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Truancy Prosecutions of Students and the Right [To] Education

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The situation is truly ironic. The argument for retaining beyond-control and truancy jurisdiction is that juvenile courts have to act in such cases because 'if we don't act, no one else will.' I submit that precisely opposite is the case: because you act, no one else does. Schools and public agencies refer their problem cases to you because you have jurisdiction, because you exercise it, and because you hold out promises that you can provide solutions.[1]

— Judge David Bazelon

I. Introduction: Going To School On Truancy

Since the inception of universal compulsory education,[2] the issue of truancy has defied easy solution. At the cynosure of the current ferment in public education in the United States, the tangled roots of truancy are a microcosm of the myriad problems afflicting our nation's schools. The complex causes of truancy have been chronicled in the social science and education literature. Many pilot projects and practices have been launched to reduce the sizeable numbers of students who fail to attend school.[3] Though some intervention efforts have succeeded in reducing truancy rates, the overall

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[1] Gordon Bazemore, Leslie A. Leip & Jeanne Stinchcomb, *Boundary Changes and the Nexus Between Formal and Informal Social Control: Truancy Intervention as a Case Study in Criminal Justice Expansionism*, 18 NOTRE DAME J.L. ETHICS & PUB. POL'Y 521, 527 (2004) (quoting David Bazelon, *Jurisdiction over Status Offenses Should be Removed from the Juvenile Court*, 21 CRIME & DELINQ. 98 (1975)). *See also* National Council on Crime and Delinquency policy statement urging the removal of status offenses from the jurisdiction of the juvenile court *in* Board of Directors, National Council on Crime & Delinquency, *Jurisdiction Over Status Offenses Should Be Removed from the Juvenile Court—A Policy Statement*, 21 CRIME & DELINQ. 97 (1975). *But* see, Lawrence H. Martin & Phyllis R. Snyder, *Jurisdiction over Status Offenses Should* Not *Be Removed from the Juvenile Court*, 22 CRIME & DELINQ. 44 (1976) (arguing against removal of status offenses because families "under stress would receive fewer services"). My thinking on this subject benefited from the nuanced discussion of the criminalization of truancy by criminologists Bazemore, Leip, and Stinchcomb's 2004 article above.

[2] There is a vast literature on the history and purposes of compulsory education. *See*, *e.g.*, CARLEN ET AL., *infra* note 27, at 11-49. One prominent educator cites protection of children from "economic serfdom" as the only valid justification for compulsory attendance laws. David Doyle, Foreword, *in* RITA E. GUARE & BRUCE S. COOPER, TRUANCY REVISITED: STUDENTS AS CONSUMERS xii (2003). In a recent novel, a renegade group of high school students called "The Truancy" rebel against the enforced nature of education. ISAMU FUKUI, TRUANCY: A NOVEL (2008).

[3] *See*, *e.g.*, NAT'L TRAINING & TECHNICAL ASSISTANCE CENTER, TRUANCY: A SERIOUS PROBLEM FOR STUDENTS, SCHOOLS AND SOCIETY (2002) (compiling various programs, publications, and truancy prevention strategies), http://www2.ed.gov/admins/lead/safety/training/truancy/index.html; Kern County Truancy Reduction Program, *available at*: http://kcsos.kern.org/schcom/trp; Center for Children's Advocacy, Truancy Court Prevention Project, *available at*: http://www.kidscounsel.org/aboutus_programs_tcpp.

success of these projects is in serious doubt. Judging from the continuing attention to truancy issues by school systems, law enforcement authorities, juvenile courts, legislative bodies, and others, the tenacious problem of truancy continues to plague school systems nationwide.[4]

In the extensive literature on truancy reduction, no firm consensus exists on model, evidence-based, replicable programs.[5] There have been a plethora of experimental initiatives designed to develop best practices for addressing truancy,[6] but only a few of these programs have been subjected to rigorous examination. Despite the dearth of data of data demonstrating the efficacy of using prosecutions as a vehicle for improving school attendance and stemming truancy, there is continued widespread reliance on the prosecution of students and parents for truancy offenses.[7] "According to juvenile court statistics gathered by the OJJDP [United States Department of Justice, Office of Juvenile Justice and Delinquency Prevention], the number of petitioned truancy cases increased by 92% from just over 20,000 in 1987 to almost 40,000 in 1996. . . . The same data show the rate of truancy petitions per 1,000 young people aged 10 or older increased 97% among black students, 70% among white students, and 11% for students of other groups."[8] Prosecuting students for truancy often generates harmful direct and collateral consequences: incarceration,[9] fines, involuntary community service, recursive court-involvement,[10] loss

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htm; The Stop Truancy and Recommended Treatment (S.T.A.R.T.) Project, *available at*: http://courts.phila.gov/courterly/summer/start.htm; King County BECCA Bill, *available at*: http://www.metrokc.gov/proatty/truancy/becca.htm.

[4] *See*, *e.g.*, Brent Begin, *Truants Threatened with Legal Action*, S.F. EXAMINER, Aug. 13, 2010, at__; Scott Johnson, *Montgomery Program Targets Truancy*, MONTGOMERY ADVERTISER, Aug. 13, 2010, at __; Charlotte Sanders, *New Law on Excessive School Absences*, WILLIAMSON DAILY NEWS, Aug. 12, 2010, at __; James Haug, *Troubled Teens Might Lose Wheels Under Schools Plan*, LAS VEGAS REV.-J., Aug. 5, 2010, at __; Erin Sherbert, *City Officials Ramp Up Efforts to Curb Truancy at Problem Campuses*, S.F. EXAMINER, Aug. 3, 2010, at __; Megan Rolland, *Truancy Report Shows Visit from Police has Impact*, THE OKLAHOMAN, Aug. 3, 2010, at __; Editorial Board, *Rethink Caddo Truancy Funds*, SHREVEPORT TIMES, Aug. 1, 2010, at __; Jeff Schmucker, *District Rewrites Truancy Playbook*, HERNANDO TODAY, Jul. 29, 2010, at __; Callie Enlow, *Last Ditch Effort: Will Truancy Court Succeed Where Schools and Parents Fail?*, SAN ANTONIO CURRENT, Jul. 28, 2010, at __; Joe Dejka, *Anti-truancy Plan May Hit Pothole*, OMAHA WORLD-HERALD, Jul. 26, 2010, at __; Erica L. Green, *Alonso to Work on Poor Student Attendance*, BALTIMORE SUN, Jul. 21, 2010, at __; Gracie Hart, *Schools Study Truancy Report*, ORANGE COUNTY REV., Jul. 21, 2010, at __.

[5] MYRIAM L. BAKER, ET AL., U.S. DEP'T OF JUSTICE, TRUANCY REDUCTION: KEEPING STUDENTS IN SCHOOL 6-7 (2001), *available at*: http://www.ncjrs.gov/pdffiles1/ojjdp/188947.pdf.

[6] *See, e.g.*, LYNN BYE, MICHELLE E. ALVAREZ, JANET HAYNES & CINDY E. SWEIGART, TRUANCY PREVENTION AND INTERVENTION: A PRACTICAL GUIDE 61-109 (2010) (United States); KEN REID, TRUANCY AND SCHOOLS 102-218 (1999) (England); Melissa K. Hunt & Derek R. Hopko, *Predicting High School Truancy Among Students in the Appalachian South*, 30 J. OF PRIMARY PREVENTION 549 (2009).

[7] *See, e.g.,* BYE ET AL., *supra* note 6, at 19-26 (survey of state truancy laws); GUARE & COOPER, *supra* note 2, at 77 (describing the "law-and-order" approach in Tulsa County, Oklahoma); Karl F. Dean, *Criminalization of Truancy*, 34 NEW ENG. L. REV. 589 (1999) (decrying the trend toward incarceration of students for truancy). In Texas, between 2005 and 2009 the number of "failure to attend school" charges filed by schools increased more than 40% from about 85,000 to 120,000. Forrest Wilder, *School House Crock: Why Is Texas Prosecuting Adults For Dropping Out*, TEXAS OBSERVER, Apr. 1, 2010, http://www.texasobserver.org/cover-story/school-house-rock. In Denver, Colorado, there were 1,600 open truancy cases in October, 2010. Jeremy P. Meyer, *Denver Truancy Court's Careful Help Leads Kids Back To Classrooms,* DENVER POST Oct. 25, 2010, at __.

[8] JAY SMINK & JOANNA ZORN HEILBRUNN, NAT'L DROPOUT PREVENTION CENTER, CLEMSON UNIV., LEGAL AND ECONOMIC IMPLICATIONS OF TRUANCY 21 (2005). Despite diligent efforts to locate more recent national statistics on truancy prosecutions, no credible data have been found in compilations of either education or juvenile justice statistics maintained by the United States Department of Education or the United States Department of Justice.

