sweeten, *Who Will Graduate? Disruption of High School Education by Arrest and Court Involvement*, 23 JUST. Q. 462, 463 (2006).

[132] *Id.* at 473.

back a grade, living in a single-parent household, poor prior academic performance, and rates of delinquent conduct.[133] Similarly, a 2009 study by sociologist Paul Hirschfield assessed the impact of a first-time arrest on high school dropout rates in Chicago.[134] Drawing a sample of students in Chicago Public Schools with high concentrations of low-income and minority students, it found that those who were arrested in ninth or tenth grade were six to eight times more likely to drop out of high school as classmates who were not arrested, even after controlling for variables including prior delinquency, peer delinquency, truancy, academic achievement, and anger control.[135] A number of other studies have drawn similar conclusions regarding the negative impact of arrest on high school graduation rates.[136]

None of these studies specifically examines the impact of an arrest when it occurs on school grounds or for school-related conduct. Yet, there is no reason to think that the negative educational impact of school-based arrest would be any less than the negative educational impact of arrest generally. On the contrary, given the importance of school officials and students maintaining positive relationships, one would expect that the negative impact of an arrest would be exacerbated when the arrest occurs at school. Further research should be conducted on this question. Nonetheless, in light of the findings to date, the use of school-based law enforcement referrals cannot currently be defended on the ground that it educationally benefits the referred youth.

2. Educational Impact on Other Students

Moreover, there is little empirical support for the claim that the use of law enforcement to maintain school order accrues educational benefits to the larger student population. It may well be true that if one student persistently disrupts the classroom, removal of that student enhances the remaining students' ability to learn.[137] However, there is no evidence

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[133] *Id.* at 478.

[134] Paul Hirschfield, *Another Way Out: The Impact of Juvenile Arrests on High School Dropout*, 82 SOC. OF EDUC. 368, 369 (2009).

[135] *Id.* at 368.

[136] *Id.* at 370.

[137] *See* Cook et al., *supra* note 9, at 372 ("Clearly, removing troublemakers from school helps maintain an environment more suitable for learning for the remaining students.").

suggesting that referring the student to law enforcement specifically—in lieu of or in addition to some other mechanism such as traditional suspension—improves the educational climate for the remaining students. Indeed, a recent meta-analysis of 178 individual studies assessing the effectiveness of different school-based disciplinary interventions found no evidence that the use of arrest and juvenile courts to handle school disorder reduces the occurrence of problem behavior in schools.[138] Some scholars have reasoned that, by creating adversarial and distrustful relationships between law enforcement and school authorities on the one hand, and the student body on the other, coercive police-like interventions may actually increase school disorder. Education scholars Matthew Mayer and Peter Leone analyzed data from the National Crime Victimization Survey to assess the relationship between coercive school security measures and educational climate and found that restrictive measures such as the use of security personnel, metal detectors, and locker searches were not only associated with higher levels of school disorder, but also possibly caused that disorder. Based on these findings they concluded, "creating an unwelcoming, almost jail-like, heavily scrutinized environment, may foster the violence and disorder school administrators hope to avoid."[139] Similarly, one criminologist recently expressed concern that "aggressive security measures produce alienation and mistrust among students" and such measures "can disrupt the learning environment and create an adversarial relationship between school officials and students,"[140] while another criminologist suggested that the use of aggressive law enforcement tactics in schools "may cause students to distrust educational and law enforcement authorities which could motivate students to engage in greater delinquency."[141] Far from suggesting that law enforcement referrals improve the educational climate for remaining students, the limited evidence to date has led experts to conclude that such referrals likely compromise educational goals.

The primary doctrinal justifications for restricting the procedural rights of youth when they are investigated or

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[138] *See id.* at 369.

[139] Matthew J. Mayer & Peter E. Leone, *A Structural Analysis of School Violence and Disruption: Implications for Creating Safer Schools*, 22 EDUC. & TREATMENT OF CHILDREN 333, 349 (1999).

[140] Randall R. Beger, *The Worst of Both Worlds*, 28 CRIM. JUST. REV. 336, 340 (2003).

