

Exclusion, Punishment, Racism and Our Schools: A Critical Race Theory Perspective on School Discipline



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ABSTRACT

Punitive school discipline procedures have increasingly taken hold in America's schools. While they are detrimental to the wellbeing and to the academic success of all students, they have proven to disproportionately punish minority students, especially African American youth. Such policies feed into wider social issues that, once more, disproportionately affect minority communities: the school-to-prison pipeline, high school dropout rates, the push-out phenomenon, and the criminalization of schools.

Before such pervasive racial inequality can be addressed effectively, the social and the psychological mechanisms that create racial inequality in the first place must be examined. This Comment offers insights from the field of Critical Race Theory on the root causes for racial inequality in American society more broadly, and in the context of school discipline more specifically. It argues that racial stigmatization, stereotyping, and implicit biases that are based on a long history of racial prejudice in the United States continue to infuse seemingly objective standards of what is considered appropriate behavior, as well as the practices—such as punitive school discipline—that are used to enforce such standards.

Because a comprehensive remedy to these systemic issues cannot be expected to come from efforts in the courts, advocates will have to rely on alternative strategies to soften and to reverse the negative impact that punitive school discipline imposes on students, especially minority students. This Comment proposes disciplinary practices based on the concept of Restorative Justice as a promising alternative to current disciplinary policies. It argues that Restorative Justice-based disciplinary policies are consistent with core principles of Critical Race Theory and are more conducive to creating a nurturing, safe, and inclusive school environment that not only keeps children in school but also helps to undermine the sources of racial conflict and of racial inequality that have plagued this nation for too long.

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INTRODUCTION

Education policy reflects philosophical judgments about the kinds of social outcomes, and indeed the kinds of people that society deems desirable. Educational philosophy, in this respect, represents society's self-conception. The capacities and competencies society inculcates in its children—and just as important, those it does not—reveal a society's ultimate vision of itself.¹

[W]e should be concerned, not with the meanings associated with conduct, but rather with the meanings associated with race itself.²

The use of exclusionary discipline policies in American schools has become increasingly prevalent over the last three decades. Before the 1960s, schools used corporal punishment and public embarrassment to discipline students.³ But with the growth in student population caused by the entry of the baby boom generation into American schools, and the influence of the civil rights and anti-Vietnam War movements on people's willingness to engage in civil disobedience, out-of-school suspensions and expulsions became more prevalent.⁴ In the late 1970s and early 1980s, U.S. Supreme Court decisions such as *Goss v. Lopez*⁵ caused school policies to shift in favor of in-school suspensions. These decisions instituted due process protections for students, which substantially restricted school administrators' discretion in implementing exclusionary discipline policies.⁶ In the late 1980s to early 1990s, schools once again shifted toward a heavy reliance on out-of-school suspensions when they began to institute the punitive zero tolerance policies that are prevalent in American schools today.⁷

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1. Shavar D. Jeffries, *The Structural Inadequacy of Public Schools for Stigmatized Minorities: The Need for Institutional Remedies*, 34 HASTINGS CONST. L.Q. 1, 21 (2006) (footnote omitted).
 2. R.A. Lenhardt, *Understanding the Mark: Race, Stigma, and Equality in Context*, 79 N.Y.U. L. REV. 803, 809 (2004).
 3. Avarita L. Hanson, *Have Zero Tolerance School Discipline Policies Turned Into a Nightmare? The American Dream's Promise of Equal Educational Opportunity Grounded in Brown v. Board of Education*, 9 U.C. DAVIS J. JUV. L. & POL'Y 289, 298 (2005).
 4. *Id.* at 298–99; see also Troy Adams, *The Status of School Discipline and Violence*, 567 ANNALS AM. ACAD. POL. & SOC. SCI. 140, 144 (2000).
 5. 419 U.S. 565 (1975).
 6. See Hanson, *supra* note 3, at 300.
 7. See Russell J. Skiba & Kimberly Knesting, *Zero Tolerance, Zero Evidence: An Analysis of School Disciplinary Practice*, NEW DIRECTIONS FOR YOUTH DEV., Winter 2001, at 17, 18–19. Zero tolerance disciplinary policies in schools have been broadly defined to mean a “philosophy or policy that mandates the application of predetermined consequences, most often severe and punitive in nature, that are intended to be applied regardless of the gravity of behavior, mitigating circum-

The move toward zero tolerance policies was initially a response to fears over increasing violence, drug-related problems, and gang activity.⁸ Eventually, the Gun-Free Schools Act of 1994⁹ and its later versions inscribed these harsh policies into federal law by conditioning federal funding on mandatory one-year expulsions of students who committed specified firearm offenses.¹⁰ Though the federal call for mandatory expulsion was limited to specific firearms and allowed for some discretion in application of the policy,¹¹ many states have expanded the scope of their zero tolerance policies widely beyond this initial reach.¹² Today, the potential applications of zero tolerance policies are almost endless, varying from state to state and even school to school.¹³ The broad implementation of these policies across the nation¹⁴ has resulted in numerous stories of nonsensical applications of the policies.¹⁵ Most alarmingly, minority youth, and especially African American youth, are disproportionately disciplined under this punitive regime and suffer most harshly from its consequences.¹⁶

Yet “in the light of the exceedingly limited rights of public school students facing school discipline,”¹⁷ punitive school discipline policies have survived attack

stances, or situational context.” Am. Psychological Ass’n Zero Tolerance Task Force, *Are Zero Tolerance Policies Effective in the Schools?: An Evidentiary Review and Recommendations*, 63 AM. PSYCHOLOGIST 852, 852 (2008) [hereinafter APA Task Force].

8. See, e.g., Skiba & Knesting, *supra* note 7, at 19.
9. Pub. L. No. 103-382, §§ 14601–14603, 108 Stat. 3518, 3907–11.
10. *Id.* § 14601 (“[E]ach State receiving Federal funds under this Act shall have in effect a State law requiring local educational agencies to expel from school for a period of not less than one year a student who is determined to have brought a weapon to a school . . . except that such State law shall allow the chief administering officer of such local educational agency to modify such expulsion requirement for a student on a case-by-case basis.”).
11. *Id.*
12. See, e.g., Hanson, *supra* note 3, at 307; Christina L. Anderson, Comment, *Double Jeopardy: The Modern Dilemma for Juvenile Justice*, 152 U. PA. L. REV. 1181, 1185 (2004); Skiba & Knesting, *supra* note 7, at 19.
13. See, e.g., ADVANCEMENT PROJECT & THE CIVIL RIGHTS PROJECT, HARVARD UNIV., OPPORTUNITIES SUSPENDED: THE DEVASTATING CONSEQUENCES OF ZERO TOLERANCE AND SCHOOL DISCIPLINE POLICIES, at vii–viii (2000) [hereinafter OPPORTUNITIES SUSPENDED], available at <http://civilrightsproject.ucla.edu/research/k-12-education/school-discipline/opportunities-suspended-the-devastating-consequences-of-zero-tolerance-and-school-discipline-policies>.
14. See, e.g., Skiba & Knesting, *supra* note 7, at 20 (citing a National Center on Education Statistics report, which stated that already in 1996–97, “94 percent of all schools ha[d] zero-tolerance policies for weapons or firearms, 87 percent for alcohol, and 79 percent for violence or tobacco”).
15. See, e.g., OPPORTUNITIES SUSPENDED, *supra* note 13, at 4–7; JUDITH A. BROWNE, ADVANCEMENT PROJECT, DERAILED!: THE SCHOOLHOUSE TO JAILHOUSE TRACK 11 (2003) [hereinafter DERAILED], available at <http://www.advancementproject.org/resources/entry/derailed-the-schoolhouse-to-jailhouse-track> (describing how “two elementary school boys were arrested and charged with terroristic threatening for playing cops and robbers with a paper gun”).
16. See *infra* Part I.B.
17. C.B. v. Driscoll, 82 F.3d 383, 385 (11th Cir. 1996).

via litigation almost unscathed and likely cannot be challenged effectively in the courts on a broad scale moving forward. As a general matter, courts usually grant school officials a large amount of discretion in handling disciplinary problems at their schools and “tend to defer to school officials when it comes to disciplinary matters” except in extreme circumstances.¹⁸ Furthermore, federal constitutional and statutory law is not particularly supportive of far-reaching challenges to punitive school discipline policies.¹⁹

Plaintiffs can challenge punitive school discipline policies under either substantive or procedural due process theories under the Fifth and Fourteenth Amendments to the U.S. Constitution. Such challenges claim that a student’s right to an education has been infringed either without sufficient substantive justification or without sufficient procedural protection.

Though substantive due process challenges once stood a fighting chance in the courts, the Supreme Court greatly reduced prospects of their success in *San Antonio Independent School District v. Rodriguez*, which ruled that education is not a fundamental right protected by the Constitution.²⁰ Therefore, plaintiffs can successfully challenge punitive school discipline policies and their applications only when they can “show an extraordinary departure from established norms that is wholly arbitrary.”²¹ If the school “provides some reasonable justification for its policy or decision, it will likely withstand judicial scrutiny,” and, in light of the large amount of discretion courts generally grant to schools in matters of educational policy, courts will likely find reasonable justifications for most instances of harsh discipline.²²

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18. Russell J. Skiba et al., *African American Disproportionality in School Discipline: The Divide Between Best Evidence and Legal Remedy*, 54 N.Y.L. SCH. L. REV. 1071, 1080 (2009–2010); see also Fuller v. Decatur Pub. Sch. Bd. of Educ. Sch. Dist. 61, 78 F. Supp. 2d 812, 821 (C.D. Ill. 2000) (“School discipline is an area which courts are reluctant to enter.”); Alicia C. Insley, Comment, *Suspending and Expelling Children From Educational Opportunity: Time to Reevaluate Zero Tolerance Policies*, 50 AM. U. L. REV. 1039, 1052–54 (2001) (noting that “the courts consistently have responded to school disciplinary matters by deferring to local school boards” but also noting some extreme cases in which even such broad deference was found not to be warranted).
 19. See, e.g., Emily Bloomenthal, *Inadequate Discipline: Challenging Zero Tolerance Policies as Violating State Constitution Education Clauses*, 35 N.Y.U. REV. L. & SOC. CHANGE 303, 326 (2011) (“The Supreme Court has essentially foreclosed the possibility of federal constitutional challenges to zero tolerance policies and practices.”).
 20. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 37 (1973) (“We have carefully considered each of the arguments supportive of . . . [a] finding that education is a fundamental right or liberty and have found those arguments unpersuasive.”).
 21. Insley, *supra* note 18, at 1057 (quoting *Dunn v. Fairfield Community High School*, 158 F.3d 962, 966 (7th Cir. 1998) in citing cases rejecting substantive due process challenges to zero tolerance policies) (internal quotation marks omitted).
 22. *Id.*; see also *supra* note 18 and accompanying text (explaining wide discretion generally granted to school officials by courts).

Procedural due process claims are also unlikely to succeed, as the procedural protections that schools must provide to students who are suspended under a punitive disciplinary policy are minimal.²³ Furthermore, procedural protections do not strike at “the underlying problem—namely, the overarching use of punitive discipline as the primary mechanism for addressing problematic behavior.”²⁴ Thus, procedural due process claims can prevent only the most egregious practices by school districts because most schools will simply “provide the basic due process requirements and summarily discharge students.”²⁵

Recognizing that challenges to punitive school discipline policies as such are not likely to succeed, plaintiffs might attempt to challenge these policies under the Equal Protection Clause of the Fourteenth Amendment or under Title VI of the Civil Rights Act of 1964²⁶ for their racially disproportionate impact.²⁷ Here too, however, Supreme Court and lower court rulings have made successful legal challenges highly unlikely, even if punitive discipline policies disproportionately affect racial minority students in a particular case.

With regards to the Equal Protection Clause, the Supreme Court established in *Washington v. Davis*²⁸ that a successful challenge to an alleged racially discriminatory state action must include a showing of discriminatory intent or of discriminatory purpose by the decisionmaker. Courts have subsequently ruled that this requirement is satisfied only when “the decisionmaker . . . selected or reaffirmed a particular course of action at least in part ‘because of,’ not merely ‘in spite of,’ its adverse effects upon an identifiable group.”²⁹ While courts may consider factors other than direct evidence of discriminatory intent in determining whether the intent requirement has been satisfied—such as discriminatory impact so large as to be “unexplainable on grounds other than race”; the historical background of a decision; the sequence of events leading up to the decision, especially when there have been departures from usual procedures; or applicable legislative or administrative history³⁰—“these types of evidence will either be difficult to obtain [in school discipline

23. The authoritative pronouncement by the Supreme Court on this issue came in the case of *Goss v. Lopez*, 419 U.S. 565 (1975), in which the Court decided that a student who has received an out-of-school suspension of ten days or less is entitled to “oral or written notice of the charges against him and, if he denies them, an explanation of the evidence the authorities have and an opportunity to present his side of the story.” *Id.* at 581.

24. Bloomenthal, *supra* note 19, at 328.

25. Insley, *supra* note 18, at 1056.

26. Pub. L. No. 88-352, § 601, 78 Stat. 241, 252.

27. See *infra* Part I.B. (discussing this disproportionate impact).

28. 426 U.S. 229 (1976).

29. *Personnel Adm'r of Mass. v. Feeney*, 442 U.S. 256, 279 (1979).

30. See, e.g., *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266–68 (1977).

cases] or will not be influential enough to persuade a court that a school or district has violated the Federal Equal Protection Clause” even when clear statistical disparities in suspension numbers exist.³¹ Courts typically require some evidence that similarly situated whites were treated differently from minority students and are very stringent about what kind of evidence they will accept to fulfill this requirement. All of this makes a successful claim under the Equal Protection Clause highly unlikely.³²

Claims under Title VI are also unlikely to succeed. For one thing, the Supreme Court has interpreted the statute itself to prohibit only intentional discrimination.³³ Courts implementing Title VI proceed under a similar analysis in evaluating proof of actionable discriminatory intent as they do under the Equal Protection Clause, and thus it is similarly difficult for plaintiffs challenging punitive school discipline policies to show such intent.³⁴ While there are administrative regulations implementing Title VI that, in theory, allow for claims based on a disparate impact theory without a showing of discriminatory intent,³⁵ the Supreme Court held in *Alexander v. Sandoval*³⁶ that there is no implied private right of action to enforce such regulations.³⁷ This means that private plaintiffs must base any challenge to a school’s policy on the statutory language of Title VI—which does not allow for a disparate impact challenge but instead requires a very difficult showing of discriminatory intent—and cannot base their lawsuits on regulations implementing the statute—which do allow for a disparate impact challenge without a showing of discriminatory intent. This leaves the federal government as the sole enforcer of Title VI regulations. Yet the agency in charge of doing the enforcing—the Office of Civil Rights within the

31. Adira Siman, *Challenging Zero Tolerance: Federal and State Legal Remedies for Students of Color*, 14 CORNELL J.L. & PUB. POLY 327, 340 (2005); see also, e.g., *Tasby v. Estes*, 643 F.2d 1103, 1107–08 (5th Cir. 1981) (finding that proof of disproportionate discipline imposed on black students, even if assumed to be statistically significant, is of “limited probative value” even in the context of ongoing desegregation efforts because “[t]oo many legitimate, non-racial factors are involved to permit an inference of discriminatory purpose”); Skiba et al., *supra* note 18, at 1092 (“[S]tatistical evidence of disproportionate discipline of minority students has rarely been sufficient in and of itself to result in findings in favor of the plaintiffs.”).

32. See Siman, *supra* note 31, at 339–40; see also *Tasby*, 643 F.2d at 1107 n.1 (stating that offense categories such as “cutting class,” “disobedience,” or “fighting” were too general to permit appropriate comparison and that the available statistics in the case did not sufficiently “reflect other relevant circumstances surrounding each individual case of punishment” (internal quotation marks omitted)).

33. E.g., *Alexander v. Sandoval*, 532 U.S. 275, 280 (2001).

34. See Siman, *supra* note 31, at 341–43.

35. See *id.* at 343–45.

36. 532 U.S. 275.

37. *Id.* at 293.

Department of Education—“does not appear to regularly apply the adverse impact doctrine in complaint investigations and determinations” but rather seems to “process[] complaints under the more rigid intentional discrimination standard.”³⁸

While state constitutions and statutes might afford greater protections for students’ educational rights, and thus potentially provide a more useful basis for individual lawsuits,³⁹ these avenues for challenging punitive school discipline policies reach only as far as the states in which they are enacted. Litigation based on such laws could provide useful relief for local beneficiaries, but it will not address the root cause of a nationwide punitive approach to disciplining students.

Notwithstanding the difficulty of challenging punitive school discipline policies in the courts, this Comment argues that such policies need to be replaced. These policies are not only ineffective in creating an environment conducive to the academic and social development of all children but also contribute to many pervasive and systemic problems that disproportionately affect minority communities and African American youth in particular.

To illustrate this point, Part I presents the main societal problems that have been associated with the increased use of zero tolerance in American schools. It presents the latest data on school discipline outcomes nationwide and compares such data with earlier studies on zero tolerance school disciplinary policies to demonstrate that little progress has been made toward the goal of creating both safe and effective learning environments for American children. In this context, Part I also highlights the troubling numbers relating to the treatment of minorities under the regime of zero tolerance policies in schools. It then takes this empirical overview and situates today’s punitive school discipline policies within the discourse on a number of widely acknowledged school-related social issues that, once more, disproportionately affect minority communities: the school-to-prison pipeline; high school dropout rates; the push-out phenomenon; and the criminalization of schools.

Because a comprehensive remedy to these systemic issues cannot be expected to come from efforts in the courts, alternative strategies to soften and to reverse the negative impact that punitive school discipline imposes on students, and especially minority students, will have to be based on voluntary measures—measures that can be implemented based on the very discretion and educational

38. Siman, *supra* note 31, at 348.

39. See Bloomenthal, *supra* note 19, at 329–34; *see also id.* at 335–53 (showing how arguments from school finance litigation in New York could be adapted to challenge zero tolerance policies); Siman, *supra* note 31, at 350–63 (describing potential arguments that could be made in challenging zero tolerance policies under different types of state laws).

judgment of local educators that has partially insulated zero tolerance from broad legal challenge.⁴⁰ In developing such effective measures, educators and policymakers need a better understanding of the intricacies of the process that is supporting the punitive status quo of school discipline in the first place.

Accordingly, Part II uses the bleak picture of racial disproportionality in school discipline developed in Part I as a point of departure and sets forth a theoretical framework based on concepts developed in the field of Critical Race Theory, which can help explain why such disproportionality exists. It argues that punitive school discipline policies serve as a tool that perpetuates, reenacts, and polices the boundaries of deeply engrained American racial hierarchies.

In construing this theoretical framework, Part II takes up the notion of racial stigma. It surveys the history of American race relations, with a particular focus on how African Americans were branded as inferior, not truly belonging to the American social fabric, and a threat to white privilege and to white control. It then examines how stigma interacts with the social psychology phenomenon of implicit bias and how both processes influence and create the troubling phenomenon that minority students, and especially African American youth, are disproportionately disciplined for subjective offenses such as defiance and disrespect for authority.