[9] The one study on the efficacy of incarceration as a remedy for halting truant behavior concluded that it did not have a material effect on subsequent school attendance. *See* JOANNA ZORN HEILBRUNN, NAT'L CENTER FOR SCH. ENGAGEMENT, JUVENILE DETENTION FOR COLORADO TRUANTS: EXPLORING THE ISSUES 20-28 (2004). The legality of escalating "unruly" truancy petitions into delinquency

of driving privileges, imposition of curfews, specification of conditions of probation that require students to meet unrealistic school performance standards, unwarranted disclosures of personal information, investigations of family dependency and neglect, mental health consequences,[11] monitoring students through radio frequency identification technology (RFID),[12] grade reductions[13] and others.[14]

The rule of law—the expectation that, even in juvenile courts, fair procedure and adherence to constitutional norms is essential—is often abused in truancy prosecutions. As recounted in the complaint in a recent class action filed in Rhode Island challenging the practices in truancy courts:

> In violation of federal and state law, these children are deprived of, among other things, adequate notice of what conduct will result in commencement of truancy proceedings or in punishment for being "truant"; adequate and timely notice of the charges against them; a preliminary investigation of those charges by the Family Court's intake office to determine legal sufficiency and propriety of the charges; the right to consult with an attorney and to have one appointed for them if they cannot afford one; an adequate explanation of their rights to remain silent, to confront school officials and to require school officials to prove the charges beyond a reasonable doubt; an opportunity to rebut the charges against them if they believe that they have been falsely accused; transcripts of Truancy Court proceedings so they that have a record of statements made to and by them; interpreters if they do not speak or have difficulty speaking English; and, if the children admit to the charges against them and agree to abide by the terms and conditions of the Truancy Court, the right to challenge school officials who claim that they have violated those terms and conditions. In addition, their parents and guardians are subjected to punitive orders of the Truancy Court despite the fact that they are not parties to the proceedings against their children.[15]

The right to counsel in truancy cases is recognized in thirty-three of the forty-five states that address truancy within juvenile court jurisdiction.[16] Few practice guides exist for lawyers who defend students in

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charges for a student's violation of an order of probation was questioned in one state. Compulsory School Attendance and Truancy Statutes, Op. Tenn. Att'y Gen. 08-27 (2008).

[10] A study has shown that a first-time court appearance during high school increases a student's chances of dropping out of high school. Gary Sweeten, *Who Will Graduate? Disruption of High School Education by Arrest and Court Involvement*, 23 JUSTICE QUARTERLY 462 (2006).

[11] *See* Jack Daniel, Amy Tillery & Denise Whitehead, *Fresno's Juvenile Behavioral Health Court: A Better Way to Serve Youth*, 43 CLEARINGHOUSE REV. J. OF POVERTY L. & POL'Y 43 (2009).

[12] See Patrick Sills, *Reasons Why Schools should Not Track Students With RFID Chips*, HELIUM http://www.helium.com/items/1934092-reasons-why-schools-should-not-track-students-with-rfid-chips (last visited Oct. 29, 2010) (New Canaan, Connecticut proposal).

[13] See *Knight v. Bd. of Educ. of Tri-Point Cmty. Unit Sch. Dist. No. 6J*, 348 N.E.2d 299 (Ill. App. 1976)

[14] BYE ET AL., *supra* note 6, at 19-26.

[15] Class Action Complaint at 4, Boyer, et al. v. Jeremiah, No. 2010-2858 (R.I. Super. Ct. Mar. 29, 2010). *See also*, Class Action Complaint, De Luna, et al. v. Hidalgo County 7:10-cv-00268 (S.D. Tex. Jul. 26, 2010) (challenging practice of jailing youth seventeen and older in an adult detention center, often for periods up to several months, because of their inability to pay fines and costs associated with missing school).

[16] Brief of Juvenile Law Center, Et Al., As *Amicus Curiae* on Behalf of Respondent, *Bellevue School District v. E.S.*, Sup. Ct. No. 83024-0 at 3 (Wash. Sup. Ct. 2009). The right to counsel in selected status offense cases exists in a majority of states. Katherine Hunt Federle, *Lawyering In Juvenile Court: Lessons From a Civil Gideon Experiment*, 37 FORD. URB. L.J. 93, 107-08 (2010). Research for this article has not found that any state high court yet recognizes the constitutional right to counsel at an initial truancy hearing, where truancy is considered a status offense. A precedent-setting constitutional challenge asserting the right to counsel at the initial truancy hearing was brought in *Bellevue School District v. E.S.*, 199 P.3d 1010 (Wash. Ct. App. 2009) (holding that because significant rights are at stake in the initial truancy proceeding, due process requires that the truant child be represented by counsel) and is currently pending decision in the Washington Supreme Court). See *infra*

truancy cases.[17] Despite the potential consequences of truancy prosecution, truancy defense is a veritable backwater, with relatively few reported cases.[18] The justifications for continuing to prosecute students for truancy are inimical to the general goals of State-sanctioned crime and punishment and the ostensible rehabilitative purposes of the Juvenile Court.

This article has a focused ambition. It will not canvass or evaluate the plentiful social science literature on truancy and truancy reduction programs.[19] It will be centered on the prosecution of students for truancy, not parents.[20] Section II of the article analyzes the institutional forces at play in truancy prosecutions of students. With an emphasis on the role of school systems, the Section examines the incentives and disincentives that motivate the multiple players involved in these prosecutions. Section III identifies salient legal issues that arise in truancy prosecutions of students. These issues often occupy a low-visibility corner of the juvenile justice system, despite their significant impacts on juvenile defendants.

Section IV elaborates the "right to education" line of cases. This mix of cases blended federal and state constitutional and statutory rights to create a right to an adequate, student-specific, comprehensive educational and social service set of interventions designed to address issues of truancy. This right has been termed by several commentators "the right to learn."[21] This right draws on strands of substantive due process, procedural due process, equal protection, the state right to education articulated in the school finance and school adequacy cases, the "No Child Left Behind" legislation,[22] and state laws that require exhaustion of a variety of steps by school systems prior to the filing of a truancy petition against a student[23] and, in some states, a showing by the school system or the prosecuting

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[17] BENTON ET AL., A.B.A. CENTER ON CHILD. & THE L., REPRESENTING JUVENILE STATUS OFFENDERS vii (2010) ("There are few training resources for attorneys representing juvenile status offenders or youth who are truant, runaways, or beyond their parent's control"). An exception is the excellent manual published by Team Child and the ACLU of Washington. TEAM CHILD, ACLU OF WASHINGTON, DEFENDING YOUTH IN TRUANCY PROCEEDINGS: A PRACTICE MANUAL FOR ATTORNEYS (2009), *available at*: http://www.teamchild.org/pdf/Truancy%20Manual%20FINAL%20(rev.10.09).pdf.

[18] In the course of researching this article, only a few states, including California, Kentucky, New York, and Illinois, had more than a handful of reported decisions in truancy prosecutions of students. Many states states where prosecutions are available had no reported decisions.

[19] *See*, *e.g.*, BYE ET AL., *supra* note 6; GUARE & COOPER, *supra* note 2; REID, *supra* note 6. For an example of a truancy reduction program that is making progress in its efforts *see* Barbara A. Babb & Gloria Danziger, *Addressing Truancy is a Complex Challenge*, BALTIMORE SUN, Jul. 30, 2010, at __. *See also* Charles Edward Pell, *Pre-offense Monitoring of Potential Juvenile Offenders: An Examination of the Los Angeles County Probation Department's Novel Solution to the Interrelated Problems of Truancy and (Juvenile) Crime*, 73 S. CAL. L. REV. 879 (2000).

[20] *See infra* for a discussion of educational neglect. This article does not discuss the prosecution of parents for a misdemeanor offense that is often called contributing to the unruly behavior of a child. TENN. CODE. ANN. § 49-6-3009 (2010). *See* Gilbert Bradshaw, *Must Utah Imprison its Parents and Children?: Alternatives to Utah's Compulsory Attendance Laws*, 22 BYU J. PUB. L. 229 (2007). Parents have also been prosecuted for allegedly forging doctor's notes to satisfy truancy documentation requirements. See, e.g., http://news.newamericamedia.org/news/view_article.html?article_id=4073bf1f386a4d2cb2cce3e259f1e72a (Orland, CA).

[21] Note, *A Right to Learn?: Improving Educational Outcomes Through Substantive Due Process*, 120 HARV. L. REV. 1323 (2007).

[22] 20 U.S.C. §§ 6301-6578 (2006).

[23] For an analysis of the diversity in State approaches to providing status offenders with services *see* JESSICA R. KENDALL, A.B.A. CENTER ON CHILD. & THE L., FAMILIES IN NEED OF CRITICAL ASSISTANCE: LEGISLATION AND POLICY AIDING YOUTH WHO ENGAGE IN NONCRIMINAL MISBEHAVIOR (2007).

authorities that a student's absences were not justified.[24] Combined, these sources of law yield a defense or remedy—the "right" education—for each student before he or she is prosecuted.

Section V crafts the architecture of this right. It is modeled on the remarkable array of approaches to educating students with disabilities under the IDEA[25] and section 504 of the Rehabilitation Act.[26] These schemes require school systems to develop comprehensive plans for students that are designed to ensure that each student makes educational progress. The article advocates that such an approach must be fully exhausted before school systems are permitted to file truancy petitions against students. The Conclusion advocates the decriminalization of truancy for students and sketches a vision for education reform that will reduce the unacceptable number of students who are chronically absent from school—and often drop-out or are pushed out from formal education--and allow each student a meaningful opportunity, however unconventional, to succeed in the transition to adulthood.

II. Truancy, Schools, and the Courts

> *For several years I have suspected that our schools condition some criminals—that for many school-age children, present educational practices backfire in their social intent. But I couldn't put my finger on the how and why of it until I visited a children's court recently.*[27]
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> — Arthur C. Johnson, Jr. (1942)

The multiple causes of truancy have been well identified: the social, the cultural, the psychological, and the educational.[28] Tackling these root causes, student-by-student, using a multi-

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[24] *See, e.g.,* TENN. CODE ANN. § 37-1-102(b)(25)(A)(i). Bullying is an example of a justification for school absences that has only recently gained more prominent attention. *See* Billie Gastic, *School Truancy and the Disciplinary Problems of Bullying Victims*, 60 EDUC. REV. 391 (2008). Laws requiring school systems to develop policies and practices to recognize and prevent bullying are on the rise, and this cause should be ruled out in any system that places the burden of proof on a school system to prove in a truancy prosecution that a student's absences were without justification.