[141] Brown, *supra* note 9, at 599.

punished for misconduct—that such investigations and punishments serve the youth's educational interests and that they differ categorically from law enforcement—prove considerably less persuasive in light of evidence of contemporary school discipline practices and their likely educational impact on students. Whatever might be said about the more traditional school discipline practices of suspension or paddling, it can hardly be argued that school-based arrest is "a valuable educational device"[142] or has "long been an accepted method of promoting good behavior and instilling notions of responsibility . . . into the mischievous heads of school children."[143] In jurisdictions where school officials frequently remove students from schools through formal arrest or the filing of a delinquency petition, one can no longer claim that the interests of the investigating school official and the student are aligned rather than adversarial. The next part explores the implications of these findings.

III. INCORPORATING CONSIDERATION OF THE EDUCATIONAL IMPACT OF SCHOOL DISCIPLINE

The developing body of empirical evidence in the preceding part challenges the doctrinal justification for denying procedural protections to youth who are accused of misconduct in schools. To the extent school discipline increasingly takes the form of law enforcement referrals, it can no longer be justified by the educational benefits it confers on the child or its purportedly nonadversarial nature. Those rationales for insulating traditional forms of school discipline from constitutional protections simply no longer apply in jurisdictions that rely on law enforcement to maintain order in schools.

Changes in the operation of school discipline parallel the evolution of the juvenile justice system decades ago. Until the 1960s, youth in juvenile court were denied the constitutional procedural protections afforded to adults in criminal court on the ground that the juvenile court, unlike the adult criminal court, was assumed to act in a nonadversarial manner in furtherance of the accused youth's interests—to rehabilitate rather than punish the youth.[144] By the 1960s,

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[142] Goss v. Lopez, 419 U.S. 565, 580 (1975).

[143] Ingraham v. Wright, 430 U.S. 651, 659 (1977).

[144] *In re* Gault, 387 U.S. 1, 25-26 (1967) ("[I]t is urged that the juvenile benefits from informal proceedings in the court. The early conception of the Juvenile

however, emerging social science evidence on actual juvenile court practices and their impact on the emotional and social development of youth cast doubt on those earlier premises:

> While there can be no doubt of the original laudable purpose of juvenile courts, studies and critiques in recent years raise serious questions as to whether actual performance measures well enough against theoretical purpose to make tolerable the immunity of the process from the reach of constitutional guarantees available to adults.[145]

The Supreme Court reasoned that "neither sentiment nor folklore should cause us to shut our eyes" to these studies.[146] Evaluating this evidence, it concluded first in *Kent v. United States* that juveniles had the "worst of both worlds"—neither the nurturing benefit of a nonadversarial system, nor the procedural protections of adult criminal court.[147] One year later, in *In re Gault*, it found that "[t]he rhetoric of the juvenile court movement has developed without any necessarily close correspondence to the realities of court and institutional routines."[148] In light of empirical developments, the Court reversed decades of precedent to extend to juveniles many of the constitutional procedural protections previously reserved for individuals in the adult criminal system.

Similarly, recent empirical evidence suggests that school discipline practices may no longer advance the beneficent, nonadversarial goals that once insulated them from ordinary judicial scrutiny. In light of the growing divergence between stated goals and actual practices in school discipline, courts should reconsider the validity of doctrinal restrictions on procedural rights in the school discipline context, just as the Supreme Court did for juvenile courts in *Gault*. This part sets forth a framework for courts to do so. In addition, it discusses the potential role of nonjudicial actors in reform efforts.

Court proceeding was one in which a fatherly judge touched the heart and conscience of the erring youth by talking over his problems, by paternal advice and admonition . . . .").

[145] Kent v. U.S., 383 U.S. 541, 554-56 (1966).

[146] *In re* Gault, 387 U.S. at 21.

[147] 383 U.S. at 556.

[148] 387 U.S. at 30 (citation omitted).