Racial stigma and implicit bias are then linked to normative baselines and the so-called acting white phenomenon. I argue that stereotyping and implicit biases arising from a long history of racial prejudice and dominance continue to infuse seemingly objective standards of what is considered appropriate behavior as well as the practices—such as punitive school discipline—that are used to enforce such standards. These practices, again, lead to disproportionate disciplining of minority students, especially for low-level behavioral offenses.

Finally, Part III offers Restorative Justice as an alternative to the current disciplinary framework and argues that Restorative Justice-based practices are more helpful in addressing the issues described in Parts I and II than current punitive policies. Part III details the particular methods employed by Restorative Justice programs in schools and marshals data from these schools to bolster the claim that under a Restorative Justice framework it is possible to ensure school safety and a positive school environment while at the same time showing genuine concern for the problems of both victims and perpetrators of inappropriate juvenile behavior as well as the victims of continuing racial bias. Part III argues that Restorative Justice-based disciplinary policies are consistent with core principles of Critical Race Theory and are more conducive to creating a

40. See *supra* note 18 and accompanying text.

nurturing, safe, and inclusive school environment because they address the root causes of problematic juvenile behavior, broaden the understanding of the harms that result from such behavior, expand the community of stakeholders that is involved in addressing issues of misbehavior at school, and give a real voice to all participants in a disciplinary incident.

I. PUNITIVE ZERO TOLERANCE POLICIES AND THEIR NEGATIVE OUTCOMES

A. School Suspensions Generally

1. The Data

One particularly alarming outcome of the growing use of zero tolerance policies is that schools are excluding more and more children from their campuses. Out-of-school suspensions are “among the most widely used disciplinary techniques” for regulating student behavior in American schools.⁴¹ For example, the number of primary and of secondary public school students that were suspended from school at least once during a particular school year has risen from an estimated 1.7 million in 1974⁴² to approximately 3.1 million in 1998⁴³ and to 3.3 million in 2006,⁴⁴ a number that represents 7 percent of the entire student population.⁴⁵ Somewhat counterintuitively, however, out-of-school suspensions are not predominantly used to punish the most dangerous student behavior but rather to punish relatively trivial acts such as disrespect toward a school authority or classroom disruption.⁴⁶ One author has termed this de-

41. Skiba & Knesting, *supra* note 7, at 28; *see also* Russell J. Skiba et al., *Office Referrals and Suspension: Disciplinary Intervention in Middle Schools*, 20 EDUC. & TREATMENT OF CHILDREN 295, 301 (1997) (finding suspensions to be by far the most common administrative disciplinary decision—with one-third of all disciplinary actions being suspensions—in a study of a large, urban Midwestern public school district).

42. Johanna Wald & Daniel J. Losen, *Defining and Redirecting a School-to-Prison Pipeline*, NEW DIRECTIONS FOR YOUTH DEV., Fall 2003, at 9, 10.

43. *Id.*; *see* Anderson, *supra* note 12, at 1189 (citing OFFICE FOR CIVIL RIGHTS, U.S. DEPT OF EDUC., FALL 1998 ELEMENTARY AND SECONDARY SCHOOL CIVIL RIGHTS COMPLIANCE REPORT: NATIONAL AND STATE PROJECTIONS (2000)).

44. MICHAEL PLANTY ET AL., NAT'L CTR. FOR EDUC. STATISTICS, NCES 2009-081, THE CONDITION OF EDUCATION 2009, at 70 (2009).

45. *Id.*

46. *See, e.g.*, Donald H. Stone & Linda S. Stone, *Dangerous & Disruptive or Simply Cutting Class; When Should Schools Kick Kids to the Curb?: An Empirical Study of School Suspension and Due Process Rights*, 13 J.L. & FAM. STUD. 1, 12 (2011) (reporting that in Maryland in 2006–07 “only 6.7% of suspensions were issued for dangerous substances, weapons, arsons and sex offenses combined”—with a similarly low 7.1 percent in 2007–08—while suspensions for disrespect, insubordination,

velopment net widening—the sweeping of low-level offenders into a punitive system for which there is no credible deterrence effect from increasingly harsh punishment.⁴⁷ This wide sweep of zero tolerance policies, then, applies punitive discipline often to students who are not really dangerous but rather in need of support to counteract family problems, detachment from school, or learning disabilities.⁴⁸ After these students have come into the reach of punitive school discipline, they then suffer from a wide range of negative effects associated with out-of-school suspension.

2. Academic Costs

Given that the amount of instructional time a student receives is an important predictor of achievement outcomes,⁴⁹ the loss of instructional time by millions of students to out-of-school suspensions hampers the academic development of many youth and diminishes their prospects of becoming productive and successful members of society.⁵⁰ In addition, these exclusionary policies inflict psychological costs on students. Excessive punishment not only impedes learning and general childhood development but also subverts the

and disruption made up 37.2 percent of all out-of-school suspensions in 2006–07 (citing MD. DEP'T OF EDUC., MARYLAND PUBLIC SCHOOL SUSPENSIONS BY SCHOOL AND MAJOR OFFENSE CATEGORY: OUT-OF-SCHOOL SUSPENSIONS 2006–2007, at 1 (2007), *available at* http://www.marylandpublicschools.org/NR/rdonlyres/BF1EED33-A890-434D-BFDD-07EA226A6F93/15171/susp07_sch_out1.pdf and MD. DEP'T OF EDUC., MARYLAND PUBLIC SCHOOL SUSPENSIONS BY SCHOOL AND MAJOR OFFENSE CATEGORY: OUT-OF-SCHOOL SUSPENSIONS 2007–2008, at 1 (2008), *available at* http://marylandpublicschools.org/NR/rdonlyres/95CF37D5-9CD5-4351-8264-DD3C91FA8A6D/18547/susp08_sch_out1.pdf); *see also* ADVANCEMENT PROJECT, TEST, PUNISH, AND PUSH OUT: HOW “ZERO TOLERANCE” AND HIGH-STAKES TESTING FUNNEL YOUTH INTO THE SCHOOL-TO-PRISON PIPELINE 4 (rev. ed. 2010) [hereinafter TEST, PUNISH, AND PUSH OUT], *available at* <http://www.advancementproject.org/resources/entry/test-punish-and-push-out-how-zero-tolerance-and-high-stakes-testing-funnel> (“The[] punitive measures [applied as a result of zero tolerance policies] extend far beyond serious infractions; instead, the vast majority of punitive disciplinary consequences tend to result from relatively minor misbehavior or trivial student actions. In fact, the problem in most cases is not the student, but, rather, the adults who react inappropriately to youthful behavior.”).

47. *See* Anderson, *supra* note 12, at 1191–93.

48. *See* Joan M. Wasser, Note, *Zeroing in on Zero Tolerance*, 15 J.L. & POL. 747, 766–67 (1999).

49. *See, e.g.*, DANIEL J. LOSEN & RUSSELL J. SKIBA, SUSPENDED EDUCATION: URBAN MIDDLE SCHOOLS IN CRISIS 8 (2010) (citing other studies).

50. For example, even when suspension numbers were still much lower in 1975, the Children’s Defense Fund reported that in the school districts that it analyzed—accounting for 53 percent of total school enrollment—one million suspended students lost over four million school days. CHILDREN’S DEF. FUND, SCHOOL SUSPENSIONS: ARE THEY HELPING CHILDREN? 55 n.2, 56 (1975), *available at* <http://www.childrensdefense.org/child-research-data-publications/archives/school-suspensions-are-they-helping-children.html>.

relationship of students with, and their trust and their confidence in, authority figures, which intensifies conflicts rather than mediating them.⁵¹ Furthermore, students who are suspended or expelled from school for a significant amount of time often have no access to alternative education or the alternative education to which they have access is gravely deficient.⁵²

Not surprisingly, then, studies suggest that zero tolerance policies neither improve school climate by removing disruptive students nor reduce rates of misbehavior through a deterrent function.⁵³ In fact, these punitive policies might actually be counterproductive. Evidence suggests that schools with higher rates of suspensions have

less satisfactory ratings of school climate, [and] less satisfactory school governance structures . . . [S]chool suspension in general appears to predict higher future rates of misbehavior and suspension among those students who are suspended. In the long term, school suspension and expulsion are moderately associated with a higher likelihood of school dropout and failure to graduate on time.⁵⁴

Furthermore, “emerging data indicate that schools with higher rates of school suspension and expulsion have poorer outcomes on standardized achievement tests”⁵⁵ independent of sociodemographic factors.⁵⁶

3. Criminalization of Youth

Even worse, research suggests a positive relationship between school suspension and youth incarceration.⁵⁷ Two primary factors likely underlie this positive relationship: (1) the increased criminalization of schools that ac-

51. See Insley, *supra* note 18, at 1069–70.

52. See, e.g., Augustina Reyes, *The Criminalization of Student Discipline Programs and Adolescent Behavior*, 21 ST. JOHN’S J. LEGAL COMMENT. 73, 80–87 (2006) (explaining the disproportionately negative effect on minorities imposed by current flaws in alternative education).

53. See APA Task Force, *supra* note 7, at 854.

54. *Id.* (emphasis omitted) (citations omitted).

55. LOSEN & SKIBA, *supra* note 49, at 10.

56. See M. Karega Rausch & Russell J. Skiba, *The Academic Cost of Discipline: The Relationship Between Suspension/Expulsion and School Achievement* 19 (May 1, 2006) (unpublished manuscript) (presented at the Annual Meeting of the American Educational Research Association, Montreal, Canada), available at <http://www.agi.harvard.edu/Search/download.php?id=45> (finding based on two regression models “that school use of out-of-school suspension and expulsion is negatively related to achievement, even when socio-demographic variables are held constant”).

57. Russell Skiba et al., Harvard Civil Rights Project, *Consistent Removal: Contributions of School Discipline to the School-Prison Pipeline* 17 (May 16–17, 2003) (unpublished conference paper), available at <http://varj.asn.au/Resources/Documents/Consistent%20Removal.pdf> (finding that across thirty-seven states with available data “there is evidence of a clear relationship between school suspension and juvenile incarceration”).

accompanied the shift to zero tolerance policies, and (2) the interaction between zero tolerance and high stakes testing, which combine to create the so-called push-out phenomenon.

With regard to the increased criminalization of schools, students, often as a result of zero tolerance policies, are increasingly within the reach of two disciplinary systems—the school system and the criminal justice system—for misbehavior that was traditionally handled exclusively by school administrators.⁵⁸ Schools in a number of states now routinely refer their students—in some instances mandatorily—to juvenile justice, or even to adult criminal justice, authorities for school-related misbehavior.⁵⁹ This creates “a unique form of ‘double jeopardy’” for which traditional procedural protections against double charging for the same offense are not available.⁶⁰ But the criminalization of student behavior does not stop at the point of referral. In fact, accompanying the shift toward zero tolerance discipline policies has been an increasing presence of law enforcement personnel on public school campuses,⁶¹ in effect “turn[ing] public schools into well-policed fortresses”⁶² and resulting in increasingly large numbers of school-based arrests.⁶³ Apart from the harms to all students who have to attempt to study in such difficult and distracting environments,⁶⁴ racial

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58. See TEST, PUNISH, AND PUSH OUT, *supra* note 46, at 4 (arguing that zero tolerance policies “have blurred the line between the education and criminal justice systems” by generating “dramatic increases in the use of lengthy out-of-school suspensions, expulsions, referrals to alternative schools, referrals to law enforcement, and school-based arrests”); Anderson, *supra* note 12, at 1194–99 (discussing “the blurring of institutional boundaries” between schools and traditional law enforcement that has resulted from zero tolerance policies).
59. See, e.g., Thalia González, *Keeping Kids in Schools: Restorative Justice, Punitive Discipline, and the School to Prison Pipeline*, 41 J.L. & EDUC. 281, 288 (2012) (“Currently, forty-one states require schools to report students to law enforcement for various misbehaviors on campus.”); see also OPPORTUNITIES SUSPENDED, *supra* note 13, app. IV (listing in considerable detail reporting requirements of student misconduct to law enforcement for all fifty states).
60. See Anderson, *supra* note 12, at 1197–99.
61. See ADVANCEMENT PROJECT ET AL., EDUCATION ON LOCKDOWN: THE SCHOOLHOUSE TO JAILHOUSE TRACK 16–18, 23–43 (2005) [hereinafter EDUCATION ON LOCKDOWN], available at <http://www.advancementproject.org/page/-/resources/FINALEOLrep.pdf> (explaining how more and more often “Law Enforcement Goes to School” and examining the extent and impact of increased law enforcement presence across four case studies); Aaron Sussman, Comment, *Learning in Lockdown: School Police, Race, and the Limits of Law*, 59 UCLA L. REV. 788 (2012); see also U.S. DEP’T OF EDUC., NCJ 228478, INDICATORS OF SCHOOL CRIME AND SAFETY: 2009, at 69–70 (2009) [hereinafter INDICATORS], available at <http://nces.ed.gov/pubs/2010/2010012.pdf> (describing the increased use of various law enforcement and security tools at schools across the United States).
62. TEST, PUNISH, AND PUSH OUT, *supra* note 46, at 15.
63. *Id.* at 18–19; González, *supra* note 59, at 289–90 (reporting very large increases in school-based arrests during the 2000s).
64. See, e.g., EDUCATION ON LOCKDOWN, *supra* note 61, at 45 (“Teachers should not spend all day disciplining students, nor should students miss out on opportunities to learn simply because of their

minorities “suffer disproportionately from increased school criminalization.”⁶⁵ Indeed, some scholars have argued that this increased criminalization of schools creates “uniquely racial harm” for nonwhite students by funneling them into the school-to-prison pipeline, harming them psychologically, and inflicting harsh economic harms and so-called citizenship harms on minorities.⁶⁶

4. The Push-Out Phenomenon

Zero tolerance policies, interacting with the high stakes testing regime that was implemented through the No Child Left Behind Act of 2001 (NCLB)⁶⁷ and its progeny, have been identified as a primary culprit for what has come to be known as the push-out phenomenon.⁶⁸ According to an Advancement Project report, these two policies “have joined together to change the incentive structure

race or because an adult has inappropriately decided they are not worthy of an education but instead belong in the penal system.”).

65. See Sussman, *supra* note 61, at 793–94 (“[D]raconian measures used to target minor rule violation . . . are expanding, making the education system and the criminal justice system increasingly difficult to distinguish in low-income, nonwhite communities.” (footnote omitted)). Sussman notes, however, that the perception underlying increased school criminalization—the perception that violence in schools is a growing problem, which emerged especially strongly after several school shootings in the late 1990s—does not reflect reality. *Id.* at 792–93. Most importantly, according to Sussman, it does not warrant the increasing criminalization of schools as an intervention, because “since the mid-1990s, school crime has [actually] decreased.” *Id.* at 792. There is only scant evidence that this decrease is correlated with increased policing in schools—policing that carries with it “the devastating effects that criminalization and increased reliance on police officers have on nonwhite students at these schools already suffering from underfunding and low educational outcomes.” *Id.* at 793; see also *id.* at 797 & n.44 (“[S]chool criminalization is only intensifying as schools steadily become safer, with various sources indicating either no correlation or an inverse one.”); cf. Bloomenthal, *supra* note 19, at 307–08 (making a similar point in the context of punitive zero tolerance school discipline policies while arguing that there is no indication that the reduction in school violence rates in the 1990s was caused by punitive treatment of minors but instead seems to be “merely part of a larger national trend of decreasing juvenile violence and crime”).

66. See Sussman, *supra* note 61, at 792, 810–31.

67. Pub. L. No. 107-110, 115 Stat. 1425 (2002) (codified as amended in scattered sections of 20 U.S.C. (2012)). The Act requires states to define and to track Adequate Yearly Progress requirements that measure the academic achievement of all public schools in a particular state. See *id.* § 1111(b)(2)(B). The objectives that each state sets for meeting such progress requirements are then measured by statewide academic assessments. See *id.* § 1111(b)(2)(G) (describing “Measurable Objectives” requirement); *id.* § 1111(b)(3) (describing “Academic Assessments” requirement). Taken together, these and other sections of the Act implement the high-stakes testing regime I reference in this Subpart.

68. See TEST, PUNISH, AND PUSH OUT, *supra* note 46, at 3 (explaining that zero tolerance policies have interacted with high stakes testing practices to turn “schools into hostile and alienating environments for many of our youth, effectively treating them as drop-outs-in-waiting” with the school-to-prison pipeline as the “devastating end result of these intertwined punitive policies”).

for educators” by making education “more than ever, a numbers game.”⁶⁹ Because the receipt of federal education funds is contingent on complying with the stringent, and numbers-driven, requirements of NCLB,⁷⁰ there is now a perverse incentive to exclude “problem students” from the educational environment through punitive school discipline. “[I]f a student acts up in class, it is no longer in educators’ self-interest to address it by assessing the student’s unmet needs or treating the incident as a teachable moment. It is much easier and more efficient to simply remove the child from class through punitive disciplinary measures”⁷¹ Because being suspended is a predictor of eventual school dropout,⁷² many students who get caught in this web of mutually reinforcing pressures do not graduate from high school, have fewer and worse job prospects, and are all

69. *Id.* at 6 (internal quotation marks omitted).

70. *See* No Child Left Behind Act § 1111(a)(1) (conditioning the receipt of federal funds on the submission of a plan describing how a state will meet the academic standards, assessments, and accountability requirements of the Act).

71. TEST, PUNISH, AND PUSH OUT, *supra* note 46, at 6 (internal quotation marks omitted). Deborah Gordon Klehr pointedly illustrates how this “perfect storm” hits students very harshly, especially those who are low achievers academically and are prone to exhibit behavioral problems:

[T]he unintended consequences of combining NCLB with zero tolerance can be a toxic mix for students. . . .

Pressure to meet Adequate Yearly Progress combined with pressure to maintain safe schools and enforce zero tolerance policies means Maurice, the seventh grader who acts out in English class as a way to show his frustration with being unable to read, gets expelled for acting out, and his below proficient test scores are not counted against the school. Maybe this seventh grader swore at his teacher. He may be arrested for making a terroristic threat. Thus, in addition to facing an expulsion from school, Maurice may now face criminal charges. He has entered the School-to-Prison Pipeline and may never recover from the consequences. Let’s assume Maurice is arrested, adjudicated delinquent, and sent to placement. If and when Maurice returns to his school district, he will likely face barriers to re-enrollment. Even if his expulsion was not permanent, Maurice’s credits from juvenile delinquency placement may not transfer to his home district. The home district may attempt to enroll him in an alternative education program for disruptive youth despite the recommendation of his juvenile probation officer and his reformed behavior in placement. If he is allowed to return to a regular school program, he is likely to be watched closely for any misbehavior while, at the same time, unlikely to receive support services. Finally, the psychological effects of the criminalization of his earlier behavior may lead Maurice to drop-out of school, return to the criminal justice system, or both.

