

American Bar Association: Joint Task Force on Reversing the School-to-Prison Pipeline

SARAH E. REDFIELD & JASON P. NANCE

I. OVERVIEW OF THE SCHOOL-TO-PRISON PIPELINE PROBLEM.....	12
A. <i>Introduction</i>	12
1. The Context.....	15
a. <i>The Meaning of Disproportionality</i>	16
b. <i>Differences in relationships and expectations relate to the exercise of discretion, and both can be damning</i>	22
c. <i>Bad or worse behavior is not the explanation for disproportionality</i>	27
d. <i>Exclusion and detention do not achieve better outcomes for students</i>	31
e. <i>Nor are the schools safer</i>	36
B. <i>The Manifestations</i>	40
1. Disproportionality manifests itself all along the pipeline where students of color are poorly served.....	40
a. <i>Students of color are disproportionately lower achievers and unable to read at basic or above</i>	40
b. <i>Students of color suffer disproportionately because of lower expectations and lack of engagement</i>	44
c. <i>Students of color are disproportionately retained in grade or excluded because of high stakes testing</i> ..	44
d. <i>Students of color are disproportionately subject to more frequent and harsher punishment</i>	47
e. <i>Students of color are disproportionately referred to law enforcement or subject to school-related arrest</i>	51
f. <i>Students of color are disproportionately placed in alternative schools</i>	52
g. <i>Students of color disproportionately drop out of school and fail to graduate from high school</i>	53

<i>h. Students of color disproportionately feel threatened at school and suffer consequences as victims</i>	58
2. For students with disabilities, disproportionality manifests itself all along the pipeline in areas similar to those outlined in the preceding section on students of color	60
<i>a. Students with disabilities are disproportionately students of color, especially in discretionary categories and these categories compound</i>	60
<i>b. Students with disabilities are disproportionately less likely to be academically proficient</i>	64
<i>c. Students with disabilities are disproportionately disciplined</i>	65
<i>d. Students with disabilities are disproportionately retained in grade but still dropping and out failing to graduate</i>	67
<i>e. Students with disabilities are disproportionately likely to spend time out of the regular classroom, to be secluded, restrained or placed in alternative schools</i>	67
<i>f. Students with disabilities are disproportionately referred to law enforcement or subject to school-related arrest and incarceration</i>	69
<i>g. Students with disabilities are disproportionately bullied and victimized</i>	71
3. Similar disproportionalities and difficulties impact LGBTQ and GNC young people	71
<i>a. LGBTQ youth suffer in a disproportionately difficult school climate</i>	72
<i>b. LGBTQ and GNC youth are disciplined more severely in school and juvenile justice</i>	73
4. These same disproportionalities experienced in school plague the juvenile justice system	73
<i>a. Youth of color are disproportionately arrested</i>	77
<i>b. Youth of color are disproportionately referred, detained (longer), charged, and held</i>	80
<i>c. Youth with disabilities show the same disproportionalities and experiences in juvenile justice as well</i>	83

<i>d. LGBTQ youth are also disproportionately represented in juvenile settings</i>	86
II. SOCIETAL CONSEQUENCES FOR IMPRISONING YOUTH	87
III. CAUSES OF THE SCHOOL-TO-PRISON PIPELINE	93
<i>A. Criminalization of School Discipline</i>	94
<i>B. The Increased Presence of Law Enforcement Officers in Schools</i>	97
<i>C. The Role of Implicit Bias and Related Unconscious Associations/Decisions</i>	107
1. Acknowledging that prior intervention has not proven sufficient	114
2. Summary of implicit bias research and its implications for the school-to-prison pipeline	117
3. Summary of group dynamics research and its implications for the school-to-prison pipeline.....	120
4. Summary of micromessaging research and its implications for the school-to-prison pipeline.....	125
5. Putting Implicit together to understand the pipeline...	126
6. New Response to the School-to-Prison Pipeline: A Focus on Implicit.....	132
IV. OVERVIEW OF TOWN HALL MEETINGS	135
<i>A. Background Information Provided for 2014-15 Town Halls</i>	135
<i>B. Chicago Town Hall Meeting – February 7, 2014</i>	136
<i>C. Boston Town Hall Meeting – August 8, 2014.....</i>	139
<i>D. Houston Town Hall Meeting – February 6, 2015</i>	141
<i>E. Washington, D.C. Town Hall Meeting – February 26, 2015</i>	144
<i>F. Arizona State University Town Hall Meeting – March 27, 2015.....</i>	145
<i>G. New Orleans Town Hall Meeting – April 14, 2015</i>	148
<i>H. Honolulu Town Hall Meeting – April 18, 2015</i>	149
<i>I. Miami Town Hall Meeting – May 14, 2015.....</i>	151
<i>J. Chicago Roundtable Discussion – July 31, 2015.....</i>	152
APPENDIX A. SELECTED CURRENT LEGISLATIVE INITIATIVES	153
APPENDIX B. RECOMMENDED PROGRAMS	167
APPENDIX C. ADDITIONAL PROGRAMMATIC RESOURCES	180

ACKNOWLEDGEMENTS

The ABA's Joint Task Force on Reversing the School-to-Prison Pipeline gratefully acknowledges and thanks Rachel Patrick, with gratitude for her work on this and so many other projects to improve the lives of our young people.

This report would not have been possible without the enthusiastic and excellent help in reviewing the draft from the team at the University of Memphis Law Review, Gregory A. Wagner, Sarah Smith, and Carl Benjamin Lewis. We also much appreciated the work of Professor Nance's research assistants.

This report was originally published at https://www.americanbar.org/content/dam/aba/administrative/diversity_pipeline/stp_preliminary_report_final.authcheckdam.pdf. Due to the participation of *The University of Memphis Law Review*, the authors' desire for as broad exposure as possible, and the imminence of the issue both locally and nationally, the report is being reprinted here with light editing.

NOTICE

This draft report is subject to further review and modification by the Joint Task Force. The content of this report has not been presented in its entirety to, or approved by, the American Bar Association House of Delegates or the Board of Governors, and therefore should not be construed as representing ABA policy, unless adopted pursuant to the bylaws of the Association.

PRELIMINARY REPORT AND RECOMMENDATIONS

January 28, 2016

PREFACE

In 2014, the American Bar Association (ABA) Coalition on Racial and Ethnic Justice (COREJ) turned its attention to the continuing failures in the education system where certain groups of students—for example, students of color, with disabilities, or LGBTQ—are disproportionately over- or incorrectly categorized in special education, are disciplined more harshly, including refer-

ral to law enforcement for minimal misbehavior, achieve at lower levels, and eventually drop or are pushed out of school, often into juvenile justice facilities and prisons—a pattern now commonly referred to as the School-to-Prison Pipeline (StPP). While this problem certainly is not new, it presented a convergence of several laws, policies, and practices where the legal community's intervention is critical.

Joined by the ABA Pipeline Council and Criminal Justice Section, and supported by its sister ABA entities, COREJ sponsored a series of eight Town Halls across the country to investigate the issues surrounding this pipeline. The focus of these Town Halls was to: 1) explore the issues as they presented themselves for various groups and various locales; 2) gather testimony on solutions that showed success, with particular focus on interventions where the legal community could be most effective in interrupting and reversing the StPP; and 3) draw attention to the role implicit bias plays in creating and maintaining this pipeline. This report is a result of those convenings. Also a result was the formation of a Joint Task Force among the three convening entities to provide an organizational structure to address Reversing the School-to-Prison Pipeline (RStPP)

To analyze the complexities surrounding the school-to-prison pipeline and identify potential solutions to reverse these negative trends, the Joint RStPP Task Force:

1. Organized and conducted eight Town Hall meetings in various parts of the United States, during which several area experts and community members voiced concerns, discussed the problems, and proposed solutions.
2. Analyzed and cumulated national data from the U.S. Department of Education's Civil Rights Data Collection and other available local data to gauge the magnitude and scope of the problems.
3. Served as a clearinghouse for information and reports relevant to the RStPP effort and disseminated that information.
4. Examined national and state laws and local school districts' policies and practices that have combined to push an increasing number of students out of school and into the justice system.
5. Analyzed laws that several states have enacted to reverse the school-to-prison pipeline.

6. Evaluated evidence-based policies and practices that various schools have implemented to reverse the school-to-prison pipeline.
7. Organized and conducted a roundtable discussion to focus exclusively on mapping out solutions to reverse these negative trends by identifying model programs and successful strategies.
8. Planned for two additional Town Halls focused on LGBTQ (San Diego) and entry points to the pipeline and juvenile justice (Memphis).
9. Drafted this preliminary report and prepared recommendations for consideration by the larger ABA.

FOUNDING TASK FORCE MEMBERS

Dawn Sturdevant Baum, Senior Attorney Department of the Interior, Indian Education Team Leader, Division of Indian Affairs, Office of the Solicitor (Jointly Appointed)

April Frazier-Camara, Special Assistant, Juvenile Defense Unit at Shelby County Public Defender (CJS appointee)

Miguel Pozo, Lowenstein Sandler LLP, immediate past President HNBA (COREJ appointee)*

Sarah E. Redfield, Professor of Law Emerita, UNH (COREJ appointee)

Matthew F. Redle, County and Prosecuting Attorney, Sheridan County, Wyoming (CJS appointee)

Wesley Sunu, Attorney, Sentry Insurance (Pipeline Council appointee)**

Artika R. Tyner, Assistant Professor (Public Policy/Leadership), University of Saint Thomas, College of Education, Leadership & Counseling (Pipeline Council appointee)

* Replaced by Salvador A. Dominguez, Assistant U.S. Attorney, Columbus, OH

** Replaced by Diana Sen, Northeast Region Director at Office of Federal Contract Compliance Programs (OFCCP)

ADVISORY COMMITTEE MEMBERS

Advisory Committee members will be drawn from relevant disciplines and organizations.

ABA ENTITY FOUNDING SUPPORT

Center for Children and the Law
Commission on Youth at Risk
Section of Litigation Children's Rights Litigation Committee
Commission on Disability Rights
Commission on Hispanic Legal Rights & Responsibilities

TASK FORCE REPORTER

Jason P. Nance, Associate Professor of Law, Associate Director of Education Law and Policy, University of Florida Levin College of Law

EXECUTIVE SUMMARY OF FINDINGS AND RECOMMENDATIONS

The school-to-prison pipeline—the metaphor encompassing the various issues in our education system that result in students leaving school and becoming involved in the criminal justice system—is one of our nation's most formidable challenges. It arises from low expectations and engagement, poor or lacking school relationships, low academic achievement, incorrect referral or categorization in special education, and overly harsh discipline, including suspension, expulsion, referral to law enforcement, arrest, and treatment in the juvenile justice system.

The Joint Task Force on Reversing the School-to-Prison Pipeline has addressed itself to issues of that pipeline by cumulating and analyzing the national and regional data as well as federal, state, and local law and policy. In 2014–2015, the Joint Task Force conducted eight Town Hall meetings to serve as a clearinghouse for information and reports relevant to the RStPP effort and a forum for understanding and evaluating evidence-based policies and practices that various schools and other institutions have implemented to reverse the school-to-prison pipeline. The Task Force has also conducted expert and roundtable discussions to map solutions to reverse these negative trends by identifying model programs and successful strategies.

While many have known about the problems associated with the school-to-prison pipeline for years, recent data from the U.S. Department of Education's Civil Rights Data Collection now elucidate their magnitude and that magnitude is unacceptably large

and out of proportion to the population of our young people. This disproportionality manifests itself all along the educational pipeline from preschool to juvenile justice and even to adult prison for students of color, for students with disabilities, for LGBTQ students, and for other groups in particular settings. These students are poorly served at every juncture.

Students of color are disproportionately:

- lower achievers and unable to read at basic or above
- damaged by lower expectations and lack of engagement
- retained in grade or excluded because of high stakes testing
- subject to more frequent and harsher punishment
- placed in alternative disciplinary schools or settings
- referred to law enforcement or subject to school-related arrest
- pushed or dropping out of school
- failing to graduate from high school
- feel threatened at school and suffer consequences as victims

For students with disabilities, disproportionality manifests itself in similar ways, and race and ethnicity, gender, and disability compound. Students with disabilities (or those who are labeled as disabled by the school) are disproportionately:

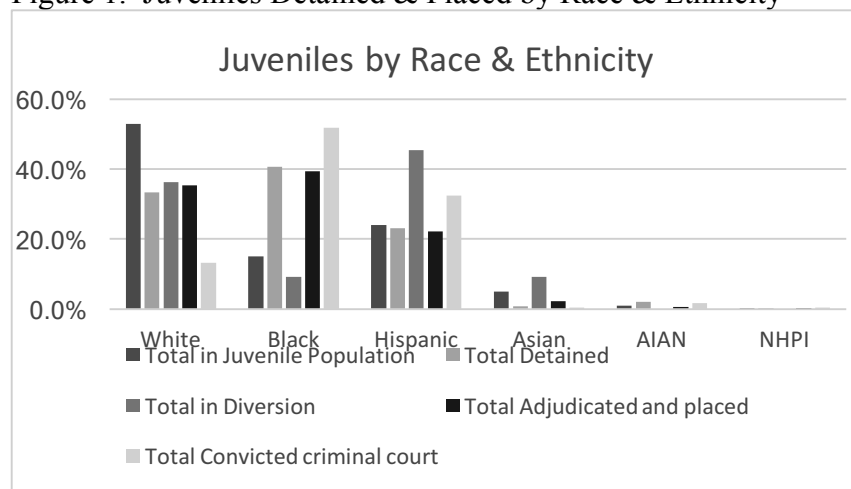
- students of color, especially in discretionary categories under the Individuals with Disabilities Education Act (IDEA)
- less likely to be academically proficient
- disciplined, and more harshly so
- retained in grade, but still dropping out or failing to graduate
- more likely to be placed in alternative disciplinary schools or settings or otherwise
- more likely to spend time out of the regular classroom, to be secluded or restrained
- referred to law enforcement or subject to school-related arrest and incarceration

Students who are LGBTQ face similar disproportional negative treatment and are more likely victimized and blamed as victims, and, again, the negatives compound.

These same differences plague the juvenile justice system where youth of color, youth with disabilities, and LGBTQ youth are typically disproportionately arrested, referred, detained (long-

er), charged, and found delinquent (or transferred to adult court). They are disproportionately confined instead of being placed on probation or into a diversion program. And all along the way, these young people caught in the school-to-prison pipeline are less likely to have access to meaningful education to allow them to graduate from high school and prepare for higher education and work opportunities.

Figure 1. Juveniles Detained & Placed by Race & Ethnicity¹



These negative disproportionalities might be understood if removals from school were in fact making schools safer or if confinement in juvenile detention or other facilities led to improved outcomes. This does not appear to be the case in practice or in theory. Nor can the disproportionate treatment of certain students and their overrepresentation in the negatives of our education and juvenile justice systems be explained away because certain groups are more likely to be engaged in bad or delinquent behavior.