A. A Context-Specific Approach to Procedural Protections in Courts

In light of the empirical evidence showing an increased reliance on law enforcement to maintain public school order and the educational harms associated with this increased reliance, courts should critically evaluate the operation of school discipline to ensure that it actually advances the educational interests that previously justified insulating school discipline from closer judicial scrutiny.[149] Given how significantly school discipline practices vary across jurisdictions, however, this analysis should be location-specific.[150]

The framework proposed here preserves the presumption that school discipline generally serves pedagogical goals, but permits the youth to rebut this presumption by showing that discipline practices in the youth's particular school or district do not further educational interests. Relevant evidence might include, for example, data showing high rates of school-based arrests in the school or district, the frequent use of school-based arrests to handle relatively minor misconduct, or expert testimony regarding the educational impact of particular disciplinary practices employed in the school or district.

Reviewing this evidence, the court would render an interpretive judgment as to whether the particular discipline practices in a school or district primarily further a law enforcement goal rather than an educational one. Where the court finds the evidence persuasive, investigations of student misconduct would be presumed adversarial and thus subject to the full scope of constitutional protections that would be available to youth outside of the school context. By contrast, where school discipline practices adhere to the traditional model of discipline furthering pedagogical goals, doctrinal restrictions on constitutional rights would remain in place. Thus, the availability of procedural protections for youth in public schools would depend on a jurisdiction-specific assessment, rather than a categorical assumption, of the educational benefit of school

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[149] *See* Eve Brensike Primus, *Disentangling Administrative Searches*, 111 COLUM. L. REV. 254, 310-11 (2011) (critiquing current "one-size-permits-everything" categorical approach to administrative searches such as those conducted in public schools).

[150] *See also* Anthony V. Alfieri, *Post-Racialism in the Inner City: Structure and Culture in Lawyering*, 98 GEO. L.J. 921, 959-60 (2010) (urging development of "local, school-specific fact investigation" to examine impact of school-based law enforcement referrals on youth).

discipline practices. This framework ensures that the education of youth is the paramount interest served.

There are a number of potential objections to this contextualized approach. First, one might argue that even if school discipline no longer serves the student's educational interests, procedural rights should remain limited to protect the interests of *other* students. Second, a critic might contend that even though jurisdictions differ in their reliance on law enforcement, a categorical rule that assumes that school discipline always furthers the educational interests of youth is preferable because it is easier to administer. Third, one might argue that a better approach would be to employ an individualized analysis to determine whether the investigation of misconduct in a particular case furthers educational goals. Fourth, one might object to this type of contextualized rule on the ground that it would improperly result in constitutional protections varying by geography (e.g., probable cause required for searches in schools in district *A*, but not in district *B*). Fifth and finally, the framework is subject to the criticism that courts should not be in the business of second-guessing the educational value of school discipline. This section addresses each in turn.

Rejecting reliance on the interests of other students. One might argue that even if the relationship between investigating official and accused student is recognized as adversarial and in service of law enforcement, procedural restrictions may remain warranted because the interests of the individual student are outweighed by the countervailing interests of other students in learning without disruption.[151] The Supreme Court has noted this concern about preserving the rights of other students in some cases.[152] This view does not necessarily hold that the ordinary calculus weighing individual interests against collective interests does not apply, but rather that the collective interest in school order weighs so heavily as to overcome the competing individual student's interest in securing the full scope of procedural protections.

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[151] *See* Ryan, *supra* note 6, at 1341, 1411-14 (interpreting limits on constitutional rights in school discipline cases as resting on the view that they are necessary to "preserve an atmosphere that is safe and conducive to learning" and "to maintain discipline in order to transmit academic knowledge"); *see also* Tribe, *supra* note 7, at 314 n.128 ("[E]ven if in general the teachers' and child's interest truly converge, at the moment of suspension convergence must surely turn into clash: the teacher is saying that the best interests of *other students* will be served by this particular student's suspension.").

[152] *See supra* notes 59-61 and accompanying text.

As a purely doctrinal matter, this approach is not entirely satisfactory. Relying on the interests of other students fails to articulate why the collective interest in school order should outweigh the collective interest in, say, reducing violent crimes in neighborhoods. It sets up the same tension between individual interests and collective interests that exists for all criminal procedural protections. Perhaps for this reason, the Court has never relied exclusively on this rationale, instead using it to buttress its primary rationale—that the collective interests and the individual student's interests are *aligned*.