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, 602–03 (2009) (footnote omitted).

72. *See* González, *supra* note 59, at 294 (“Once removed from schools, students experience decreased academic achievement, further fueling negative attitudes and leading to increased dropout rates.”); Russell W. Rumberger, *Why Students Drop Out of School*, in DROPOUTS IN AMERICA: CONFRONTING THE GRADUATION RATE CRISIS 131, 143–44 (Gary Orfield ed., 2004).

but guaranteed to have future encounters with law enforcement and with the criminal justice system.⁷³

5. Economic Costs

Apart from these tragic social costs, such a criminalization regime also has an economic cost. This cost stems from both the greater cost of running a crowded criminal justice system as well as from the lost productivity of youth who get caught in the system's wheels without receiving the necessary skills to become productive members of society.⁷⁴ In 2007, for example, "[s]tates spent about \$5.7 billion . . . to imprison 64,558 youth committed to residential facilities. . . . [O]n average, it costs states \$240.99 per day—around \$88,000 a year—for every youth in a juvenile facility."⁷⁵ Economists Mark Cohen and Alex Piquero estimate that the monetary present value of saving a high-risk youth from a life of crime range from \$2.6 to \$5.3 million if the youth can be saved by age eighteen, from \$3.2 to \$5.8 million if the youth can be saved by age fourteen, and from \$3.2 and \$5.5 million if the youth can be saved by age ten.⁷⁶ These societal savings comprise a large number of individual cost items relating to future crime, drug involvement, and lower educational attainment that society does not have to pay when children avoid a life of crime.⁷⁷

73. See Gary Orfield, *Losing Our Future: Minority Youth Left Out*, in DROPOUTS IN AMERICA: CONFRONTING THE GRADUATION RATE CRISIS, *supra* note 72, at 1, 1 ("Dropping out often leads to economic and social tragedy. High school dropouts are far more likely than graduates to be unemployed, in prison, unmarried or divorced, and living in poverty.").

74. This cost also stems in part from expenditures necessitated by the increased criminalization of schools. See Sussman, *supra* note 61, at 797 ("[P]oor schools are now spending a larger portion of their money to look like prisons and have less money to spend because state funds are being used to maintain prisons."). Official government data in a joint report by the Department of Education and the Bureau of Justice Statistics support Sussman in his conclusion that schools increasingly look like prisons. See INDICATORS, *supra* note 61, at 69–70 (reporting that 90 and 43 percent of schools had controlled access to buildings and school grounds, respectively, during school hours; that 55 percent used security cameras to monitor the school; that 58 percent required faculty and staff to wear badges and picture identification at school; that 22 percent used random dog sniffs to check for drugs; and that such numbers have generally risen over time).

75. JUSTICE POLICY INST., THE COSTS OF CONFINEMENT: WHY GOOD JUVENILE JUSTICE POLICIES MAKE GOOD FISCAL SENSE 4 (2009).

76. Mark A. Cohen & Alex R. Piquero, *New Evidence on the Monetary Value of Saving a High Risk Youth*, 25 J. QUANTITATIVE CRIMINOLOGY 25, 46 (2009).

77. *Id.* at 27–46 (investigating the "Cost of Individual Crimes," "Victim Costs," "Criminal Justice-Related Costs Due to Career Criminals," "Opportunity Cost of Career Criminal's Time While Incarcerated," "Opportunity Cost of Resources Associated with the Manufacture and Sale of Drugs," "Drug Rehabilitation Expenses," "Reduced Productivity Due to Decreased Work Ability," "Medical Costs Associated with Overdose or Other Drug-Related Illness," "Premature Death Due to Drug Abuse," "Additional Crime Committed by Drug Users," "Criminal Justice Costs

American society should be extremely critical of school discipline policies that impede its youth's academic potential, criminalize its children, and waste enormous amounts of social and economic resources. Additionally, the general problems with punitive school discipline policies also implicate deep notions of equality and inequality because they do not impose their harsh effects on all societal groups equally.

B. Racial Disproportionality in School Discipline

Equally as alarming as the general societal costs associated with punitive school discipline outlined above is the fact that studies over the past thirty years have consistently found that school disciplinary actions, including out-of-school suspensions,⁷⁸ disproportionately affect minority youth, especially African American students.⁷⁹ And not only has racial disproportionality in school

Associated with Drug Use,” “Third-Party Costs” associated with drug crime, and “Lost Wages and Productivity” associated with high school dropout).

78. See RUSSELL J. SKIBA ET AL., IND. EDUC. POLICY CTR., *THE COLOR OF DISCIPLINE: SOURCES OF RACIAL AND GENDER DISPROPORTIONALITY IN SCHOOL PUNISHMENT* 3–5 (2000), available at <http://www.iub.edu/~safeschl/cod.pdf> (listing and describing prior studies that found racial disproportionality in school discipline before confirming such findings with own study). For findings of such racial disproportionality in specific locales, see, for example, *OPPORTUNITIES SUSPENDED*, *supra* note 13, and *DERAILED*, *supra* note 15.

79. This Comment will focus specifically on the racial disproportionality in school discipline that African American youth suffer from. This is a conscious choice, which reflects the fact that in many ways racial disproportionality in school discipline is the most obvious in its disproportionate effects on African American children. See Russell J. Skiba et al., *Race Is Not Neutral: A National Investigation of African American and Latino Disproportionality in School Discipline*, 40 SCH. PSYCHOL. REV. 85, 101 (2011) (noting the results of the study are “consistent with previous research indicating ubiquitous overrepresentation in school discipline for African American students, but inconsistent evidence of disparities” as they affect Latino students). It also reflects my intent to honor the fact that the field of Critical Race Theory, which is a major guidepost for this piece, recognizes the need to address the discriminatory treatment imposed on different minority groups in the United States in their particular context and with a concrete understanding of the particularized histories and experiences of different groups. See Devon W. Carbado, *Critical What What?*, 43 CONN. L. REV. 1593, 1614 (2011) (explaining that Critical Race Theory scholars implement their theoretical insights “across racial groups, and in the context of doing so try to avoid . . . the pitfalls of essentialism” (footnote omitted)). As a consequence, the fact that I do not discuss racial disproportionality in school discipline as it affects other racial groups does not mean that these disproportionalities do not exist or that they are not serious. Rather, it reflects my conviction that those issues deserve separate in-depth engagement.

Similarly, I acknowledge that the analysis in this piece is offered through a lens that does not focus specifically on issues of gender and, very importantly, on issues of the intersection between race and gender. Therefore, the analysis may prioritize male over female experiences and may marginalize problems that need to be seriously explored. See, e.g., Kimberlé Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139, 140 (arguing that “dominant conceptions of discrimination condition us to think about subordination as

discipline been a consistent finding, the severity of the disproportionality also seems to have increased over time.⁸⁰

According to data from the Office of Civil Rights of the U.S. Department of Education, in 1972–73, African American students were twice as likely to be suspended—as measured by the percentage of enrolled African American students that had been suspended one day or more—as white students, but in 2006–07, African American students were three times as likely to be suspended.⁸¹ Similarly, in an unprecedentedly detailed investigation into discipline rates, which used a nationally representative sample of schools, Professor Russell Skiba and his colleagues found that African American students are more than twice as likely to receive a disciplinary office referral as compared to white students at the elementary school level and more than 3.7 times as likely to receive such a referral in middle school.⁸² African American students were significantly more likely to receive an office referral *for all offense categories* under investigation.⁸³ Furthermore, once referred to the office, African American students were significantly more likely to receive out-of-school suspensions as their punishment for a particular offense in both elementary and middle school.⁸⁴ While this disparity in

disadvantage occurring along a single categorical axis” and “that this single-axis framework erases Black women in the conceptualization, identification and remediation of race and sex discrimination by limiting inquiry to the experiences of otherwise-privileged members of the group”); see also Kimberlé Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241 (1991). The intersection between race and gender as it relates to school discipline is also a topic worth separate and detailed consideration, but it is not the specific focus of this Comment. Thus, I feel compelled to state this limitation but leave a separate investigation of these issues to other scholars, or defer it until a later point in time. See, e.g., LOSEN & SKIBA, *supra* note 49, at 8, 12 (finding that in the authors’ study “suspension rates were consistently higher for Black females than for Hispanic or White males,” noting that this “raise[s] important questions about . . . the possibility of conscious or unconscious racial and gender biases at the school level,” and recommending that school discipline data should henceforth be collected “with full disaggregation of the data by race with gender” to improve research in this area (emphasis omitted)); see also *id.* at 14 tbl.1b, 16 tbls. 1e & 1f (presenting tables which show the clear disparity in suspension rates not only between black and white female students but also between black female and white male students).

Finally, it seems very likely that societal subordination along the axes of class, sexual orientation, disability, and immigration status also influences the decisionmaking of school officials who are responsible for administering discipline codes and rules. As with the topics just discussed, these issues warrant separate attention.

80. See DANIEL J. LOSEN, NAT’L EDUC. POLICY CTR., *DISCIPLINE POLICIES, SUCCESSFUL SCHOOLS, AND RACIAL JUSTICE* (2011), available at <http://nepc.colorado.edu/publication/discipline-policies>.

81. *Id.* at 4 fig.1.

82. Skiba et al., *supra* note 79, at 93.

83. *Id.* at 93–94.

84. *Id.* at 95.

punishment holds true for all infraction types at the elementary school level, it is reduced to only certain infraction types at the middle school level.⁸⁵

Significantly, this racial disproportionality in school discipline cannot be entirely explained by differences in socioeconomic status or differential rates of misbehavior.⁸⁶ Therefore, while low socioeconomic status is a risk factor for school suspension, race also contributes to differences in suspension rates independently of socioeconomic status.⁸⁷ Similarly,

investigations of student behavior, race, and discipline have yielded no evidence that African American over-representation in school suspension is due to higher rates of misbehavior, regardless of whether the data are self-reported, or based on analysis of disciplinary records. If anything, studies have shown that African American students are punished more severely for less serious or more subjective infractions.⁸⁸

Furthermore, numerous studies have documented that African American students are disciplined more frequently than white students for offenses that are ambiguous and vague while white students are more likely to be disciplined more frequently than African American students in clearly delineated offense categories.⁸⁹ It seems likely that racial stereotyping—conscious or unconscious—as well as cultural mismatch between teachers and students are at work and can explain at least some part of existing racial disproportionality in school discipline.⁹⁰ A more in-depth theoretical analysis of what could be at the bottom of this difference in the types of misbehavior for which African American and white students are suspended is provided in Part II below.

The available data suggest that the foregoing racial disparities in school discipline translate to similar disparities in whom schools refer to the juvenile justice system⁹¹ as well as to the criminal justice system.⁹² These findings of pervasive racial disparities in the disciplinary programs of American schools and, as a corollary, in the life chances of millions of Americans, beg for both clear

85. *Id.* These types, in the nomenclature of the author, were “disruption, moderate infractions, and tardy/truancy.” *Id.*

86. *See* Skiba et al., *supra* note 18, at 1088.

87. *Id.* at 1088 & n.134 (citing studies).

88. *Id.* at 1088 (footnotes omitted).

89. *See, e.g.*, OPPORTUNITIES SUSPENDED, *supra* note 13, at 8; DERAILED, *supra* note 15, at 21–26.

90. *See* Skiba et al., *supra* note 79, at 87.

91. *See, e.g.*, Sean Nicholson-Crotty et al., *Exploring the Impact of School Discipline on Racial Disproportion in the Juvenile Justice System*, 90 SOC. SCI. Q. 1003 (2009); *see also* TEST, PUNISH, AND PUSH OUT, *supra* note 46, at 19; EDUCATION ON LOCKDOWN, *supra* note 61, at 23–43 (describing racial disparities in four case studies).

92. *See, e.g.*, Sharon Dolovich, *Creating the Permanent Prisoner*, in LIFE WITHOUT PAROLE: AMERICA’S NEW DEATH PENALTY? 96 (Charles J. Ogletree, Jr. & Austin Sarat eds., 2012).

theoretical explanation and more equitable alternatives to the current zero tolerance policies, which are clearly failing. Parts II and III of this Comment take up this challenge.

II. A CRITICAL RACE THEORY PERSPECTIVE ON ZERO TOLERANCE

In light of the foregoing facts, it should be an uncontroversial step to argue that such a pervasive and a persistent pattern of racial disproportionality does not develop by accident or by coincidence. Rather, it has to be at least partially the result of a biased process that systemically disadvantages minority, and especially African American, youth. The existence of such systematic bias becomes even more obvious once one considers that the same patterns of vast racial disproportionality in punishment also exist in the juvenile justice system⁹³ and its adult counterpart, the criminal justice system.⁹⁴ Because existing research has made clear that the most obvious explanation for differential rates of punishment—differential rates of misbehavior—is not sufficient to explain racial disproportionality in school discipline,⁹⁵ further inquiry must be made into the potential bases of this racial disproportionality. The following Part attempts to do just that. In doing so, it draws on concepts and on theories developed in the field of Critical Race Theory (CRT).

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93. See Kenneth B. Nunn, *The Black Nationalist Cure to Disproportionate Minority Contact*, in JUSTICE FOR KIDS: KEEPING KIDS OUT OF THE JUVENILE JUSTICE SYSTEM 135, 138 (Nancy E. Dowd ed., 2011) (reporting that “[i]n 2006, youth from communities of color constituted 63 percent of the juveniles detained and 69 percent of those committed to secure juvenile correctional facilities” and that “African American youth are overrepresented to a greater degree than any other racial/ethnic category” as they represented “13 percent of the nation’s juvenile population in 2006” but “30 percent of all juveniles arrested, 42 percent of those who were detained, and 39 percent of those in residential placement” (citation omitted)).
94. See, e.g., MARC MAUER & RYAN S. KING, THE SENTENCING PROJECT, UNEVEN JUSTICE: STATE RATES OF INCARCERATION BY RACE AND ETHNICITY 4 & n.9 (2007) (stating that “[t]he American prison and jail system is defined by an entrenched racial disparity in the population of incarcerated people” and reporting that in 2005 the incarceration rate per 100,000 people was 412 for whites and 2290 for blacks).
95. See *supra* notes 86–88 and accompanying text. Michelle Alexander makes a similar point about incarceration rates for drug offenses, which also disproportionately affect African Americans. See MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS 99 (rev. ed. 2012) (“There is, of course, an official explanation for [racial disproportionality in drug-offense-related imprisonment]: crime rates. This explanation has tremendous appeal—before you know the facts—for it is consistent with, and reinforces, dominant racial narratives about crime and criminality dating back to slavery. The truth, however, is that rates and patterns of drug crime do not explain the glaring racial disparities in our criminal justice system.”). Alexander cites to studies that explain that “[a]lthough the majority of illegal drug users and dealers nationwide are white, three-fourths of all people imprisoned for drug offenses have been black or Latino” and that “African Americans are incarcerated at grossly disproportionate rates throughout the United States.” *Id.* at 98–99.

A. Critical Race Theory: An Overview

In the broadest terms, CRT developed in the 1980s as an intellectual project and movement of scholars of color who sought to critique and to explore the relationships between law, race, racism, and social power in ways that existing fields such as Critical Legal Studies or the liberal civil rights tradition could not or had not.⁹⁶ Over the two decades since, CRT scholars have continuously expounded core tenets of CRT such as the following: that race is a social construction and a performative identity; that racism is endemic and institutionalized in society; that social and historical context is very important in any particular analysis of racial issues; and that there is a need to “look to the bottom” to gain a better understanding of the reality of racial discrimination and to develop potential solutions to the societal problems it creates.⁹⁷ Furthermore, CRT emphasizes its interdisciplinary approach to resolving and ameliorating the still-existing oppression of people of color.⁹⁸

Probably the most important and influential claim of CRT is that race is not a natural, fixed, or biological concept, but instead a social⁹⁹ and a legal construc-

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96. See Kimberlé Crenshaw et al., *Introduction to CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT*, at xiii, xix (Kimberlé Crenshaw et al. eds., 1995) (describing the atmosphere in which CRT developed as one “in which progressive scholars of color struggled to piece together an intellectual identity and a political practice that would take the form both of a left intervention into race discourse and a race intervention into left discourse”). Of course, any one-sentence description of the origins of a movement as complex and as diverse as CRT is necessarily incomplete. I refer the interested reader to the works of some of the most influential scholars in CRT for a more detailed account of how CRT developed and of what its central ideas are. See, e.g., Carbedo, *supra* note 79; Kimberlé Williams Crenshaw, *Twenty Years of Critical Race Theory: Looking Back to Move Forward*, 43 CONN. L. REV. 1253 (2011); Crenshaw et al., *supra*. Issue 5 of Volume 43 of the *Connecticut Law Review*, published in 2011, commemorates twenty years of Critical Race Theory as a movement and also contains much interesting scholarship on this point.
97. See Carbedo, *supra* note 79, at 1607–15 (giving an overview of these ideas and how they play an important role in defining the “whatness” of Critical Race Theory scholarship).
98. See, e.g., MARI J. MATSUDA ET AL., *WORDS THAT WOUND: CRITICAL RACE THEORY, ASSAULTIVE SPEECH, AND THE FIRST AMENDMENT* 6 (1993). In this piece, for example, I will marshal social science evidence, particularly from the field of social psychology, to augment my analysis of the problematic nature of exclusionary and punitive school discipline and of its disproportionate impact on minority youth.
99. See Carbedo, *supra* note 79, at 1609 (“CRT . . . weighs-in [sic] directly on the very idea of race, rejecting the conception of race as a biological fixed social category and arguing instead that race is socially constructed.”); see also Ian F. Haney López, *The Social Construction of Race: Some Observations on Illusion, Fabrication, and Choice*, 29 HARV. C.R.-C.L. L. REV. 1, 27 (1994) (“Race must be viewed as a social construction.”); *id.* at 10–39 (describing evidence that repudiates the notion of race as a biological concept, critiquing alternative conceptions of race under ethnicity theory, nationalist, and colonialist critiques, and proposing the term “racial fabrication” as best capturing the dynamics of how race operates and should be understood).

tion.¹⁰⁰ This argument is based on the notion that throughout American history, race has not been socially and legally constructed neutrally, but instead it has operated as a powerful coercive and ideological tool¹⁰¹ used to privilege whiteness and to subordinate people of color.¹⁰² While scholars have proposed different variations of how this process might work in detail,¹⁰³ the following

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100. See IAN HANEY LÓPEZ, *WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE* 78–108 (rev. ed. 2006) (describing the complex ways in which both positive law and legal actors shape notions of race through the coercive function of law—establishing the physical appearances and features of a community by regulating access to it and by creating meanings and material conditions that attach to such features—and through the ideological function of law—legitimizing the use of race as a useful tool of social categorization, helping racial categories “to transcend the sociohistorical contexts in which they develop,” and reifying racial categories by “making the categories seem natural, rather than human creations” as the material conditions attached to legally constructed racial categories act to confirm existing ideas about race and racial hierarchy).