[25] 20 U.S.C. §§ 1400-1491 (2006).

[26] 29 U.S.C. § 794 (2006).

[27] Arthur C. Johnson Jr., *Our Schools Make Criminals*, 33 J. CRIM. L. & CRIMINOLOGY 310 (1942). Johnson, an educational supervisor at Attica, N.Y., State Prison, continues:

> There I saw a little tike start out along a road which had begun in his school classroom and which probably will end at a prison gate. I know, for after twenty years equally divided between public and prison educational work, I know both ends of that road. . . . "Your Honor," a court investigator testified, "I know this case well. John's teacher and the principal of his school agree that he is a confirmed truant and trouble-maker, who refuses to respond to proper influence and treatment." I have read hundreds of juvenile case histories without realizing that a second-hand opinion may become prosecutor and jury for what in effect constitutes a criminal trial. There could be no defense—John *was* truant, and he certainly appeared to be a trouble-maker. The judge sealed the fate of the sullen lad. "John Doe, Jr., on the evidence, this court has no alternative but to declare you a delinquent under the law, and commit you to (institution named) until such time as the authorities there are convinced that your attitude and conduct have changed. That is all."

Johnson's article is one of the earliest explicitly to identify the phenomenon now called "the-school-to-prison-pipeline." *See also* A. Lewis Rhodes & Albert J. Reiss, Jr., *Apathy, Truancy and Delinquency as Adaptations to School Failure*, 48 SOCIAL FORCES 12 (1969); Bruce Balow, *Delinquency and School Failure*, 25 FED. PROBATION 15 (1961). *See generally*, Symposium, *School-to-Prison-Pipeline Symposium*, 54 N.Y.L. SCH. L. REV. 867 (2010).

systemic approach, is demanding work, both institutionally and personally by those charged with attendance responsibilities. The different missions and prisms of the various institutional actors—school authorities, child welfare personnel, prosecutors, law enforcement, juvenile courts—who deal with truancy often lead to deadlock and unseemly shifting of responsibilities.[29]

School authorities, dominated in truancy work by social workers, often tend to view the problem as one of family dysfunction or, in extreme cases, dependency and neglect.[30] Child welfare authorities look to the schools as the driving force of the problem.[31] Without resources or services of their own to address truancy, law enforcement and prosecuting authorities look to the schools, the child welfare system, and the juvenile courts for solutions.[32] To these authorities, truancy prosecutions serve as early warnings to children and youth who may start down the path of law breaking. Juvenile court judges and personnel, without the resources enjoyed by the schools and the child welfare agencies, also cast a wide net of responsibility for the cases that are prosecuted and view their authority with a mixture of treatment, rehabilitation, and punishment.[33] This issue of colliding institutional competences and capacities is not new in analyzing approaches to tough social problems. But, as always, the issue on the ground is infinitely more complicated, with local factors often dominating theoretical approaches.

Nevertheless, there are certain touchstones that guide the approach of this article and lead to its conclusion that truancy should be decriminalized. First, the incentives for school systems intensively to investigate the educational causes of truancy are thin. Large bureaucracies, even those with personnel who are well-meaning and dedicated, are hesitant to lay blame on themselves. Even when the institutional will exists, the resources, training, and leadership may be lacking. As will be elaborated below, the incentive structure to remediate educational issues for at-risk students may be changing due to the federal No Child Left Behind Act,[34] a development that holds fragile promise for reducing the

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[28] *See, e.g.,* WILLIAM H. QUINN, FAMILY SOLUTIONS FOR YOUTH AT RISK: APPLICATIONS TO JUVENILE DELINQUENCY, TRUANCY AND BEHAVIOR PROBLEMS (2004); KEN REID, TRUANCY: SHORT AND LONG-TERM SOLUTIONS (2002); PAT CARLEN, DENIS GLEESON & JULIA WARDHAUGH, TRUANCY: THE POLITICS OF COMPULSORY SCHOOLING (1992).

[29] The resort by school systems to truancy prosecution as the "ultimate truancy intervention" contains an ironic element. SMINK & HEILBRUNN, *supra* note 8, at 19. In recent years, intervention by courts in the educational process has been criticized by commentators who view law-driven school reform as anti-democratic, fiscally irresponsible, and educationally strangling. *See*, *e.g.*, FROM SCHOOLHOUSE TO COURTHOUSE: THE JUDICIARY'S ROLE IN AMERICAN EDUCATION (Joshua M. Dunn & Martin R. West eds., 2009); RICHARD ARUM, JUDGING SCHOOL DISCIPLINE: THE CRISIS OF MORAL AUTHORITY (2003); LAW & SCHOOL REFORM: SIX STRATEGIES FOR PROMOTING EDUCATIONAL EQUITY (Jay P. Heubert ed., 1999). These commentators should applaud the retreat of juvenile and family courts from truancy prosecutions, yet they have remained silent on this issue. Conversely, other commentators have lamented the retreat of the Supreme Court in recognizing the constitutional rights of students. *See* Erwin Chemerinsky, *The Deconstitutionalization of Education*, 36 LOY. U. CHI. L.J. 111 (2004); *see also* David M. Engstrom, *Civil Rights Paradox? Lawyers and Educational Equity*, 10 J.L. & POL'Y 387 (2002).

[30] *See*, *e.g.*, CARLEN ET AL., *supra* note 20, at 94.

[31] In recent years child welfare systems have come under federal court orders to reduce the number of children in state custody. *See*, e.*g.*, *Kenny A. v. Perdue*, 454 F. Supp. 2d 1260 (N.D. Ga. 2006); *Brian A. v. Bredesen*, no. 3:00-0445 (M.D. Tenn. Jul. 27, 2001). This mandate inexorably created a disincentive for child welfare authorities to take into custody children who are solely truant.

[32] *See, e.g.*, Brent Begin, *Truants Threatened with Legal Action*, S.F. EXAMINER, Aug. 13, 2010, at__.

[33] Martin & Snyder, *supra* note 1, at 44.

[34] 20 U.S.C. §§ 6301-6578 (2006).

number of students deemed truant. By emphasizing the criticality of test scores, however, NCLB may not be flexible enough to accommodate the needs of chronically absent students for educational interventions and programs that do not fit the rigid metrics of NCLB accountability.

Second, the phenomenon of school exclusion, or push-out, is now well-documented.[35] Through unnecessarily harsh disciplinary practices,[36] regimented academic approaches to gaining academic credits and progress toward graduation, subtle discouragement about a student's prospects of success in school, maintenance of an unwelcoming environment, or court-referrals, students often make rational decisions to abandon their education.[37] Truancy prosecutions are one manifestation of this phenomenon. The push-out/dropout problem will be exacerbated in states such as North Dakota that raised the age of compulsory education from 16 to 18.[38]

Third, school systems possess by far the largest cache of resources than any of the other institutional players in truancy. Without entering the simmering debate over the adequacy of school finances, this proposition is unassailable. Schools are uniquely positioned among the actors in truancy to understand root causes and to bring to bear interdisciplinary approaches and services to the student. School systems should understand these approaches from their obligations to serve students eligible for special education, an obligation not imposed on the other truancy actors.

Fourth, by drastically curtailing the ability of school systems to file truancy petitions in court, if not eliminating this course of action, the responsibility for addressing a student's needs will fall squarely on the system best equipped to handle this complicated task. In an article on school "drop-outs," a cognate problem, education scholars observed:

> The focus on the social, family and personal characteristics [of drop-outs] does not carry any obvious policy implications for shaping school policy and practice. Moreover, if the research on drop-outs continues to focus on the relatively fixed attribute of students the effect of such research may well be to give schools an excuse for their lack of success with the dropout.[39]

Finally, in a prescient article on truancy, two legal scholars, experts in criminal law, criticize the use of the juvenile courts as "bludgeons to compel unwilling children to attend school."[40] The authors claim that such compulsion is fundamentally in conflict with the underlying purposes of compulsory

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[35] "School push-out happens when students are illegally excluded from school." ADVOCATES FOR CHILDREN, SCHOOL PUSHOUT UPDATE (2008), *available at*: http://www.advocatesforchildren.org/pubs/pushout_update_2008.pdf. *See* Davin Rosborough, *Left Behind, and then Pushed Out: Charting a Jurisprudential Framework to Remedy Illegal Student Exclusions*, 87 WASH. U. L. REV. 663 (2010). Students who drop out of high school compose a disproportionate number of incarcerated high school age youths. Sam Dillon, *Study Finds High Rate of Imprisonment Among Dropouts*, N.Y. TIMES, Oct. 9, 2009, at __.

[36] *See*, *e.g.*, Katayoon Majd & Patricia Puritz, *The Cost of Justice: How Low-Income Youth Continue to Pay the Price of Failing Indigent Defense Systems*, 16 GEO. J. ON POVERTY L. & POL'Y 543 (2009).

[37] GUARE & COOPER, *supra* note 2, at 1.

[38] S.B. 2184, 60 Leg. (N.D. 2007).