The causes of the school-to-prison pipeline are many, complex, and interrelated. These include criminalization of school discipline and the increased presence of law enforcement officers in

1. *Easy Access to the Census of Juveniles in Residential Placement: 1997-2013*, OFF. OF JUV. JUST. AND DELINQ. PREVENTION [hereinafter JJDP, *Easy Access*], <http://www.ojjdp.gov/ojstatbb/ezacjrp/asp/selection.asp> (select "Race"; "Most Serious Offense General"; "12 or younger"; click "Show Table") (last visited Jan. 25, 2016).

schools. Throughout these causes runs evidence of implicitly biased discretionary decisions, which, unintentionally, bring about these results.

RECOMMENDATIONS

The school-to-prison pipeline is a complex problem with no easy or simple solutions. At their core, solutions should focus on ways to (a) improve academic achievement and increase the likelihood that students will remain in school, graduate, and prepare to become positive, contributing members of our society; (b) decrease the number of suspensions, expulsions, and referrals to law enforcement; and (c) decrease disparities along racial and other lines relating to discipline and academic achievement. While completely dismantling the school-to-prison pipeline is a task that our entire nation must take on, there are affirmative steps that the American Bar Association is well positioned to take to reverse these negative trends.

Based on its national investigation, including the information gathered at the national Town Hall meetings and roundtable discussions and the extensive review of the current research, the Task Force recommends that the ABA take steps to:

ABA AND PARTNERS: CONVENINGS AND TRAINING

1. Adopt ABA policy and specific resolutions as appropriate to implement these recommendations.
2. Join with other partners to continue additional Town Halls discussing solutions and offering training on implementation.
3. Support legal representation for students at the point of exclusion from school, including development of model best practice training modules for lawyers and law students for representation for students facing suspension or expulsion.
4. Support ongoing convenings where educators, School Resource Officers, law enforcement, and juvenile justice decision makers join together to develop strategies to reverse the School-to-Prison-Pipeline.
5. Develop training modules for training of SROs and police dealing with youth on appropriate strategies for LGBTQ students

and students with disabilities.

6. Develop training modules on Implicit Bias and De-Biasing for decision makers along the StPP including teachers and administrators, school resource officers, police, juvenile judges and others dealing with juveniles, to reduce disproportionalities.
7. Encourage its members to continue engagement in youth mentoring initiatives.
8. Support related legislative and policy initiatives.

LEGISLATION AND POLICY

9. Remove zero-tolerance policies from schools.
10. Support legislation eliminating criminalizing student misbehavior that does not endanger others.
11. Support legislation eliminating the use of suspensions, expulsions, and referrals to law enforcement for lower-level offenses
12. Support demonstrated alternative strategies to address student misbehavior, including Restorative Justice.
13. Provide model policy and support school policy and agreements that clarify the distinction between educator discipline and law enforcement discipline.
14. Provide appropriate training for School Resource Officers.
15. Identify funding and provide safe harbor for participants in evaluative research on implicit bias and de-biasing training.
16. Provide for continued and more detailed data reporting relating to school discipline and juvenile detention and disproportionality.

I. OVERVIEW OF THE SCHOOL-TO-PRISON PIPELINE PROBLEM²

A. Introduction

A sheriff's deputy summoned to handle four-year old elementary student with ADHD, admittedly having a temper tantrum, handcuffs the boy. When his mother arrives at the school she learns that he has already been taken to the sheriff's office where handcuffs have been replaced with shackles. The mother says that her son "deserves to go to school and feel safe and know that he'll come back home to his mommy. He won't be carted off like a criminal."³

But it seems that this child and far too many more of our young people will indeed be carted off like a criminal.

The school-to-prison pipeline—the metaphor encompassing the various issues in our education system that result in students leaving school and becoming involved in the criminal justice system—is one of our nation's most formidable challenges.⁴ It arises

2. Some of this report is taken from the following sources: Jason P. Nance, *Dismantling the School-to-Prison Pipeline: Tools for Change*, 48 ARIZ. ST. L. J. 313 (2016); Jason P. Nance, *Schools, Police, and the School-to-Prison Pipeline*, 93 WASH. U. L. REV. 919 (2016) [hereinafter *Schools, Police*].

3. Hawes Spencer, *Child Handcuffed and School Policies Questioned*, NPR RADIO (Dec. 9, 2014), <http://wvtf.org/post/child-handcuffed-and-school-policies-questioned#stream/0>; see also Melinda D. Anderson, *When Schooling Meets Policing*, THE ATLANTIC (Sept. 21, 2015) <http://www.theatlantic.com/education/archive/2015/09/when-schooling-meets-policing/406348/> (cumulating similar incidents of police involvement with schools); Tunette Powell, *My Son Has Been Suspended Five Times. He's 3.*, WASH. POST: POSTEVERYTHING (July 24, 2014), <https://www.washingtonpost.com/posteverything/wp/2014/07/24/my-son-has-been-suspended-five-times-hes-3/>.

4. See *Hawker v. Sandy City Corp.*, 774 F.3d 1243, 1245–46 (10th Cir. 2014) (Lucero, J., concurring) (quoting Jason P. Nance, *School Surveillance and the Fourth Amendment*, 2014 WIS. L. REV. 79, 83 (2014)); U.S. DEP'T OF JUST. & U.S. DEP'T OF EDUC., DEAR COLLEAGUE LETTER ON THE NONDISCRIMINATORY ADMINISTRATION OF SCHOOL DISCIPLINE 4–5 (2014) [hereinafter DEAR COLLEAGUE LETTER], <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201401-title-vi.pdf>. Professor Monique Morris defines this

from low expectations, low academic achievement, incorrect referral or categorization in special education, and overly harsh discipline, including suspension, expulsion, referral to law enforcement, arrest, and treatment in the juvenile justice system.

While many have known about the problems associated with the school-to-prison pipeline for years, recent data from the U.S. Department of Education's Civil Rights Data Collection ("CRDC") now elucidate their magnitude. According to the CRDC, during the 2011–2012 school year, schools referred approximately 260,000 students to law enforcement, and approximately 92,000 students were arrested on school property during the school day or at a school-sponsored event.⁵ Local data provide additional, sobering evidence of this problem,⁶ especially in light of the substantial evidence that many of these referrals to law enforcement were for minor offenses.⁷ The number of student sus-

school to prison pipeline as "the school-based policies, practices, conditions, and prevailing consciousness that facilitate criminalization within educational environments and the processes by which this criminalization results in the incarceration of youth and young adults," a definition that adds emphasis to the "prevailing consciousness" that facilitates these results. Monique W. Morris, *Searching for Black Girls in the School-to-Prison Pipeline*, NAT'L COUNCIL ON CRIME & DELINQ. (Mar. 18, 2013), <http://www.nccdglobal.org/blog/searching-for-black-girls-in-the-school-to-prison-pipeline>.

5. See U.S. DEP'T OF EDUC. OFF. FOR C.R., CIVIL RIGHTS DATA COLLECTION, DATA SNAPSHOT: SCHOOL DISCIPLINE 6 (2014) <http://ocrdata.ed.gov/Downloads/CRDC-School-Discipline-Snapshot.pdf> [hereinafter U.S. DEP'T OF EDUC. OFF. FOR CIVIL RIGHTS].

6. See sources cited *supra* note 2 (documenting data that school-based arrests have increased in several states and in several school districts throughout the country).

7. See, e.g., FLA. STATE CONF. NAACP, ADVANCEMENT PROJECT & NAACP LEGAL DEFENSE AND EDUC. FUND, INC., ARRESTING DEVELOPMENT: ADDRESSING THE SCHOOL DISCIPLINE CRISIS IN FLORIDA 6 (2006) [hereinafter ARRESTING DEVELOPMENT], <http://b3cdn.net/advancement/e36d17097615e7c612bbm6vub0w.pdf> (stating that during the 2004–05 school year, there were 26,990 school-based referrals to the Florida Department of Juvenile Justice, and seventy-six percent of those referrals were for "disorderly conduct, trespassing, or assault and/or battery, which is usually nothing more than a schoolyard fight."); ACTION FOR CHILDREN N.C., FROM PUSH OUT TO LOCK UP: NORTH CAROLINA'S ACCELERATED SCHOOL-TO-PRISON PIPELINE 9 (2013), http://www.ncchild.org/wp-content/uploads/2014/05/2013_STPP-FINAL.pdf. ("Students were most commonly referred to the juvenile justice system for low-

pensions and expulsions have also dramatically increased in recent years.⁸ According to the CRDC, approximately 3.5 million students were suspended at least one time during the 2011–2012 school year, and approximately 130,000 were expelled from school during that same time period.⁹ As with referrals to law enforcement and school-based arrests, data also indicate that the majority of these suspensions and expulsions resulted from only trivial infractions of school rules or offenses, not from offenses that endangered the physical well-being of other students.¹⁰ Numbers are similar for those detained in the juvenile justice system.¹¹

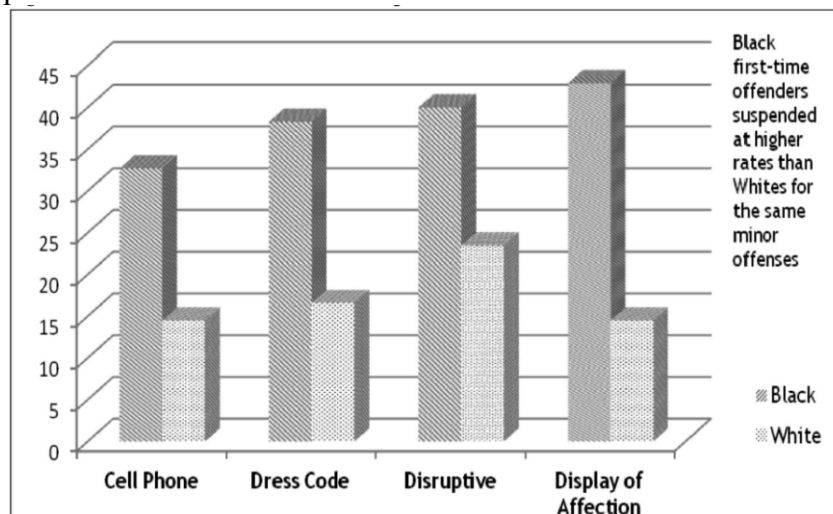
level offenses[.]”); JUSTICE POLICY INST., EDUCATION UNDER ARREST: THE CASE AGAINST POLICE IN SCHOOLS 15 (2011) [hereinafter EDUCATION UNDER ARREST], http://www.justicepolicy.org/uploads/justicepolicy/documents/educationunderarrest_fullreport.pdf (observing that during the 2007–08 school year in Birmingham, Alabama, ninety-six percent of students referred to juvenile court were for misdemeanors that included disorderly conduct and affray).

8. For example, the number of students in secondary schools suspended or expelled increased “from one in thirteen in 1972–73 to one in nine in 2009–10.” See JACOB KANG-BROWN ET AL., VERA INST. OF JUST., A GENERATION LATER: WHAT WE’VE LEARNED ABOUT ZERO TOLERANCE IN SCHOOLS 2 (2013), <http://www.vera.org/sites/default/files/resources/downloads/zero-tolerance-in-schools-policy-brief.pdf>.

9. See U.S. DEP’T OF EDUC. OFF. FOR CIVIL RIGHTS, *supra* note 5.

10. See TONY FABELO ET AL., BREAKING SCHOOLS’ RULES: A STATEWIDE STUDY OF HOW SCHOOL DISCIPLINE RELATES TO STUDENTS’ SUCCESS AND JUVENILE JUSTICE INVOLVEMENT 37 (2011), https://csgjusticecenter.org/wp-content/uploads/2012/08/Breaking_Schools_Rules_Report_Final.pdf, (reporting that 97 percent of suspensions and expulsions in Texas resulted from offenses that did not require suspension or expulsion under law); Daniel J. Losen, *Sound Discipline Policy for Successful Schools: How Redressing Racial Disparities Can Make a Positive Impact for All*, in DISRUPTING THE SCHOOL-TO-PRISON PIPELINE 45, 54–55 (Sofia Bahena et al. eds., 2012) (explaining that the vast majority of suspensions and expulsions are for minor offenses); see also AM. BAR ASS’N, CRIMINAL JUSTICE (REPORT NO. 103B) 2 (2001), http://www.americanbar.org/content/dam/aba/directories/policy/2001_my_103b_authcheckdam.pdf (explaining that students have been suspended or expelled for shooting a paperclip with a rubber band or bringing a manicure kit to school); Am. Psychol. Ass’n Zero Tolerance Task Force, *Are Zero Tolerance Policies Effective in Schools? An Evidentiary Review and Recommendations*, 63 AM. PSYCH. 852, 852 (2008) (explaining that a ten-year-old girl was expelled because her mother put a small knife in her lunchbox to cut up an apple); *id.* (describing that a student was expelled for talking on a cell phone to his mother

Figure 2. Discipline Disproportionality Minor Offense NC Example¹²



1. The Context

This report discusses data and issues that cause and maintain the school-to-prison pipeline. Some general aspects of the issue offer a frame for the particular, and go a long way toward explaining the way young people enter and remain in the pipeline. These overarching topics are reviewed here to provide context and

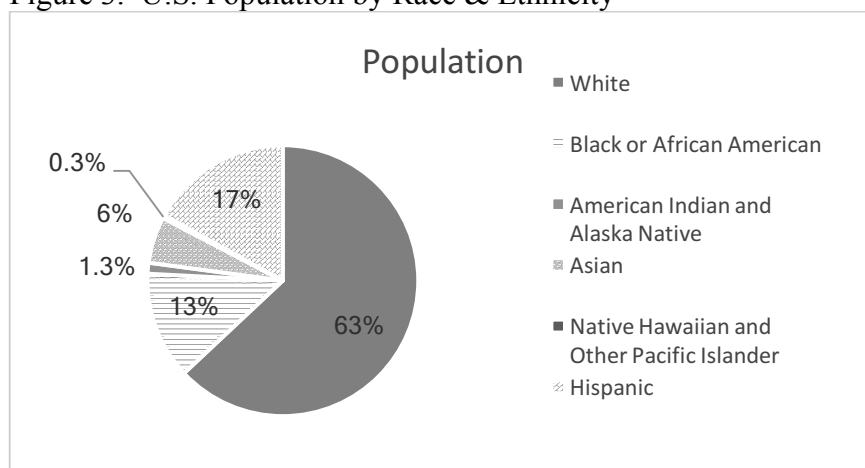
who was on deployment as a soldier to Iraq and with whom he had not spoken to for thirty days). *Id.*

11. See generally *Criminal Justice Reform, Part II: Hearing Before the H. Comm. on Oversight & Gov't Reform*, 114th Cong. (2015) (statement of Liz Ryan, Youth First! Initiative), <https://oversight.house.gov/wp-content/uploads/2015/07/Ryan-YouthFirst-Statement-7-15-Criminal-Justice-II-COMplete.pdf> (summarizing the data); Press Release, Office of the Press Sec'y, Presidential Proclamation—National Youth Justice Awareness Month, 2015, The White House (Sept. 30, 2015), <https://www.whitehouse.gov/the-press-office/2015/09/30/presidential-proclamation-national-youth-justice-awareness-month-2015>.