A corollary of the idea of law as both a social and a legal construction is that the relationship between law and race is not unidirectional but rather coconstitutive. See Laura E. Gómez, *Understanding Law and Race as Mutually Constitutive: An Invitation to Explore an Emerging Field*, 6 ANN. REV. L. & SOC. SCI. 487, 488 (2010) (identifying “an emerging genre of sociolegal scholarship that explores how law and race construct each other in an ongoing, dialectic process that ultimately reproduces and transforms racial inequality” and providing examples of works in that field).

101. See LÓPEZ, *supra* note 100, at 81–93 (describing the coercive and ideological dimensions of race as constructed by law).

102. See, e.g., Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1707, 1713–14 (1993).

In ways so embedded that it is rarely apparent, the set of assumptions, privileges, and benefits that accompany the status of being white have become a valuable asset that whites sought to protect and that those who passed sought to attain . . . Whites have come to expect and rely on these benefits, and over time these expectations have been affirmed, legitimated, and protected by the law
 . . . The origins of whiteness as property lie in the parallel systems of domination of Black and Native American peoples

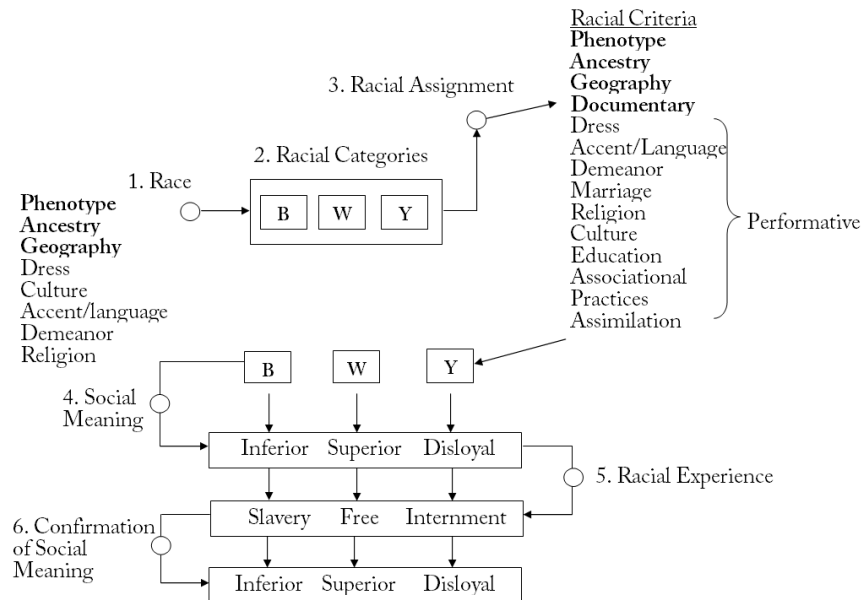
Id. Professor Harris explains that while “[w]hiteness as property has taken on more subtle forms” today, it “retains its core characteristic—the legal legitimation of expectations of power and control that enshrine the status quo as a neutral baseline, while masking the maintenance of white privilege and domination.” *Id.* at 1715.

The concept of racial accumulation, the idea that “[w]e all inherit advantages and disadvantages, including the historically accumulated social effects of race,” is connected to and builds on this notion of normalized and of legalized white privilege. Carbado, *supra* note 79, at 1608. “CRT exposes the[] inter-generational transfers of racial compensation,” which are economic, cultural, and ideological. *Id.* It aims to “intervene[] to correct th[e] market failure and the unjust racial allocations” created by this system of “racial compensation” full of “racial shelters . . . and racial taxes” that so “profoundly shape[] and help[] . . . support the contemporary economies of racial hierarchy.” *Id.* at 1608–09.

103. See, e.g., LÓPEZ, *supra* note 100, at 10 (identifying race as “the historically contingent social systems of meaning that attach to elements of morphology and ancestry” which operate on “three interrelated levels, the physical, the social, and the material” and embarking on an “examination of the possible ways in which law creates differences in physical appearance, of the extent to which law ascribes racialized meanings to physical features and ancestry, and of the ways in which law translates ideas about race into the material societal conditions that confirm and entrench those ideas”); Jerry Kang, *Cyber-Race*, 113 HARV. L. REV. 1130, 1138–47 (2000) (offering a “social cognitive

schematic provides the guideposts for this particular piece:¹⁰⁴

FIGURE 1. SOCIAL CONSTRUCTION OF RACE¹⁰⁵



Step 1 gives content to “this thing we call *race*.”¹⁰⁶ In particular, it acknowledges that people in the United States think of race along different dimensions, which include the phenotype, ancestry, dress, culture, accent, religion,

approach” to explaining race as a social construction and developing a model of “racial mechanics” which looks at how “rules of racial mapping” are used to classify individuals into racial categories which carry particular racial meanings, which in turn alter social interactions).

104. This schematic should be thought of as a useful heuristic, which captures in broad terms a highly complex and dynamic social process. While, in reality, the process by which race is socially constructed will not always be as clean or as linear, the schematic remains helpful because it imposes structure and common terminology on a social process of categorization in which most people engage only instinctively.
105. Professor Carbado describes this schematic in more detail in a currently unpublished work. Devon W. Carbado, *Discrimination on the Basis of Racial Orientation* (Mar. 10, 2013) (unpublished manuscript) (on file with author). I was introduced to the theory and arguments underlying this schematic by Professor Carbado in his lectures in my law school course on CRT. For a textual description of the basic substance of this schematic, see Carbado, *supra* note 79, at 1610.
106. *Race: The Power of an Illusion*, FACING HIST. & OURSELVES, <http://www.facinghistory.org/resources/library/race-power-illusion> (last visited Dec. 27, 2013) (previewing the content of the three-part documentary titled *Race: The Power of an Illusion*).

and more of a person whose race is being determined.¹⁰⁷

Steps 2 and 3 describe the process by which individuals then use their impression of another person's race to sort that person into one of a number of different racial categories¹⁰⁸ through the process of racial assignment. During this process, people engage any number of racial criteria, some of which overlap with factors used in determining race itself, to determine the racial category into which a particular individual should be placed.¹⁰⁹ It is at this point that another important tenet of CRT becomes salient, namely that there is a distinct, performative dimension to race.¹¹⁰ "Under this view of race, people actively work their identities to shape how others experience" and, in turn, categorize them.¹¹¹ One's choices of dress, accent or language, general demeanor, religious and cultural

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107. See, e.g., *Abdullahi v. Prada USA Corp.*, 520 F.3d 710, 712 (7th Cir. 2008) (describing ideas about how to define "[a] racial group as the term is generally used in the United States today" and referencing "common ancestry," "physical traits," "appearance," and "accent" as factors playing a role).
108. The names of U.S. racial categories and the characteristics of the people assigned into these categories have changed over time, as the context in which racial categorization becomes necessary has changed as well. See, e.g., *People v. Hall*, 4 Cal. 399 (1854) (struggling with the issue of whether Chinese witnesses should be allowed to testify against whites under evidentiary statutes including only the categories "Negro," "mulatto," "Indian," and "black person"). Today, the U.S. Census, for example, asks people to self-select into any of the six racial categories "White, Black or African American, American Indian or Alaska Native, Asian, and Native Hawaiian or Other Pacific Islander [or] Some Other Race," with the additional option for people to identify as either "Hispanic or Latino" or "Not Hispanic or Latino" in combination with any of the racial categories. E.g., KAREN R. HUMES ET AL., U.S. CENSUS BUREAU, OVERVIEW OF RACE AND HISPANIC ORIGIN: 2010, at 2 (2011), <http://www.census.gov/prod/cen2010/briefs/c2010br-02.pdf>.
109. See, e.g., *Perkins v. Lake Cnty. Dep't of Utils.*, 860 F. Supp. 1262 (N.D. Ohio 1994) (engaging documentary evidence and evidence of ancestry, self-definition, community regard, physicality, and cultural performance practices of the plaintiff in trying to determine whether he could make out a claim of disparate treatment in the workplace because of his status "as an American Indian").
110. See Carbado, *supra* note 79, at 1609 (explaining that part of what it means to argue that race is a social construction "includes describing race as a performative identity, one whose meanings shift not only from social context to social context but from social interaction to social interaction"). For a detailed treatment of this subject across a number of different contexts, see DEVON W. CARBADO & MITU GULATI, *ACTING WHITE?: RETHINKING RACE IN POST-RACIAL AMERICA* (2013).
111. Carbado, *supra* note 79, at 1609. Professor Kenji Yoshino has identified three strategies with which minorities might respond to assimilationist demands to conform to the norms of the dominant majority: passing, covering, and conversion. See Kenji Yoshino, *Covering*, 111 YALE L.J. 769, 772–73 (2002). In this context, passing means to hide one's true underlying identity, covering means to not emphasize the underlying identity even though one identifies with it, and conversion means to actually alter one's underlying identity to a different one. *Id.* at 772. Yoshino interrogates these phenomena mainly in the context of sexual orientation, but Professor John Tehranian explicitly imports Yoshino's framework into his analysis of the complicated racial position Middle Easterners have had to navigate in the United States, especially in the aftermath of the terrorist attacks of September 11, 2001. See John Tehranian, *Compulsory Whiteness: Towards a Middle Eastern Legal Scholarship*, 82 IND. L.J. 1, 17–23 (2007); see also Harris, *supra* note 102, at 1710–12 (recounting her grandmother's difficult struggle with passing as a white, which was the only way to guarantee her family's economic survival in an overtly racist society, but also forced a measure of self-denial in the process).

practices, education and associational practices, and perceived level of assimilation into the predominant community culture all play a role in how one is assigned to a particular racial category. Significantly, “even when a person does not intend to [actively] manage her identity . . . , the racial meanings others ascribe to her . . . will turn at least in part on her performative identity.”¹¹²

Therefore, the performative aspect of race and racial assignment is intricately tied to Step 4, the social meanings associated with particular racial categories. In the broadest sense, the racial hierarchy in the United States has developed a framework¹¹³ that associates whiteness with superiority and dominance,¹¹⁴ blackness with inferiority and lack of worth,¹¹⁵ and Asian identity¹¹⁶

112. Carbado, *supra* note 79, at 1609.

113. A detailed treatment of the histories and societal processes that shaped these meanings is beyond the scope of this Comment. Nevertheless, Part II.B, *infra*, will take up some of the history leading to the development of African Americans as a deeply stigmatized minority suffering the harshest abuses—physically, psychologically, and legally—at the hands of the white majority with effects that continue to reverberate to this day—for example, as I argue, in the context of school discipline. In the following footnotes, I will simply provide illustrative examples to strengthen my claim.

114. See, e.g., *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting) (“The white race deems itself to be the dominant race in this country. And so it is, in prestige, in achievements, in education, in wealth, and in power. So, I doubt not, it will continue to be for all time, if it remains true to its great heritage, and holds fast to the principles of constitutional liberty.”).

115. One particularly infamous rendition of this idea was delivered by then U.S. Supreme Court Chief Justice Roger Taney in *Dred Scott v. Sandford*:

It is difficult at this day to realize the state of public opinion in relation to that unfortunate race [blacks], which prevailed in the civilized and enlightened portions of the world at the time of the Declaration of Independence, and when the Constitution of the United States was framed and adopted. But the public history of every European nation displays it in a manner too plain to be mistaken.

They had for more than a century before been regarded as beings of an inferior order, and altogether unfit to associate with the white race, either in social or political relations; and so far inferior, that they had no rights which the white man was bound to respect; . . . This opinion was at that time fixed and universal in the civilized portion of the white race. It was regarded as an axiom in morals as well as in politics, which no one thought of disputing, or supposed to be open to dispute; and men in every grade and position in society daily and habitually acted upon it in their private pursuits, as well as in matters of public concern, without doubting for a moment the correctness of this opinion.

And in no nation was this opinion more firmly fixed or more uniformly acted upon than by the English Government and the English people.

60 U.S. (19 How.) 393, 407–08 (1856); cf. Randall L. Kennedy, *Racial Critiques of Legal Academia*, 102 HARV. L. REV. 1745, 1751 (1989) (“[O]f all the many racially derogatory comments about people of color, particularly Negroes, none has been more hurtful, corrosive, and influential than the charge that they are intellectually inferior to whites.”).

116. I include a short discussion of how Carbado’s schematic applies to the social construction of Asian identity here mainly to provide the reader with an illustration of the complexity of the mechanics of the social construction of race. The mechanism through which the social construction of race takes place has many moving parts and is shaped by many different factors that apply differently to different racial groups. As mentioned in note 79, *supra*, I focus mainly on the process as it applies

with disloyalty and perpetual foreignness.¹¹⁷ As society develops and acts on such social meanings, members of specific racial categories inevitably have particular racial experiences that reflect the existing racial hierarchy. These experiences are represented in Step 5 of the schematic. For example, once American society ascribed the meaning of inferiority to blackness, slavery became not only a possibility but also a desirable option, even for its victims, in the eyes of white society.¹¹⁸ On the other hand, whites, marked and perceived as the superior race, were seen as entitled to all the benefits of freedom and liberty that are regarded as the foundation of American society.¹¹⁹ Similarly, the racial meaning of disloyalty and foreignness assigned to Asian Americans led the U.S. government to force tens of thousands of people of Japanese ancestry, including many American cit-

to African Americans, but this does not mean that such a mechanism is not also taking place vis-à-vis other racial groups. My discussion of the social construction of race in the context of Asian identity is simply meant to be an additional example that elaborates on the different steps of Carbado's schematic. A similar contextual and historical analysis of the experience of Latinos/-as and of Native Americans would be similarly illuminating.

117. In the case of *Fong Yue Ting*, argued during the height of anti-Chinese sentiment in the United States in 1893, the Solicitor General argued to the Supreme Court that this natural foreignness should be the basis for allowing exclusion and deportation of Chinese laborers from the United States. *Fong Yue Ting v. United States*, 149 U.S. 698, 711–12 (1893). In his brief, “[t]he solicitor . . . reminded the Court that the Chinese are ‘a people not suited to our institutions, remaining a separate and distinct race, incapable of assimilation.’” Gabriel J. Chin, *Segregation's Last Stronghold: Race Discrimination and the Constitutional Law of Immigration*, 46 UCLA L. REV. 1, 18 (1998). Similarly, during World War II, General DeWitt, in charge of the Western Defense Command, made the following statements to the Secretary of War during 1942: “In the war in which we are now engaged racial affinities are not severed by migration. The Japanese race is an enemy race and while many second and third generation Japanese born on United States soil, possessed of United States citizenship, have become ‘Americanized,’ the racial strains are undiluted.” COMM’N ON WARTIME RELOCATION & INTERNMENT OF CIVILIANS, PERSONAL JUSTICE DENIED 66 (1982). Drawing an explicit distinction from other potential European enemy aliens, he justified his policy of excluding all people of Japanese ancestry from the West Coast to a congressional committee by saying:

It makes no difference whether [a person with Japanese ancestry] is an American citizen, he is still a Japanese. American citizenship does not necessarily determine loyalty. [By contrast, y]ou needn’t worry about the Italians at all except in certain cases. Also, the same for the Germans except in individual cases. But we must worry about the Japanese all the time until he is wiped off the map.

Id.

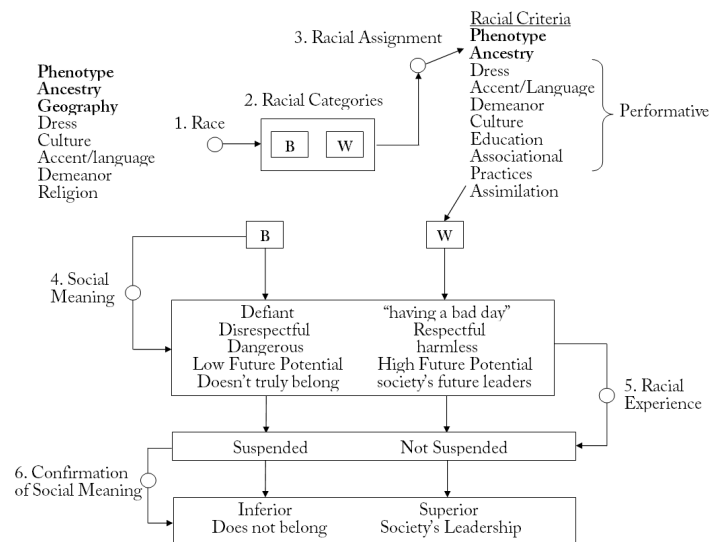
118. See *Dred Scott*, 60 U.S. (19 How.) at 407 (arguing that the history of Western societies clearly shows a perception of blacks as being “so far inferior, that they had no rights which the white man was bound to respect; and that the Negro might justly and lawfully be reduced to slavery for his benefit”).
119. Before the Civil War, for example, citizenship via naturalization was available only to “free white person[s].” See *Ozawa v. United States*, 260 U.S. 178, 194–95 (1922). Only after the Civil War in 1870 was this citizenship statute expanded to “aliens of African nativity and to persons of African descent.” *Id.* at 195. The statute still completely denied Asian Americans, among many other groups, the naturalization privilege. See *id.* at 198 (finding the Japanese plaintiff to be “entirely outside the zone” of people even potentially eligible to claim whiteness and thus the right to become a citizen via naturalization).

izens, into internment during World War II.¹²⁰

Step 6 represents the final step in the vicious circle of the social construction of racial hierarchy in which the racial experiences of members of particular racial categories confirm existing racial meanings. That is to say, society comes to think that if a person is categorized as black and that person is legally forced into slavery, that person must be inferior to those who are free and are not so subjugated. Conversely, if a person is white and enjoys liberty and freedom, that person must be superior. If a person is categorized as Asian and has been interned, this must be because she is disloyal and a perpetual foreigner.¹²¹

Applying this general framework to the particular issue that I explore in this Comment—racial disproportionality in school discipline, with a particular focus on African American youth—and synthesizing it with the material presented above in Part I, we can hypothesize a similar dynamic that operates as follows:

FIGURE 2. SOCIAL CONSTRUCTION OF RACE IN THE CONTEXT OF SCHOOL DISCIPLINE



120. See Jerry Kang, *Denying Prejudice: Internment, Redress, and Denial*, 51 UCLA L. REV. 933, 940 (2004) (“By June 1942, just six months into the war, 97,000 Japanese Americans had been rounded up, most of them held in assembly centers. In the first week of June, our crushing victory in the Battle of Midway made any West Coast invasion highly improbable. Still, the internment machine continued to chum. By November, over 100,000 persons were forced from assembly centers into relocation camps. Of these, approximately 70 percent were U.S. citizens because of their birth in the United States.” (footnotes omitted)).

121. I will pick up more on this particular dynamic, and especially how it includes the internalization of negative social meaning and stereotypes. See *infra* Part II.B.