[39] Gary G. Wehlage & Robert A. Rutter, *Dropping Out: How Much Do Schools Contribute to the Problem?*, 87 TCHRS. C. REC. 374, 376 (1986)

[40] Irene Merker Rosenberg & Yale L. Rosenberg, *Truancy, School Phobia and Minimal Brain Dysfunction*, 61 MINN. L. REV. 543, 599 (1977).

education statutes: "It is doubtful whether coerced education will 'prepare citizens to participate effectively and intelligently in our open political system' so as 'to preserve freedom and independence.'"[41] A leading book on truancy by education scholars notes that "using the full force of law" to deal with truancy is inimical to "treating students as [clients and consumers], and moving to engage students in the process of their own education."[42]

III. The Nontransparent Legal Contours of Truancy

Truancy cases implicate a host of potential legal issues. Because truancy cases are filed predominantly in juvenile or family courts, where procedural rules are more relaxed and the presence of defense lawyers is rare, legal issues embedded in truancy cases often fall under the radar. This section will survey the most salient of these issues, several of which are currently being litigated for the first time. Several prototypical narratives of the adverse impacts that truancy prosecutions have on students will help frame the legal issues discussed in this section.

Francisco De Luna, a student in McAllen, Texas, was diagnosed with attention-deficit hyperactivity disorder (ADHD) in the third grade.[43] In the sixth grade his school refused to continue administering Francisco's medication, and his focus, grades and attendance began to suffer. When Francisco was thirteen, his father died, and his mother was forced to work longer hours to support her family. Francisco's school attendance suffered, and he was cited numerous times for failing to attend school. The citations stated that Francisco displayed a "defiant attitude" and "'did not want to learn.'" Francisco's behavior at school deteriorated, and he was suspended serially from school. In truancy court, he waived his rights and pled guilty. He was fined, and he and his mother were ordered to pay $257 to $383 per month, including court costs. The case remained open. Francisco did not appear at a scheduled court appearance, and, based on his failure to appear and to pay the fines associated with his truancy violations, he was ultimately arrested and jailed for eighteen days. The Complaint alleges that Francisco suffered "psychological damage, humiliation, mental anguish, and emotional injury."

Jeremy Bowen was a special education student in Rhode Island.[44] He missed only two days of school and had five "tardies" (being late to school) after he began to feel overwhelmed by his school work. He was prosecuted for truancy, with school officials seeking to have Jeremy adjudicated "wayward." Allegedly, the truancy petition was filed because of his difficulties with class and homework, not his absences. He and his mother made several appearances in court until the case was dismissed following the intervention of an attorney and the provision of additional services and supports to Jeremy by the school system. The Complaint alleges that Jeremy and his mother experienced stress, anxiety, and humiliation in the course of the proceedings.

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[41] *Id.* (citing Wisconsin v. Yoder, 406 U.S. 205, 221 (1972)).

[42] GUARE & COOPER, *supra* note 2, at 79.

[43] These facts are derived from the class action Complaint filed by the American Civil Liberties Union Foundation of Texas in a constitutional challenge to the incarceration of students for failing to pay fines imposed in truancy prosecutions. Class Action Complaint at 25, *DeLuna v. Hidalgo Cty*, 7:10-cv-00268 (S.D. Tex. Jul 26, 2010).

[44] These facts are derived from the class Complaint filed by the American Civil Liberties Union in a constitutional challenge to the operation of truancy courts in the State. Class Action Complaint at 36-39, *Boyer v. Jeremiah*, C.A. No. 2010-1858 (R.I. Sup. Ct. Mar. 29, 2010).

A. The Right To Counsel In Truancy Cases

Although there is no reliable data on the actual number of students represented by counsel in truancy cases, it is safe to draw a few hypotheses. First, except for the recent litigation in the State of Washington establishing the right to counsel in the first truancy filing,[45] the right to counsel does not attach as a constitutional matter (as opposed to a statutory right) in any other state upon the filing of a first truancy petition, unless truancy is treated by the state as a crime of delinquency, which potentially carries a punishment of incarceration upon a finding of guilt. Second, the number of reported truancy cases around the country is infinitesimally small compared to the number of petitions filed.[46] This suggests that very few cases are appealed. Finally, the sketchy accounts that exist on truancy prosecutions strongly suggest that these cases are recursive, in other words the students are required to make multiple court appearances to demonstrate compliance with conditions of probation and to show "progress" in school attendance and performance. Except for families with decent financial means, the expense of counsel for these recurring hearings is prohibitive.[47]

The reality is that most students who are prosecuted for truancy are from low-income families and cannot afford an attorney throughout the course of the case.[48] Yet the potential consequences flowing from a truancy prosecution can be severe.[49] A recent case in the United States Supreme Court underscored the importance of advising defendants of the consequences of a guilty plea. In *Padilla v. Kentucky*, the Court held that a defense counsel's failure to advise his client that a plea of guilty made him subject to automatic deportation violated the defendant's right to effective assistance of counsel.[50] By analogy, *Padilla* should apply in truancy prosecutions where students are subject to potential sanctions, such as incarceration and other punitive measures.

The guiding hand of counsel at the first truancy filing can stave off these consequences if counsel has the knowledge and resources to investigate the justifications for the absences and the ability to present these as a defense.[51] This was the rationale cited by the Washington Court of Appeals

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[45] Bellevue School District v. E.S., 199 P.3d 1010 (Wash. Ct. App. 2009).

[46] *See*, Federle, *supra* note 12.

[47] One study, for example, estimated that attorneys, if paid on an hourly basis, would receive $55 for each hour spent in court and $45 for each hour spent out of court. JOANNA ZORN HEILBRUNN, NAT'L CENTER FOR SCH. ENGAGEMENT, THE COSTS AND BENEFITS OF THREE INTENSIVE INTERVENTIONS WITH COLORADO TRUANTS 14-16 (2003).

[48] *See generally* Majd & Puritz, *supra* note 25, at 523.

[49] *See*, BYE ET AL., *supra* note 8. As noted above, these consequences can include incarceration, fines, involuntary community service, loss of driving privileges, imposition of curfews, mandatory counseling programs, and other sanctions.

[50] 130 S.Ct. 1473 (2010).

[51] "Although the Supreme Court's 2002 decision in *Alabama v. Shelton* is an adult criminal case, it is relevant to status offense proceedings where youth face the possibility of incarceration. In *Shelton* the Court held that if a criminal defendant who was convicted of a crime and given a suspended sentence violates the terms of his probation, the state may not impose a prison term unless the defendant was advised of his right to counsel at the initial adjudication. The scenario the defendant in *Shelton* faced is similar to what happens in many status offense cases where adjudicated youth violate the court's dispositional order and then face incarceration." A.B.A., THE RIGHT TO COUNSEL IN STATUS OFFENSE CASES 1 (2010) (discussing *Alabama v. Shelton*, 535 U.S. 654 (2002)), *available at*: http://new.abanet.org/child/publicdocuments/right_to_counsel_factsheet.pdf. *But see*, Iowa v.

in *Bellevue School District v. E.S.*[52] Using the due process balancing test found in *Mathews v. Eldridge*,[53] the Court balanced the important interests at stake for the student—including the right to a meaningful education—with the risks of an erroneous finding of truancy by the court and the inability of youthful defendants adequately to raise available defenses—and determined that the Fourteen Amendment required counsel to be appointed at the initial truancy hearing.[54] Counsel in truancy cases, as in delinquency cases, must exercise heightened sensitivity in their truancy representation to the array of differences—such as disability, language, and class—that often characterize students enmeshed in truancy prosecutions.[55]

B. Guilty Pleas In Truancy Prosecutions

Given the volume of truancy cases that many juvenile courts handle, and the prevailing perception that these cases are somehow not susceptible to formal legal procedures, it is no surprise that the formalities associated with guilty pleas are frequently honored in the breach. The overwhelming number of students prosecuted for truancy plead guilty to the charges.[56] Many are told only the number of days that they have been absent from school without a meaningful colloquy about potential defenses--justifications for their absences. In *N.K. v. Commonwealth*,[57] noting that the status offense of truancy, though not a criminal matter, can have severe consequences, the court held that the standards of *Boykin v. Alabama,*[58] which govern the constitutional minima in the taking of guilty pleas, apply in truancy prosecutions. Acknowledging the less formal nature of juvenile court proceedings, the court nevertheless insisted that a meaningful plea colloquy is essential in truancy cases.

C. Justification Issues

If anything, truancy can be conceived as a narrative of difference. Each student tells a uniquely personal story of why she or he is chronically absent from school.[59] Not all of these narratives are recognized in all states as legitimate reasons or justifications for absences. Most states count, as excused absences, reasons such as:[60]

Tovar, 541 U.S. 77 (2004) (Trial court may accept waiver of counsel and a guilty plea if it informs the defendant of the nature of the charges, the right to counsel, and the range of allowable punishments).

[52] 199 P.3d 1010 (Wash. Ct. App. 2009).

[53] 424 U.S. 319 (1976).

[54] *See* Scott v. Illinois, 440 U.S. 367 (1979) (right to counsel for adults in misdemeanor cases involving potential incarceration); Argersinger v. Hamlin, 407 U.S. 25 (1972); Hurrell-Haring v. New York, 930 N.E.2d 217 (N.Y. Ct. App. 2010) (right to counsel in misdemeanor cases).

[55] See Tamar R. Birckhead, *Culture Clash: The Challenge of Lawyering Across Difference in Juvenile Court*, 62 RUTGERS L. REV. 959 (2010).

[56] See *In re T.T.* No. A127275 (Cal. App. 1 Dist. Oct. 28, 2010) (Judge informs student-defendants in truancy cases that 99.9% of the students in his court choose not to be represented by an attorney).

[57] No. 2010-CA-000041-ME, 2010 WL 4026085 (Ky. App. Oct. 15, 2010).

[58] 395 U.S. 238 (1969).

[59] GUARE & COOPER, *supra* note 2, at 17-71.

[60] *See, e.g.*, TENN. DEP'T OF EDUC., TRUANCY DEFINITION (Apr. 2010) (on file with author).

