

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

Our legal jurisprudence has only recently begun to take notice of adolescence as a stage of life from childhood and adulthood.

these teenage behaviors. Over the past few decades in America, classic misbehaviors through serious discipline has become common. Nowadays, teenagers accused of stealing, fighting, "wronging the ancients"

³ increasingly face suspension from school, or even an introduction into the juvenile justice system.

Take the story of Jerome, a sophomore in high school in the inner ring suburbs of Saint Louis.

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

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

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

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

23. *Id.* at 216.

24. *Id.* at 207.

25. R.M. Ingersoll, *Why Do High Poverty Schools Have Difficulty Staffing Their Classrooms With Qualified Teachers?* 11 (Center for American Progress ed., 2004), <https://www.americanprogress.org/issues/education/news/2004/11/19/120500-high-poverty-schoolshavedifficulty-staffing-their-classrooms-with-qualified-teachers/> [https://perma.cc/A3D7-6L7].

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

27. Matthew I. Fraidin, *Decision Making in Dependency Court: Heuristics, Cognitive Biases, and Accountability*, 6 *CLEV. ST. L. REV.* 913, 925-26 (2013).

28. See *infra* Section III.

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

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

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

Successful reform should incorporate our understanding of successful youth development and the impact of trauma. To be truly impactful, however, reforms also need to focus on combatting the role of bias in adult decision makers. It is not enough to train or encourage adults to use a more forgiving approach toward

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

A. Natural Tendencies towards Risk Taking and Peer Orientation

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

This dual system change means adolescents have different biological tendencies toward rewards and risks.⁴⁴ Evolutionary researchers theorize these are adaptive processes helping adolescents move from the safety of home into new and often scary adult territory.

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statements, respond in monosyllables, and provide nonlinear and confusing narratives.⁵⁷

Luckily, desistence from many of these behaviors seems to be a natural

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traumatic experiences yield misbehaving youth was the origin of our juvenile justice system.⁶³

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

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

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

Adults, to be successful with any youth, need to be conscious of their own

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are told words suggesting violence—“leg, break, arm, his—imediely before being asked to characterize behavior of people ty encountered, those subjct are more liely to characterihe behavior as aggressie.⁷⁷ Peoples initia impressions of another person, especially if it creates particularly positive or neae emotions, will remain consistent despite new encounters in large part due to how we are primed to viw them.⁷⁸

Se -serving bias describes people's tendency to interpret events in a way that is advantageous for thei own esteem by takig credit for success and denying responsibility for fre.⁷⁹ Se -serving bias is shown through behavior demonstrating a common human tendency to interpret the world to make it square more comfortably with one's own intes.⁸⁰ Pe often overstate the rol they have played in an event where they participated, particularly if they are proud of the outcome.⁸¹ This is adoptive behavior, and can give a person the confidence to reach beyond what he or she could otherwise initiate. These biaie he decion maers fee in difficult situans by reeving cognitive dissonance arising out of uncertainty.⁸²

This bias is amplified in a profession like teachig, where a teacher's self in his or her own efficacy is essential for functioning.⁸³ For example, research shows tees will attributestudets ' high grades to their own skill in teaching and preparing, and low grades to the student's failure to pa ation or prepare.⁸⁵ Teachers seem generally at a loss to identif causes for student misbehavior, but most teachers commonly cited student's home lives as the

77. Id. “Once the encoding takes place and an overall impression of the target is formed, however, it may then be used as a basis for inferring traits of the target that are unrelated to either the original behavioral information or the material in the priming task at all.”⁷⁷ The likelihood any information will be used to encode future inputs increases with the number of times the person has been primed with that specific information.⁷⁸

78. Kathryn M. Stanchi, *The Power of Priming in Legal Advocacy: Using the Science of First Impressions to Persuade the Reader*, 44 OR. L. REV. 305, 305-06 (2010).