Setting aside Step 1 for the purposes of this discussion (that is, accepting as a given the existence of race as a fluid category whose definition depends on different dimensions), teachers and school administrators—those who are involved in making a disciplinary decision—assign students into the racial categories white and black. Different racial criteria might be salient depending on the particular context of the interaction, but given the face-to-face nature of many incidents leading to a disciplinary decision,¹²² phenotype and certain performative racial assignment criteria—in particular dress, accent, general demeanor, and associational practices of the student—are highly influential in the racial assignment process of the decisionmaker.¹²³

Through a complex and interlocking process—influenced by longstanding notions of racial stigma,¹²⁴ societal stereotypes and implicit bias derived in part from such stigma,¹²⁵ differential perception and evaluation of the same event when engaged in by members of the racial majority and minority,¹²⁶ and normative baselines regarding what constitutes appropriate behavior¹²⁷—the disciplinary decisionmaker evaluates the behavior of the student within an existing framework of social meanings associated with the student’s racial category. In situations in which there is at least some ambiguity regarding whether a disciplinary violation has occurred,¹²⁸ these meanings can be the

122. At the stage of the initial office referral, for example, a teacher or a school safety officer will be present at the particular incident and will initiate the disciplinary process. Similarly, because students who are suspended, even for short amounts of time, have a due process right to at least an informal hearing at which they are presented the evidence against them and at which they can provide their side of the story, the principal or the other administrator making the disciplinary decision will likely have at least a cursory face-to-face interaction with the student. *See Goss v. Lopez*, 419 U.S. 565, 581 (1975) (“Students facing temporary suspension have interests qualifying for protection of the Due Process Clause, and due process requires, in connection with a suspension of 10 days or less, that the student be given oral or written notice of the charges against him and, if he denies them, an explanation of the evidence the authorities have and an opportunity to present his side of the story.”).

123. I discuss the performative dimension of the school disciplinary process in greater detail below. *See infra* Part II.C.

124. *See infra* Part II.B.

125. *See infra* Part II.B.

126. *See infra* Part II.B.

127. *See infra* Part II.C.

128. This ambiguity can occur at two different points: offense definition and behavior evaluation. Particular offense categories might be defined so vaguely that there will always be ambiguity regarding whether a violation has occurred. Candidates falling into this category are offenses such as defiance of authority. *See OPPORTUNITIES SUSPENDED*, *supra* note 13, at 4–5 (describing the many different behaviors for which students could be suspended for “defiance of authority” using the experiences of a ten-year old African American girl). Similarly, ambiguities could arise regarding whether an offense category has been met, even if it is clearly delineated. For example, it might not always be clear whether there was an assault on a teacher if a teacher is attempting to break up a fight between students and gets hurt in the scuffle. Whether a student will be charged

decisive factor in evaluating whether a student was defiant or having a bad day, respectful or disrespectful, dangerous and threatening or harmless. This evaluation of student behavior is generally and predictably one that negatively affects minority youth.

This evaluation determines which disciplinary action the school will take and, in turn, determines the racial experience of the student. At a minimum, the portion of racial disproportionality in school discipline that cannot be explained by socioeconomic factors and by rates of actual misbehavior can be attributed to this process.¹²⁹ Completing the vicious cycle, the experiences of American youth confirms and rigidifies broader social meanings that associate inferiority and lack of true societal belonging with blackness, and superiority and societal leadership with whiteness.¹³⁰

In the following Subpart, I describe in greater detail the foundation and the operation of this process. As a foundational matter in this quest, it is necessary to develop an understanding of why administrators and teachers in charge of disciplinary decisionmaking would ever evaluate similar behavior differently simply because white or African American students engage in it, leading to the disproportionalities described in Part I. The concept of racial stigma, a comprehensive analysis of which R.A. Lenhardt introduced into the law reviews,¹³¹ is a critical building stone in this inquiry.

with, and likely expelled for, assault on a teacher will depend on the teacher's subjective evaluation of the student's behavior in the particular situation.

129. See *supra* notes 86–88 and accompanying text. Of course, socioeconomic conditions themselves are such in the United States that minority groups, and especially African Americans and Latinas/-os, consistently and predictably find themselves at the bottom rung of the economic ladder. See, e.g., U.S. CENSUS BUREAU, *Income Expenditures, Poverty, and Wealth*, in STATISTICAL ABSTRACT OF THE UNITED STATES: 2012, at 431, 452 tbls.690 & 691 (2012), available at <http://www.census.gov/prod/2011pubs/12statab/income.pdf> (showing large disparities in household incomes at all income levels between black and Hispanic households on the one hand, and white households on the other); see also *id.* at 459 tbl.704 (showing similar disparities in per capita income). Professor Robin A. Lenhardt has attributed this “stubborn persistence of the color line” in large part to the kind of racial stigma I will describe *infra* in Part II.B. See Lenhardt, *supra* note 2, at 806–09 (describing racial inequalities in various societal arenas and identifying racial stigma as the “true source of racial injury in the United States,” which “accounts for the persistence of racial disparities that mark the color line”).

130. See *supra* notes 114–15 and accompanying text.

131. See Lenhardt, *supra* note 2.

B. Stigmatization and Implicit Bias

1. What Is Stigma?¹³²

In social science, stigma “refers to a trait [of a person] so thoroughly discredited as to challenge the humanity of those bearing it.”¹³³ In American society, “the prototypical stigmatized trait is race; the prototypical stigmatized group, African Americans.”¹³⁴ From this definition, it becomes clear that racial stigma operates more perniciously than the mere dislike of a particular racial group. It goes into the realm of dehumanization, implying social inferiority and rendering the racially stigmatized person “socially spoiled, dishonored, and reduced in our minds from a whole and usual person to a tainted, discounted one.”¹³⁵ In so doing, stigmatization creates a virtual identity, an accumulation of negative attributes imputed to that individual that takes precedence over the actual identity of the individual.¹³⁶ In the absence of strong counteracting information, this virtual identity assumes a type of master status and becomes a “mask, a barrier that both makes it impossible for the stigmatized person’s true self to be seen and fixes the range of responses that others will have to that person.”¹³⁷

Stigmatizing a vulnerable group “can serve several functions [for the stigmatizer], including self-esteem enhancement, control enhancement, and anxiety buffering.”¹³⁸ Stigma allows the stigmatizer to engage in psychologically favorable downward comparisons with the discredited other, a process that can also occur at the group level when stigmatization of an outgroup facilitates the development of a “sense of positive group distinctiveness” for the ingroup.¹³⁹ Both processes

132. The term stigma originally derived from a “system of markings . . . burned or cut onto the bodies of criminals, traitors, and prostitutes as a way of identifying them as people ‘to be discredited, scorned, and avoided’” in Ancient Greece. It has become “part of common parlance” in general society today, yet it “has escaped clear definition,” especially in the legal context. In the field of social science, however, the term has been used consistently for a significant amount of time and thus the social science use of the term will guide my discussion in this piece. Lenhardt, *supra* note 2, at 814 (citing Steven L. Neuberg et al., *Why People Stigmatize: Toward a Biocultural Framework*, in *THE SOCIAL PSYCHOLOGY OF STIGMA* 31, 31 (Todd F. Heatherton et al. eds., 2000)).

133. Jeffries, *supra* note 1, at 2; *see also* John F. Dovidio et al., *Stigma: Introduction and Overview*, in *THE SOCIAL PSYCHOLOGY OF STIGMA* 1, 1 (Todd F. Heatherton et al. eds., 2000) (“Stigmatization, at its essence, is a challenge to one’s humanity.”).

134. Jeffries, *supra* note 1, at 2.

135. Lenhardt, *supra* note 2, at 818 (footnotes omitted) (internal quotation marks omitted); *see also* Dovidio et al., *supra* note 133, at 1 (“[S]tigmatization involves dehumanization, threat, aversion, and sometimes the depersonalization of others into stereotypic caricatures.”).

136. Lenhardt, *supra* note 2, at 818–19.

137. *Id.* at 819–21.

138. Dovidio et al., *supra* note 133, at 7.

139. *Id.* at 7–8.

can “motivate active discrimination” against the stigmatized.¹⁴⁰ Furthermore, because “[s]tigmatas arouse anxiety and feelings of threat,” stigmatizers want to “enhance [their] perceived and actual control” over the stigmatized, which might lead to “differential treatment, systematic avoidance, segregation, and marginalization of others who are threatening to the stigmatizer’s well-being . . . or values.”¹⁴¹ “[S]tigmatization may arise from motivations to justify or rationalize the status quo in society, which often involves institutional forms of discrimination and segregation”¹⁴² At the individual level, “this type of stigmatization can increase personal opportunity by limiting opportunities of potential competitors.”¹⁴³ At the group level, stigmatization provides “a rationale that explains and excuses disparate social treatment of identifiable groups of people” and, “through systematic discrimination and residential, occupational, and social segregation, . . . reinforces the collective control of one group over another.”¹⁴⁴

In order to evaluate how this process has played out in the particular context of the United States, specifically with regards to the treatment of African Americans, and to see why an understanding of stigma is helpful in explaining racial disproportionality in school discipline today, it is necessary to know the historical context of American race relations that has led to the stigmatization of African Americans. It is to this history that I now turn.¹⁴⁵

2. A Short History of the Stigmatization of African Americans in the United States

The most appropriate starting point for an inquiry into the source of racial stigma in the United States lies in the origins and processes of American slavery.¹⁴⁶ “For once the cycle of debasement in slavery and prejudice in the mind was underway, it was automatically self-reinforcing.”¹⁴⁷

140. *Id.* at 8.

141. *Id.* at 7–8 (citation omitted).

142. *Id.* at 8.

143. *Id.*

144. *Id.* at 9; *see supra* notes 113–119 and accompanying text (describing how particular racial meanings—which often include messages of stigma, as described below—lead to differential treatment of particular racial groups, which, in turn, reinforces existing racial hierarchies).

145. At this point, I must note that anything approaching a complete history of events leading to the stigmatization of African Americans in the United States is far beyond the scope of this Comment. The following information is exemplary and meant to give the reader a useful frame for evaluating my overall argument.

146. *See* WINTHROP D. JORDAN, *WHITE OVER BLACK: AMERICAN ATTITUDES TOWARD THE NEGRO, 1550–1812*, at x (1968) (“Understanding the way [American Negro] slavery began is both extremely difficult and absolutely essential to comprehension of the white man’s attitudes toward Negroes.”).

147. *Id.*

A spotty historical record suggests that not all early Africans transported to the colonies were subject to enslavement.¹⁴⁸ Yet beginning in 1640,¹⁴⁹ records show that white colonists increasingly singled out “Negroes”¹⁵⁰ for lifetime bondage and other forms of legally enforced “generalized debasement . . . as a group,”¹⁵¹ culminating in the infamous slave codes.¹⁵² It seems clear that a notion of almost unbridgeable religious, physical, and cultural difference between the English and other Europeans, on the one hand, and Africans, on the other, came to justify the increasingly divergent treatment of Negroes as perpetual slaves.¹⁵³ “Slavery . . . was to be only for strangers.”¹⁵⁴ “By the end of the seventeenth century in all the [American] colonies of the English empire there was chattel racial slavery” rendering Negroes the property of their white masters.¹⁵⁵

Most important for my purposes here, it was during this time period that the foundation for the unique stigmatization of African Americans in the United States was laid: The general sense that the peoples of West Africa were somehow less than fully human¹⁵⁶ had been transformed into a justification for a system of massive brutality and of discriminatory treatment.¹⁵⁷ Colonists in the late seventeenth century “turned increasingly to . . . physiognomic difference” in

148. *See id.* at 74; *see also* Harris, *supra* note 102, at 1716–17 (stating that at the time of the “early colonists . . . it was not an irrefutable presumption that all Africans were ‘slaves’ or that slavery was the only appropriate status for them”). When I use the term enslavement in the context of Africans in the early colonies, I refer to the process of forcing individuals into hereditary lifetime service to a master. *See* JORDAN, *supra* note 146, at 62 (“[T]he key term in . . . many . . . early descriptions of the Negro’s condition was perpetual. Negroes served ‘for ever’ and so would their children.”). This perpetual character distinguishes enslavement from indentured servitude, the process by which many Europeans, including many English, paid for their transportation across the Atlantic by promising their labor to another for a certain period of time. *See id.* at 47.

149. *Id.* at 75.

150. Jordan explains that the word “Negro” was actually imported into the English language in reference to Hispanic terminology. *Id.* at 61. According to Jordan, this suggests at least a tenuous connection between the enslavement practices of the English and those of the Spanish and of the Portuguese, countries that had been involved in the slave trade much earlier and more wholeheartedly than early English colonialists. *See id.* at 57–61. I use it here only for terminological consistency with my sources on this period of American history.

151. *Id.* at 77. For examples of such debasement, *see id.* at 77–80.

152. *See id.* at 82.

153. *See id.* at 91–98.

154. *Id.* at 68 (internal quotation marks omitted); *see also id.* at 88 (“Even . . . Scottish prisoners . . . were never treated as slaves in England or the colonies. . . . Here was the nub: captive Scots were men ‘as our owne.’ Negroes were not. They were almost hopelessly far from being of the English nation.”); *see also id.* at 91–98 (discussing the influence of the notion of “difference” on the rationale for enslavement).

155. *Id.* at 98.

156. *See id.* at 3–43.

157. Antislavery activists would later attack this exact link as faulty and as wrong. In fact, the new word “prejudice” originated in part around this critical objective. *See id.* at 276.

justifying Negro slavery and “by the end of the seventeenth century dark complexion had become an independent rationale for enslavement.”¹⁵⁸ Stigma, as defined above, had been attached to the peculiar characteristics of African Americans and led to their dehumanization. After all, “[s]o much was slavery a complete loss of liberty that it seemed to Englishmen somehow akin to loss of humanity. No theme was more persistent than the claim that to treat a man as a slave was to treat him as a beast.”¹⁵⁹ By contrast, whiteness—a concept that emerged only around this time—became the new standard for privilege in the United States.¹⁶⁰

The American Revolution, and the shift in consciousness that led to and accompanied it, imposed strains on ideas of Negro inferiority and on the justifications for enslavement that existed before the latter part of the eighteenth century.¹⁶¹ Yet despite protest against the institution of slavery, it continued, and specific clauses in the Constitution—chief among them the Three-Fifths Clause—bore evidence of white Americans’ conviction that Negroes were not

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158. *Id.* at 95–96. Note that this does not mean that racism, as a fully developed corollary of white supremacy, had necessarily taken hold yet. Such racism only fully developed after the American Revolution. It does mean, however, that a number of perceived differences between English and Negroes, with physical differences becoming increasingly important, had become a separate rationale for enslavement and for brutal differential treatment of Negroes. See Jason Campbell & James Oakes, *The Invention of Race: Rereading White Over Black*, 21 *REVIEWS AM. HIST.* 172, 174–80 (1993).
159. JORDAN, *supra* note 146, at 54. It should be noted at this point that while most white Americans harbored a deep conviction that Negroes were inferior to them, for mostly religious reasons they did not literally believe that Negroes were animals. Myths and tales, particularly about the close (and sometimes sexual) connection between Negroes and apes, however, were common and served a number of functions for whites. These included the potential for disassociation from the cruelties of slavery, the imposition of a hierarchy on different types of beings when people in the late eighteenth century tried to impose order on their environment, and, importantly, “a means of expressing the social distance between the Negro and the white man. It was this function which was bound to appeal particularly to men with experience in America.” *Id.* at 228–39; see also *id.* at 493–94.
160. See *id.* at 95, 134 (“[W]hile slavery served as a working model of social subordination, it was one that could be applied only to Negroes, and thus the status of slave became the very model of what white Americans could *never* be.”); see also Harris, *supra* note 102, at 1718 (“Racial identity was further merged with stratified social and legal status: ‘Black’ racial identity marked who was subject to enslavement; ‘white’ racial identity marked who was ‘free’ or, at minimum, not a slave. The ideological and rhetorical move from ‘slave’ and ‘free’ to ‘Black’ and ‘white’ as polar constructs marked an important step in the social construction of race.” (footnote omitted)).
161. See, e.g., JORDAN, *supra* note 146, at 289–90 (describing how many around the time of the Revolution pointed out the hypocrisy in claiming liberty as a natural right of all men and yet enslaving Negroes in their midst); see also *id.* at 269–304 (giving broader overview of American “[s]elf-scrutiny in the Revolutionary Era” and discussing how a shift toward environmentalism and other theories underlying the revolutionary sentiment undercut assumptions basic to the maintenance of slavery).

truly their equals and could continue to explicitly be treated unequally.¹⁶² In fact, not only could they be treated unequally on the presumed eve of liberty for all, they were considered to not truly belong to the body of the newly emerging nation¹⁶³ based on a philosophically inconsistent, but tightly held, emotional conviction that Negroes were inferior to whites and that true integration and membership in American society would never be possible.¹⁶⁴ The United States was to be a “white man’s country.”¹⁶⁵

Slavery became a hardened way of life in part of the new republic and played a significant role in national politics as the country expanded westward.¹⁶⁶ Free Negroes, even in the North, were increasingly subject to a pattern of rigid separation.¹⁶⁷ Before the Civil War, the federal government predictably sided with slaveholders by considering enslaved Negroes more as the property of whites than as equal human beings entitled to their freedom.¹⁶⁸ Even after the Civil

162. *See id.* at 321–25 (explaining the compromises made around the institution of slavery in the framing of the Constitution); *see also* Thurgood Marshall, *Reflections on the Bicentennial of the United States Constitution*, 101 HARV. L. REV. 1, 2–4 (1987) (same).

163. *See* JORDAN, *supra* note 146, at 341. This point was driven home further by the first American naturalization statute, which reserved the privilege of naturalization only to “free white person[s]” and retained that language until after the Civil War. *See* *Ozawa v. United States*, 260 U.S. 178, 194–95 (1922). Lenhardt considers this lack of acceptance in, and of belonging to, society to be a crucial aspect of the stigmatization of African Americans in the United States, with harms that continue to operate perniciously to this day. *See* Lenhardt, *supra* note 2, at 844–47 (discussing “Race-Based Citizenship Harms” resulting from stigmatization of African Americans in the United States).

164. This dynamic is most vividly illustrated by early eighteenth century calls, largely concentrated in Virginia, to remove the Negro population from the United States based on a perceived incompatibility of the Negro with American civilization and on seeming capitulation to the fact that whites would likely never accept Negroes as true equals in their society. *See* JORDAN, *supra* note 146, at 546–69.

165. *See id.* at 542–69.

166. *See id.* at 403–06. For the important role slavery played in the westward expansion of the United States, *see*, for example, LAURA E. GÓMEZ, *MANIFEST DESTINIES: THE MAKING OF THE MEXICAN AMERICAN RACE* 131–36 (2007).

167. *See* JORDAN, *supra* note 146, at 414–22. This process of separation even reached what one could consider the most egalitarian institutions of American society: the churches. *Id.* at 422–26. Jordan notes:

The splintering of the churches along racial lines was not simply a matter of Negroes recognizing that they would be more welcome elsewhere. It symbolized an increasingly clear-cut and pervasive separation. It meant that the one institution which was at all prepared to accept the Negro as an equal was shattered—completely, as it turned out. . . . When Christian equalitarianism ran head on into American racial mores the result was, institutionally and in the public mind, gradual fission along racial lines.