12. DANIEL J. LOSEN & JONATHAN GILLESPIE, OPPORTUNITIES SUSPENDED: THE DISPARATE IMPACT OF DISCIPLINARY EXCLUSION FROM SCHOOL 33 fig. 10 (2012), <http://civilrightsproject.ucla.edu/resources/projects/center-for-civil-rights-remedies/school-to-prison-folder/federal-reports/upcoming-ccrr-research/losen-gillespie-opportunity-suspended-2012.pdf> (data from Public Record request).

developed further in later sections. Concepts discussed include the meaning of disproportionality; differences in relationships and expectations as they relate to the exercise of discretion. Also of particular significance is the research that debunks two common misperceptions and demonstrates instead that the disproportionalities along the school-to-prison pipeline are *not* simply attributable to bad (worse) behavior of certain groups and that excluding students from their regular school setting and/or detaining them in juvenile or other facilities does *not* necessarily contribute to either a safer or better environment or to more successful outcomes for those students.

Figure 3. U.S. Population by Race & Ethnicity¹³



a. The Meaning of Disproportionality

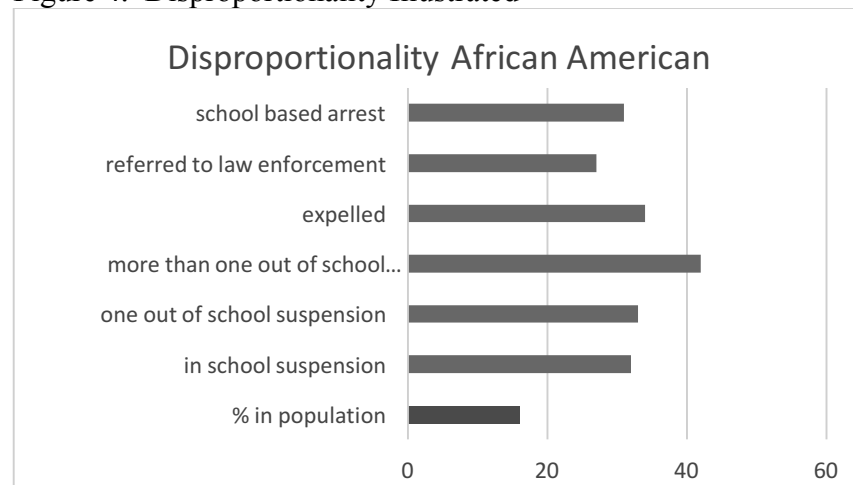
Disproportionality refers to the difference between a group's representation in the population at large and its over or under representation in specific areas.¹⁴ African-American stu-

13. *Population Distribution by Race/Ethnicity*, KAISER FAMILY FOUNDATION, <http://kff.org/other/state-indicator/distribution-by-raceethnicity/?currentTimeframe=0&sortModel=%7B%22colId%22:%22Location%22,%22sort%22:%22asc%22%7D> (last visited Oct. 22, 2016).

14. *See id.*; *see also* Figure 4. The Meaning of Disproportionality & Figure 5. U.S. Juvenile Population by Race & Ethnicity.

dents offer an illustration, which is expanded with additional data throughout the report.

Figure 4. Disproportionality Illustrated



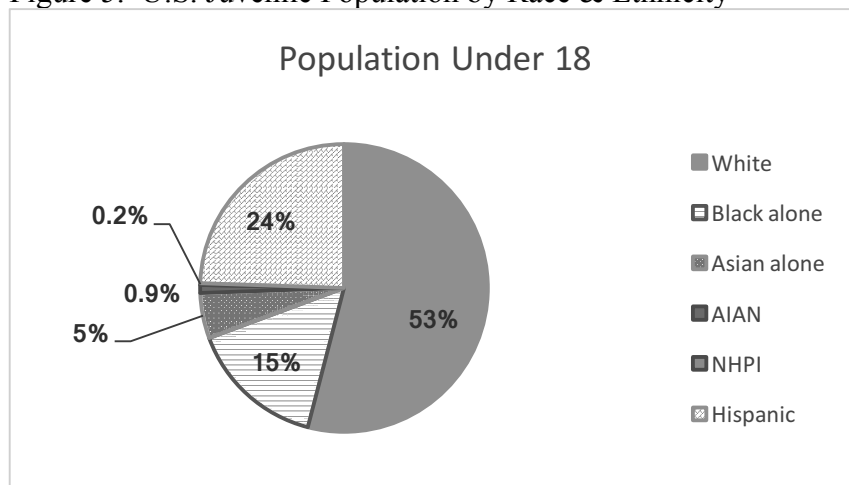
African-American students comprised only sixteen percent of the student population during the 2011–2012 school year, but they represented thirty-two percent of students who received an in-school suspension; thirty-three percent of students who received one out-of-school suspension; forty-two percent of students who received more than one out-of-school suspension; and thirty-four percent of students who were expelled.¹⁵ During that same time frame, African-American students represented twenty-seven percent of the students who were referred to law enforcement and thirty-one percent of students who were subject to a school-based arrest.¹⁶ In addition, although African-American children represent-

15. See U.S. DEP'T OF EDUC. OFF. FOR CIVIL RIGHTS, *supra* note 5, at 1–2; LOSEN & GILLESPIE, *supra* note 12, at 6 (finding that one out of every six Black students enrolled in K–12 public schools has been suspended at least once, but only one out of twenty White students has been suspended).

16. U.S. DEP'T OF EDUC. OFF. FOR CIVIL RIGHTS, *supra* note 5, at 6. The CRDC data is corroborated by substantial additional localized data. See Russell J. Skiba, Mariella I. Arredondo & Natasha T. Williams, *More than a Metaphor: The Contribution of Exclusionary Discipline to a School-to-Prison Pipeline*, 47 EQUITY & EXCELLENCE IN EDUC. 546, 550 (2014); MATTHEW P. STEINBERG, ELAINE ALLENSWORTH & DAVID W. JOHNSON, STUDENT AND TEACHER SAFETY IN CHICAGO PUBLIC SCHOOLS: THE ROLES OF COMMUNITY CONTEXT AND

ed eighteen percent of preschool enrollment, they represented forty-eight percent of the preschool children who received more than one out-of-school suspension.¹⁷

Figure 5. U.S. Juvenile Population by Race & Ethnicity¹⁸



While disproportionality is most often discussed in terms of Black boys,¹⁹ the problem is not limited to this group. Operative

SCHOOL SOCIAL ORGANIZATION 46 (2011) (maintaining that low-performing students are less likely to be engaged in school and more likely to be frustrated and misbehave); see also Matthew P. Steinberg, Elaine Allensworth & David W. Johnson, *What Conditions Support Safety in Urban Schools? The Influence of School Organizational Practices on Student and Teacher Reports of Safety in Chicago*, in CLOSING THE SCHOOL DISCIPLINE GAP: EQUITABLE REMEDIES FOR EXCESSIVE EXCLUSION 118, 125 (Daniel J. Losen ed., 2015) (explaining that low-achieving students are less likely to be engaged and more likely to act out).

17. U.S. DEP'T OF EDUC. OFF. FOR CIVIL RIGHTS, *supra* note 5, at 1.

18. *Families and Living Arrangements*, U.S. CENSUS BUREAU tbl.C3, <https://www.census.gov/hhes/families/data/cps2012C.html> (last visited Jan. 14, 2016); see also WILLIAM O'HARE, THE CHANGING CHILD POPULATION OF THE UNITED STATES: ANALYSIS OF DATA FROM THE 2010 CENSUS (2011), <http://files.eric.ed.gov/fulltext/ED527048.pdf>.

19. See, e.g., FOUNDATION CENTER, TRANSFORMING PERCEPTION: BLACK MEN AND BOYS, http://www.issuelab.org/resource/transformingperception_black_men_and_boys; Oscar Barbarin & Gisele M. Crawford, *Acknowledging and Reducing Stigmatization of African American Boys*, 61 YOUNG CHILD. 79 (2006); Ronald F. Ferguson, *Teachers' Perceptions and Expectations and the Black-White Test Score Gap*, 38 URB. EDUC. 460 (2003).

variations and disproportionalities exist within each broad category and across geographical areas.²⁰ While other groups may not have been studied as deeply,²¹ the disproportionalities and concerns are real. For example, disproportionality is evident in differential treatment by gender where African-American girls are more often and more severely disciplined than other girls,²² most often, for “subjectively defined behaviors, or behaviors considered inappropriate by educators.”²³ This is true further along the pipeline as

20. See, e.g., LOSEN & GILLESPIE, *supra* note 12, at 18–22 (reviewing disproportionality in discipline/special education by state). See generally OFF. FOR CIVIL RIGHTS, U.S. Dep’t of Educ., Resolution Letter, Christian County (KY) Public Schools (Feb. 28, 2014), <http://www2.ed.gov/about/offices/list/ocr/docs/investigations/03115002-a.html> (finding a violation of Title VI based on different treatment against African-American students who were disciplined more frequently and harshly than White students whose behavior was similar and whose disciplinary histories were similar or worse).

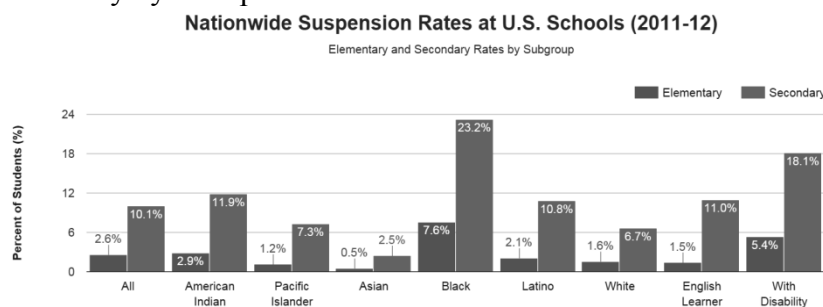
21. KIMBERLÉ WILLIAMS CRENSHAW ET AL., BLACK GIRLS MATTER: PUSHED OUT, OVERPOLICED, AND UNDERPROTECTED 7 (2015), http://static1.squarespace.com/static/53f20d90e4b0b80451158d8c/t/54dcc1ece4b001c03e323448/1423753708557/AAPF_BlackGirlsMatterReport.pdf (“[M]uch of the existing research literature excludes girls from the analysis, leading many stakeholders to infer that girls of color are not also at risk.”); DANIEL LOSEN ET AL., ARE WE CLOSING THE SCHOOL DISCIPLINE GAP? 30 (2015) [hereinafter ARE WE CLOSING], http://civilrightsproject.ucla.edu/resources/projects/center-for-civil-rights-remedies/school-to-prison-folder/federal-reports/are-we-closing-the-school-discipline-gap/AreWeClosingTheSchoolDisciplineGap_FINAL221.pdf (“Given the high rates and extraordinarily large gaps revealed by the intersection of race and gender, we join the call for more research into the discipline gap at these intersections, as they raise questions about the possible influence of race-specific gender bias and stereotypes.”).

22. Jamilia J. Blake et al., *Unmasking the Inequitable Discipline Experiences of Urban Black Girls: Implications for Urban Educational Stakeholders*, 43 URB. REV. 90, 90 (2011) (“Black girls are overrepresented in exclusionary discipline practices and Black girls reason for discipline referrals differs significantly from White and Hispanic girls.”); Francine T. Sherman, *Justice for Girls: Are We Making Progress?*, 59 UCLA L. REV. 1584, 1617 (2012) (finding Black girls to be the fastest growing group of girls referred to juvenile courts and in detention); CRENSHAW ET AL., *supra* note 21, at 7 (“[P]unitive disciplinary policies also negatively impact Black girls and other girls of color.”); Morris, *supra* note 4, (calling for more attention to Black girls).

23. Amy S. Murphy, Melanie A. Acosta & Brianna L. Kennedy-Lewis, *“I’m Not Running Around with My Pants Sagging, so How Am I Not Acting Like a Lady?”: Intersections of Race and Gender in the Experiences of Female Mid-*

well where the data shows that the proportion of female youth arrested and entering the juvenile justice system for law violations has increased from 1980–2010 across the spectrum of crimes from less to most serious.²⁴ There are also group differences when the data is reviewed by age.²⁵

Figure 6. At Least One Out of School Suspension Elementary & Secondary by Group²⁶



Also significant in considering the data is the tendency of negatives of groups to compound where a student is part of more than one group, e.g., students of color who are also students with disabilities or LGBTQ students.²⁷

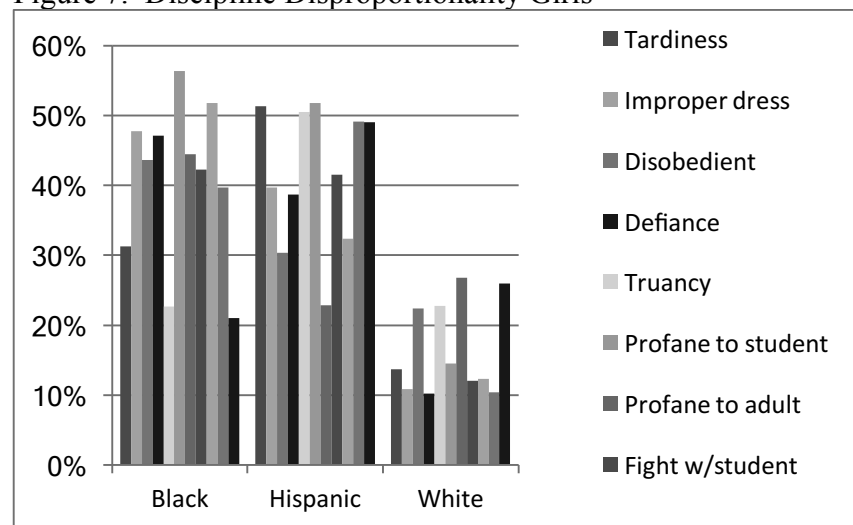
dle School Troublemakers, 45 URB. REV. 586, 586, 594, 596 (2013) (reporting on the connection to achievement, noting that the “girls each shared their desires to be academically successful, yet often feel stymied.”).

24. NAT’L CTR. FOR JUV. JUST., NAT’L COUNCIL OF JUV. & FAM. COURT JUDGES, JUVENILE OFFENDERS AND VICTIMS: 2014 NATIONAL REPORT 121 (Melissa Sickmund & Charles Puzzanchera, eds., 2014) [hereinafter OJJDP 2014 NATIONAL REPORT], <http://www.ojjdp.gov/ojstatbb/nr2014/downloads/NR2014.pdf>.

25. See *infra* Figure 6. At Least One out of School Suspension Elementary & Secondary by Group; see also Claudia Rowe, *Race Dramatically Skews Discipline, Even in Elementary School*, SEATTLE TIMES, June 23, 2015, <http://www.seattletimes.com/education-lab/race-dramatically-skews-discipline-even-in-elementary-school/> (providing comparative data for Seattle elementary schools).

26. U.S. DEP’T OF EDUC. OFF. FOR CIVIL RIGHTS, *supra* note 5, at 2; *Nationwide Suspension Rates at U.S. Schools (2011-12)*, UCLA CTR. FOR CIVIL RIGHTS REMEDIES, <http://www.schooldisciplinedata.org/ccrr/index.php> (last visited Jan. 12, 2016).