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

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

'Just world theory' posits that most people have intrinsically organized their mindset around the idea of deservingness— that for both themselves and for others, the outcomes they receive are the ones they deserve. In the face of examples of injustice or suffering, people are motivated to minimize these examples to maintain the appearance that the world gives out resources and ill fate accordingly as people deserve them.⁹⁰ For example, if people can

of litigation,¹⁰² and even medical professionals with ~~sur-~~ outcomes overestimate the effect their clinical interventions will have on patients.¹⁰³ In fact, anyone in a professional role who considers themselves to be an expert tends to be especially overconfident in their own judgments and more resistant to change.¹⁰⁴

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

C. Cognitive Bias Impacting School Discipline Appeals: Confirmation Bias

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

When there is a dominant perspective of a group, members often will look for evidence to help them conform their perspectives to the dominant beliefs out of a desire to achieve harmony and fit in.¹⁰⁹ Research shows that in organizations like schools where there are a few central decision makers who give both implicit and explicit directions, lower level staff members will shape their perspectives to conform.¹¹⁰ For exa

student for special education needs despite contradictory evidence arising in the actual testing itself.¹¹ In another study, teachers were presented with a pool of students who were in actuality similar, but told some were referred for “Emotional Disturbance.”¹² The teachers involved in the study were almost four times as likely to identify behaviors from the Emotional Disturbance group as “problem” despite there being no actual predetermined clinical or logistical differences between the two sets of students.

Unchecked confirmation bias has also been noted to impact a person's ability to adequately investigate an issue. A recent study where participants were asked to evaluate a case file of an assault featuring several possible suspects showed the effects of confirmation bias on investigations in action.¹³ The participants who were asked early in the case to name a suspect showed a greater tendency to confirm that hypothesis by suggesting lines of investigation focusing on that suspect, doubting the applicability of motives only applicable to other suspects, and put greater stock in the reliability of witnesses incriminating that suspect.¹⁵ These same pressures and resulting preference for confirming information also affect defense attorneys tasked with evaluating the decision to plea or proceed to trial.

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

While cognitive scientists have been able to clearly document observable effects of various biases, research showing a clear path to reduce these bias is less promising. Initially researchers hoped awareness of biases alone would be enough to combat them, but have found that a crucial component of automatic

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

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

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

119. Jennifer T. Kubota et al, The Neuroscience of Race, 15 NATURE NEUROSCIENCE

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

III. STRUCTURAL ASPECTS OF SCHOOL DISCIPLINE LAW

J.J. was, "very cold, calculating, and unremorseful." Later that night, J.J. killed himself.¹⁵¹

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

This decision shows the incredible amount of discretion given to school officials in making the decision to suspend or expel. Because public education has long been considered to be a property right, deprivation of the right to receive a public education does need to observe due process protections such as notice and the opportunity to be heard.¹⁵⁶ However, only the process is reviewable—

confessed in forty minutes, was cold and calculating character. J.'s family had no way to challenge this perception of the Principal, formed in less than an hour and then finalized into a lingering decision.⁵⁸

J.'s story exemplifies how the right to procedural due process has been interpreted with such flexibility as to be somewhat blurred in length. eTd [(J.)2-()54 (a)0.8

an in-school suspension¹⁷⁷. Time away from peers and from meaningful opportunities create deficiencies in social emotional skills and harms youth who are often already at risk¹⁷⁸. The seriousness of the consequences makes it even more disturbing that these decisions are made with ~~less~~ procedures and the absence of meaningful review.

B. Overloaded Officials

problems!¹⁸⁴ Although this is often attributed to urban issues, often it can arise out of just a basic problem with numbers.

In Michigan, education researchers found that in one district, Muskegon Public Schools, in 2013–2014, there were 665 long-term suspensions a year, or around twelve a day.¹⁸⁵ Statutorily, as in most states, only the superintendent, the school board, or a specific designee were able to long-suspend or expel a student for an instance of violence, a gross misdemeanor, or persistent disobedience on school property.¹⁸⁶ The district would need a fleet of employees to adequately investigate, give notice, or hold hearings. Unsurprisingly, this burden has led to disciplinary decisions that are likely unwarranted. While the officials were dealing with some violent incidents, other suspension-worthy actions were writing a cuss word on art work, kicking another student, and throwing a snowball.¹⁸⁷ Increased demands with few resources means officials are more likely to skip a thorough evaluation and go immediately to the easiest solution.