Id. at 425.

168. *See* Ronald S. Sullivan, Jr., *Classical Racism, Justice Story, and Margaret Morgan’s Journey From Freedom to Slavery: The Story of Prigg v. Pennsylvania*, in *RACE LAW STORIES* 59 (Rachel F. Moran & Devon W. Carbado eds., 2008) (describing the federal government’s involvement,

War, which was ostensibly fought, at least in part, in the name of improving the lot of the Negro population, the interests of Negroes once again fell prey to the need for compromises among whites. The largest resolve to protect Negro rights and dignity theretofore seen, which had resulted in the Reconstruction Amendments and numerous other pieces of protective legislation, very soon lost its vigor when economic depression changed policy concerns for whites and massive Southern recalcitrance to federal intrusion into local affairs caused Republicans to conclude that Reconstruction had quickly become a liability.¹⁶⁹ With the compromise of 1877 as a capstone, American society reconfirmed that it considered Negroes and their interests as inferior to whites and as not entitled to treatment as equals in the United States.¹⁷⁰ Quickly, the South embarked on programs “reshaping the South’s legal system in the interests of labor control and racial subordination.”¹⁷¹ And soon the massive segregationist Jim Crow regime took hold in many parts of the country.¹⁷² The thousands of lynchings of African

including the U.S. Supreme Court, in the recapture of fugitive slaves in the mid-nineteenth century).

169. See ERIC FONER, RECONSTRUCTION: AMERICA’S UNFINISHED REVOLUTION, 1863–1877, at 512–63 (1988). Foner puts the point succinctly after retelling how the Democratic party regained political control over Mississippi in 1875 through a campaign of brutal, and murderous, voter intimidation of Negroes and their presumed Republican sympathizers—violence against which the federal government provided no protection for the first time during Reconstruction:

The depression and its consequences—an erosion of free labor thought, growing middle-class conservatism, and resurgent racism—all contributed to [a] shift [away from Reconstruction] in the [Republican] party’s center of gravity. Ames [the former Republican governor of Mississippi] commented bitterly, “I am fighting for the Negro, and to the whole country a white man is better than a ‘Nigger.’” But as Mississippi’s blacks were well aware, the campaign for white supremacy also involved a struggle to maintain the planter’s economic domination. “I suppose it is a fight between the poor people and the rich man now,” commented Alexander Branch, a former slave who had risen to serve on the board of police of Wilkinson County. In such a fight . . . the sympathies of Northern Republicans would rest with men of property.

Id. at 563.

170. See *id.* at 564–87. The historical narratives in both JORDAN, *supra* note 146, and FONER, *supra* note 169, are full of candid statements by contemporaries of the respective time periods under study that point to this overarching suspicion of African Americans in the eyes of whites. I recommend these accounts to the skeptical reader. Paradigmatic of this widespread sentiment is the following statement a mainstream Republican made during the controversy over the 1877 presidential election: “[T]he truth is, the negroes are ignorant, many of them not more than half civilized . . . [and] no match for the whites. . . . Our Southern system is wrong.” FONER, *supra* note 169, at 569 (second, third, and fourth alterations in original) (internal quotation marks omitted).
171. FONER, *supra* note 169, at 588, 593–95.
172. See C. VANN WOODWARD, THE STRANGE CAREER OF JIM CROW 72–118 (3d rev. ed. 1974). Although not the focus of his inquiry, Woodward makes clear that at least until the Great Depression, the North was no exception in its discriminatory and separate treatment of African Americans. See *id.* at 113–18.

Americans that occurred in the United States during this period serve as a tragic reminder of the perverse and inhumane treatment white Americans considered appropriate for the group in their midst that the nation as a whole had never truly been willing to accept.¹⁷³

Undoubtedly, significant progress in race relations has been made, especially since the end of World War II. *Brown v. Board of Education*¹⁷⁴ outlawed Jim Crow laws, and the Supreme Court overruled arguments that interracial marriage should be prohibited in order to preserve racial purity.¹⁷⁵ The Civil Rights Movement engaged in incredible sacrifice and put forth enormous efforts to overcome the legacy of racism in the United States. But even after all these victories, even in the face of today's code of political correctness that eschews statements perceived to be racist, the longstanding idea that African Americans are inferior to whites and somehow do not properly belong within this "white man's country"¹⁷⁶ has shown a remarkable staying power.¹⁷⁷

This short synopsis of the history of the specific stigmatization of African Americans by whites in the United States falls neatly in line with the functions that stigmatization serves for stigmatizers.¹⁷⁸ That white Americans used assertions of African American inferiority to enhance their self-esteem, creating the positive group distinctiveness white Americans have craved from the very beginning of settlement via favorable downward comparisons, is an underlying

173. See STEWART E. TOLNAY & E. M. BECK, *A FESTIVAL OF VIOLENCE: AN ANALYSIS OF SOUTHERN LYNCHINGS, 1882–1930* (1995).

174. 347 U.S. 483 (1954). The resistance against this process, however, was massive and not exclusively limited to the South, although it was certainly most vocal there. See WOODWARD, *supra* note 172, at 154–68.

175. *Loving v. Virginia*, 388 U.S. 1 (1967). It is significant to note, nevertheless, that such arguments were made as late as 1967.

176. JORDAN, *supra* note 146, at 542.

177. The following sources serve as a frustrating reminder of this staying power: Charles Johnson, *Fox News Commenters React to Trayvon Martin: 'Good Shot Jimmy'*, LITTLE GREEN FOOTBALLS (Mar. 20, 2012, 10:36 AM), http://littlegreenfootballs.com/article/40088_Fox_News_Commenters_React_to_Travon_Martin_Good_Shot_Zimmy (collecting racist comments to an online article about the tragic shooting of young African American Trayvon Martin in Florida in early 2013, including statements like "Them monkeys can jump!" and "That is all it was—just another n i qq er. No loss"); Dodai Stewart, *Racist Hunger Games Fans Are Very Disappointed*, JEZEBEL (Mar. 26, 2012, 12:00 PM), <http://jezebel.com/5896408/racist-hunger-games-fans-dont-care-how-much-money-the-movie-made> (collecting reactions of fans of the recently released movie *Hunger Games* exhibiting their frustration with the casting of African American actors with comments such as "I was pumped about the Hunger Games. Until I learned that a black girl was playing Rue," and "Sense [sic] when has Rue been a nigger"). Apart from these verbal reminders of deep-seated prejudice toward African Americans, societal conditions bear proof of the fact that African Americans as a group are not treated equally in American society. See, e.g., Lenhardt, *supra* note 2, at 806–07.

178. See *supra* notes 138–144 and accompanying text.

theme of the above-summarized history of race relations in the United States. Similarly, treating African Americans inhumanely served to buffer feelings of both sexual and physical anxiety and threat that Americans had always connected with African Americans. Certainly, stigmatization led to (successful) attempts of whites to rationalize the status quo through institutional discrimination and to “enhance [their] perceived and actual control” over African Americans through “differential treatment, systematic avoidance, segregation, and marginalization of others who are threatening to the stigmatizer’s personal well-being . . . or values.”¹⁷⁹

At a macro level, stigmatization was the process through which whites assigned the crucial, and overwhelmingly negative, racial meanings of inferiority and of lack of true belonging to African Americans at Step 4 in Figure 1. These meanings, in turn, allowed for the imposition of racial experiences such as enslavement, segregation, and massive and institutionalized discrimination at Step 5, leading to a confirmation of the initial negative meanings at Step 6. I argue that a similar claim can be made at the micro level of school suspensions in an effort to explain current patterns of racial disproportionality. In order to really understand how this process would unfold, however, it is necessary to first understand a bit about human social psychology generally, and the social psychology of American race relations in particular.

3. Implicit Bias

One might suspect that such a long history of brutal discriminatory treatment and of ascription of notions of inferiority, lack of belonging, and less-than-equal humanity to a particular racial group would lead to a pervasive negative bias in thinking about, and interacting with, that particular group. In fact, social psychologists have found widespread evidence of exactly such bias directed toward African Americans in the United States. But how does bias work exactly?¹⁸⁰

179. See Dovidio et al., *supra* note 133, at 8; *supra* note 140 and accompanying text.

180. Because I am not trained in social psychology, and I suspect that neither are most of my readers, the following account will necessarily include simplifications. However, I hope that the insights that can be gained from these simplifications are nevertheless helpful in thinking about the problem of racial disproportionality in school suspensions. I rely for most of the following on a review of the social psychology literature as it pertains to legal scholarship by Professor Jerry Kang. See Jerry Kang, *Trojan Horses of Race*, 118 HARV. L. REV. 1489 (2005). Kang’s work includes meticulous references to scientific works for all his assertions. For the sake of brevity, I have generally omitted them here, except if especially relevant.

To begin with, we all think in so-called schemas, cognitive shortcuts and rules that allow us to avoid “drown[ing] in information” by sorting the many stimuli we constantly perceive into some form of coherent order based on their perceived attributes.¹⁸¹ “Different schema types exist for different types of entities,” including racial schemas.¹⁸² Figures 1 and 2, for example, are attempts to describe racial schemas—ways in which people, as well as society generally, construct and deal with the stimuli that compose the concept of race. People form the concept of race through a combination of particular stimuli they perceive—such as physiognomy, behavior, and accent—and sort other individuals into particular racial categories, based on a set of racial assignment criteria. Assignment into a particular group triggers particular racial meanings, a set of assumed attributes of an individual associated with a particular category. These meanings structure interactions, leading to a particular racial experience. This experience then may or may not confirm the initial racial meaning.

At the stage of racial meanings, it is important to distinguish two different components such meanings are comprised of: a cognitive component, most often called stereotype, which includes “thoughts or beliefs about the category, such as generalizations about their intelligence or criminality”; and an affective component, often called attitude, which “reflects emotions, feelings, and evaluations that range on the scales of positive/negative, good/bad, approach/avoid.”¹⁸³ Activation of racial schema can trigger both types of meanings, which then “jointly drive the perceiver’s reactions.”¹⁸⁴ Importantly, “racial schemas are ‘chronically accessible’ and can be triggered by the target’s mere appearance, since we as observers are especially sensitive to visual and physical cues.”¹⁸⁵ Racial schemas influence what we pay attention to, how we interpret what we pay attention to, and what we remember about a person.¹⁸⁶ The fact that this occurs in ways that are often not consciously controlled and even outside of our awareness forms the basis of the concept of implicit bias.¹⁸⁷ Scientists who study implicit bias recognize that, in our current moral environment, explicit self-reports—such as direct questions on a survey—are unreliable as the sole measure

181. *Id.* at 1498–99.

182. *Id.* at 1499.

183. *Id.* at 1500.

184. *Id.* at 1500–01.

185. *Id.* at 1503.

186. *Id.* at 1503–04.

187. *Id.* at 1504–06.

for assessing people's racial beliefs.¹⁸⁸ Thus, these scientists turn to indirect measures of racial beliefs. The most common measure is the Implicit Association Test, which measures reaction speeds in sorting tasks that involve racial priming. The test is based on the assumption that a person should be able to sort schema-consistent arrangements more quickly than schema-inconsistent arrangements.¹⁸⁹ Results from such tests show that implicit bias is a pervasive phenomenon that is clearly dissociated from explicit self-reports.¹⁹⁰

Most importantly for my purposes here, racial schemas and implicit bias have significant behavioral consequences, especially as they pertain to punitive discipline in American schools. Birt Duncan, for example, found that white undergraduate students were significantly more likely to evaluate ambiguous behavior as violent or aggressive when an African American person engaged in it than when a white person engaged in the same behavior.¹⁹¹ Furthermore, they were more likely to attribute that behavior to personal characteristics when an African American person engaged in it but to situational characteristics when a white person engaged in it.¹⁹² Similarly, Andrew Sagar and Janet Schofield found that both African American and white sixth-grade students were more likely to

188. *Id.* at 1506–08. Important in this context is the potential issue of dissociation, which refers to the existence of “implicit mental processes [that] may draw on racial meanings that, upon conscious consideration, we would expressly disavow.” *Id.* at 1508.

189. *Id.* at 1508–10. Professor Kang explains the process like this:

Participants are shown a Black or White face and told to hit as fast as possible a key on the left or right side of the keyboard. They are also shown words stereotypically associated with Blacks or Whites and again told to hit a key on the left or right side of the keyboard. In half the runs, the Black face and Black-associated word are assigned to the *same* side of the keyboard (schema-consistent arrangement). In the other half, they are assigned *opposite* sides (schema-inconsistent arrangement). The same goes for the White face/White-associated stimulus combination.

Tasks in the schema-consistent arrangement should be easier, and so it is for most of us. How much easier—as measured by the time differential between the two arrangements—provides a measure of implicit bias. The obvious confounds—such as overall speed of participant's reactions, right- or left-handedness, and familiarity with test stimuli—have been examined and shown not to undermine the [Implicit Association Test]'s validity.

Id. at 1510 (footnote omitted).

190. *Id.* at 1512–14. While the IAT is not without its critics, it has been shown to have remarkable predictive validity, especially when used in combination with self-report measures. See Anthony G. Greenwald et al., *Understanding and Using the Implicit Association Test: III. Meta-Analysis of Predictive Validity*, 97 J. PERSONALITY & SOC. PSYCHOL. 17, 32 (2009) (“This review justifies a recommendation to use IAT and self-report measures jointly as predictors of behavior. . . . [In] high social sensitivity . . . studies of racial and other intergroup behavior. . . . [T]he predictive validity of IAT measures significantly exceeded the predictive validity of self-report measures.”).

191. Birt L. Duncan, *Differential Social Perception and Attribution of Intergroup Violence: Testing the Lower Limits of Stereotyping of Blacks*, 34 J. PERSONALITY & SOC. PSYCHOL. 590, 595–97 (1976).

192. *Id.*

evaluate ambiguous school-related behavior as threatening when an African American student engaged in it than when a white student engaged in it.¹⁹³

Additionally, a number of studies suggest that implicit bias might create racially biased behavioral leakage. In other words, higher scores of implicit bias directed toward African Americans correlate with more positive interactions with other white individuals as compared to interactions with African Americans.¹⁹⁴ Negative nonverbal behavior, in turn, is likely to create positive feedback loops of retaliatory responses in social interaction, escalating conflict in the process.¹⁹⁵ A series of shooter bias studies found that both African Americans and whites are more likely to (both correctly and incorrectly) identify objects carried by a purported aggressor as guns and accordingly shoot the aggressor, when the aggressor is African American than when the aggressor is white, and conversely, both (correctly and incorrectly) identify an object as not a gun when the purported aggressor was white.¹⁹⁶ Follow-up studies suggest the source of this shooter bias is likely stereotype-based—associated with the prevailing stereotype that African American individuals are more likely to carry guns—rather than attitude-based—associated with a negative emotional reaction to an African American individual.¹⁹⁷

Another important research finding related to implicit bias has been that whites, on average, show expansive ingroup favoritism. This means that whites implicitly favor other whites to a large degree, while African Americans do not show similar levels of ingroup favoritism and instead show “a slight bias in favor of [w]hites or no bias either way.”¹⁹⁸

Finally, and importantly, social psychology research suggests that implicit racial biases are most likely to affect decisionmaking when the decision involves an ambiguous situation and provides the biased decisionmaker some ground to justify the biased decision on nonracial grounds.¹⁹⁹

193. H. Andrew Sagar & Janet Ward Schofield, *Racial and Behavioral Cues in Black and White Children's Perceptions of Ambiguously Aggressive Acts*, 39 J. PERSONALITY & SOC. PSYCHOL. 590, 596–97 (1980).

194. Kang, *supra* note 180, at 1523–24.

195. *Id.* at 1524–25.

196. *Id.* at 1525–27.

197. *Id.* at 1527–28.

198. *Id.* at 1534.

199. See Leanne S. Son Hing et al., *A Two-Dimensional Model That Employs Explicit and Implicit Attitudes to Characterize Prejudice*, 94 J. PERSONALITY & SOC. PSYCHOL. 971, 982–84 (2008) (discussing how participants with high implicit prejudice scores discriminated only in situations of attributable ambiguity—that is, in a situation in which there is an excuse condition for discriminatory behavior that allows the discriminator to evaluate his or her behavior as nondiscriminatory).

4. Stigmatization, Implicit Bias, and School Discipline

What do these insights into the operation of racial stigma in the United States and into the processes of racial bias tell us about the sources of racial disproportionality in school discipline in American public schools? Racially disproportionate suspension numbers represent a microcosm of racial stigmatization in the United States and illustrate the real negative effects of implicit bias on the lives of African American schoolchildren. More specifically, the long and broad history of stigmatization of African Americans in the United States has provided the fertile ideological breeding ground from which the racially biased stereotypes that (sub)consciously influence individual suspension decisions have developed.

As described, the United States has an incredibly long history of regarding African Americans as inferior in mental capacity and as incapable of attaining societal leadership, but simultaneously as an ever-present sexual and physical threat to the racial integrity and political and social dominion of white America.²⁰⁰ These notions have been so pervasive and longstanding that they form an ideological and cultural undercurrent in American self-understanding. Schools were and are a particularly important battleground in this context—as evidenced by the fierce battle over school desegregation and integration that continues to this day²⁰¹—because they develop society’s future leadership; because they are a springboard to societal success, acceptability, and privilege; and because they are the location for the inculcation of important cultural values.²⁰² If one accepts my

200. See generally *supra* Part II.B.2.

201. One example of the intense conflict that school integration continues to cause is the recent Supreme Court decision of *Parents Involved in Community Schools v. Seattle School District No. 1*, 551 U.S. 701 (2007). In that case, the majority’s finding that it was unconstitutional for local school districts in Seattle and in Louisville to employ student assignment plans that partially used race to avoid the resegregation of the districts’ schools was met with vocal dissents questioning the majority’s reasoning and faithfulness to the legacy of *Brown v. Board of Education*. See, e.g., *id.* at 868 (Breyer, J., dissenting) (“The last half century has witnessed great strides toward racial equality, but we have not yet realized the promise of *Brown*. To invalidate the plans under review is to threaten the promise of *Brown*. The plurality’s position, I fear, would break that promise. This is a decision that the Court and the Nation will come to regret.”).

202. See, e.g., *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954). In *Brown*, the Court stated:

Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education.

Id.

argument that white Americans have never considered African Americans truly to be a part of the American social fabric, it is a logical conclusion that such a sentiment would be directed toward African American children in the specific context of America's schools. These sentiments communicate to African American schoolchildren that they do not really belong in a place that is conceived to be a white space and that they cannot and should not attain leadership positions because doing so would threaten and subvert the cultural and political dominion of whites.