(1) Personal illness or medical appointments, although these events often must be documented, an often insurmountable problem when a family has difficulty transporting their child to see a doctor;[61]

(2) Illness of an immediate family member;

(3) A death in the family;

(4) Extreme weather conditions;

(5) Court appearances;

(6) Recognized religious observances;

(7) Legal quarantine of the home; or

(8) Circumstances that, in the discretions of school authorities, are judged to create emergencies over which a student has no control.

The circumstances that might justify a student's absences are often much more nuanced than the official lists of excused absences published by school systems. Most prominently, students with unidentified educational disabilities—typically involving mental or emotional issues[62]—often are prosecuted for truancy without serious compliance with the Individuals With Disabilities Education Act ("IDEA")[63] and section 504 of the Rehabilitation Act ("section 504").[64] Each school system is under obligations under the Child Find provisions of IDEA and under section 504 aggressively to identify, evaluate, and certify, where appropriate, students within their jurisdiction who are eligible for special education and related services under IDEA[65] or protection from discrimination under section 504.[66] If a student is suspected of having an educational disability, he or she is protected under the safeguards of the IDEA until a final determination of non-eligibility is made. Until such time, school authorities should

[61] A family without transportation, for example, cannot practically be expected to produce a doctor's note excusing an absence for illness. TENNCARE URGENT CARE TRANSPORTATION AMENDMENT (Sept. 2008) (on file with author) (requires Medicaid managed care organizations to provide transportation to doctors' offices within three hours of notification by Medicaid recipient). Some jurisdictions have prosecuted parents for allegedly forging doctor's notes to provide the necessary documentation to school and prosecutorial authorities. Cite cases in newspaper story.

[62] The wide range of youth mental health issues associated with students who are chronically absent is surveyed in NIXON PEABODY LLP, REPORT BEFORE THE COMM. ON HEALTH & COMM. ON HUMAN SERVS. FOR THE COUNCIL OF THE DIST. OF COLUMBIA, RESEARCH ON YOUTH MENTAL HEALTH, JUVENILE JUSTICE, AND PARENTAL ENGAGEMENT FOR THE DISTRICT OF COLUMBIA (July 22, 2010). Students who are gifted are often not served either under the IDEA or equivalent state laws. Yet these students can easily become alienated in their school environment and miss days of school. *See* Elizabeth A Siemer, *Bored Out of Their Minds: The Detrimental Effects of No Child Left Behind on Gifted Children*, 30 WASH. U. J. L. & PUB. POL'Y 539 (2009).

[63] 20 U.S.C. §§ 1400-1491 (2006).

[64] 29 U.S.C. § 794 (2006).

[65] 20 U.S.C. §§ 1400-1491 (2006); 34 C.F.R. §§ 300.1-300.818 (2006).

[66] 29 U.S.C. § 794 (2006); 34 C.F.R. §§ 104.1-104.61 (2006).

be barred from prosecuting students for truancy under IDEA[67] since truancy is not a "crime" that can be referred to appropriate authorities for students with disabilities.[68]

There are other justifications that do not make the formal lists. For example, students who are the victims of school-based bullying, harassment, or intimidation cannot be blamed for viewing their school as a hostile environment.[69] They may not, however, be in a position to articulate their trauma to school authorities; missing school is a likely consequence. Similarly, students who are gifted may develop an aversion to attending school. Students who are subject to excessive discipline at school may also be reluctant to return. The circumstances are manifold.

A recent study of truancy that surveyed students about their reasons for not attending school propounded an explanation of truancy based on rational choice theory.[70] Under this theory "students make fairly sophisticated calculations and decisions, weighing the pros and cons of attending school or class, taking risks based on the costs of cutting against the benefits of attending, and thus 'test the system' to see how far they can go."[71] This "power to choose" by students is denied to them by the compulsory education laws. The solution, the study's authors propose, is to abandon the "get tough" or "law and order" approach to truancy and treat students as the consumers of their own education.[72] By so doing, the authors urge schools to develop creative approaches to satisfy the needs and wants of their students and present a rich menu of approaches that would reduce truancy rates.[73]

D. Valid Court Orders and Orders of Probation

Under the Juvenile Justice and Delinquency Prevention Act of 1974 ("Act"), juvenile judges possess the authority to issue Valid Court Orders (VCOs) in status offense cases such as truancy prosecutions.[74] This authority allows judges to impose mandatory conditions on students who plead guilty to truancy and to enforce these conditions with contempt and potential incarceration. Although the right to counsel should attach in a hearing alleging multiple violations of a VCO, the ability of a defendant collaterally to challenge a prior plea or a prior finding of violation, when the defendant did not have counsel, is precluded.[75] Compounding the problem is that the conditions specified in a VCO are

[67] 20 U.S.C. § 1415(k)(6) (2006). This is often called the "Referral To and Action by Law Enforcement and Judicial Authorities" section of IDEA.

[68] For a full elaboration of this position, see Dean Hill Rivkin, *Decriminalizing Students with Disabilities*, 54 N.Y.L. SCH. L. REV. 909 (2010).

[69] *See generally*, RANA SAMPSON, U.S. DEP'T OF JUSTICE, BULLYING IN SCHOOLS (2009).

[70] GUARE & COOPER, *supra* note 2, at 13-15.

[71] *Id*. at 13.

[72] *Id*. at 76-81.

[73] *Id*. at 73-86.

[74] 28 C.F.R. § 31.303 (f)(iii)(3). Originally, the Act sought to encourage states to decriminalize status offenses, but a 1980 amendment to the original legislation created an exception permitting judges to place status offenders into secure confinement for violations of a VCO.

[75] *See* Bellevue, *supra* note 40, at 1012.

often rotely imposed and unrealistically achievable.[76] Requiring a student who has been chronically truant to "attend school regularly," when the reasons for the absences are unknown, borders on the impossible for many students who have journeyed this far in the truancy process. Other conditions could include prohibitions on being subject to school discipline ("avoid suspensions"), mandated passing of courses, submission to drug and/or alcohol testing, abstention from the unlawful consumption of drugs or alcohol, and others.

The VCO exception is under critical challenge today. There has been abuse of this vehicle to punish youth for status offenses, contrary to the intentions of the Act.[77] Evidence also suggests that the VCO is used disproportionately against youth of color.[78] Further, there is no evidence that the imposition of a VCO has a meaningful impact on the behavior of affected youth. To the contrary, the incarceration of status offense youth through VCOs may worsen their behavior by exposing them to other incarcerated youth serving time for more serious offenses and subject them to debilitating psychological harm, especially those youth who suffer from mental health issues.[79] For these reasons, the National Council of Family and Juvenile Court Judges has urged Congress to repeal the VCO exception in the upcoming reauthorization of the Juvenile Justice and Delinquency Prevention Act.[80] The United States Department of Justice has also urged repeal of this provision.[81]

E. Educational Neglect

Educational neglect is a charge brought against a parent for failing to ensure that his or her child is getting an education in accordance with local compulsory education laws.[82] Truancy or non-compliance with compulsory education laws is dealt with under diverse state schemes, including who is

[76] *See, e.g.,* PAT ARTHUR, NAT'L CENTER FOR YOUTH L., THE INCARCERATION OF STATUS OFFENDERS UNDER THE VALID COURT ORDER EXCEPTION TO THE JUVENILE JUSTICE AND DELINQUENCY PREVENTION ACT (2008).

[77] *Id*.

[78] *Id*.

[79] *See generally* on the effects of incarceration PETER LEONE & LOIS WEINBERG, CENTER FOR JUVENILE JUSTICE REFORM, ADDRESSING THE UNMET EDUCATIONAL NEEDS OF CHILDREN AND YOUTH IN THE JUVENILE JUSTICE AND CHILD WELFARE SYSTEMS (2010); Elizabeth Cate, *Teach Your Children Well: Proposed Challenges to Inadequacies of Correctional Special Education for Juvenile Inmates*, 34 N.Y.U. REV. L. & SOC. CHANGE 1 (2010).

[80] NAT'L COUNCIL OF FAM. & JUV. CT. JUDGES, RESOLUTION REGARDING EFFORTS TO ENSURE AVAILABILITY OF EVIDENCE-BASED SERVICES TO MEET THE NEEDS OF STATUS OFFENDERS AND THEIR FAMILIES 1 (2010) *available at*: http://www.ncjfcj.org/images/stories/dept/resolutions/evidence-based%20services.7.10.final.pdf.

[81] Letter from Ronald Weich, Assistant Attorney General, US Dep't of Justice, to Senator Patrick J. Leahy, Chairman, Committee on the Judiciary (Apr. 15, 2010), *available at*: http://ojjdp.ncjrs.gov/enews/10juvjust/DOJViewsLetterS678.pdf.