Enhancing this, most teachers report choosing the profession out of intrinsic motivation to help children and think of themselves as a caring person.¹⁸⁸ Many teachers or others working in education believe they personally can improve outcomes for youth. Studies of adults training to be teachers showed the majority believed they have a special calling and will be more successful than other individuals at teaching, despite having experience outside of limited student-teaching roles.¹⁸⁹ Teachers typically overemphasize the importance of the affective variables like having a harmonious relationship

184. DIV. ACCOUNTABILITY SERVICES, PUB. SCHS. N.C., SCHOOL SIZE AND ITS RELATIONSHIP TO ACHIEVEMENT AND BEHAVIOR 10 (2000), <http://www.ncpublicschools.org/docs/accountability/evaluation/legislative/size.pdf> [<https://perma.cc/H068-H>].

185. Lynn Moore, Staggering Numbers of Students Expelled and Suspended, MLive Probe Finds, MLive (June 8, 2015, 5:00 AM), http://www.mlive.com/news/muskegon/index.ssf/2015/06/staggering_numbers_of_students.html [<https://perma.cc/7806-S4>]. The study quoted the President of the Muskegon School Board as saying, “It’s staggering the amount of kids we have out of school . . . It’s frightening . . . There are kids that figure out how to get suspended . . . They do it deliberately. They do it on purpose.”

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

187. Moore, *supra* note 185.

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

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

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

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

with students, while underemphasizing the actual technical skills needed in teaching.¹⁹⁰

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

Data from school exclusions shows the more subjective the offense is, the more the decision maker will penalize minority students. Offenses like "disrespect" show more racial bias. [6 ei]J 0 Tc 0 Tw 1[(o)-3 (ff)0.CIDtw3 - Tw [36 (ubj)5.7 o Pd-210.56 227 T

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

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

In all likelihood, any given youth official cares deeply about their job and about the youth they serve. However, the all-human susceptibility to act on biases can create havoc if any given individual is given such a duty. a

Recent events in Missouri can further serve to show the limits of a change in rhetoric alone. A national report found that Missouri had the highest suspension rates for elementary level students in the nation, ²²⁷ “disturbing” disparity between discipline given to black and white children in schools.²²⁸ In the reaction since, people have started to talk much more openly about school discipline and voice a commitment to progress.²²⁹ A wide variety of school districts in the Saint Louis area, urged in part by activists, have stated their commitment to limiting use of out-of-school suspensions.²³⁰ Accordingly, the Missouri state legislature recently passed funding for training certifying schools as “trauma-informed.”²³¹

Yet most policy remains unchallenged and undiscussed. The Missouri Safe Schools Act remains on the books.²³² This law, originally passed in 1996, mandates expulsions for certain offenses and increases the chances the police will become involved in a school dispute.²³³ Even the school districts who have publicly voiced a commitment to decrease school suspensions have done so on

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

What we know about confirmation bias and self-serving bias also shows individuals have a tremendous ability to rationalize decisions that are

appropriate.²⁴⁶ IDEA mandates that schools draft individualized Education Programs (“IEP”) for each youth in collaboration with the youth, parents, teachers, attorneys for each side, and other interested parties.²⁴⁷

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

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

The lesson from twenty

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

Specifically, this should include elements such as forcing responsible school officials to state specific and articulable facts behind the decision to suspend, with specific requirements that the official have explicitly considered counterfactuals and other arguments.²⁵⁴ Rather than having another employee of the district review the suspension, the state could create a body with independent review power, who can evaluate a situation without the goal of confirming the decision.²⁵⁵ States could create pre-decisional accountability²⁵⁶ by requiring principals and teachers to do a yearly review in which each employee has to justify discipline decisions and explain inequities. Finally, states and localities could create a private right of action where families have an avenue other than due process rights to sue districts for violations of process.²⁵⁷

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

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

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

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

256.

criminogenic.²⁶¹ While we can make the process for exclusion or adjudicating more rigorous, and we can work on funding a system with alternatives, we also need to consider simply forbidding adults from utilizing certain practices. Proposals include formally banning the practice of shackling and restraining youth,²⁶² no longer allowing armed police officers in schools or referring cases to the police,²⁶³ mandating the use of non-punitive practices instead of the wide use of both expulsions and eday or activity suspensions to control behavior;pua (e)4.2 (p)-5 (th)-5 (in)-5 (lee)-4.2 (a)-4. (e)4.2 i(to)-5 [(to)-5 (th)-5 (c)-4.2 ()11.mhe th

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

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