Furthermore, the deep-seated fear that the historical and continuing maltreatment of African Americans by whites could spark a backlash at any time²⁰³ lies at the root of the pervasive notion that African Americans are more violent and dangerous than other racial groups, especially whites. Certainly this fear forms part of the stereotype found in both Duncan's and Sagar and Schofield's studies that the exact same action in an ambiguous situation will be evaluated as more dangerous and threatening when an African American person engaged in it than when a white person engaged in it.²⁰⁴ It is also part of the greater willingness to pull the trigger when a perceived aggressor is African American instead of white in the shooter bias studies.²⁰⁵

These currents and stereotypes that flow in significant part from the long history of stigmatization in the United States affect school decisionmaking. First, in response to the stereotype that greater danger and threat emanate from African Americans' behavior, school decisionmakers are more likely to consider a particular African American student's conduct in an ambiguous situation²⁰⁶ suspension worthy. In other words, it is more likely to qualify as the kind of defiance, insubordination, or aggressive behavior that needs to be controlled through punitive school discipline. These suspension categories are the exact categories in which we see racial disproportionality most blatantly.²⁰⁷ Such behavior triggers fears of loss of dominion and control, of revolt, and of danger that have been associated with African Americans for at least the last three-hundred years. It triggers the subtle conviction engrained in American thought

203. This fear reaches back to the time period of American slavery, when white fears of slave insurrections were common and led to vicious abuse of not only those immediately suspected of planning to revolt, but free African Americans as well. See JORDAN, *supra* note 146, at 399, 402, 577.

204. See *supra* notes 191–201 and accompanying text.

205. See *supra* notes 195–197 and accompanying text.

206. Again, ambiguity in the context of a school discipline decision can arise either because the behavior engaged in by the student is ambiguous in its intent or character, or because the disciplinary offense that attaches to that behavior is ambiguously defined. See *supra* note 128.

207. See *supra* note 89 and accompanying text.

that behavior that is at least potentially threatening or dangerous is in fact threatening and dangerous when an African American individual engages in it.

Once an interaction has been considered as potentially suspension worthy by a disciplinary decisionmaker, racial bias is more likely to lead to behavioral leakage, the positive feedback loop of retaliatory interactions that creates a hostile climate in the interpersonal interaction and leads to an escalation in conflict.²⁰⁸ This feedback loop reinforces the school authority's belief that the behavior was in fact defiant, subordinating, or dangerous. Consequently, the person in charge of discipline will be more inclined to impose an act of discipline on that student—to pull the trigger on the suspension so to speak. After all, control of a potentially defiant African American population has always been a prime concern in the United States. Ambiguous behavior of African Americans screams danger. And if Americans are more inclined to physically shoot a potentially dangerous person if that person is African American, the decision to suspend likely comes more easily as well when an African American student is the offender.

Lastly, the history of stigmatization and stereotyping is more likely to create an excuse condition for the person imposing the punishment.²⁰⁹ Not only will that person think that the punished behavior was actually more dangerous, more subordinating, and more subversive, but the person will also be guided by the subconscious idea that the African American student did not truly belong in the school space to begin with, was incapable of realizing the leadership potential that schools are supposed to inspire in their students, and was already facing a future with dim or no prospects for success. If that is so, why not suspend the student?²¹⁰

208. See *supra* notes 193–194 and accompanying text.

209. See *supra* note 199 and accompanying text.

210. Aside from the claim that this description exaggerates the state of racial discrimination in the United States today—a claim that is widely popular today but vastly underestimates the role that racial bias still plays in the United States—there is one obvious counter to this description. Namely, if it is true that these worries and threats associated with African Americans are ones that originate in the white American population, is my argument then limited to only white teachers and administrators disciplining their students? I submit that it is not. For one thing, no one is immune to the pernicious effects of stigmatization, and stigma can be internalized. See Lenhardt, *supra* note 2, at 841–42. Similarly, stereotypes of a particular group, including that the group is more dangerous, can be shared by members of that same group—even members who have a positive emotional identification with that group. This is where the difference between stereotypes and attitudes is important. I may have a generally positive attitude toward a particular student, but that does not preclude me from falling prey to the stereotype that he or she is likely to be more dangerous than his or her white peer, or more undisciplined, or a greater threat to my authority. Recall note 198, *supra*, and its accompanying text: While whites exhibit strong implicit bias in favor of other whites, African Americans either exhibit no bias in either direction or even favor whites slightly. Therefore, while I might cautiously hypothesize that racially disproportionate discipline decisions are somewhat less prevalent when the person making the discipline decision is also African American, this does not mean that my argument laid out in this Part is undercut.

Moreover, why not suspend the student if his behavior was not appropriate in the first place?

C. Normative Baselines—Acting White

1. What Are Normative Baselines?

In the United States, “[w]hiteness is the racial norm. In this culture the black person, not the white, is the one who is different.”²¹¹ This has been the case since the very beginning of English settlement in North America.²¹² Many, if not most, whites fall prey to the “*transparency*” phenomenon: the tendency . . . not to think about whiteness, or about norms, behaviors, experiences, or perspectives that are white-specific.²¹³ Because of the long history of white privilege and the monopolization of political, cultural, and societal power in the hands of whites, most engrained cultural norms in the United States hail from white cultural practices, which are privileged as preferable over all others. For example, Americans might consider the ideal litigator as a person who acts in line with stereotypes associated closely with whites—that is, a person who is ambitious, assertive, and competitive²¹⁴—and in turn assume that a white person will act more in line with such attributes than a racial minority such as an Asian American person.²¹⁵

For this reason, one should not readily assume that seemingly neutral decisionmaking and behavioral evaluation criteria, especially in issues that involve race, are in fact race neutral.²¹⁶ Instead, one should be strongly suspicious that these criteria might “misidentify as race-neutral personal characteristics, traits, and behaviors that are in fact closely associated with whiteness.”²¹⁷

211. Barbara J. Flagg, “*Was Blind, but Now I See*”: *White Race Consciousness and the Requirement of Discriminatory Intent*, 91 MICH. L. REV. 953, 971 (1993).

212. See *supra* Part II.B.2.

213. Flagg, *supra* note 211, at 957.

214. See Jerry Kang et al., *Are Ideal Litigators White? Measuring the Myth of Colorblindness*, 7 J. EMPIRICAL LEGAL STUD. 886, 891 (2010) (noting that “stereotypes of lawyers and litigators are not only strongly gendered, . . . but also strongly racialized [in that] the traits and behaviors used to describe ideal litigators, such as ambitious, assertive, competitive, dominant, and argumentative, typically bring to mind White professionals, especially White male professionals”).

215. See *id.* at 894, 899–900 (creating and validating a scale of words typically associated with litigators and finding that the study respondents both explicitly reported thinking that most Americans associate those words more with whites than Asian Americans and finding significant implicit bias showing that participants had a tighter mental connection between white faces and litigator terms than between Asian American faces and litigator terms).

216. See Flagg, *supra* note 211, at 973.

217. *Id.* at 974.

In this regard, white normative baselines can be regarded as the counterpart to racial stigmatization in the social construction of race, specifically at the stage of racial meanings—Step 4 in Figure 1. While stigmatization affixes notions of inferiority, dangerousness, threat, and lack of belonging to African Americans as societal outsiders, normative baselines represent the fact that the dominant societal group—whites—will attach labels of appropriateness, even superiority, to its own customary behaviors. In other words, normative baselines represent “the vast terrains of institutional racism—the maintenance of institutions that systematically advantage whites—and cultural racism—the usually unstated assumption that white culture is superior to all others.”²¹⁸

Barbara Flagg describes this process very succinctly in a short narrative, based on real events, that illustrates behavioral leakage in the questioning of a minority applicant interviewing for a position on a majority white board of directors of a public interest organization.²¹⁹ The panel somewhat insensitively inquires into the applicant’s lack of a college education—not a requirement for the position—although the applicant has other relevant experience, and also engages in otherwise potentially intrusive questioning, eliciting a defensive response and an increasingly tense interaction between the board and the minority applicant.²²⁰ In the end, the board evaluates the candidate as “hostile” and as a potentially “disruptive presence,” presumably not the kind of evaluation one would hope to receive when applying for a position.²²¹ Flagg identifies this as an instance in which the white board members expected “that all interviewees will, or should, respond to a given line of questioning the way a white candidate . . . would respond.”²²² Further, the board seems to impose white educational norms on the candidate by implicitly requiring the college education the board members themselves received, even though such education is not necessary for the job.²²³ Most importantly, Flagg concludes:

The most troubling and perhaps least obviously race-specific aspect of the story is the ultimate assessment of the black candidate as “hostile.” This seemingly neutral adjective is in fact race-specific in

218. *Id.* at 959.

219. *See supra* notes 193–194 and accompanying text.

220. *See* Flagg, *supra* note 211, at 974. In particular, after digging deeply into the financials of the business the candidate built as an entrepreneur, information the candidate is reluctant to provide, the board members ask: “Why . . . didn’t you go to college later, when you were financially able to do so? Will you be comfortable on a Board where everyone else has at least a college degree?” *Id.* (internal quotation marks omitted).

221. *Id.* at 975.

222. *Id.*

223. *Id.* at 976.

this context insofar as it rests on norms and expectations that are themselves race-specific. To characterize the candidate's responses as hostile is to judge them inappropriate. Such a judgment presupposes an unstated norm of appropriate behavior in that setting, one that reflects white experience, priorities, and life strategies.²²⁴

The board expected the African American candidate to act white.²²⁵ In other words, the board expected the candidate to negotiate her own sense of self-identity to conform to the board's white expectations of what is appropriate—rather than hostile or disruptive—in order to avoid punishment in the selection process.²²⁶ Something quite similar might also be at work in the school discipline context, leading to African American disproportionality in out-of-school suspension.

2. Normative Baselines and School Discipline

The remarks above provide interesting insights into racial disproportionality in school discipline, especially as it pertains to offenses like defiance or disrespect. Because these categories are vague and inherently normative, they are prime candidates for being filled with unstated assumptions—normative baselines—about what kind of behavior is or is not appropriate at school. As mentioned above, schools have always played a very important role in preparing children for proper and successful participation in civic life and in inculcating in its youth the values society considers most important.²²⁷ But the very civic life for which students are being prepared is one that has always been dominated by white interests, preferences, values, and norms.

Consequently, what white Americans have traditionally considered, and consider today, to be appropriate behavior likely overdetermines the behavioral norms expected from students, behavioral norms with which most Americans

224. *Id.*

225. *See generally* CARBADO & GULATI, *supra* note 110.

226. *See id.* at 24.

[B]ecause people of color often perceive themselves to be the subject of negative stereotyping, they are likely to feel the need to do significant amounts of identity work to counter those stereotypes. What is worse, these stereotypes are often in tension with the institutional norms around which the workplace is organized. As a result of this tension, persons of color must master the ability to negotiate between their sense of self and their sense of who the institution wants them to be.

Id.

227. *See supra* note 202 and accompanying text.

likely also most closely associate a white face.²²⁸ By virtue of their contrasting physical differences, African American youth without such a prototypically white face have a disadvantage from the start if they want to be perceived as behaving appropriately. Similarly, to the extent that a student's cultural background embodies unique patterns of behavior that do not conform to the white norm,²²⁹ this disadvantage is exacerbated. To be clear, students might lower the negative impact of this dynamic in a variety of ways.²³⁰ But they are set up for disproportionate treatment and punishment because decisionmakers perceive them as extraneous bodies engaging in inappropriate behavior within a societal fabric structured around white interests. This is especially true in vague offense categories like disrespect and defiance, which heighten the negative stereotypes of African Americans as being more threatening and dangerous. Moreover, some students might develop resentment against a perceived need to act white in order to be successful at school.²³¹ To the extent that such resentment is manifested outwardly, it will likely lead to behavioral leakage, positive feedback loops of negative interactions with discipline administrators, and therefore disproportionate suspension rates.

III. ALTERNATIVES TO PUNITIVE SCHOOL DISCIPLINE AND ZERO TOLERANCE

At this point, the reader might be disturbed and frustrated by the prevalence of racial bias in the American school system, which emanates from broader currents of bias in American society as a whole. Punitive school discipline policies have been shown to be highly problematic. They are not conducive to either sound childhood development or to the development of greater racial equality for America's youth. So what can be done to change this dire situation? What are viable alternatives to zero tolerance and its pernicious effects? In this Part, I argue that the principles of Restorative Justice, when implemented into a school's disciplinary process, show promise and potential to alleviate some of the most pressing issues described above.

228. Cf. Kang et al., *supra* note 214 (illuminating how study respondents given a list of litigator terms both explicitly and implicitly associated the terms with whites).

229. Such patterns might be related to, for example, style of dress, accent, and general demeanor.

230. See CARBADO & GULATI, *supra* note 110, at 25–35 (describing potential coping mechanisms such as “providing racial comfort, strategic passing, using prejudice, providing racial discomfort, selling out, and buying back”).

231. See, e.g., Jeffries, *supra* note 1, at 32 (connecting internalized stigma on the part of minority youth to a perception that achieving educational success is “acting white,” an activity that is “perceived as a foreign pursuit” as a result of the children’s “thoroughly discredited . . . self-perception”).

A. What Is Restorative Justice?

Restorative Justice is an alternative method of dealing with misbehavior distinguished from the two dominant models of discipline: retribution and rehabilitation.²³² Its core values focus on “healing rather than hurting, moral learning, community participation and community caring, respectful dialogue, forgiveness, responsibility, apology, and making amends” in an attempt to restore victims and offenders, as well as broader affected communities, to a more positive place after something bad has happened.²³³ Maybe the most familiar form of disciplinary decisionmaking associated with Restorative Justice is victim-offender mediation (VOM), a practice that has been utilized periodically in the U.S. criminal justice system.²³⁴

Victim-offender mediation is [a practice available to] victims who want to have a mediation meeting with the offender to discuss how the crime affected them and how the offender can repair the harm. Victim-offender mediations are conducted by trained mediators who are sensitive to the needs of victims and their families.²³⁵

The goal of VOM, and of Restorative Justice more broadly, is to first identify more specifically what harm has occurred and to then develop—through dialogue as opposed to top-down punishment—a mutually agreeable solution for repairing the harm and reintegrating the perpetrator into the broader community. For example, a possible outcome of Restorative Justice could be a “sentence” of community service.²³⁶ Restorative Justice attempts to counteract problems within the current punitive framework for dealing with misbehavior—which include excessive punishment, excessive imprisonment, and victim alienation—by implementing a collaborative process that focuses on repairing harms through reconciliation, dialogue, and greater inclusion of the stakeholders in any particular incident.²³⁷

232. See John Braithwaite, *Restorative Justice: Assessing Optimistic and Pessimistic Accounts*, 25 CRIME & JUST. 1, 4 (1999).

233. *Id.* at 6.

234. See, e.g., Mark S. Umbreit, *Restorative Justice Through Victim-Offender Mediation: A Multi-site Assessment*, 1 W. CRIMINOLOGY REV. 1, 7–9 (1998), available at <http://wcr.sonoma.edu/v1n1/umbreit.html>.

235. *Id.* at 7; see also *id.* at 12–13 (describing VOM process).

236. See *id.* at 5–7, 12–13.

237. See *id.* at 2–3, 5–7.

Some authors have proposed Restorative Justice models as a potentially effective alternative way of administering school discipline²³⁸—especially as compared to zero tolerance policies—because they take into account the needs of the multiple actors involved in a disciplinary proceeding as well as the multiple levels of harm that a school experiences when it has to deal with violence.²³⁹ Scholars stress that Restorative Justice’s greater focus on accountability, reintegration and inclusion (instead of exclusion and exiling), community building, and the development of problemsolving skills is particularly beneficial for schools because it allows for the development of a safe, collaborative, and positive environment in which students are more likely to succeed.²⁴⁰ Restorative Justice models incorporate different kinds of practices at varying levels of sophistication, ranging from simple circle discussions between the victim, offender, a mediator, and any other stakeholders; to affective statements that provide for emotion sharing; to whole-school implementation across a variety of school activities beyond disciplinary practices.²⁴¹

Because Restorative Justice focuses on reintegration, dialogue, collaboration, and mutual respect, it offers useful tools for countering the problems created by current regimes of punitive school discipline as described in Part I. But are Restorative Justice methods actually effective when put into practice?

B. Restorative Justice—A Potential Solution?

Available studies suggest that Restorative Justice can indeed be beneficial in addressing issues associated with punitive school discipline and in reducing the exorbitant numbers of school suspensions in American schools today.

For example, a study conducted by the Thelton E. Henderson Center for Social Justice at the University of California, Berkeley, School of Law reported positive results from the implementation of a Restorative Justice program at Cole Middle School in West Oakland, California.²⁴² Although the school had to be closed because of declining enrollment only two years into the implementation of

238. See, e.g., González, *supra* note 59; Hanson, *supra* note 3; Anderson, *supra* note 12; Cara Suvall, *Essay, Restorative Justice in Schools: Learning From Jena High School*, 44 HARV. C.R.-C.L. L. REV. 547 (2009).

239. See Suvall, *supra* note 238, at 559–62.

240. See González, *supra* note 59, at 300–01.

241. See *id.* at 301–03.

242. MICHAEL D. SUMNER ET AL., SCHOOL-BASED RESTORATIVE JUSTICE AS AN ALTERNATIVE TO ZERO-TOLERANCE POLICIES: LESSONS FROM WEST OAKLAND (2010).

the program,²⁴³ the report found that the average suspension rate at the school dropped from fifty suspensions per one hundred students to only six suspensions per one hundred students on average for the two years after the program was implemented.²⁴⁴ Students also gave strong positive feedback on how the program helped to reduce problematic behavior such as fighting and helped build relationships with other students.²⁴⁵

The Denver Public Schools have also reported significant reductions in out-of-school suspensions after implementing Restorative Justice practices in the 2006–07 school year through the Denver Public Schools Restorative Justice Project.²⁴⁶ Because of early successes with the program, the program has expanded continuously and, during the 2008–09 school year, served 1235 students.²⁴⁷ Schools not only experienced increases in timeliness and in student social skills after the implementation of Restorative Justice²⁴⁸ but were also able to reduce the rate of suspensions per one hundred students by almost 10 percent over three years of utilizing Restorative Justice.²⁴⁹

Similarly, the International Institute for Restorative Practices (IIRP) found positive results in schools both in the United States (specifically six schools in Pennsylvania) and internationally after those schools implemented Restorative

243. *Id.* at 10.

244. *Id.* at 31.

245. *Id.* at 20.

246. See MYRIAM L. BAKER, DPS RESTORATIVE JUSTICE PROJECT: YEAR THREE, YEAR END REPORT 2008–2009, at 3–4 (2009), available at www.restorativejusticecolorado.org/_literature_55812/Denver_Public_Schools_Restorative_Justice_Program_Final_Report_2008-2009.

247. *Id.*

248. *Id.* at 10–14.