[82] 68 AM. JUR. 2D *Schools* § 272 (2010). Perversely, in Saez et al. v. City of Springfield, parents unsuccessfully sued their children's school district under 42 U.S.C. § 1983 for educational neglect, claiming that the school district violated their Fourteenth Amendment Due Process rights by not physically restraining from leaving school during instructional hours. 2010 WL 2881512 No. 09-2134, slip op. (1st Cir. Jul. 22, 2010).

held accountable for a child's truancy.[83] Educational neglect is a charge that places this accountability squarely on the parents, and in some states these cases must be handled by child welfare agencies.[84]

The issue of educational neglect, however, is often murky due to the numerous parties and interests that are involved.[85] Because "[e]ducational neglect exists as a problem between the jurisdictions of the Department of Health and Welfare and the Department of Education," as well as the parents of truant youth, communication between the parties often breaks down, and attention to the child at issue and the reasons for his or her truancy are often lost in the jumble of poorly delineated responsibilities and duties between the parties.[86] Many states have statutes that clearly define the role of the parent in compulsory education, thus making it easy to prosecute when all elements of the offense are met,[87] while other states can prosecute parents under a compulsory education law that uses arguably vague language.[88] The problem is that many states can prosecute parents for educational neglect in a number of ways, while often little attention is paid to the school's own potential contribution to or failure to respond to a child's truant behavior.[89]

The result of these poorly defined responsibilities is that parents are often faced with a misdemeanor charge or other criminal charge or penalty, or receive formal notice of an investigation by child protective officers.[90] Child protective services often become overwhelmed by reports of educational neglect that pan out to be matters better solved by improved communication between parents and the schools.[91] In fact, "[c]hild protective workers . . . receive reports in which the school has made a report to the [state child welfare agency] without first investigating the parent's role in the child's absences," a move made possible by a lack of standard procedure at the schools.[92] Further, following up on these reports often strains the limited resources of such agencies, which must also investigate reports of domestic violence, sexual abuse, and neglect of children.[93]

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[83] MYRIAM L. BAKER, ET AL., U.S. DEP'T OF JUSTICE, TRUANCY REDUCTION: KEEPING STUDENTS IN SCHOOL 1 (2001), *available at*: http://www.ncjrs.gov/pdffiles1/ojjdp/188947.pdf.

[84] Child Welfare's Back Alley: "Educational Neglect," http://nccpr.blogspot.com/2010/06/child-welfares-back-alley-educational.html (June 21, 2010, 6:10 EST) (hereinafter "NCCPR Child Welfare Blog").

[85] PHILIP P. KELLY, CENTER FOR SCH. IMPROVEMENT & POL'Y STUD., C. OF EDUC., BOISE ST. U., EDUCATIONAL NEGLECT & COMPULSORY SCHOOLING IN IDAHO: 13,954 REASONS TO TAKE ACTION 1 (2006), *available at*: http://csi.boisestate.edu/pdf/EducationalNeglectLegislativeBrief.pdf.

[86] *Id* at 2.

[87] CHILD. L. OFF., TRUANCY AND EDUCATIONAL NEGLECT 1 (2005), *available at*: http://childlaw.sc.edu/frmPublications/Truancy EducationalNeglect.pdf.

[88] State v. White, 509 N.W.2d 434 (Wis. Ct. App. 1993).

[89] *In Re: Jamol F. Child*, 878 N.Y.S.2d 581, 585-87 (Fam. Ct. 2009); *See* CHILD. L. OFF., *supra* note 70.

[90] *See, e.g.*, Baker, *supra* note 66, at 3; 68 AM. JUR 2D SCHOOLS § 271 (2010); Alex Berg & Megan Gibson, *Should Parents Be Punished for Teenage Truancy?*, HUFFINGTON POST, Jun. 8, 2010, http://www.huffingtonpost.com/alex-berg/should-parents-be-punishe_b_605006.html.

[91] JESSICA GUNDERSON, ET AL., VERA INST. OF JUST., RETHINKING EDUCATIONAL NEGLECT FOR TEENAGERS: NEW STRATEGIES FOR NEW YORK STATE 10-16 (2009).

[92] *Id.* at 8.

[93] NCCPR Child Welfare Blog, *supra* note 67.

The irony of educational neglect is that schools and child protective agencies often point fingers at parents first and ask questions later, without ever considering that the schools may not only be able to better improve the number of truant students they have, but may also bear some of the responsibility for the number of truant students in the first place. One successful principal of an urban charter school poignantly articulates this lapse in logic, remarking:

> If a parent keeps her child out of school for one week, that parent can be charged with educational neglect, a crime punishable by fines and imprisonment in all 50 states. When a school fails to educate 1,000 children, it's called an achievement gap, attestable to poverty, race, neighborhood, etc.[94]

Before schools and other agencies place an often irrebuttable burden on parents to explain why their child is chronically absent from school, there must be a more comprehensive, transparent, and well-defined system for handling truant youth.

IV. The Right To Education

Since the seminal case of *Brown v. Board of Education*,[95] which articulated the centrality of equal educational opportunity under the United States Constitution, the right to education has been developed in cases implicating a variety of education contexts. Despite profound language in several United States Supreme Court cases that emphasized the core democratic values served by universal education in our country,[96] litigation over the right to education was consigned to the state courts. In *San Antonio School District v. Rodriguez*, the United States Supreme Court rejected the claim that education was a fundamental right under the Fourteenth Amendment to the United States Constitution.[97] *Rodriguez* was largely responsible for the shift in the litigation strategies of educational reformers.[98] In many respects, this was a propitious development, one that produced long-term gains in educational opportunity and achievement from what was perceived as a profound civil rights loss.[99]

These gains were rooted in state constitutional provisions that more explicitly recognized the benefits of a quality education and the over-riding duty of the state to provide such a system of schools.[100] The wave of cases following *Rodriguez*—the equity campaign litigation—saw state high courts consistently invalidate inequitable school financing schemes.[101] Despite the many variations in these decisions, school children were the beneficiaries of this constitutional litigation.

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[94] Steve Parry, *Getting Rid of Bad Teachers: The Unions 'Plant' Mentality*, Feb. 24, 2010, N.Y. TIMES, at __.

[95] 347 U.S. 483 (1954).

[96] Plyer v. Doe, 457 U.S. 202 (1982); Dean Hill Rivkin, *Legal Advocacy and Education Reform: Litigating School Exclusion*, 75 TENN. L. REV. 265 (2008).

[97] 411 U.S. 1 (1973) (a school finance case from Texas that was decided 5-4).

[98] *See generally*, Michael Heise, *The Story of* San Antonio Indep. Sch. Dist. v. Rodriguez*: School Finance, Local Control, and Constitutional Limits*, *in* EDUCATION LAW STORIES (Michael A. Olivas & Ronna G. Schneider eds., 2007).

[99] *See* JULES LOBEL, SUCCESS WITHOUT VICTORY: LOST LEGAL BATTLES AND THE LONG ROAD TO JUSTICE IN AMERICA (2003).

[100] JOHN DINAN, SCHOOL FINANCE LITIGATION: THE THIRD WAVE RECEDES, *in* FROM SCHOOLHOUSE TO COURTHOUSE: THE JUDICIARY'S ROLE IN AMERICAN EDUCATION 96 (Joshua M. Dunn & Martin R. West eds., 2009).

[101] *Id*.

A cognate wave of litigation followed the school finance cases, and was often integrally intertwined with it. These cases became known as the school adequacy cases.[102] The claims in these cases, resting on state constitutional provisions and selected state statutes, centered on the inadequate provision of education to students. School systems were ordered to provide a sound basic education to students.[103]

A similar recent development reinforces a broad state constitutional right of access to education for students who are suspended or expelled for violating school rules. In *King v. Beaufort County Board of Education*,[104] the North Carolina Supreme Court, using a state equal protection standard of intermediate scrutiny, held that school administrators must articulate an important or significant reason for denying a student access to alternative education. This right shifts the burden to school systems to justify exclusion of offending students from continuing educational opportunities.

Several commentators have argued that courts should explicitly recognize a "right to learn."[105] Starting from the premise that compulsory education laws, though valid exercises of state power, impose deep restraints on the personal liberty interests of students, the claim is made that the state has concomitant duties to ensure that each student receive an educational program that is tailored to her or his learning needs and effectively addresses each student's educational needs.[106] This claim is anchored in substantive due process.[107]

The lynchpin case supporting a right to learn is *Youngerberg v. Romeo.*[108] In *Youngerberg*, the United States Supreme Court found that involuntarily committed persons with mental retardation "enjoy[ed] constitutionally protected interests in conditions of reasonable care and safety, reasonably nonrestrictive confinement conditions, and such training as may be required by these interests."[109] Employing a balancing test, which weighed the "individual's interest in liberty against the State's asserted reasons for restraining individual liberty,"[110] the Court found that the State must provide these individuals "minimally adequate training."[111] Concurring, Justice Blackmun stated that individuals in

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[102] *See*, *e.g.*, William S. Koski & Rob Reich, *When "Adequate" Isn't: The Retreat from Equity in Educational law and Policy and Why It Matters*, 56 EMORY L.J. 545 (2006).

[103] Gershon M. Ratner, *A New Legal Duty for Urban Public Schools, Effective Education in Basic Skills*, 63 TEX. L. REV. 777, 818-23 (1985).

[104] No. 480A09, 2010 WL 4237430 (N.C. Oct. 8, 2010).

[105] *See, e.g.*, Daniel S. Greenspahn, *A Constitutional Right To Learn: The Uncertain Allure of Making a Federal Case Out of Education*, 59 S.C. L. REV. 755 (2008); Note, *A Right to Learn?: Improving Educational Outcomes Through Substantive Due Process*, 120 HARV. L. REV. 1323 (2007).

[106] Greenspahn, *supra* note 87, at 774 (citing Penelope A. Preovolos, *Rodriguez Revisited: Federalism, Meaningful Access, and the Right to Adequate Education*, 20 SANTA CLARA L. REV. 75, 101 (1980)).

[107] *Id*. at 773-75.

[108] 457 U.S. 307 (1982).

[109] *Id*. at 324.

[110] *Id*. at 320.

[111] *Id*. at 322.