27. DANIEL LOSEN, DAMON HEWITT & IVORY TOLDSON, ELIMINATING EXCESSIVE AND UNFAIR EXCLUSIONARY DISCIPLINE IN SCHOOLS POLICY RECOMMENDATIONS FOR REDUCING DISPARITIES 4 (2014),

Figure 7. Discipline Disproportionality Girls²⁸

http://www.indiana.edu/~atlantic/wpcontent/uploads/2014/04/Disparity_Policy_031214.pdf; see also NAT'L DISABILITIES RIGHTS NETWORK, ORPHANAGES, TRAINING SCHOOLS, REFORM SCHOOLS AND NOW THIS? RECOMMENDATIONS TO PREVENT THE DISPROPORTIONATE PLACEMENT AND INADEQUATE TREATMENT OF CHILDREN WITH DISABILITIES IN THE JUVENILE JUSTICE SYSTEM 12 (2015), http://www.ndrn.org/images/Documents/Issues/Juvenile_Justice/NDRN_-_Juvenile_Justice_Report.pdf (discussing the disproportionate incarceration rate of children with different racial or ethnic backgrounds as well as with disabilities); U.S. DEP'T OF EDUC. OFF. FOR CIVIL RIGHTS, *supra* note 5, at 3–7 (demonstrating the disproportionate punishment of these various groups); Brianne Dávila, *Critical Race Theory, Disability Microaggressions and Latina/o Student Experiences in Special Education*, 18 RACE ETHNICITY & EDUC. 443, 453–54 (2015) (“Disability does not simply replace race in these instances, but represents a complex interplay of race and disability in the lives of Latina/o students in special education.”); Janel A. George, *Stereotype and School Pushout: Race, Gender, and Discipline Disparities*, 68 ARK. L. REV. 101, 104 (2015) (commenting on race and gender combined); Sherman, *supra* note 22, at 1617 (citing Jyoti Nanda, *Blind Discretion: Girls of Color & Delinquency in the Juvenile Justice System*, 59 UCLA L. REV. 1502 (2012) (“[D]espite the rapid growth in the number of black girls in the juvenile justice system, the intersection of race and gender in juvenile justice is almost never considered.”); cf. Valerie Purdie-Vaughns & Richard P. Eibach, *Intersectional Invisibility: The Distinct Advantages and Disadvantages of Multiple Subordinate-Group Identities*, 59 SEX ROLES 377, 378–80 (2008) (discussing the disadvantages of multiple and single group identities).

28. See Blake et al., *supra* note 22, at 96–104 (using compiled data and illustration sources).

b. Differences in relationships and expectations relate to the exercise of discretion, and both can be damning

Relationships are one of the most significant factors in student learning; where those relationships are lacking or based on low expectations, learning will be damaged.²⁹ Differences in expectations and engagement influence teaching and learning;³⁰ they influence the quality of instruction³¹ and the feedback students receive.³² The so-called Pygmalion effect—a self-fulfilling prophecy or expectation effect where when teachers expect good performance they get it and vice versa—has long been known in educa-

29. See generally JOHN HATTIE, *VISIBLE LEARNING: A SYNTHESIS OF OVER 800 META-ANALYSES RELATING TO ACHIEVEMENT* 921–32 (2009) (discussing factors in achievement and highlighting relationships and expectations).

30. SARAH E. REDFIELD, *DIVERSITY REALIZED: PUTTING THE WALK WITH THE TALK FOR DIVERSITY IN THE PIPELINE TO THE LEGAL PROFESSION* ch.4 (2009) [hereinafter REDFIELD, *DIVERSITY*] (summarizing issues of engagement in the context of the so-called new 3Rs: rigor, relevance, relationship); Sheri A. Castro Atwater, *Waking Up to Difference: Teachers, Color-Blindness, and the Effects on Students of Color*, 35 J. INSTRUCTIONAL PSYCHOL. 246, 246, 252 (2008) (discussing significance of understanding the difference “between a ‘race should not matter’ philosophy and a ‘race does not matter’ philosophy”); Monica Biernat & Amanda K. Sesko, *Communicating About Others: Motivations and Consequences of Race-Based Impressions*, 49 J. EXPERIMENTAL SOC. PSYCHOL. 138 (2013) (discussing White tendency to use different “within-category judgment standards”). See generally BARUTI K. KAFELE, *CLOSING THE ATTITUDE GAP* (2013) (discussing the importance of knowing and believing in one’s students).

31. Drew S. Jacoby-Senghor et al., *A Lesson in Bias: The Relationship Between Implicit Racial Bias and Performance in Pedagogical Contexts*, 63 J. EXPERIMENTAL SOC. PSYCHOL. 50, 53 (2016) (describing how implicit bias impacts instructor anxiety, lesson quality, and student performance).

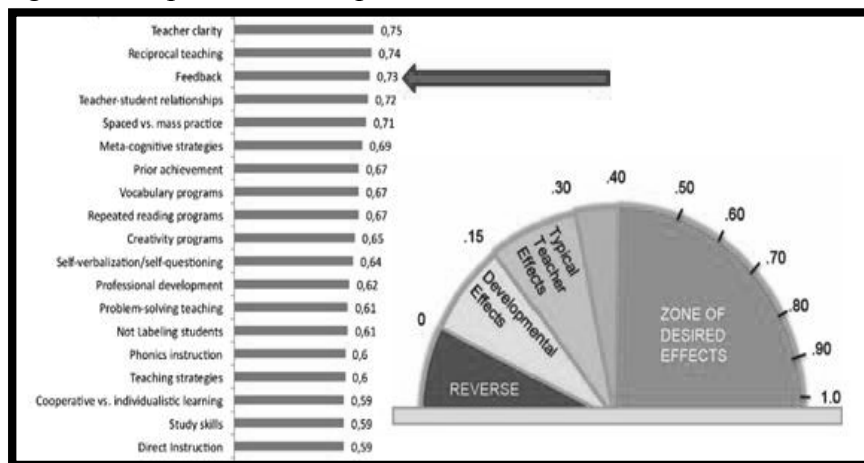
32. Alyssa Croft & Toni Schmader, *The Feedback Withholding Bias: Minority Students Do Not Receive Critical Feedback from Evaluators Concerned About Appearing Racist*, 48 J. EXPERIMENTAL SOC. PSYCHOL. 1139, 1142–44 (2012) (discussing feedback withholding bias, feedback inflation, and their potential impact on students); John Hattie & Helen Timperley, *The Power of Feedback*, 77 REV. EDUC. RES. 81, 81 (2007) (noting that feedback is one of the most powerful influences on student learning and achievement); *Feedback in Schools* by John Hattie, *VISIBLE LEARNING*, <http://visible-learning.org/2013/10/john-hattie-article-about-feedback-in-schools/> (“The culture of the student can influence the feedback effects: Feedback is not only differentially given but also differentially received.”) (last visited Oct. 22, 2016).

tion.³³ Such self-fulfilling expectations, together with related depletion,³⁴ can be a primary cause for racial disparities relating to academic achievement and subsequent pipeline events.³⁵

33. ROBERT L. GREEN, EXPECT THE MOST—PROVIDE THE BEST, 6–8, 29–39 (2014) (reviewing importance of expectations and offering case studies); ROBERT ROSENTHAL & LENORE JACOBSON, PYGMALION IN THE CLASSROOM (1968); Rosa Hernández Sheets, *From Remedial to Gifted: Effects of Culturally Centered Pedagogy*, 34 THEORY INTO PRAC. 186 (1995) (reporting that Spanish-speaking students who failed second-year Spanish, who are later labeled Advanced and encouraged by their teacher, go on to pass the Advanced Placement Spanish exam); cf. Kathleen Cotton, *Expectations and Student Outcomes*, SCH. IMPROVEMENT RES. SERIES (1989), <http://educationnorthwest.org/sites/default/files/expectations-and-student-outcomes.pdf> (“The most important finding from this research is that TEACHER EXPECTATIONS CAN AND DO AFFECT STUDENTS’ ACHIEVEMENT AND ATTITUDES.”).

34. Jennifer A. Richeson et al., *African Americans’ Racial Attitudes and the Depletion of Executive Function After Interracial Interactions*, 23 SOC. COGNITION 336 (2005); Jennifer A. Richeson & J. Nicole Shelton, *Negotiating Interracial Interactions: Costs, Consequences, & Possibilities*, 16 CURRENT DIRECTIONS PSYCHOL. SCI. 316, 316 (2007) (“[I]ndividuals often exit interracial interactions feeling drained both cognitively and emotionally.”); *infra* note 407.

35. See generally Jamilia J. Blake et al., *Challenging Middle-Class Notions of Femininity: The Causes of Black Females’ Disproportionate Suspension Rates*, in CLOSING THE SCHOOL DISCIPLINE GAP, *supra* note 16, at 76 (citation omitted) (“Although a number of factors are believed to contribute to disproportionate disciplinary practices, racial/ethnic bias has been implicated more frequently.”); Pamela Fenning & Jennifer Rose, *Overrepresentation of African American Students in Exclusionary Discipline: The Role of School Policy*, 42 URB. EDUC. 536, 537 (2007) (explaining that students of color are targeted by teachers out of fear and anxiety of losing control of the classroom); Kent McIntosh et al., *Education not Incarceration: A Conceptual Model for Reducing Racial and Ethnic Disproportionality in School Discipline*, 5 J. APPLIED RES. ON CHILD. no. 2, 2014, at 3 (stating that conscious or unconscious bias is an important factor in the discipline gap).

Figure 8. Importance of Expectation³⁶

Where labeling of young people is virtually omnipresent—Limited English Proficiency, emotionally disturbed, intellectually disabled, troubled, trouble-maker, noncompliant, insubordinate, delinquent, from a bad family—decisions and actions flow from these labels and expectations they engender among both educators and students.³⁷ A recent study of school personnel found that less than one-third of teachers believe that schools should expect all students to meet high academic standards; and most do not believe that *at risk* students would respond to these high expectations and work harder.³⁸ As a study of teachers and administrators on this

36. Rodney Lee, Equity and Diversity Educ. Dep't, Clark Cty., Las Vegas, NV, Presentation, Effect Size (on file with authors) (compiling information from HATTIE, *supra* note 29); see also *Hattie Ranking: Influences And Effect Sizes Related To Student Achievement*, VISIBLE LEARNING, <http://visible-learning.org/hattie-ranking-influences-effect-sizes-learning-achievement/> (demonstrating the most and least effective influences upon students) (last visited Oct. 22, 2016).

37. See, e.g., HATTIE, *supra* note 29, at 2840 (“Smith (1980) found that when labeling information on pupil ability is given to teachers, they reliably rate student ability, achievement, and behavior according to the information provided.”).

38. JOHN M. BRIDGELAND ET AL., ON THE FRONT LINES OF SCHOOLS: PERSPECTIVES OF TEACHERS AND PRINCIPALS ON THE HIGH SCHOOL DROPOUT PROBLEM 2 (2009), <http://www.civicerprises.net/MediaLibrary/Docs/ED%20-%20on%20the%20front%20lines%20of%20schools.pdf>.

particular point found strong and high-level expectations often remain least present where they are most needed, leading one education expert to observe: “The biggest resistance to improving high schools is a deep-seated belief that many of our students cannot learn much. We’ve created a system that allows them to validate that”³⁹ Researchers have empirically demonstrated that teachers with negative attitudes towards ethnic minorities viewed those students as less intelligent and less capable of obtaining promising post-career prospects; and student achievement differences between ethnic minority students and other students were larger in classrooms with prejudiced teachers than with teachers who held less prejudicial attitudes.⁴⁰

In such a system, the exercise of discretion is critical.⁴¹ Discretionary decisions place students in tracks or locations where

39. Kathleen Vail, *Remaking High Schools*, AM. SCH. BOARD J., Nov. 2004, http://www.wacharterschools.org/news/natlnews/2004-11_ASBJHighSchool.htm.

40. See Linda van den Bergh et al., *The Implicit Prejudiced Attitudes of Teachers: Relations to Teacher Expectations and the Ethnic Achievement Gap*, 47 AM. EDUC. RES. J. 497, 518 (2010); Clark McKown & Rhona S. Weinstein, *Teacher Expectations, Classroom Context, and the Achievement Gap*, 46 J. SCH. PSYCHOL. 235, 256 (2008) (demonstrating empirically that teachers with high prejudicial attitudes towards minority students experienced higher gaps in student achievement along racial lines than teachers with lower biases); Harriet R. Tenenbaum & Martin D. Ruck, *Are Teachers’ Expectations Different for Racial Minority than for European American Students? A Meta-Analysis*, 99 J. EDUC. PSYCHOL. 253, 271 (2007) (observing that teachers have higher expectations for White students than for minority students, and that teacher expectancies may lead to differences in academic performances); see also *infra* notes 426–430 and accompanying text; CHERYL STAATS, KIRWIN INST. FOR THE STUDY OF RACE AND ETHNICITY, STATE OF THE SCIENCE: IMPLICIT BIAS REVIEW 30–34 (2013) http://www.issuelab.org/resource/state_of_the_science_implicit_bias_review_2013.

41. See, e.g., Catherine Kramarczuk Voulgarides & Natalie Zwerger, *Identifying the Root Causes of Disproportionality*, METROPOLITAN CTR. FOR RES. ON EQUITY & TRANSFORMATION SCHS., https://steinhardt.nyu.edu/scmsAdmin/media/users/ll81/Identifying_the_Root_Causes_of_Disproportionality.pdf (“Teachers may hold [lower] implicit, preconceived notions about particular racial and ethnic groups of students that they may subconsciously apply to students.”); see also George, *supra* note 27, at 102, 105, 110 (“Whether educators admit it or not, they—like everyone else—are vulnerable to harboring bias, and when the opportunity to exercise discretion in decision making arises,

those identified as “low-performing students” go to low level, unchallenging classes.⁴² Discretionary decisions place students disproportionately in certain special education categories.⁴³ This foreshadows, or perhaps reflects, the related finding that many students “expressed sadness that they were not challenged more and that the classes and teachers were not inspiring.”⁴⁴ Estimates place the impact of such negative teacher perceptions at “almost 3 times as great for African Americans as for whites,” larger for poor and female students, and “cumulative across disadvantages or stigmas.”⁴⁵

Discretionary decisions also determine if a parent is called or a student is sent to the office or referred to law enforcement.⁴⁶ These decisions are often made without basis in fact; as the researchers reviewing school discipline in Texas put it:

Instead, the determining factor is how teachers and administrators interpret and apply these codes of conduct. What behaviors, for example, amount to “classroom disruption”? Should a student immediately be removed from the classroom for any sign of

it usually plays out against African American students, including African American girls.”).

42. John M. Bridgeland et al., *THE SILENT EPIDEMIC: PERSPECTIVES OF HIGH SCHOOL DROPOUTS* 5 (2006) <http://www.gatesfoundation.org/united-states/Documents/TheSilentEpidemic3-06FINAL.pdf> [hereinafter *THE SILENT EPIDEMIC*] (“Studies show that the expectations that teachers have for their students has an effect both on student performance and whether they drop out of school.”).