Moreover, as an empirical matter, there is little evidentiary support in the literature for the claim that the use of law enforcement, rather than other forms of discipline, in fact advances the educational interests of other students. On the contrary, as set forth in the preceding part, social scientists from related disciplines in education, criminology, and sociology suggest that heavy reliance on policing measures in public schools generates an adversarial atmosphere that may compromise the educational environment for all students.[153]

Rejecting a categorical rule. The proposed context-specific approach to determining the scope of procedural rights is preferable to an alternative categorical regime notwithstanding concerns of administrability. Concededly, the current categorical rule that exempts school searches from probable cause requirements and presumes school officials are not agents of the police for *Miranda* purposes is easy for courts to apply consistently; courts and litigants are not required to engage in a potentially costly fact-specific assessment of actual school discipline practices.[154] A defense of the current categorical rule might reason that schools in general continue to use school discipline to further educational interests, even if some schools depart from this norm; thus, the factual premise on which the doctrinal restrictions rest—that school discipline and law enforcement generally remain discrete—remains accurate *most of the time.*

Such reliance on generalities is explicitly permissible pursuant to the *Mathews v. Eldridge* framework for determining procedural rights in the civil context, which assesses the risk of error associated with the denial of

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[153] *See supra* notes 138-41 and accompanying text.

[154] *See* Evan H. Caminker, *Precedent and Prediction: The Forward-Looking Aspects of Inferior Court Decisionmaking*, 73 TEX. L. REV. 1, 38-41 (1994) (describing normative reasons for preferring nationally uniform legal rules).

procedural protections in the "generality of cases, not the rare exceptions."[155] Under this view, restrictions on procedural rights are warranted so long as school discipline "generally" is discrete from law enforcement, and disciplinarians "rarely" stand in an adversarial position *vis a vis* students.

The increasing availability of relevant data mitigates this concern about administrability. Federal agencies have amended the biannual federal Civil Rights Data Collection to require school districts to maintain and publicly report data on the total number of student referrals to law enforcement and the total number of school-related arrests for each school.[156] These mandatory data-collection and reporting requirements reduce the litigation costs associated with obtaining and analyzing this information.

More importantly, the primary purpose of uniform, categorical rules is to ensure that "similarly situated litigants are treated equally."[157] Where the facts show that litigants are not, in fact, similarly situated in a legally significant way, the application of the same rule to them is no longer appropriate.[158] In addition, reliance on generalities in the name of efficiency is inappropriate where, as here, criminal—as opposed to civil—procedures are implicated.[159] As Jerry L. Mashaw has pointed

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[155] Mathews v. Eldridge, 424 U.S. 319, 335, 344 (1976) (stating that determination of what process is due in the administrative context requires balancing of three factors: "First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail."); *see, e.g.*, Carey v. Piphus, 435 U.S. 247, 259 (1978) (applying *Mathews* framework to determine procedural due process rights to challenge school suspension); Ingraham v. Wright, 430 U.S. 651, 675 (1977) (same for corporal punishment); Doe *ex rel.* Doe v. Todd Cnty. Sch. Dist., 625 F.3d 459, 462-64 (8th Cir. 2010) (same for placement in an alternative high school setting); Watson *ex rel.* Watson v. Beckel, 242 F.3d 1237, 1240 (10th Cir. 2001) (same for expulsion); Palmer v. Merluzzi, 868 F.2d 90, 95 (3d Cir. 1989) (same for suspension from interscholastic athletics); Newsome v. Batavia Local Sch. Dist., 842 F.2d 920, 923-24 (6th Cir. 1988) (same for expulsion); *In re* Expulsion of E.J.W. from Indep. Sch. Dist. No. 500, 632 N.W.2d 775, 780 (Minn. Ct. App. 2001) (same); Hinds Cnty. Sch. Dist. Bd. of Trs. v. R.B. *ex rel.* D.L.B., 10 So. 3d 387, 399-402 (Miss. 2008) (same).

[156] OFFICE FOR CIVIL RIGHTS, U.S. DEP'T OF EDUC., 2009-10 CIVIL RIGHTS DATA COLLECTION, OMB 1875-0240 (on file with author).

[157] *See* Caminker, *supra* note 154, at 39-40.