State mental hospitals were constitutionally entitled to a right to "habilitation," or training that would prevent a person from losing "pre-existing self-care skills" while confined.[112] The decision accorded deference to the judgment of professionals in determining the contours of this right to training.[113]

One keen commentator linked the right to training found in *Youngerberg* to the professional standards mandated by the federal No Child Left Behind Act of 2001 ("NCLB").[114] If students are in schools that do not meet minimum requirements under NCLB, this commentator argued that the students should have a legitimate substantive due process claim to an adequate education, or a "right to learn."[115] In the truancy context, state laws or rules that mandate meaningful efforts to educate and provide intensive, individualized services to students who are deemed truant also provide professional benchmarks for asserting a constitutional claim to a minimally effective educational program. A leading lawyer in school adequacy litigation campaigns has urged that the right to "meaningful educational opportunity," which is part of the "equity equation" in these cases, requires that "children . . . be provided a range of programs and services that respond directly to their educational needs and that will reasonably allow them to develop their educational potential."[116] Still another analyst has urged that, in the context of excluding students from education under zero tolerance policies, schools have an affirmative duty to address the underlying causes of improper behavior by students.[117]

A final constitutional dimension deserves to be added to the calculus of this article's argument. This dimension examines the justifications for prosecuting students for truancy and visiting on them the sanctions that often flow from truancy cases. In *Graham v. Florida*, the United States Supreme Court, under the Eight Amendment, invalidated a sentence of life without parole for a juvenile who committed armed burglary and related crimes. [118] In part, the decision rested on the weak penological justifications for imposing this sentence.[119] Canvassing the four goals of penal sanctions—retribution, deterrence, incapacitation, and rehabilitation—the Court held that none of these goals justified a sentence of life without parole.[120] The Court also noted the special difficulties faced by juvenile defense counsel in representing youths: "Difficulty in weighing long-term consequences; a corresponding impulsiveness; and reluctance to trust defense counsel seen as part of the adult world a rebellious youth rejects, all can

[112] *Id*. at 327 (Blackmun, J. concurring).

[113] *Id.* at 328.

[114] 20 U.S.C. §§ 6301-6578 (2006).

[115] Daniel S. Greenspahn, *A Constitutional Right To Learn: The Uncertain Allure of Making a Federal Case Out of Education*, 59 S.C. L. REV. 755 (2008); Note, *A Right to Learn?: Improving Educational Outcomes Through Substantive Due Process*, 120 HARV. L. REV. 1323 (2007).

[116] Michael A. Rebell, Poverty, *"Meaningful" Educational Opportunity, and the Necessary Role of the Courts*, 85 N.C. L. REV. 1467, 1514 (2007).

[117] Emily Bloomenthal, *Inadequate Discipline: Challenging Zero Tolerance Policies as Violating State Constitution Education Clauses* 40-47 (March 16, 2010) New York University Review of Law & Social Change, Forthcoming, *available at*: http://ssrn.com/abstract=1573256.

[118] 130 S.Ct. 2011 (2010).

[119] *Id*. at 2028-30.

[120] *Id*.

lead to poor decisions by one charged with a juvenile offense."[121] These dynamics are compounded in the truancy context, where counsel is rarely present and where the right of the child to "accuracy, dignity, and participation"[122]—the "core" of due process protections for juveniles—is observed only in the breach.

Truancy prosecutions fall into a nether world of legal proceedings. As a status offense, truancy is not technically a "crime." Yet the consequences of truancy prosecutions can equal the sanctions imposed on juvenile offenders who commit delinquency offenses, which are deemed "crimes." The penal justifications that are subliminally asserted to justify truancy prosecutions are as unpersuasive as those proffered in *Graham v. Florida*. Retribution[123] and incapacitation are not apt goals for prosecuting students for truancy.[124] Deterrence and rehabilitation, on the other hand, cannot be summarily rejected as rationales for truancy prosecutions. The flaw in citing these two goals to justify truancy prosecutions, however, is that there is no valid data to support either the deterrent or rehabilitative effects of truancy prosecutions.[125] Before visiting on youthful defendants the collateral consequences that often flow from truancy prosecutions, there should be more solid evidence that such prosecutions rationally further the goals of deterrence or rehabilitation and are narrowly tailored to achieve these ends. Rhetorical stories of the effectiveness of deterrence and rehabilitation in the truancy context should not suffice for the same reasons advanced by the majority in *Graham* in rejecting the punishment levied in that case: when dealing with youth, punishments must be carefully crafted to the needs and developmental levels of youthful defendants.

The goals of deterrence and rehabilitation presumably are furthered in truancy reduction programs. But, such programs often do not precede the initiation of court proceedings. No matter how well meaning the responsible parties are, there are no good grounds for resorting to the courts in these cases. The fact that a random student or two may be "cured" of his or her truancy through court intervention is insufficient reason to justify the current system of undifferentiated prosecutions. As evidenced by the typically recursive nature of these prosecutions, and their overwhelming numbers, prosecution of truant students only faintly deters this conduct, if at all, and the overarching goal of

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[121] *Id*. at 2032.

[122] Emily Buss, *The Missed Opportunity in Gault*, 70 U. CHI. L .REV. 39, 47 (2003).

[123] A form of retribution is often meted out by judges in truancy cases through tough talk and explicit threats of escalated sanctions. The negative consequences that such hard-line discourse can have on inherently fragile children and youth is frequently not part of the judicial calculus. Just as zero tolerance and other punitive disciplinary policies have been shown to generate perverse consequences for students, *see* AM. PSYCHOL. ASS'N ZERO TOLERANCE TASK FORCE, *infra* note 133 (retributive truancy prosecutions cannot withstand rational scrutiny).

[124] Although students who are incarcerated for truancy may receive education services in juvenile detention, where being absent would be near impossible, no one justifies truancy prosecutions for this reason. Indeed, incarceration, even short-term, has potentially high adverse effects on children and youth: "According to a large body of national research, the detention environment , by itself, can exacerbate and/or cause mental health problems, substance abuse, stress-related illnesses and learning difficulties and send young people back to their families and communities with increased anger, frustration or depression." ROBIN L. DAHLBERG, AM. CIV. LIBERTIES UNION, LOCKING UP OUR CHILDREN: THE SECURE DETENTION OF MASSACHUSETTS YOUTH AFTER ARRAIGNMENT AND BEFORE ADJUDICATION 25 (2008).

[125] See Jessica Gunderson, *Getting Teenagers Back To School: Rethinking New York State's Response To chronic Absence*, Vera Inst. of Just., 7 (Oct. 2010).

rehabilitation cannot be achieved in the overwhelming majority of juvenile courts that do not possess the resources to provide a thick educational and social services program designed to provide effective educational services for prosecuted students.[126]

When woven together, the strands of a right to education merge into an enforceable claim for students who are subjected to prosecution for truancy. This constitutionally-based claim is rooted in the education provisions of state constitutions and federal and state substantive and procedural due process clauses, supplemented by state and federal statutes—whether in state truancy schemes or in the federal No Child Left Behind Act[127]—that require school systems to provide effective, heightened educational services to children and youth. This right can also be justified by the enervated penological justifications for sanctioning students for truancy, especially through incarceration and other intrusive restraints on liberty and deprivations of property.

V. The Right To the Right Education

A. The Special Education Model

Students who are eligible for special education services under the federal Individuals With Disabilities Education Act ("IDEA") are entitled to a Free Appropriate Public Education (FAPE) that is embodied in an Individualized Education Program ("IEP") designed to meet the unique educational needs of each eligible student.[128] Through the participation of a student's parents, experts, and school personnel at an IEP Team meeting, an IEP is formulated to ensure that each eligible student makes genuine educational progress.[129] The student is also entitled to a range of "related services," including psychological counseling, social work services, transportation, parent counseling and training and other interventions.[130] Eligible students are also entitled to transition services designed to aid them in their transition from high school to productive post graduate opportunities.[131] For those students who meet only the eligibility criteria of section 504, an anti-discrimination statute, a similar plan of accommodations must be created.[132] For students whose behavior in schools transgresses rules and prevailing norms, IDEA and 504 require that a functional behavior assessment (FBA) be performed and a

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[126] An effective educational intervention is multi-layered and depends on the "quality of implementation." The intervention must be implemented in a variety of difference settings. *See* Russell J. Skiba, Suzanne E. Eckes & Kevin Brown, *African American Disproportionality in School Discipline: The Divide Between Best Evidence and Legal Remedy*, 54 N.Y. L. SCH. REV. 1071, 1075 (2010).

[127] The Elementary and Secondary Education Act was amended to include the No Child Left Behind Act of 2001 at 20 U.S.C. §§ 6301-6578 (2006). Title I states: "The purpose of this subchapter is to ensure that all children have a fair, equal, and significant opportunity to obtain a high-quality education and reach, at a minimum, proficiency on challenging State academic achievement standards and state academic assessments." 20 U.S.C. § 6301 (2006).

[128] The IDEA IEP requirements are codified at 20 U.S.C. § 1415(e) (2006).

[129] *Id*.

[130] 34 C.F.R § 300.34.

[131] 34 C.F.R § 300.43.

[132] See 34 C.F.R. § 104.33(b)(1)(i) & (2). See Mark C. Weber, *A New Look at Section 504 and the ADA in Special Education Cases* (July 8, 2010) Texas Journal on Civil Liberties and Civil Rights, Forthcoming, *available at*: SSRN: http://ssrn.com/abstract=1636483.

behavior intervention plan (BIP) be developed.[133] It is beyond the scope of this piece to elaborate on the detailed requirements that govern IEPs or section 504 plans or the array of educational practices and social supports that are contained in these programs.