43. See *infra* p. 29. Students with disabilities are disproportionately students of color, especially in discretionary categories and these categories compound.

44. *THE SILENT EPIDEMIC*, *supra* note 42, at 5. However, it is not clear how much of this response is a defense mechanism, covering for work or performance levels not achieved by students.

45. Ferguson, *supra* note 19, at 460, 472, 474–75.

46. See further discussion *infra* pp. 53–54. Students of color are disproportionately referred to law enforcement or subject to school-related arrest. Students with disabilities are disproportionately referred to law enforcement or subject to school-related arrest and incarceration. See generally JENNI OWEN ET AL., *INSTEAD OF SUSPENSION: ALTERNATIVE STRATEGIES FOR EFFECTIVE SCHOOL DISCIPLINE* (2015), https://law.duke.edu/childedlaw/schooldiscipline/downloads/instead_of_suspension.pdf (discussing other options).

it, and, if so, which of the various possible consequences listed in the code of conduct should be imposed? How school administrators interpret these codes, and their responses to violations, varies enormously.⁴⁷

And discretion shows in the results. In the Texas discipline data, African-American and Hispanic children have been found to be “slightly” more likely to be sent to the office and “substantially” more likely to be suspended or expelled.⁴⁸ Even when sent to the office, there are differences in the kind of triggering behavior—for African-American students, the more subjective “disrespect, excessive noise, threatening behavior, and loitering” and White students, the more objective “smoking, vandalism, leaving without permission, and using obscene language.”⁴⁹ Harsher treatment also occurs for relatively minor “offenses,” again, disproportionately so: “suspensions frequently occur in the absence of any physical violence or blatant verbal abuse [R]emoving a student from class is a highly contextualized decision based on subtle race and gender relations”⁵⁰ Discretionary decisions will also determine if a student is arrested, detained, or diverted.⁵¹

c. Bad or worse behavior is not the explanation for disproportionality

Disproportionate treatment of students and their overrepresentation in the negatives of our education and juvenile justice systems cannot be explained away because certain groups are more

47. FABELLO ET AL., *supra* note 10, at 17 (citation omitted).

48. John M. Wallace, Jr. et al., *Racial, Ethnic, and Gender Differences in School Discipline Among U.S. High School Students: 1991-2005*, 47 NEGRO EDUC. REV. 59, 54–55 tbls.2 & 3 (2008).

49. Daniel J. Losen, National Education Policy Center, Discipline Policies, Successful Schools, and Racial Justice 7 (2011), http://www.greatlakescenter.org/docs/Policy_Briefs/Losen_Discipline_PB.pdf; Russell J. Skiba et al., *The Color of Discipline: Sources of Racial and Gender Disproportionality in School Punishment*, 34 URB. REV. 317, 332 (2002).

50. Frances Vavrus & KimMarie Cole, “*I Didn’t Do Nothin’*”: *The Discursive Construction of School Suspension*, 34 URB. REV. 87, 87 (2002).

51. See *infra* note 243 and accompanying text.

likely to be engaged in bad or delinquent behavior.⁵² According to the U.S. Department of Education's Office of Civil Rights, discipline and other disparities are based on race and cannot be explained by more frequent or serious misbehavior by minority students.⁵³ As the Department recently stated, quite emphatically and unambiguously, "in our investigations we have found cases where African-American students were disciplined more harshly and more frequently *because of their race* than similarly situated white students. *In short, racial discrimination in school discipline is a real problem.*"⁵⁴

Substantial empirical research corroborates the U.S. Department of Education's conclusion.⁵⁵ School discipline records

52. See, e.g., JUV. DET. ALTS. INITIATIVE, THE ANNIE E. CASEY FOUND., DETENTION REFORM: AN EFFECTIVE APPROACH TO REDUCE RACIAL AND ETHNIC DISPARITIES IN JUVENILE JUSTICE fig.1 (2009), <http://www.aecf.org/m/resourcedoc/aecf-DetentionReform3ReduceRacialDisparities-2009.pdf> [hereinafter JDAI].

53. See DEAR COLLEAGUE LETTER, *supra* note 4.

54. *Id.* (emphasis added).

55. See, e.g., Catherine P. Bradshaw et al., *Multilevel Exploration of Factors Contributing to the Overrepresentation of Black Students in Office Disciplinary Referrals*, 102 J. EDUC. PSYCHOL. 508, 508 (2010) (finding that after controlling for teacher ratings of students' behavior problems, African-American students were more likely than White students to be referred to the office for disciplinary reasons); LOSEN, *supra* note 49, at 6–7; Sean Kelly, *A Crisis of Authority in Predominantly Black Schools?*, 112 TCHRS. C. REC. 1247, 1261–62 (2010) (examining data from teacher surveys and finding that when controlling for factors such as low achievement and poverty, that African-American students were no more disruptive than other students); Anna C. McFadden et al., *A Study of Race and Gender Bias in the Punishment of Handicapped School Children*, 15 EDUC. & TREATMENT CHILD. 140, 144 (1992) (finding that African-American male disabled students were punished more severely than other students for the same offenses); Russell J. Skiba et al., *Where Should We Intervene? Contributions of Behavior, Student, and School Characteristics to Out-of-School Suspension*, in CLOSING THE SCHOOL DISCIPLINE GAP, *supra* note 16, at 132–34, 134 (finding that race was a strong predictor of out-of-school suspensions); Michael Rocque & Raymond Paternoster, *Understanding the Antecedents of the "School-to-Jail" Link: The Relationship Between Race and School Discipline*, 101 J. CRIM. L. & CRIMINOLOGY 633, 653–54 (2011) (finding that African-American students are significantly more likely than Whites to be disciplined even after taking into account other salient factors such as grades, attitudes, gender, special education or language programs, and their conduct in school as perceived by teachers); Russell J. Skiba et al., *Race Is Not*

and students' self-reports also show that the concerning differences and disproportionality are not simply attributable to the stigmatized group behaving "badly" relative to their peers or to socioeconomic factors.⁵⁶ The Discipline Disparity Collaborative reports:

The crux of the matter then, is whether African American students engage in more seriously disruptive behavior that could justify different rates and severity of consequences. A number of different methods have been used to test the idea that differential punishment is due to different rates of misbehavior. Regardless of the method, such studies have provided little to no evidence that African American students in the same school or district are engaging in more seriously disruptive behavior that could warrant higher rates of exclusion or punishment.⁵⁷

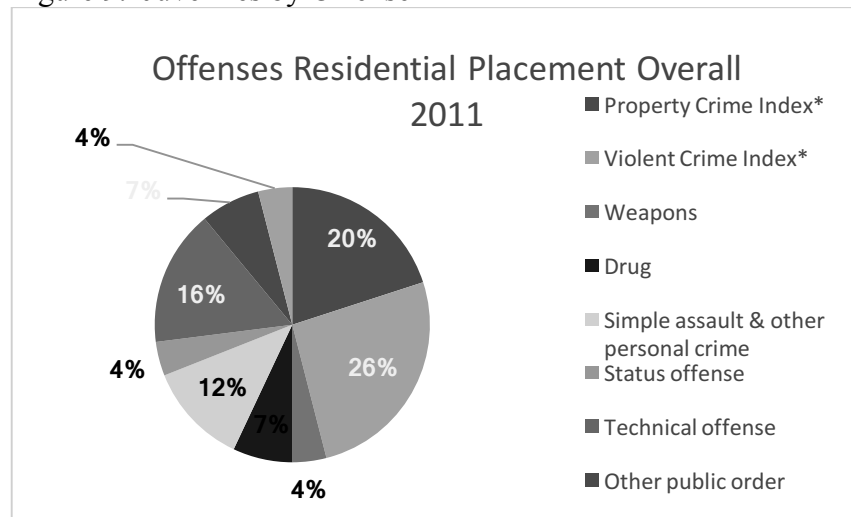
Neutral: A National Investigation of African American and Latino Disproportionality in School Discipline, 40 SCH. PSYCHOL. REV. 85, 95–101 (2011) (finding significant disparities for minorities with respect to school discipline after examining an extensive national sample).

56. See, e.g., Anne Gregory & Aisha R. Thompson, *African American High School Students and Variability in Behavior across Classrooms*, 38 J. COMMUNITY PSYCHOL. 386 (2010); Anne Gregory et al., *The Achievement Gap and the Discipline Gap: Two Sides of the Same Coin?*, 39 EDUC. RESEARCHER 59 (2010); John D. McCarthy & Dean R. Hoge, *The Social Construction of School Punishment: Racial Disadvantage Out of Universalistic Process*, 65 SOC. FORCES 1101, 1101 (1987); Russell J. Skiba et al., *supra* note 49; Wallace, Jr. et al., *supra* note 48, at 54–55 tbls.2 & 3; Gary G. Wehlage & Robert Rutter, *Dropping Out: How Much Do Schools Contribute to the Problem?*, WIS. CTR. FOR EDUC. RES., 374 (1986) <http://files.eric.ed.gov/fulltext/ED275799.pdf> (last visited Oct. 22, 2016).

57. RUSSELL J. SKIBA & NATASHA T. WILLIAMS, SUPPLEMENTARY PAPER I: ARE BLACK KIDS WORSE? MYTHS AND FACTS ABOUT RACIAL DIFFERENCES IN BEHAVIOR 3 (2014) (citations omitted), http://www.indiana.edu/~atlantic/wp-content/uploads/2014/03/African-American-Differential-Behavior_031214.pdf. This report continues, "Actual tests, however, have not supported the hypothesis of differential behavior. Regardless of whether the outcome variables are office disciplinary referrals at the school level, major offenses (e.g., weapons or substance use and possession) at the state level, or self-report data from national studies, controls for the extent or type of disruptive behavior have led to small and often nonsignificant changes in measured disproportionality. The fact that

In the juvenile justice system, studies are similar. Here, in what the Annie B. Casey Foundation labels as a “tragic irony,” many of the young people detained are held for status offenses such as running away, truancy, incorrigibility, and technical violations such as violations of probation, parole, or valid court orders—not for violent crimes.⁵⁸

Figure 9. Juveniles by Offense⁵⁹



“Property Crime Index” includes crimes such as burglary, theft, auto theft, and arson. “Violent Crime Index” includes crimes such as criminal homicide, violent sexual assault, robbery, and aggravated assault. “Technical offenses” include probation, parole, and

race remains a significant predictor of discipline after controlling for a range of disciplinary infractions strongly suggests that factors related to student behavior are not sufficient to account for racial/ethnic disparities in discipline.” *Id.* at 4 (citations omitted).

58. RICHARD A. MENDEL, THE ANNIE E. CASEY FOUND., NO PLACE FOR KIDS: THE CASE FOR REDUCING JUVENILE INCARCERATION 13 (2011), <http://www.aecf.org/m/resourcedoc/aecf-NoPlaceForKidsFullReport-2011.pdf>; see also JJDP, *Easy Access*, *supra* note 1 (select “Age” as Row Variable and “Most serious Offense Detail” as Column Variable; then follow “Show Table”) (comparing age of offender to type of offense).

59. JJDP, *Easy Access*, *supra* note 1 (select “Placement Status General” as Row Variable and “Most serious Offense Detail” as Column Variable; then follow “Show Table”).

valid court order violations. “Status offenses” include running away, truancy, and incorrigibility.

Whatever the offense, racial and ethnic data remain disturbing, but, as with school data explained above, the data cannot support the view that this is because these young people are more criminal. Recognizing that “[s]ome have argued that this overrepresentation of youth of color in the justice system is simply a result of those youths committing more crimes than White youth,” The National Council on Crime and Delinquency summarizes that “a true analysis is much more complicated” and does not support this conclusion.⁶⁰

d. Exclusion and detention do not achieve better outcomes for students

As some of the leading researchers in the field have concluded, “High suspension rates do not improve learning conditions.”⁶¹ It perhaps goes without saying that time spent learning is among the strongest predictors of achievement.⁶² Results of being out of school directly disadvantage the students and the impact is likely circular and cumulative.⁶³

60. NAT’L COUNCIL ON CRIME AND DELINQUENCY, AND JUSTICE FOR SOME 1 (2007), http://www.nccdglobal.org/sites/default/files/publication_pdf/justice-for-some.pdf. But see Michael J. Leiber & Jennifer H. Peck, *Race in Juvenile Justice and Sentencing Policy: An Overview of Research and Policy Recommendations*, 31 LAW & INEQ. 331, 341 (2013) (finding some validity to the “differential offending perspective”).

61. ARE WE CLOSING, *supra* note 21, at 9; see also Amy P. Meek, Note, *School Discipline “As Part of the Teaching Process”: Alternative and Compensatory Education Required by the State’s Interest in Keeping Children in School*, 28 YALE L. & POL’Y REV. 155, 158 (citation omitted) (2009) (“Researchers have shown, however, that high suspension rates do not improve school climates . . .”).

62. ALAN GINSBURG, PHYLLIS JORDAN AND HEDY CHANG, ABSENCES ADD UP: HOW SCHOOL ATTENDANCE INFLUENCES STUDENT SUCCESS 1, 3 (2014), http://www.attendanceworks.org/wordpress/wp-content/uploads/2014/09/Absences-Add-Up_September-3rd-2014.pdf (“The association between poor attendance and lower NAEP scores is robust and holds for every state and for each of the 21 urban districts regardless of size, region or composition of the student population.”).

63. *Id.* at 2. These harms are also consonant with the growing research on the impact on children of adverse childhood experiences (“ACE”) of child-

Student underachievement often leads to student misbehavior in the classroom. Empirical studies confirm that it is common for low-performing students to misbehave out of frustration or embarrassment when they are unable to learn the academic material and meet grade-level expectations.⁶⁴ For example, research shows that when students are retained in grade, this does not improve their subsequent academic achievement.⁶⁵ As many educators well understand, when students begin to comprehend that the educational process is not working for them—that they will not be admitted to college, have access to a good-paying job, or enjoy a promising career—they have fewer incentives to obey school rules and take school seriously,⁶⁶ leading to disciplinary exclusion, often for trivial violations of school rules.⁶⁷

hood abuse and neglect (including educational neglect). See generally *Injury Prevention & Control: Division of Violence Protection*, CENTERS FOR DISEASE AND CONTROL AND PREVENTION, <https://www.cdc.gov/violenceprevention/acestudy/about.html> (last visited Oct. 23, 2016) (detailing the increased risk of poor outcomes as a result of ACE).

64. See STEINBERG, ALLENWORTH & JOHNSON, *STUDENT AND TEACHER SAFETY IN CHICAGO PUBLIC SCHOOLS*, *supra* note 16, at 46 (observing that low-performing students are less likely to be engaged in school and more likely to be frustrated and misbehave); Steinberg, Allenworth & Johnson, *What Conditions Support Safety in Urban Schools?*, *supra* note 16, at 125 (maintaining that low-performing students are less likely to be engaged and more likely to act out).

65. HATTIE, *supra* note 29, at 2301–06 (summarizing research regarding negative effects of retention in grade on achievement and behavior).