249. *Id.* at 15–16. It should be noted, however, that the report also states that there was a 40 percent reduction in the total number of suspensions across the entire district compared to the baseline before the expansion of the project, which includes many schools that did not formally adopt Restorative Justice practices. Myriam Baker notes: “Although the RJ project is not solely responsible for these changes, it has definitely been a springboard for changes on the district level in the intent and implementation of discipline policy.” *Id.* at 15. After all, the Board of Education for the district clearly established in their most recent student discipline policy that restorative intervention strategies are available and encouraged in dealing with student misbehavior. See *Policies and Procedures*, DENVER PUB. SCHS., <http://www.dpsk12.org/policies/Policy.aspx?-db=policy.fp3&-format=detail.html&day=policyview&-sortfield=File&-op=eq&Section=J&-recid=32883&-find=> (last visited Dec. 28, 2013) (explaining that “[t]here are three types of intervention strategies that are available: Administrative, Restorative, and Skill-based/Therapeutic” and noting the expectation that “[s]chools should minimize the use of out-of-school suspensions, recommendations for expulsion, and referrals to law enforcement, to the extent practicable” since “[i]t is a goal of the Denver Public Schools and the Board of Education that the juvenile and criminal justice systems be utilized less frequently to address school-based misconduct”).

Justice programs.²⁵⁰ With regard to the American schools, the IIRP reported reductions in categories ranging from general suspension rates to the frequency of individual behavioral incidents over different time periods. Across the board, all the schools studied worldwide were able to reduce suspension rates after they instituted Restorative Justice programs.²⁵¹

A pilot project that implemented Restorative Justice disciplinary practices in four Minnesota school districts also reported encouraging success.²⁵² Although a number of implementation challenges were reported, including the gathering of useable baseline data,²⁵³ out-of-school suspensions dropped at every school with accurate and usable baseline data following the implementation the program.²⁵⁴

Finally, Thalia Gonzalez, in a comprehensive description of American schools that have implemented Restorative Justice programs, also reported general decreases in suspension rates after the implementation of the programs.²⁵⁵ At North High School in the Denver Public Schools District—Gonzalez's case study school—out-of-school suspensions declined by 34 percent in the four years after implementation of the program.²⁵⁶

Restorative Justice is a promising approach to resolving the towering issues of punitive school discipline described in Part I. Is it equally promising in counteracting the pervasive problem of racial bias in school discipline, and in society more broadly, as described in Part II?

C. Restorative Justice and Reducing Racial Disproportionality

There are numerous reasons to think that integrating Restorative Justice principles more fully into American school discipline policies will be helpful in addressing the pervasive racial bias that persists in American society.

250. INT'L INST. FOR RESTORATIVE PRACTICES, IMPROVING SCHOOL CLIMATE: FINDINGS FROM SCHOOLS IMPLEMENTING RESTORATIVE PRACTICES (2009), *available at* http://www.iirp.edu/iirpWebsites/web/uploads/article_pdfs/92115_IIRP-Improving-School-Climate.pdf.

251. *Id.*

252. Nancy Riestenberg, Restorative Measures in Schools: Alternatives to Suspensions In-School Behavior Intervention Grants (2004) (Presentation at the National Conference of the Hamilton Fish Institute on School and Community Violence), *available at* <http://gwired.gwu.edu/hamfish/merlin-cgi/p/downloadFile/d/16820/n>.

253. *Id.* at 42.

254. *Id.* at 43–49.

255. Gonzalez, *supra* note 59.

256. *Id.* at 334.

1. Countering Perceptual Segregation and Implicit Bias

Restorative Justice might be an attractive alternative to punitive zero tolerance policies because it is a practice that can provide a forum for minority voices to show that systematic inequalities remain a reality in society. CRT scholars, such as Russell Robinson, have pointed out that that a wide gulf exists between the perceptions of whites and the perceptions of African Americans on the issue of racial discrimination in the United States.²⁵⁷ This phenomenon is called perceptual segregation and posits that “[b]lacks and whites, on average, tend to view allegations of racial discrimination through substantially different perceptual frameworks.”²⁵⁸ In particular, whites generally subscribe to a colorblindness perspective, which “views discrimination as an aberration from a colorblind norm, and . . . regards most forms of race-consciousness as socially disruptive,” while blacks more often subscribe to a “pervasive prejudice perspective,” which “views discrimination as a commonplace event, rooted in daily social dynamics.”²⁵⁹ The existence of such perceptual segregation is thus highly significant in the context of school discipline because it affects a person’s “very definition of racial discrimination.”²⁶⁰

Disciplinary decisionmakers who subscribe to the colorblindness perspective will be more likely to suspend African American students for two interacting reasons. First, they will be less aware of the fact that notions of racial stigma and of negative racial stereotypes toward African Americans influence their decisionmaking.²⁶¹ After all, if one is convinced that colorblindness is society’s norm and that racial discrimination is no longer a significant problem, one is more likely to believe that a decision to suspend a student for dangerous, threatening, or defiant behavior in an ambiguous situation is on the merits rather than influenced by bias. Second, one will be less likely to see the consistent findings of pervasive racial disproportionality in school discipline in the United

257. Russell K. Robinson, *Perceptual Segregation*, 108 COLUM. L. REV. 1093, 1106–13 (2008) (marshaling empirical evidence showing that African Americans more often perceive that African Americans as a group are subject to more frequent and blatant discrimination, and that measures taken to remedy such discrimination are often inadequate, as compared to whites).

258. *Id.* at 1106.

259. *Id.* at 1117 (internal quotation marks omitted).

260. *Id.* It should be noted that the theory of perceptual segregation deals with differing perceptions between racial groups on average. African Americans are not immune from subscribing to the colorblindness perspective. Supreme Court Justice Clarence Thomas is one prominent example. *See, e.g., Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 752 (2007) (Thomas, J., concurring) (noting that in his view “as a general rule, all race-based government decisionmaking—regardless of context—is unconstitutional”).

261. *See supra* Part II.B.4.

States as the product of biased decisionmaking and thus as a cause for concern or a cause for change in their own decisionmaking. One will be more likely to cling to (unfounded)²⁶² notions that differential rates of misbehavior are truly at the source of such disproportionality. As soon as this thought has crept into a decisionmaker's mind, a decision to suspend in an ambiguous situation becomes more likely. After all, if African American students simply act out more—that is, if they do not conform with existing normative baselines of appropriate behavior²⁶³—why would it be discrimination to suspend them more often for such behavior?

Restorative Justice has the potential to bridge the gap of understanding created in part by perceptual segregation. In particular, its focus on dialogue and on giving all parties an opportunity to interact and to share their perspectives might lead to the discovery of misunderstandings and of different perceptions of the interactions between members of a school community in the first place. After all, the “failure . . . to interact meaningfully with [others] and to engage those of other races on racial issues” maintains perceptual differences.²⁶⁴ Restorative Justice, especially when it is implemented in schools on a broad and daily basis, encourages meaningful interaction and gives a voice to those who otherwise might not have a safe place to express their thoughts and emotions.

Restorative Justice circles, affective statements, conferences, and the like can also bring to the surface the causes of behavioral leakage²⁶⁵ by encouraging both students and disciplinary decisionmakers to be honest about how they perceived the other person's behavior in the interaction that might lead to a suspension for, say, defiance. A teacher may discover that the student felt neglected by the teacher, not sufficiently respected, or that issues outside of the classroom weighed on their behavior in class. The teacher might then understand both how his or her own behavior might have caused the situation to escalate into a suspension-worthy event, or that what the student might need is not being kicked out from school for a number of days, but a showing of respect and care. Even more importantly, students have a greater ability to share their belief that a teacher's behavior toward them was inappropriate and their belief that their race played a role in this process. In the best-case scenario, teachers will reconsider their own potential biases and adjust their behavior appropriately. In any case, they will be reminded that a different interpretation of their behavior exists and that it might impose racial harm on the students they are committed to serve.

262. See *supra* notes 86–88 and accompanying text.

263. See *supra* Part II.C.

264. Robinson, *supra* note 257, at 1133.

265. See *supra* notes 193–194 and accompanying text.

In this way, Restorative Justice programs represent a real-life implementation of a very important maxim in CRT: the need to “look to the bottom.”²⁶⁶ In a groundbreaking article published in 1987, Mari Matsuda proposed “that those who have experienced discrimination speak with a special voice to which we should listen.”²⁶⁷ Restorative Justice programs, through their focus on dialogue, open discussion, sharing of multiple viewpoints, and collaborative integration, provide a forum for the “special voice to which we should listen” and incorporate it into mutually agreeable solutions to instances of conflict.²⁶⁸ This represents a productive approach to resolve difficult issues caused by the long history of racial bias in the United States. Certainly, it is a more productive approach than current punitive policies.

2. Countering Stigmatization

Furthermore, and for similar reasons, Restorative Justice presents a legitimate response to the debilitating effects of racial stigma. Restorative Justice allows the story behind the alleged offender’s actions to be heard so as to determine the reasons and the root causes underlying problem behavior. From there, it seeks to find potential collaborative and nonpunitive solutions to such behavior. This focus on rehabilitation and reintegration might lead to a more open dialogue about stigma’s extent, lived reality, and hurtful consequences with which minorities have to contend even today²⁶⁹ and which is likely to influence both behavior and disciplinary decisionmaking at school.²⁷⁰ In that sense, Restorative Justice has the potential to make all participants to what is initially categorized as an incidence of unidirectional misbehavior realize their common

266. See generally Mari J. Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 HARV. C.R.-C.L. L. REV. 323 (1987).

267. *Id.* at 324.

268. *Id.*

269. See Lenhardt, *supra* note 2, at 824–25 (describing how stigma creates a “socially shared sense of reality” which causes “racial disparities in social indicators, such as education or employment, simply [to] not register as problems with which the nonstigmatized must be concerned” because “they merely confirm basic assumptions about the character and abilities of racially stigmatized minorities”); *id.* at 811, 887–90 (discussing the need to shift the focus of the discourse about racial stigma to more productive avenues); *cf. id.* at 879–80 (describing the need to make changes to, for example, law enforcement training and practices like racial profiling because “[t]he idea that racial stigma affects our cognitive processes in a way that makes racialized decisionmaking seem objective or rational arguably calls much of the prevailing wisdom about the potential dangerousness of certain individuals and who should reasonably be considered a law enforcement threat into doubt”).

270. See *id.* at 820–21 (suggesting that a negative reaction to a stigmatized person on the basis of the negative traits associated with his “virtual identity” imputed by stigmatization is countered (only) when there is reason for the person interacting with the stigmatized to realize the actual identity of the other individual).

humanity, the aspect of social interaction that racial stigma specifically denies.²⁷¹ Restorative Justice humanizes the story behind a discipline violation by individualizing it and giving it a face, and thus makes it more likely that an integrative response takes place.²⁷² In the process, measures that create a collaborative climate, at school and hopefully beyond, are more likely to be adopted and a punitive framework discarded.²⁷³

D. Criticisms of, and Hurdles to, the Implementation of Restorative Justice

Restorative Justice is not without its critics. Richard Delgado, a prominent CRT scholar, for example, criticized the particular practice of Victim-Offender Mediation in the context of the general criminal justice system as a potential mechanism of oppression available to a victim, as lacking traditional procedural protections provided in fora like courts, and as potentially facilitating only shallow behavioral change.²⁷⁴ Similarly, Gillean McCluskey and his colleagues have criticized Restorative Justice for being excessively focused on shaming an offender, not taking into account other variables interacting with misbehavior such as poverty, drugs, alcohol, or mental health issues, and potentially placing too much emphasis on the actions of individuals by forgetting the contexts of group dynamics and of institutionalized hierarchies that often contribute to

271. See *supra* Part II.B. Restorative Justice in schools, therefore, might help to start a process that counteracts the still very real effects and workings of this stigma. See Laura Mirsky, *Restorative Practices: Whole-School Change to Build Safer, Saner School Communities*, RESTORATIVE PRACTICES EFORUM (Int'l Inst. for Restorative Practices, Bethlehem, Pa.), May 26, 2011, at 2, available at http://www.iirp.edu/iirpWebsites/web/uploads/article_pdfs/93801_Whole-School-Change.pdf (“The most informal restorative practice, affective statements, are defined as personal expressions of feeling in response to specific positive or negative behaviors of others, and ‘I statements’ that humanize the person making them, immediately changing the dynamic between the people involved and making it possible to improve relationships in a school community.” (citations omitted)).

272. Cf. Christian G. Fritz, *A Nineteenth Century “Habeas Corpus Mill”: The Chinese Before the Federal Courts in California*, 32 AM. J. LEGAL HIST. 347, 371–72 (1988) (describing how the requirement of habeas corpus proceedings humanized interactions between otherwise overtly racist judges and Chinese immigrants and how this humanization might have been a large factor in the extraordinary success rate of such habeas corpus proceedings during a time of increasing anti-Chinese sentiment, and even Chinese exclusion).

273. See SUMNER ET AL., *supra* note 242, at 13–20 (discussing the very positive climate change to constructive and proactive problem solving that took place at Cole Middle School after the implementation of the Restorative Justice program and the strong positive perceptions of the program by students, teachers, and parents).

274. Richard Delgado, *Goodbye to Hammurabi: Analyzing the Atavistic Appeal of Restorative Justice*, 52 STAN. L. REV. 751 (2000).

disciplinary incidents.²⁷⁵ But these challenges are not fatal to Restorative Justice per se. Rather, they criticize particular facets of how Restorative Justice has been implemented in particular contexts and the relative emphasis that is put on specific aspects or theories of Restorative Justice, such as shaming.

More troublesome is the existence of significant barriers to the implementation of Restorative Justice in schools.²⁷⁶ Implementing Restorative Justice is resource intensive, especially early on, because of the great need to provide proper training to all administrators and faculty, and optimally also to school staff.²⁷⁷ Creating a change in schoolwide policies also involves a difficult interaction with higher levels of rulemaking and bureaucracy.²⁷⁸ Furthermore, because of the need for consistent application of Restorative Justice policies, achieving buy-in

275. See, e.g., G. McCluskey et al., *I Was Dead Restorative Today: From Restorative Justice to Restorative Approaches in School*, 38 CAMBRIDGE J. EDUC. 199 (2008). McCluskey and his colleagues also argue that the central insistence on shame in Restorative Justice might be misplaced in certain instances because “many of the most vulnerable—and sometimes troublesome—young people in schools may have very complex lives and very complex feelings, sometimes including misplaced shame, about personal or family issues.” *Id.* at 205–06.

276. See, e.g., CORDELIA ANDERSON ET AL., RESPECTING EVERYONE’S ABILITY TO RESOLVE PROBLEMS: RESTORATIVE MEASURES 11–12 (1998); SUMNER ET AL., *supra* note 242, at 22–30; Nancy Riestenberg, Seeding Restorative Measures in Minnesota: Challenging Opportunities 6–7 (Feb. 16, 2011) (Presented at the ESRC-Funded Seminar Series), *available at* <http://www.educ.cam.ac.uk/research/projects/restorativeapproaches/seminarfour/N%20Reistenberg.pdf>.

277. A student and her principal at a Colorado school that has implemented Restorative Justice explain the importance of having good training in *rjcolorado1*, *Restorative Justice in Schools*, YOUTUBE (Oct. 19, 2010), <http://www.youtube.com/watch?v=0bKso6EJBZY#t=82>. They explain that implementing Restorative Justice is a very work-intensive project and not an easy way out for either the principal or the student, but well worth it in the end. The principal describes Restorative Justice as:

one of those rare things in life where you know it’s right. I mean, everybody knows it’s right to give kids another chance. And then, you can see the data. You can see that, wow, they have fewer incidents, they have this strong culture, the kids are really respectful and are really responsible. Then, why wouldn’t you [implement Restorative Justice]? . . . I can definitely see where . . . teachers might feel like “Oh, here is another program. Now, this is the next thing we have to do.” . . . But what I have found as a teacher and now as a principal, with Restorative Justice, is that it’s not something extra. It goes along with everything that I’ve already done. I mean, as educators we are in education because we believe in kids and because we really want to help them be their best. And that is what Restorative Justice is all about. And it’s really just tools to help us do that. . . . Really, in the end you save so much time. Because if your circle takes one negative leader and turns him or her into a positive leader, you’ve saved yourself so much time.

Id.

278. See Jeffries, *supra* note 1, at 4–5, 35–60. Jeffries structures his entire piece around the premise that current decisionmaking structures in schools, and especially those serving stigmatized minorities, are excessively rigid and hierarchical as a result of constraints imposed by the nature of public schools and by democratic political decisionmaking. *Id.* The problems of rigid rules from the top overriding and potentially interfering with Restorative Justice practices by innovative schools, are likely to be a considerable issue in this context.

from the entire school community is absolutely critical, but at times difficult to achieve. Teachers might be stuck in their old ways and, depending on their perspective on the proper method to discipline misbehaving students, might not be willing to implement a restorative approach.²⁷⁹ Lastly, in some instances it might not be possible to get the broader community—including stakeholders such as law enforcement, parents, neighbors of the school, and other government agencies—sufficiently involved in the Restorative Justice practices of a particular school. These stakeholders are important for the success of Restorative Justice programs, but especially in communities facing difficult issues outside of school disciplinary problems—such as unemployment, crime, or poor housing—it might be difficult to convince these stakeholders that a strong effort to implement an entirely new, bottom-up approach to discipline at a local school is necessary and warrants their time.

Still, Restorative Justice has shown great potential for achieving tremendous benefits for both the general student population and racial minorities. In light of these benefits, it should be possible to convince policymakers, school officials, parents, law enforcement, and many other stakeholders interested in properly educating and treating this nation's youth of the rightness of Restorative Justice's method. If there is enough support for a transformative measure, challenges to implementation generally fade in comparison.

CONCLUSION

Punitive approaches to school discipline such as zero tolerance policies have failed America's youth. They are robbing students of needed educational opportunities and are contributing to a wide variety of social problems. Not only that, but racial minorities—especially African Americans—who are already the most vulnerable to societal maltreatment, are hit hardest by such policies. This is not surprising given the long history of stigmatization, dehumanization, and prejudice that American society has directed toward such minorities. Improper racial stereotypes and implicit bias continue to distort our perception and evaluation of others' behaviors, and thus negatively affect our decisionmaking regarding how to respond to instances of what the majority considers inappropriate behavior. Such processes seem to be at work in disciplinary

279. See, e.g., LOSEN, *supra* note 80, at 1–2 (describing the story of “iconic principal Joe Clark” who gained notoriety and a substantial following by implementing “get tough” policies in a New York school and even was the inspiration for a movie based on his tenure as a principle). For more details on Clark, see Ezra Bowen, *Education: Getting Tough*, TIME, Feb. 1, 1988, <http://www.time.com/time/magazine/article/0,9171,966577-2,00.html>.

decisionmaking in this country's primary and secondary schools, and have led to serious negative and disproportionate treatment of African American youth, kicking them out of schools as if they do not belong there in the first place. This needs to change. One way it could change is through the implementation of Restorative Justice principles into the ways in which schools administer their disciplinary codes. Restorative Justice has shown promise not only in reducing the overt manifestations of punitive policies, such as suspension numbers, but also in exhibiting conceptual strengths that can counter the processes underlying racial discrimination in the United States more broadly. Restorative Justice deserves a chance to help remediate the damage caused by zero tolerance policies and to undermine the sources of racial conflict that have plagued this nation for too long.