[158] *See generally* Alexes Harris, *Diverting and Abdicating Judicial Discretion: Cultural, Political, and Procedural Dynamics in California Juvenile Justice*, 41 LAW & SOC'Y REV. 387 (2007) (discussing competing values of predictability and uniformity while describing tension between individual justice versus equal justice).

[159] Medina v. California, 505 U.S. 437, 443 (1992) (rejecting applicability of *Mathews* balancing framework for criminal procedural rights). *But see* Hamdi v. Rumsfeld, 542 U.S. 507, 527-28 (2004).

out, criminal procedural rules prohibit coerced confessions not because they will yield *inaccurate* conclusions about guilt—indeed, they are often all too accurate—but rather because such confessions offend our basic sense of personal autonomy.[160] Our juvenile and criminal justice systems require a more granular assessment of facts than the current categorical rule provides.

Rejecting an individualized rule. In light of the need for a more granular rule, one might argue in favor of an individualized case-by-case assessment of whether procedural rules should be extended to a particular student, instead of the jurisdiction-specific rule proposed here. This alternative approach might determine procedural rules depending on, for example, whether a school resource officer was present or participated in the particular search or questioning, or the subjective intent of the school official in conducting the search or questioning.

This individualized alternative, however, would not be workable. The presence or absence of a school resource officer does not indicate whether a search or questioning was carried out for law enforcement purposes. One recent study found that the presence of school resource officers was not correlated with the number of school-based arrests in a school.[161] The particular roles played by school resource officers differ significantly across schools. In some schools they are charged with enforcement of criminal laws, while in others they focus on mentoring, counseling, and teaching.[162] Because of this variability in roles, school resource officers cannot neatly be categorized as law enforcement or school official. The better approach to determine whether school investigations serve law enforcement purposes is one that examines aggregate data of rates of law enforcement referrals in the particular school or district.

Nor would it be desirable for a court to attempt to discern the subjective intent of individual school officials to determine

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[160] Jerry L. Mashaw, *Administrative Due Process: The Quest for a Dignitary Theory*, 61 B.U. L. REV. 885, 904-05 (1981) (arguing that due process seeks to protect dignitary value in privacy in the prohibition against coerced confessions and unreasonable searches); *see also* Martin H. Redish & Lawrence C. Marshall, *Adjudicatory Independence and the Values of Procedural Due Process*, 95 YALE L.J. 455, 481 (1986) (suggesting core value of efficiency embodied in *Mathews* balancing test differs from prior core due process value of fairness).

[161] Theriot, *supra* note 9, at 284-85 (finding that the presence of school resource officers does not predict more total arrests, but does predict more arrests for disorderly conduct).

[162] PETER FINN & JACK MCDEVITT, NATIONAL ASSESSMENT OF SCHOOL RESOURCE OFFICER PROGRAMS 43 (2005).

whether a particular search or interrogation was for law enforcement purposes; this approach would present significant evidentiary difficulties and potentially encourage false statements from school officials. More importantly, such an individualized rule would chill school principals, who might feel pressured to provide *Miranda* warnings any time they questioned a student about anything—even about not having a hall pass—in case the student responded with incriminating statements that might subsequently be excluded from court because of a *Miranda* violation. The context-specific rule, by contrast, would encourage school officials to provide procedural protections only in schools or districts that routinely rely on law enforcement, and not in those schools or districts that do not.

Accepting geographically contingent rules. A fourth objection would challenge the proposed context-specific rule because it would result in constitutional protections varying by geography: probable cause and *Miranda* warnings would be required for student investigations in district *A*, but not in district *B*. There is precedent for these location-specific constitutional protections, however.

In *Illinois v. Wardlow*, the Supreme Court concluded that the question of whether flight from the police provides reasonable suspicion to justify a stop-and-frisk depends on background facts regarding the particular area—specifically, the level of crime in that particular area.[163] Here, courts would employ a similar approach to reject the categorical rule denying procedural protections in schools and instead determine the entitlement to such protections based on the background facts of student criminalization in the particular school or district. In those schools or districts in which law enforcement goals were shown to predominate over educational ones, courts would demand probable cause and *Miranda* warnings for school-based investigations.[164]

Accepting educational assessments by courts*:* Finally, one might object to the proposed context-specific approach on the ground that courts should not be in the business of second-

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[163] Illinois v. Wardlow, 528 U.S. 119 (2000).