66. STEINBERG, ALLENWORTH & JOHNSON, *STUDENT AND TEACHER SAFETY IN CHICAGO PUBLIC SCHOOLS*, *supra* note 16, at 27–31, 46 (finding that students' academic skills are highly correlated with overall safety at the school); PAUL WILLIS, *LEARNING TO LABOR* 72 (1977) (explaining that “teachers’ authority becomes increasingly the random one of the prison guard, not the necessary one of the pedagogue” when students think that the knowledge, skills, and credentials acquired in school are irrelevant); Pedro A. Noguera, *Schools, Prisons, and Social Implications of Punishment: Rethinking Disciplinary Practices*, 42 *THEORY INTO PRAC.* 341, 342 (2003).

67. See AM. BAR ASS'N, *supra* note 10, at 2; ACTION FOR CHILDREN N.C., *supra* note 7, at 9–10 (“Students were most commonly referred to the juvenile justice system for low-level offenses . . .”); EDUCATION UNDER ARREST, *supra* note 7, at 14–15 (reporting that in 2007–08, ninety-six percent of school-based referrals in Birmingham, Alabama, were for misdemeanors); FABELO ET AL., *supra* note 10, at 37 (reporting that ninety-seven percent of suspensions and expulsions in Texas resulted from offenses that did not require suspension or expulsion under law); FLA. DEP'T OF JUVENILE JUSTICE, OFFICE

And student misbehavior and discipline often lead to student underachievement,⁶⁸ in “a downward spiral of academic failure, disengagement from school, and antisocial behaviors.”⁶⁹ As leading researchers put it,

If we ignore the discipline gap, we will be unable to close the achievement gap. Of the 3.5 million students who were suspended in 2011-12, 1.55 million were suspended at least twice. Given that the average suspension is conservatively put at 3.5 days, we estimate that U.S. public school children lost nearly 18 million days of instruction in just one school year because of exclusionary discipline.⁷⁰

FOR PROGRAM ACCOUNTABILITY, DELINQUENCY IN FLORIDA’S SCHOOLS 8 (2011), https://www.prisonlegalnews.org/media/publications/fl_dept_of_juvenile_justice_study_on_delinquency_in_fl_schools_2004-2011.pdf (observing that “disorderly conduct” was the second most common school-related delinquency referral in Florida schools from 2005–2011); ARRESTING DEVELOPMENT, *supra* note 7, at 6 (reporting that during the 2004–05 school year in Florida, seventy-six percent of school-based referrals to law enforcement were for misdemeanor offenses such as disorderly conduct); S.C. DEP’T OF JUVENILE JUSTICE, 2012–2013 ANNUAL STATISTICAL REPORT 5 (2013), <http://www.state.sc.us/djj/pdfs/2012-13%20Annual%20Statistical%20Report.pdf> (stating that the third most frequent offense associated with referrals to family court in 2012–2013 was “disturbing schools”).

68. Elizabeth Glennie et al., *Addition by Subtraction: The Relation Between Dropout Rates and School-Level Academic Achievement*, 114 TCHRS. C. REC. 1, 2 (2012), <http://www.tcrecord.org/Content.asp?ContentID=16529> (“[I]mprovements in school-level academic performance will lead to improvements (i.e., decreases) in school-level dropout rates. . . . [and] more evidence of a negative side of the quest for improved academic performance. When dropout rates increase, the performance composites in subsequent years increase.”); Tary J. Tobin & Claudia G. Vincent, Univ. of Or., Presentation, Culturally Competent School-Wide Positive Behavior Support: From Theory to Evaluation Data, 7th International Conference on Positive Behavior Support, St. Louis, Mo. (Mar. 26, 2010).

69. REBECCA STAVENJORD, EXCLUSIONARY DISCIPLINE IN MULTNOMAH COUNTY SCHOOLS: HOW SUSPENSIONS AND EXPULSIONS IMPACT STUDENTS OF COLOR 9 (2012), http://allhandsraised.org/content/uploads/2012/10/exclusionary_discipline_1-3-12.pdf.

70. ARE WE CLOSING, *supra* note 21, at 4 (emphasis omitted).

Several empirical studies support these conclusions. Analyzing longitudinal data from Florida, scholars Robert Balfanz, Vaughan Byrnes, and Joanna Hornig Fox found that the odds of a student dropping out of school increased from sixteen percent to thirty-two percent the first time that a student was suspended in the ninth grade and increased each additional time that student was suspended.⁷¹ Further, when controlling for other factors such as student demographics, attendance, and course performance, they found that each suspension decreased the odds that a student would graduate from high school by twenty percent and decreased the odds of a student attending a postsecondary institution by twelve percent.⁷² Similarly, analyzing longitudinal data from Texas, scholar Miner P. Marchbanks III and his colleagues discovered that when a student received some type of exclusionary discipline, including an in-school suspension, out-of-school suspension, expulsion, a disciplinary alternative placement, or a juvenile justice placement, that student was 23.5 percent more likely to drop out of school after accounting for other salient factors; Marchbanks claimed that even this was a conservative measure,⁷³ and that “[w]hen a student was suspended or expelled, his or her likelihood of being involved in the juvenile justice system the subsequent year increased significantly.”⁷⁴ And once students so disciplined

71. See, e.g., Robert Balfanz et al., *Sent Home and Put Off Track*, in CLOSING THE SCHOOL DISCIPLINE GAP, *supra* note 16, at 22 (finding that in a longitudinal study of 181,897 Florida students, after controlling for student demographics and other indicators that a student is not on track to graduating, that each suspension decreases the odds that a student will graduate by twenty percent); ARE WE CLOSING, *supra* note 21, at 4 (discussing the negative impact of suspensions on academic performance).

72. Balfanz et al., *supra* note 71, at 22.

73. See Miner P. Marchbanks III et al., *The Economic Effects of Exclusionary Discipline on Grade Retention and High School Dropout*, in CLOSING THE SCHOOL DISCIPLINE GAP, *supra* note 16, at 64.

74. FABELO ET AL., *supra* note 10, at xi–xii; see also Patrick S. Metze, *Plugging the School-to-Prison Pipeline by Addressing Cultural Racism in Public Education Discipline*, 16 U.C. DAVIS J. JUV. L. & POL’Y 203, 228–29 (2012). It appears to be a little known fact that when Trayvon Martin was shot by George Zimmerman, he was staying at his father’s house because he had been suspended from school. Janel George, Senior Education Policy Counsel, NAACP Legal Defense and Educational Fund, Inc., Presentation at the School-to-Prison Pipeline San Diego Town Hall (Feb. 5, 2016).

they are significantly more likely to find themselves moving further along the pipeline toward prison. Once involved with the juvenile justice system, concerning results continue.⁷⁵ At the prison end of the pipeline, educational opportunity is severely limited in most states.⁷⁶

Nor do schools with high levels of exclusionary discipline attain a higher level of academic achievement for the school as a whole: “Perhaps more important, recent research indicates a negative relationship between the use of school suspension and expulsion and school-wide academic achievement, even when controlling for demographics such as socioeconomic status.”⁷⁷ What is more, “when harsh exclusionary policies are discontinued in schools, referrals to juvenile correctional facilities also decrease.”⁷⁸

Once in the juvenile justice system and prison part of the pipeline, the results are the same. Detention/incarceration does not accomplish one of its primary objectives, which is to deter criminal behavior. Evidence of improved outcomes from detention is similar in terms of reasons for arrest and detention, and the results are similarly unimpressive. As the Annie B. Casey report summarized: “The vast majority of studies find that incarceration is no more effective than probation or alternative sanctions in reducing the criminality of adjudicated youth, and a number of well-

75. Anne M. Hobbs et al., *Assessing Youth Early in the Juvenile Justice System*, 3 J. OF JUV. JUST. 80, 81–90 (2013) (“Research confirms that the practice of detaining juveniles for relatively low-level offenses is both ineffective and detrimental Early Assessment . . . appears to reduce recidivism.”).

76. COUNCIL OF STATE GOV'TS JUSTICE CTR., LOCKED OUT: IMPROVING EDUCATIONAL OUTCOMES FOR INCARCERATED YOUTH 3 (2015) https://csgjusticecenter.org/wp-content/uploads/2015/11/LOCKED_OUT_Improving_Educational_and_Vocational_Outcomes_for_Incarcerated_Youth.pdf [hereinafter LOCKED OUT]; see also NAT'L EVALUATION AND TECH. ASSISTANCE CTR. FOR THE EDUC. OF CHILDREN AND YOUTH WHO ARE NEGLECTED, DELINQUENT, OR AT-RISK, FACT SHEET: JUVENILE JUSTICE EDUCATION (2011), <http://www.neglected-delinquent.org/sites/default/files/NDFactSheet.pdf> (discussing the state of the education system in juvenile justice centers).

77. Am. Psychol. Ass'n Zero Tolerance Task Force, *supra* note 10, at 854.

78. ROBERT L. LISTENBEE, JR. ET AL., REPORT OF THE ATTORNEY GENERAL'S NATIONAL TASK FORCE ON CHILDREN EXPOSED TO VIOLENCE 184 (2012) <http://www.justice.gov/defendingchildhood/cev-rpt-full.pdf>.

designed studies suggest that correctional placements actually exacerbate criminality.”⁷⁹ In a comprehensive meta-analysis examining 7,304 juveniles across twenty-nine studies over a thirty-five year period, scholars Anthony Petrosino, Carolyn Turpin-Petrosino, and Sarah Guckenburg found that juvenile justice processing did not effectively deter delinquency; instead, it actually increased delinquency and future involvement in the justice system.⁸⁰ In short, the research overwhelmingly demonstrates that the “official processing of a juvenile law violation may be the *least* effective means of rehabilitating juvenile offenders.”⁸¹

*e. Nor are the schools safer*⁸²

The negative disproportionalities might be understood if indeed removals from school were in fact making schools safer, or, if indeed, confinement in juvenile detention or other facilities led to improved outcomes. This does not appear to be the case in prac-

79. MENDEL, *supra* note 58, at 9–12 (“[T]he overall body of recidivism evidence indicates plainly that confinement in youth corrections facilities doesn’t work well as a strategy to steer delinquent youth away from crime. . . . Follow-up studies have long shown that youth released from juvenile correctional facilities seldom succeed in school.”); *see also* ANTOINETTE DAVIS ET AL., SUPERVISION STRATEGIES FOR JUSTICE-INVOLVED YOUTH 1–2 (2014), http://nccdglobal.org/sites/default/files/publication_pdf/supervision-strategies.pdf.

80. ANTHONY PETROSINO ET AL., FORMAL SYSTEM PROCESSING OF JUVENILES: EFFECTS ON DELINQUENCY 6–18 (2013) <http://permanent.access.gpo.gov/gpo59099/cops-p265-pub.pdf>; *see also* Anna Aizer & Joseph J. Doyle, Jr., *Juvenile Incarceration, Human Capital, and Future Crime: Evidence from Randomly Assigned Judges*, 130 Q. J. ECON. 759 (2015) (demonstrating empirically that juvenile incarceration lowers the probability that a juvenile will complete high school and increases the probability of adult incarceration); PEW CHARITABLE TRS., RE-EXAMINING JUVENILE INCARCERATION (2015), http://www.americanbar.org/content/dam/aba/uncategorized/criminal_justice/2015_Reexamining_Juvenile_Incarceration.authcheckdam.pdf.

81. Hobbs et al., *supra* note 75, at 81 (emphasis added); *see supra* Figure 9. Juvenile by Offense.

82. *See* Jason P. Nance, *Students, Security, and Race*, 63 EMORY L.J. 1, 21 (2013) (reviewing relevant research that punitive measures “negatively affect the learning environment”).

tice or in theory.⁸³ As researchers Dan Losen and Russell Skiba summarize, “[T]here is no evidence that frequent reliance on removing misbehaving students improves school safety or student behavior.”⁸⁴

In school situations, many removals are for behaviors that do not invoke real safety concerns;⁸⁵ the vast majority of suspensions—95% of the 3.3 million children suspended from school each year—are for nonviolent offenses such as violating the dress code or “disruptive” behavior.⁸⁶

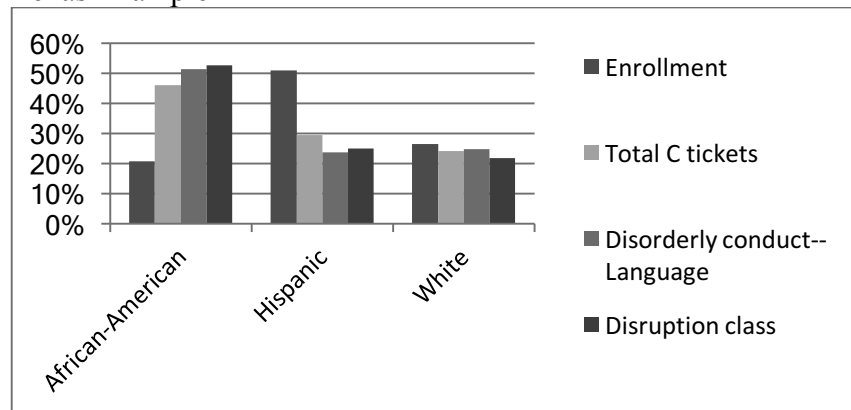
83. See RICHARD A. MENDEL, JUVENILE DETENTION ALTERNATIVES INITIATIVE PROGRESS REPORT 17 (2014), <http://www.aecf.org/m/resourcedoc/aecf-2014JDAIProgressReport-2014.pdf>; Nance, *supra* note 82, at 25 (“Strict Security Measures Applied Disproportionately to Minority Students Are Particularly Harmful.”). See generally PEDRO A. NOGUERA, THE TROUBLE WITH BLACK BOYS 121–23 (2008) (describing removing “bad apples” as not successful in improving classroom).

84. DANIEL J. LOSEN & RUSSELL SKIBA, SUSPENDED EDUCATION: URBAN MIDDLE SCHOOLS IN CRISIS 2 (2010), http://www.splcenter.org/sites/default/files/downloads/publication/Suspended_Education.pdf (citation omitted).

85. See Russell Skiba & M. Karega Rausch, *School Disciplinary Systems: Alternatives to Suspension and Expulsion*, in CHILDREN’S NEEDS III: DEVELOPMENT, PREVENTION, AND INTERVENTION 87, 89 (George G. Baer & Kathleen M. Minke eds., 2006), http://www.indiana.edu/~equity/docs/Alternatives_to_Expulsion.pdf; Skiba, Arredondo & Williams, *supra* note 16, at 550; e.g., ROBIN L. DAHLBERG, ARRESTED FUTURES: THE CRIMINALIZATION OF SCHOOL DISCIPLINE IN MASSACHUSETTS’S THREE LARGEST SCHOOL DISTRICTS 34 (2012), https://www.aclu.org/files/assets/maarrest_reportweb.pdf; FABELO ET AL., *supra* note 10, at 13; ARTHUR BURKE & VICKI NISHIOKA, SUSPENSION AND EXPULSION PATTERNS IN SIX OREGON SCHOOL DISTRICTS 1 (2014) [hereinafter “OREGON”], <http://files.eric.ed.gov/fulltext/ED544799.pdf>.