For purposes of fashioning a right to the "right" education for students prosecuted for truancy, the special education model demonstrates the expertise that resides in school systems for meeting the needs of students with complex education challenges. By law, this model is premised on evidenced-based best practices.[134] Similar models, though not as widely documented, exist in the truancy literature.[135] The right to such an individualized program in the truancy context can be asserted as a defense in a truancy prosecution or requested as a remedy in a systemic challenge to local truancy prosecutions schemes, where effective interventions are not provided prior to the institution of a truancy prosecution.[136]

This approach has been advocated by several commentators who claim that each student, regardless whether a student meets the rigorous eligibility criteria of IDEA, should receive a program modeled on a special education IEP.[137] The argument for a universal IEP resonates in progressive educational communities and in legal circles where disability scholars seek to loosen distinctions between disabled and nondisabled students and extend the concept of equality to all students.[138] Regardless of the ultimate merits of this broad-gauged approach, students who are threatened with prosecution for chronic truancy often possess the at-risk characteristics that animated the creation of the IDEA. Students who are truant form a class closely akin to the students with disabilities who were excluded form school in the days before the IDEA and were the beneficiaries of the entitlements Congress conscientiously enacted. These students were effectively excluded from schools without meaningful programs for their inclusion. The right to the right education for students who are truant is a natural evolution of a right that some argue is a "human right."[139]

B. NCLB And Beyond

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[133] 29 U.S.C. § 794 (2006). A discussion of the differences between an IEP under the IDEA and a section 504 accommodation plan is beyond the scope of this article, however, for a comprehensive analysis *see* Perry A. Zirkel, Commentary, *An Updated Comparison of the IDEA and Section 504/ADA*, 216 ED. LAW REP. 1 (2007).

[134] *See*, NAT'L CENTER FOR SCH. ENGAGEMENT, TRUANCY PREVENTION IN ACTION: BEST PRACTICES AND MODEL TRUANCY PROGRAMS (2005).

[135] *See*, *e.g.*, GUARE & COOPER, *supra* note 2, at __; REID, *supra* note 6, at __ ; Russell J. Skiba, Suzanne E. Eckes & Kevin Brown, *African American Disproportionality in School Discipline: The Divide Between Best Evidence and Legal Remedy*, 54 N.Y.L. SCH. L. REV. 1071 (2010).

[136] Cite 1983 cases in R.I. & TX

[137] *See*, *e.g.*, Deborah Gordon Klehr, *Addressing the Unintended Consequences of No Child Left Behind and Zero Tolerance: Better Strategies for Safe Schools and Successful Students*, 16 GEO. J. ON POVERTY L. & POL'Y 585 (2009); Stephen A. Rosenbaum, *Full SP[ ]ED Ahead: Expanding the IDEA Idea to Let All Students Ride the Same Bus*, 4 STAN. J. CIV. RTS. & CIV. LIBERTIES 373, 384-88 (2008); Judith D. Singer, *Should Special Education Merge With regular Education?*, 2 EDUC. POL'Y 409 (1988).

[138] *See* MARTHA MINOW, MAKING ALL THE DIFFERENCE: INCLUSION, EXCLUSION, AND AMERICAN LAW (1990).

[139] A.B.A. SEC. ON LITIG. CHILD. RTS. LITIG., RAISING OUR HANDS: CREATING A NATIONAL STRATEGY FOR CHILDREN'S RIGHT TO EDUCATION AND COUNSEL iv-v (2009).

NCLB has introduced unprecedented nationwide standards of accountability into public school systems that have long neglected the need for the individualization of education for all students.[140] Under NCLB, the failure of a small cohort of students to progress and graduate can lead to the imposition of wide-ranging remedial measures for failing schools. These measures include "school choice," "supplemental educational services," and compelled investments in school staff and facilities. NCLB is operating in an environment where competition from charter schools and new forms of private education is pushing the envelope of pupil individualization in public school systems. These developments do not necessarily mean that there will be unqualified progress in serving profoundly at-risk students. If charter schools, for example, are allowed to exercise unconstrained discretion to push-out students who do not conform to their rigorous programs, public schools will be faced with an even greater concentration of students who need heroic efforts to engage them and their families in any real educational opportunities.

For purposes of crafting individualized programs for students who are chronically truant, the NCLB-induced climate of educational innovation is guardedly promising. Such innovations as School-Wide Positive Behavioral Interventions and Supports,[141] programs of restorative justice,[142] the offering of educational programs designed to meet students interests in nontraditional subjects that have often been subsumed under the neglected category of vocational education, the provision of cutting-edge compensatory educational services,[143] and other approaches to enhancing student engagement all hold the potential to serve students who are truant and failing to complete high school.[144] The opportunities and pitfalls that these programs present are formidable, but the climate of experimentation that has been stimulated by NCLB is bound to continue. For students who are truant because traditional educational programs are unsuited to their development, needs, and interests, there is cautious hope on the horizon that all students will be understood and served appropriately.[145]

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[140] Mark Burgreen, *Being Neighborly in Title 20: Using the IDEA to Lend a Helping Hand to NCLB*, 43 COLUM. J.L. & SOC. PROBS. 51 (2009).

[141] *See* R.H. Homer, G. Sugai, A.W. Todd & T. Lewis-Palmer, *School-wide Positive Behavior Support: An Alternative Approach to Discipline in Schools*, *in* INDIVIDUALIZED SUPPORTS FOR STUDENTS WITH PROBLEM BEHAVIORS: DESIGNING POSITIVE BEHAVIOR PLANS, 359-90 (L. Bambara & L. Kern eds., 2005).

[142] *See* LORRAINE STUTZMAN AMSTUTSZ & JUDY H. MULLETT, THE LITTLE BOOK OF RESTORATIVE DISCIPLINE FOR SCHOOLS: TEACHING RESPONSIBILITY; CREATING CARING CLIMATES (2005).

[143] Amy P. Meek, *School Discipline "As Part of the Teaching Process": Alternative and Compensatory Education Required by the State's Interest in Keeping Children in School*, 28 YALE L. & POL'Y REV. 155 (2009). The individualized educational services for youth in correctional facilities provide a model for the educational services proposed in this article for students who are habitually truant and subject to prosecution. For a description of these services *see* Elizabeth Cate, *Teach Your Children Well: Proposed Challenges to Inadequacies of Correctional Special Education for Juvenile Inmates*, 34 N.Y.U. REV. L. & SOC. CHANGE 1, 28-36 (2010).

[144] *See*, *e.g.*, RUSSELL SKIBA ET AL., AM. PSYCHOL. ASS'N ZERO TOLERANCE TASK FORCE, ARE ZERO TOLERANCE POLICIES EFFECTIVE IN THE SCHOOLS? AN EVIDENTIARY REVIEW AND RECOMMENDATIONS 9 (2006); Lucille Eber et al., *Wraparound and Positive Behavioral Interventions and Supports in the Schools*, 10 J. EMOTIONAL & BEHAV. DISORDERS 171 (2002).

[145] Fringe movements, such as "unschooling," which advocates a libertarian, free-choice, approach to youth learning, are receiving marginally more attention in today's dynamic educational climate. *See* http://www.unschooling.com/library/faq/index.shtml. There has been a recent call for more intensive, short-term vocational and career training as an alternative to a college degree. *See* Jacques Steinberg, *Plan B: Skip College*, N.Y. TIMES, May 14, 2010, at __.

VI. Conclusion

This article urges the creation of judicially-imposed rights or legislatively-created schemes that will decriminalize truancy.[146] The collateral consequences of maintaining the current system of truancy prosecutions of students outweigh any demonstrated value to deploying the courts in this social and educational morass.[147] The gradual trend toward individualization in K-12 education is the right course to ensure that each student receives an adequate education. These methods of individualization should draw on the evidence-based best practices demonstrable in the special education laws. Some of the the most promising school reform efforts promote the engagement of all students in the educational environment through supports such as small learning communities, the creation of a system of advocates for families and students, and instructional changes that are tailored to the strengths and interests of each student.[148] Juvenile and family courts, law enforcement, and prosecutors have minimal resources and training to deal with the educational and therapeutic underpinnings of truancy. They should be relieved of these responsibilities. The resources that now are devoted to truancy prosecutions—and enhanced funding--should be placed in the hands of competent school systems and affiliated social services and community-based agencies whose missions explicitly encompass the provision of the right education for each student.

[146] *See* A.B.A., COMMISSION ON YOUTH AT RISK AND COMMISSION ON HOMELESSNESS AND POVERTY, REPORT TO THE HOUSE OF DELEGATES 1-4 (2008) *available at*: http://www.abanet.org/youthatrisk/reports.pdf. A leading criminal law scholar has identified the "diversionary" function of the juvenile court as a singular achievement in reducing the incarceration of youth. Franklin E. Zimring, *The Common Thread: Diversion in Juvenile Justice*, 88 CAL. L. REV. 2479 (2000).

[147] "Research has demonstrated that the use of the courts alone to reduce school absences is ineffective, especially in cases of chronic truancy or for youth who have already been involved in the justice system." Jill Carter & Alan Leschied, *Maintaining Mental Health and Youth Justice-Involved in Mainstream Education: Implications for Ontario's New Mandatory Requirement for School Attendance*, 19 EDUC. & L.J. 169 (2010).

[148] See Edward L. Deci, *Large-Scale School Reform As Viewed from The Self-Determination Theory Perspective*, 7 Theory & Res. in Educ. 244 (2009); see also Robert Balfanz, Liza Herzog & Douglas J. MacIver, *Preventing Student Disengagement and Keeping students on the Graduation Path in Urban Middle-Grades Schools: Early Identification and Effective Interventions*, 42 EDUC. PSYCHOLOGIST 223 (2007).