[164] *See also* Livingston, *supra* note 7, at 286 (arguing that courts should consider "character and social meaning" of encounters between officers and individuals to determine whether the encounter furthers ordinary law enforcement goals and should thus be subject to ordinary criminal procedural protections, or whether, instead, the encounter lacks the adversarial relationship characteristic of law enforcement encounters and should thus benefit from more relaxed procedural protections).

guessing the decisions of school officials.[165] As the Supreme Court emphasized in the student speech case *Hazelwood School District v. Kuhlmeier*, "the education of the Nation's youth is primarily the responsibility of parents, teachers, and state and local school officials, and not of federal judges."[166]

Notwithstanding the deference afforded to school officials, however, the *Kuhlmeier* decision affirmed the propriety of judicial scrutiny over the educational value of school officials' decisions. In *Kuhlmeier*, which involved censorship of a high school newspaper published by students in a journalism class, the Court held that even in the context of classroom activities, where the deference afforded to school officials is greatest, it would review a school official's conduct to determine whether it is "reasonably related to legitimate pedagogical concerns."[167] If courts are trusted with reviewing the educational goals of in-classroom decisions in the First Amendment context—albeit pursuant to a forgiving standard of review—it is difficult to understand why they should not be trusted with determining whether particular discipline practices further educational goals in the Fourth and Fifth Amendment contexts, which involve the procedural rights of criminal suspects, an area in which courts have particular expertise.[168]

B. The Role of Nonjudicial Actors in Preserving the Educational Value of School Discipline

Ultimately, courts have limited authority in shaping school discipline. They may determine which procedural protections will extend to youth who are investigated or punished at school, but they lack the authority to determine what kind of conduct warrants punishment, and what kind of punishment should be imposed. They are poorly situated institutionally to prevent criminal charges from being filed against a student for engaging in a schoolyard shoving match or cursing loudly in class.[169] Therefore, a critical role exists for

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[165] Buss, *supra* note 3, at 570 (discussing institutional disadvantages of judicial determinations of school policies).

[166] 484 U.S. 260, 273 (1988).

[167] *Id.*

[168] Buss, *supra* note 3, at 571 (noting that, although "the public school context may require special latitude for educational or administrative judgment," procedures involving alleged student misconduct are within "the field in which courts are most competent").

[169] *See* William J. Stuntz, *Implicit Bargains, Government Power, and the Fourth Amendment*, 44 STAN. L. REV. 553, 563 (1992) (noting that robust procedural

nonjudicial actors to ensure that these decisions are informed by the educational impact of discipline practices.[170] Even with robust judicial procedural protections, nonjudicial actors including school boards, principals, teachers, and individual police officers will always retain a great deal of discretion in determining how to handle student misconduct. In light of the emerging empirical evidence, those charged with developing discipline practices should reduce reliance on law enforcement and instead institute practices that improve educational outcomes for youth.

Policy makers in several jurisdictions have already taken the lead in examining the intersection between school discipline and law enforcement. For example, school officials in Clayton County, Georgia, a part of the Atlanta Metro region, convened a Blue Ribbon Commission to study school discipline issues.[171] In its report, the Commission found that in the span of a few years, the number of student referrals to law enforcement per year grew from eighty-nine to 1,400.[172] The Commission further found that most of the offenses involved minor incidents such as fights or disorderly conduct that "have traditionally been handled by the school and are not deemed the type of matters appropriate for juvenile court."[173] Based on these empirical findings, the chief judge of the local juvenile court convened a group of local stakeholders including parents, police officers, school officials, and juvenile public defenders to discuss the use of the juvenile justice system to maintain student discipline. After a series of roundtable meetings, participants reached a resolution that would further school safety and at the same time reduce the number of youth referred to juvenile court for school-based misconduct. The resulting cooperative agreement imposed a three-strikes policy for disciplinary infractions.[174] The first time a child commits certain offenses identified as "focus acts"—affray, disruption of school, disorderly conduct, minor obstruction of the police, and

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protections mean little when there are no substantive limits to the government's ability to define impermissible behavior, as in the situation of a school principal).