86. ROBERT L. LISTENBEE, JR. ET AL., *supra* note 78, at 183–84; COMM. ON ASSESSING JUVENILE JUSTICE REFORM, REFORMING JUVENILE JUSTICE: A DEVELOPMENTAL APPROACH 23 (Richard J. Bonnie et al. eds., 2013), http://www.nap.edu/download.php?record_id=14685# [hereinafter REFORMING JUVENILE JUSTICE].

Figure 10. Discipline disproportionality Illustrated, Bryant ISD, Texas Example⁸⁷



“C tickets” are given in Texas by School Resource Officers for discipline infractions. The total here includes the subsets of disorderly and disruptive.

As researcher Daniel Losen summarizes: “Contrary to popular belief, most suspensions are not for guns, drugs or violence Accordingly, the high rates of disciplinary removal from school currently seen in American schools cannot reasonably be attributed to the necessary responses to unlawful or dangerous misbehavior.”⁸⁸

Many removals stem from the application of the zero tolerance concept.⁸⁹ The concept of zero tolerance, which calls for au-

87. Letter from NAACP Legal Def. & Educ. Fund & Nat’l Ctr. for Youth Law, to Dallas Office for Civil Rights, U.S. Dep’t of Educ. (Feb. 20, 2013), http://youthlaw.org/wp-content/uploads/2014/11/Bryan_ISD_OCR_Complaint_FINAL.pdf (citing data obtained by Texas Appleseed through Open Record Requests); *see also supra* Figure 6. At Least One Out of School Suspension Elementary & Secondary by Group.

88. Daniel J. Losen, *supra* note 49, at 8; *see also* ARE WE CLOSING, *supra* note 21, at 10–11.

89. *See, e.g.,* Ratner v. Loudoun Cty. Pub. Schs., 16 Fed. App’x 140, 141–42 (4th Cir. 2001) (per curiam) (upholding the suspension of a 13-year-old student who took a knife away from a fellow student because the student told him that she was going to commit suicide even though all agreed that Ratner posed no threat, in fact the opposite). *See generally* Lenore Skenazy, *Here Are 10 Outrageous ‘Zero Tolerance’ Follies of 2014*, HIT & RUN BLOG (Dec. 29,

tomatic discipline in every case of the specified behavior, was spawned by the requirements of the Gun Free School Zone Act in 1994⁹⁰ and grew to include other behaviors.⁹¹ A zero tolerance approach limited discretion, though research eventually revealed that discretion continued and the approach was not especially effective.⁹² The American Psychological Association (“APA”) Zero Tolerance Task Force concluded that these policies do not bring about improved school safety. On the contrary, “data on a number of indicators of school climate have shown the opposite effect, that is, that schools with higher rates of school suspension and expulsion appear to have *less* satisfactory ratings of school climate, to have less satisfactory school governance”⁹³

2014, 9:30 AM), <https://reason.com/blog/2014/12/29/the-top-10-zero-tolerance-follies-of-2014#.ozntkut:gd1T>.

90. Gun-Free Schools Act of 1994, 20 U.S.C. §§ 8921–23, *repealed by* No Child Left Behind Act of 2001, Pub. L. No. 107-110, tit. X, § 1011(5)(C), 115 Stat. 1986.

91. *See generally* ASHLEY NELLIS, RETURN TO JUSTICE: RETHINKING OUR APPROACH TO JUVENILES IN THE SYSTEM 95 (2015) (reviewing history and discussing of examples as applied beyond weapons).

92. Thalia González, *Restoring Justice: Community Organizing to Transform School Discipline Policies*, 15 U.C. DAVIS J. JUV. L. & POL’Y 1, 9–10 (2011); KANG-BROWN ET AL., *supra* note 8, at 4; LOSEN & SKIBA, *supra* note 84, at 9; Am. Psychol. Ass’n Zero Tolerance Task Force, *supra* note 10, at 856–57; AM. BAR ASS’N JUVENILE JUSTICE COMM’N, *supra* note 10, at 4–6; *see also* *Ending the School-to-Prison Pipeline: Hearing Before the Subcomm. on the Constitution, Civil Rights and Human Rights of the S. Comm. on the Judiciary*, 112th Cong. 156–62 (2013) (statement of Laurel G. Bellows, President, American Bar Association); Nat’l Inst. of Justice, *School-Based Bullying Prevention Programs*, CRIMESOLUTIONS.GOV, https://www.crimesolutions.gov/PracticeDetails.aspx?ID=20&utm_source=eblast-govdelivery&utm_medium=eblast&utm_campaign=pract20-school-based-bullying (last visited Jan. 11, 2016) (discussing failure of these policies regarding bullying). *See generally* Russell J. Skiba & Daniel J. Losen, *From Reaction to Prevention: Turning the Page on School Discipline*, AM. EDUCATOR, Winter 2015–2016, http://www.aft.org/ae/winter2015-2016/skiba_losen#sthash.PoX9AxdK.dpuf (providing overview of development and waning of this approach).

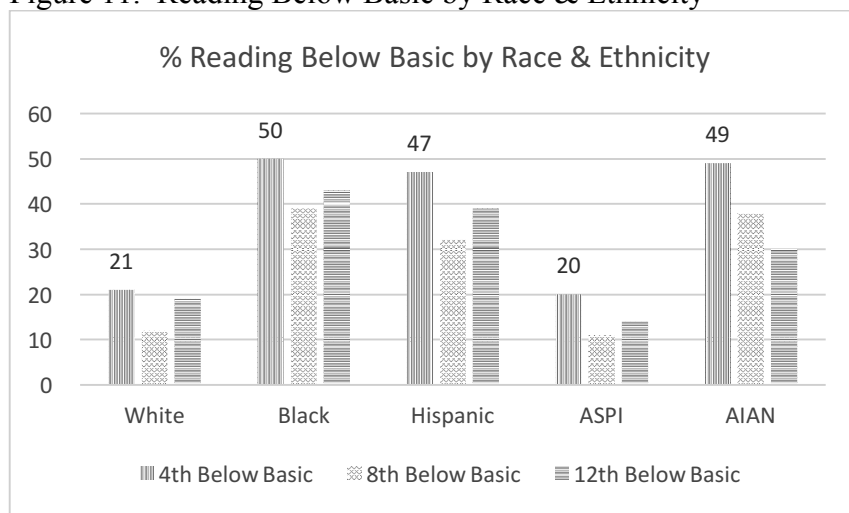
93. Am. Psychol. Ass’n Zero Tolerance Task Force, *supra* note 10, at 854.

B. The Manifestations

1. Disproportionality manifests itself all along the pipeline where students of color are poorly served⁹⁴

a. *Students of color are disproportionately lower achievers and unable to read at basic or above*

Figure 11. Reading Below Basic by Race & Ethnicity⁹⁵



The overall achievement gap between African-American, Hispanic, and American Indian Alaskan Native (AIAN) students and their White and Asian peers has been a subject of concern since at least 1966 when the U.S. Department of Health Education

94. Scholar Margaret Burchinal and her colleagues have described the “substantial gap in educational achievement between Black and White children [a]s one of the most pernicious problems facing American society.” Margaret Burchinal et al., *Examining the Black-White Achievement Gap Among Low-Income Children Using the NICHD Study of Early Child Care and Youth Development*, 82 CHILD DEV. 1404, 1404 (2011). See generally CATHERINE Y. KIM ET AL., THE SCHOOL-TO-PRISON PIPELINE: STRUCTURING LEGAL REFORM 1 (2010) (explaining that conditions increasing the probability that a student will be involved in the criminal justice system are broad and might include depriving students of needed resources to enhance their educational opportunities).

95. NAT’L CTR. FOR EDUC. STATISTICS, U.S. DEP’T OF EDUC., DIGEST OF EDUCATION STATISTICS 2013, at 233 tbl.221.20 (2013), <http://nces.ed.gov/pubs2015/2015011.pdf>.

and Welfare commissioned the *Equality of Educational Opportunity Study* (Coleman Report).⁹⁶

Because reading is one of the most critical skills for every student and citizen and relates to many other academic and societal skills, one's ability to read offers a clear example of a primary academic concern.⁹⁷ Differences in reading skills begin early and endure.⁹⁸ At kindergarten, African-American and Hispanic children are significantly less likely to know their letters or recognize beginning and ending sounds than their White and Asian peers.⁹⁹ For example, 50% of Hispanic children recognize the letters of the alphabet when they enter kindergarten compared to 57% of African-American, 71% of White, and 80% of Asian American children.¹⁰⁰

At the end of the third grade, most gaps identified in preschoolers persist.¹⁰¹ Significantly, a student who is not "a modest-

96. See *Equality of Educational Opportunity Study*, INTER-UNIVERSITY CONSORTIUM FOR POL. & SOC. RES., <http://www.icpsr.umich.edu/icpsrweb/ICPSR/studies/06389> (last visited Oct. 29, 2016).

97. See generally REDFIELD, DIVERSITY, *supra* note 30, at ch. 3 (reviewing reading, writing, history, and civics). Several demographic groups are disproportionately represented in this bottom tier, including those who did not graduate from high school, those who did not speak English before starting school, Hispanic & Black adults, and those with multiple disabilities. Nat'l Ctr. for Educ. Stat., *National Assessment of Adult Literacy ("NAAL")*, http://nces.ed.gov/naal/kf_demographics.asp (last visited Oct. 29, 2016).

98. Burchinal et al., *supra* note 94, at 1401 ("[R]acial disparities in school achievement increase by about one tenth of a standard deviation during each year of school."); Nancy E. Dowd, *What Men?: The Essentialist Error of the "End of Men"*, 93 B.U. L. REV. 1205, 1217 (2013) (observing that the racial achievement gap widens as children grow because minority schools have fewer resources).

99. JERRY WEST, KRISTIN DENTON & ELVIRA GERMINO-HAUSKEN, U.S. DEP'T OF EDUC., *AMERICA'S KINDERGARTNERS* 16, 22 tbl.6 (2000), <http://nces.ed.gov/pubs2000/2000070.pdf>.

100. PAUL E. BARTON & RICHARD J. COLEY, EDUC. TESTING SERV., *WINDOWS ON ACHIEVEMENT AND INEQUALITY* 9–11 (2008), <http://www.ets.org/Media/Research/pdf/PICWINDOWS.pdf> (reviewing achievement gap from child development to global comparisons); JAY MACLEOD, *AIN'T NO MAKIN' IT: ASPIRATIONS & ATTAINMENT IN A LOW-INCOME NEIGHBORHOOD* 13–16, 100 (3d ed. 2009) (discussing differences/impact).

101. See AMY RATHBUN, JERRY WEST & ELVIRA GERMINO-HAUSKEN, U.S. DEP'T OF EDUC., *FROM KINDERGARTEN THROUGH THIRD GRADE:*

ly skilled reader by the end of third grade is quite unlikely to graduate from high school.”¹⁰² The percentage of American Indian students reading below grade level at fourth grade is 53%; for African-American students, 51%; for Hispanic students, 49%; for White students, 22%; and for Asian Pacific Islanders (ASPI), 20%.¹⁰³ African-American and Latino 17-year-olds, on average, read at the same level as White 13-year-olds.¹⁰⁴ By twelfth grade, there is an almost 30-point difference in scale scores on the National Assessment of Education Progress (NAEP).¹⁰⁵

These differences remain evident notwithstanding decades of varied strategies and interventions.¹⁰⁶ Summarizing the data on this intractable problem, leading literacy researchers conclude:

Nationally reported data point to four conclusions: (1) There are differences in the emerging literacy knowledge and performance of young children entering kindergarten from various racial/ethnic and socioeconomic backgrounds; (2) the gap is greater for children who enter school with a combination of multiple risk factor (e.g., . . . whether the primary language spoken in the home is not English); (3) by

CHILDREN’S BEGINNING SCHOOL EXPERIENCE 16 fig.5 (2004), <http://nces.ed.gov/pubs2004/2004007.pdf>.

102. NAT’L RESEARCH COUNCIL, PREVENTING READING DIFFICULTIES IN YOUNG CHILDREN 21 (Catherine E. Snow, M. Susan Burns & Peg Griffin eds., 1998); THE TRUST FOR EARLY EDUCATION, A POLICY PRIMER: QUALITY PRE-KINDERGARTEN 14 (2004).

103. NAT’L CTR. FOR EDUC. STATISTICS, U.S. DEP’T OF EDUC., READING 2011: NATIONAL ASSESSMENT OF EDUCATIONAL PROGRESS AT GRADES 4 AND 8, 15 fig.8 (2011), <http://nces.ed.gov/nationsreportcard/pdf/main2011/2012457.pdf>.

104. THOMAS D. SNYDER & SALLY A. DILLOW, U.S. DEP’T OF EDUC., DIGEST OF EDUCATION STATISTICS 2011, at 193 tbl.125 (2012), <http://nces.ed.gov/pubs2012/2012001.pdf>.

105. MARIANA HAYNES, ALLIANCE FOR EXCELLENT EDUC., CONFRONTING THE CRISIS: FEDERAL INVESTMENTS IN STATE BIRTH-THROUGH-GRADE-TWELVE LITERACY EDUCATION 4 (2012), <http://www.all4ed.org/files/ConfrontingTheCrisis.pdf>.

106. See SCHOTT FOUND. FOR PUB. EDUC., THE URGENCY OF NOW: THE SCHOTT 50 STATE REPORT ON PUBLIC EDUCATION AND BLACK MALES 43–48 (2012), <http://blackboysreport.org/bbreport2012.pdf>.

grade 4, there is a significant discrepancy between the reading comprehension proficiency of European American, non-Hispanic students and their African American and Hispanic peers, and this discrepancy continues through grade 12; and (4) these gaps have been stable for more than a decade.¹⁰⁷

Other subject areas show similar discrepancies.¹⁰⁸ This is hardly surprising considering that these same students have fewer engaging educational experiences,¹⁰⁹ fewer experienced highly qualified teachers,¹¹⁰ less access to rigorous and high level coursework, and experience lower expectations from their teachers.¹¹¹

107. HANDBOOK OF RESEARCH ON LITERACY AND DIVERSITY 1 (Lesley Mandel Morrow, Robert Rueda & Diane Lapp, eds., 2009).

108. REDFIELD, DIVERSITY, *supra* note 30, at ch. 3 (2009) (summarizing gaps all along the educational pipeline).

109. *See, e.g.*, THE SILENT EPIDEMIC, *supra* note 42, at 3–4; *see also* REDFIELD, DIVERSITY, *supra* note 30, at 82–85 (reviewing the research).