[170] Michael Heise, *Litigated Learning and the Limits of Law*, 57 VAND. L. REV. 2417 (2004) (discussing limits of litigation to create social change in education).

[171] CLAYTON CNTY. PUB. SCH., BLUE RIBBON COMMISSION ON SCHOOL DISCIPLINE: A WRITTEN REPORT PRESENTED TO THE SUPERINTENDENT AND BOARD OF EDUCATION (1997).

[172] *Id.*

[173] *Id.*

[174] Clayton County Cooperative Agreement (2007), *available at* http://www.juveniledefender.org/files/resources-juvenile-cooperative_agreement_070804.pdf.

criminal trespass—the student receives a warning rather than being referred to law enforcement, as was the prior practice.[175] If the youth commits one of these offenses a second time, the child is referred to a school conflict-diversion program, mediation program, or other court-sponsored program.[176] It is only if the student commits the offense a third time that he or she may be referred to law enforcement.[177]

Importantly, the Cooperative Agreement has succeeded not only in reducing the number of school-based arrests, but also in improving school order and, according to its advocates, educational outcomes. Since the agreement was implemented, the number of dangerous weapons incidents decreased by 70 percent, fighting offenses decreased by 87 percent, and other focus acts decreased by 36 percent.[178] Advocates for the reform effort maintain that the reduced reliance on school-based arrests furthers safety goals by facilitating nonadversarial relationships between students and authority figures.[179] At the same time, graduation rates increased by 20 percent, although it is not clear that this can be attributed to the reduced reliance on law enforcement.[180] Similar community reform efforts are underway in Denver, Baltimore, Raleigh, San Francisco, Atlanta, and Birmingham.[181] These efforts suggest the possibility of effective reform by nonjudicial actors to ensure that mechanisms for maintaining school order actually benefit the educational interests of students.

CONCLUSION

Emerging empirical evidence casts significant doubt on the ongoing validity of doctrinal justifications for denying procedural protections to youth accused of misconduct in schools. Where a growing number of jurisdictions are relying on

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[175] *Id.*

[176] *Id.*

[177] *Id.*

[178] STOP THE SCH. HOUSE TO JAIL HOUSE TRACK, http://www.stopschoolstojails.org/clayton-county-georgia.html (last visited Feb. 28, 2012); *see also* Stephen Teske, Power Point Presentation: Improving School & Community Safety: An Multi-Integrated Systems Approach (Apr. 10-13, 2010), *available at* http://juvjustice.org/media/resources/public/resource_395.pdf.

[179] STOP THE SCH. HOUSE TO JAIL HOUSE TRACK, *supra* note178.

[180] *Id.*

[181] *See* JASON LANGBERG ET AL., ADVOCATES FOR CHILDREN'S SERVICES, LAW ENFORCEMENT OFFICERS IN WAKE COUNTY SCHOOLS: THE HUMAN, EDUCATIONAL, AND FINANCIAL COSTS 10-11 (2011), *available at* http://www.newsobserver.com/content/media/2011/2/3/SRO%20Report.pdf.

law enforcement to maintain school order, the investigation and punishment of youth can no longer categorically be insulated from judicial scrutiny on the ground that it furthers the educational interests of the suspect-youth. Just as the Supreme Court in *Gault* confronted emerging factual evidence regarding the operation of the juvenile justice system to extend fuller procedural protections to youth in juvenile court, courts should consider how school discipline actually operates in today's society and revisit the scope of procedural protections available to youth in public schools accordingly.

This article provides a descriptive assessment of the increased criminalization of school discipline and its impact on youth and sets forth a means by which courts and policymakers should respond to these factual developments. The underlying causes of such criminalization and the reasons for the disparities among jurisdictions are beyond the scope of this article. Such factors may include the availability of federal funding for school resource officers, reduction of resources for classroom management training, overcrowded classrooms, income levels, racial demographics, and dismantling of desegregation decrees, among many others. Future research in this area will be important to ensure that youth benefit from the model of school discipline as educational tool idealized by the Court.