110. U.S. DEP'T OF EDUC. OFFICE FOR CIVIL RIGHTS, THE TRANSFORMED CIVIL RIGHTS DATA COLLECTION (CRDC) (2012), <http://www2.ed.gov/about/offices/list/ocr/docs/crdc-2012-data-summary.pdf>. Students with more teachers with at least five years' experience show more academic gains, but these are the very teachers that are lacking in high minority schools. THE EDUC. TRUST, THEIR FAIR SHARE: HOW TEXAS-SIZED GAPS IN TEACHER QUALITY SHORTCHANGE LOW-INCOME AND MINORITY STUDENTS 2 (2008), <http://edtrust.org/wp-content/uploads/2013/10/TXTheirFairShare.pdf>; SUSAN AUD ET AL., U.S. DEP'T OF EDUC., STATUS AND TRENDS IN THE EDUCATION OF RACIAL AND ETHNIC GROUPS 48 (2010), http://www.air.org/sites/default/files/downloads/report/AIR-NCESracial_stats_trends1_0.pdf (showing disparity in qualification in relationship to school population); ALLIANCE FOR EXCELLENT EDUC., IMPROVING THE DISTRIBUTION OF TEACHERS IN LOW-PERFORMING HIGH SCHOOLS 1 (2008), http://www.issuelab.org/resource/improving_the_distribution_of_teachers_in_low_performing_high_schools ("There are different ways of measuring teacher quality at the high school level . . . , but no matter what measurement is used, students in poorer high schools which primarily serve students of color are generally taught by lower-quality teachers. Teachers in these schools routinely lack experience, qualifications, and effectiveness" (internal citation omitted)).

111. *See generally* Higher Education: Gaps in Access and Persistence Study, NAT'L CTR. FOR EDUC. STATISTICS, <http://nces.ed.gov/pubs2012/2012046/chapter6.asp> (last visited Oct. 30, 2016) (reviewing rigorous courses particularly math); JEANNIE OAKES, RAND CORP., MULTIPLYING INEQUALITIES: THE EFFECTS OF RACE, SOCIAL CLASS, AND

*b. Students of color suffer disproportionately because of lower expectations and lack of engagement*¹¹²

Engagement of a young person with his/her teachers or school or other adults is critical,¹¹³ but many adults in these systems are not engaged. As discussed in the context section, many school officials and teachers who work with minority students living in poor neighborhoods have a stronger tendency to adopt a lower level of expectations for their students.¹¹⁴ There is troubling empirical evidence suggesting that some teachers and school officials believe that some students, particularly African-American males, are “bound for jail” and “unsalvageable.”¹¹⁵

c. Students of color are disproportionately retained in grade or excluded because of high stakes testing

In early years and beyond, minority students are disproportionately held back. For American Indian-Alaskan Native students, 7% are held back in kindergarten, for Native Hawaiian Pacific Islander students, 8%, as compared to African-American students at 5%, White and Hispanic students at 4%, and Asian stu-

TRACKING ON OPPORTUNITIES TO LEARN MATHEMATICS AND SCIENCE (1990), <http://www.rand.org/pubs/reports/2006/R3928.pdf>; NAT'L CTR. FOR EDUC. STATISTICS, U.S. DEP'T OF EDUC., THE NATION'S REPORT CARD 28 (2007), <https://nces.ed.gov/nationsreportcard/pdf/studies/2007467.pdf> (also showing curricular disparities); UNIV. OF CAL. UNDERGRADUATE WORK TEAM OF THE STUDY GROUP ON UNIV. DIVERSITY, RECOMMENDATIONS AND OBSERVATIONS 19 fig.6 (2007), http://ucop.edu/student-affairs/_files/07-diversity_report.pdf (California data).

112. See *supra* 29–35 and accompanying text; STEINBERG, ALLENWORTH & JOHNSON, STUDENT AND TEACHER SAFETY IN CHICAGO PUBLIC SCHOOLS, *supra* note 16, at 46 (maintaining that low-performing students are less likely to be engaged in school and more likely to be frustrated and misbehave); Steinberg, Allensworth, & Johnson, *What Conditions Support Safety in Urban Schools*, *supra* note 16, at 125 (explaining that low-achieving students are less likely to be engaged and more likely to act out).

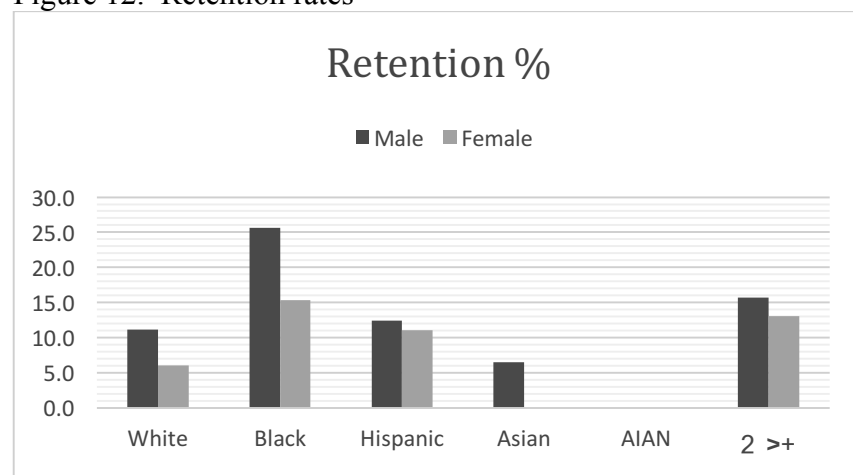
113. DAHLBERG, *supra* note 85, at 34 (“[T]he most critical factor in creating safe, orderly schools [is] not the presence of police, but the engagement of school administrators.”).

114. REDFIELD, DIVERSITY, *supra* note 30, at 38–48, 70–74.

115. Paul J. Hirschfield, *Preparing for Prison? The Criminalization of School Discipline in the USA*, 12 THEORETICAL CRIMINOLOGY 79, 92 (2008).

dents at 2%.¹¹⁶ Similar patterns continue into later grades; for example, in sixth grade, American Indian-Alaskan Natives are still held back at twice the rate of Whites and African-American students at three times that rate; and twelve percent of African-American students are retained in ninth grade, which is nearly double the rate of all students retained.¹¹⁷

Figure 12. Retention rates¹¹⁸



High stakes testing exacerbates these concerns. Students are disproportionately impacted by high school exit exams.¹¹⁹ Fur-

116. U.S. DEP'T OF EDUC. OFFICE FOR CIVIL RIGHTS, CIVIL RIGHTS DATA COLLECTION, DATA SNAPSHOT: EARLY CHILDHOOD EDUCATION 5 (2014), <https://www2.ed.gov/about/offices/list/ocr/docs/crdc-early-learning-snapshot.pdf>; see *infra* Figure 12.

117. OFFICE FOR CIVIL RIGHTS, CIVIL RIGHTS DATA COLLECTION, CIVIL RIGHTS DATA COLLECTION, 2009-10 NATIONAL AND STATE ESTIMATIONS, http://ocrdata.ed.gov/StateNationalEstimations/Projections_2009_10 (follow "National total" hyperlink) (last visited Oct. 11, 2016); Catherine E. Lhamon, *Five New Facts from the Civil Rights Data Collection*, HOMEROOM: THE OFFICIAL BLOG OF THE U.S. DEP'T OF EDUC. (Mar. 21, 2014), <http://blog.ed.gov/2014/03/five-new-facts-from-the-civil-rights-data-collection/>. As discussed previously, retention is not a successful intervention strategy. HATTIE, *supra* note 29.

118. AUDET AL., *supra* note 110, at 92 tbl.17a.

119. See ADVANCEMENT PROJECT, TEST, PUNISH, AND PUSH OUT: HOW "ZERO TOLERANCE" AND HIGH-STAKES TESTING FUNNEL YOUTH INTO THE SCHOOL-TO-PRISON PIPELINE 25, 27-28 (2010), <http://b3cdn.net/advancement/>

ther, federal and state education accountability laws also may create a perverse incentive to push low-performing students out of school.¹²⁰ Federal and state accountability laws require students to regularly test students and impose consequences on schools that fail to meet certain standards.¹²¹ Many fear that school officials sometimes suspend, expel, or refer low-performing students to the juvenile justice system to avoid having their low scores count against their schools.¹²²

d05cb2181a4545db07_r2im6caqe.pdf (discussing dehumanizing effects of testing).

120. Rachel F. Moran, *Sorting and Reforming: High-Stakes Testing in the Public Schools*, 34 AKRON L. REV. 107, 115 (2000) (maintaining that in a high-stakes testing context, low-performing students “are in danger of being pushed out” of schools).

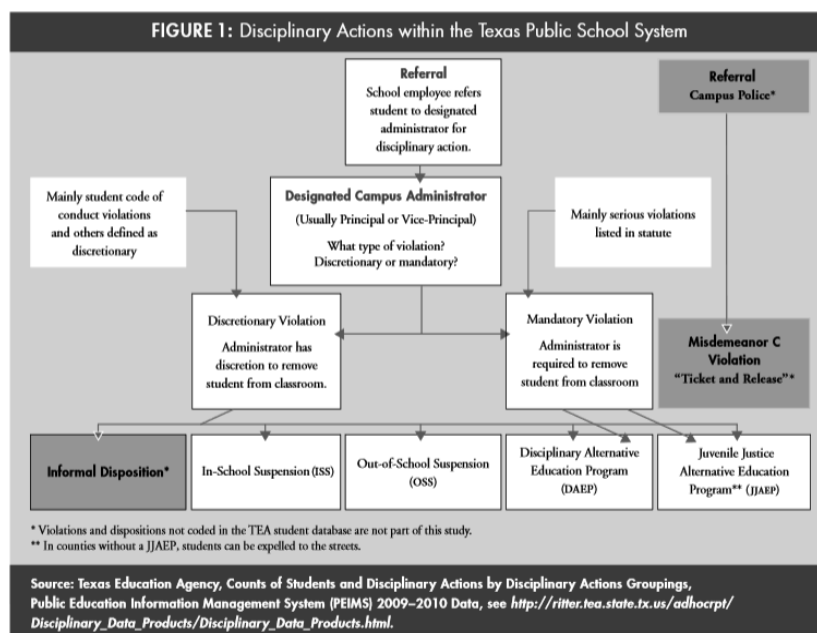
121. For example, the now-defunct No Child Left Behind Act required schools that received federal funds to administer various academic assessments to students at different stages during grades three through twelve and imposed sanctions on schools whose students failed to meet certain standards. *See Testing: Frequently Asked Questions*, U.S. DEP’T OF EDUC., <http://www2.ed.gov/nclb/accountability/ayp/testing-faq.html> (last modified Nov. 17, 2004); Torin Monahan & Rodolfo D. Torres, *Introduction*, in *SCHOOLS UNDER SURVEILLANCE: CULTURES OF CONTROL IN PUBLIC EDUCATION* 5 (Torin Monahan & Rodolfo D. Torres eds., 2009). The Every Student Succeeds Act, Pub. L. 114-95, which replaced the No Child Left Behind Act on December 10, 2015, also requires states receiving federal funds to implement student academic assessments in their public schools. *See* Every Student Succeeds Act, 114 Pub. L. No. 114-95, § 1111(b)(2), 129 Stat. 1802, 1825–29 (2015). However, one of the hallmarks of the Every Student Succeeds Act is that it prohibits the federal government from determining the weight of those assessments for accountability purposes. *See id.* at sec. 1111(e)(1)(B)(iii); *see also* SENATE COMMITTEE ON HEALTH, EDUCATION, LABOR AND PENSIONS, *THE EVERY CHILD ACHIEVES ACT OF 2015*, at 1, http://www.help.senate.gov/imo/media/The_Every_Child_Achieves_Act_of_2015--summary.pdf (last visited Oct. 13, 2016).

122. *See, e.g.*, FED. ADVISORY COMM. ON JUVENILE JUSTICE, *ANNUAL REPORT 2010* 10 (2010); NAACP LEGAL DEF. & EDUC. FUND, *DISMANTLING THE SCHOOL-TO-PRISON PIPELINE* 5 (2005), http://www.naacpldf.org/files/publications/Dismantling_the_School_to_Prison_Pipeline.pdf; Linda Darling-Hammond, *Race, Inequality and Educational Accountability: The Irony of ‘No Child Left Behind’*, 10 RACE ETHNICITY & EDUC. 245, 252–55 (2007); 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 (2010); Michael P. Krezmien et al., *Juvenile Court Referrals and the Public Schools: Nature and*

d. Students of color are disproportionately subject to more frequent and harsher punishment

School discipline runs a continuum from in-class interventions, in-school suspensions, out-of-school suspensions, placement in disciplinary alternative education programs, to expulsions and on to the juvenile justice system and beyond.¹²³

Figure 13. Discipline Approaches (TX)¹²⁴



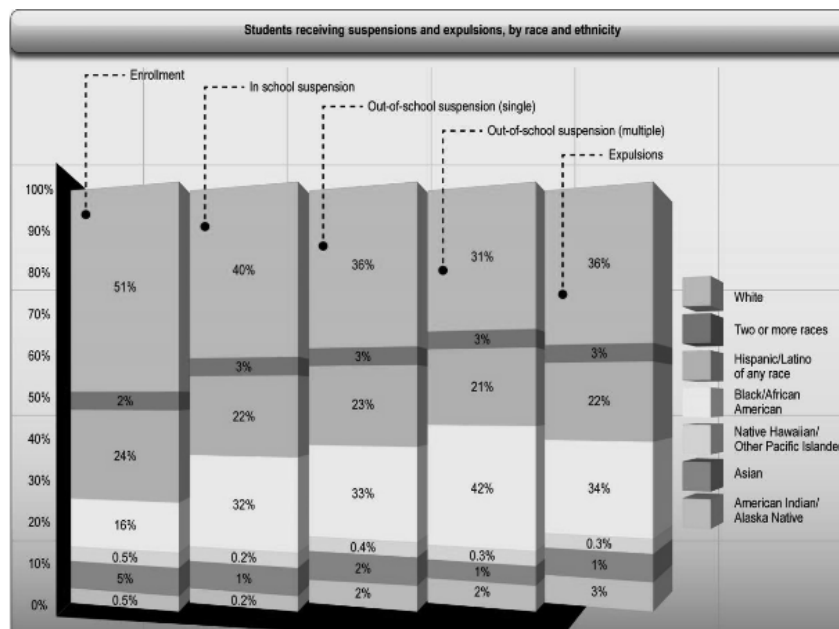
Extent of the Practice in Five States, 26 J. CONTEMP. CRIM. JUST. 273, 274 (2010); James E. Ryan, *The Perverse Incentives of the No Child Left Behind Act*, 79 N.Y.U. L. REV. 932, 969–70 (2004); ADVANCEMENT PROJECT, *supra* note 119, at 28–33.

123. See ERICA TERRAZAS, TEXAS APPLESEED, WHEN MY CHILD IS DISCIPLINED AT SCHOOL: A GUIDE FOR FAMILIES 3–4 (2009), [http://www.texasjc.org/sites/default/files/uploads/TX%20Appleseed%20-%20Guide%20for%20Families,%20When%20My%20Child%20is%20Disciplined%20at%20School%20\(Jan%202009\).pdf](http://www.texasjc.org/sites/default/files/uploads/TX%20Appleseed%20-%20Guide%20for%20Families,%20When%20My%20Child%20is%20Disciplined%20at%20School%20(Jan%202009).pdf). See generally Wallace, Jr. et al., *supra* note 48, at 47.

124. FABELO ET AL., *supra* note 10, at 19.

The CRDC shows that African-American and American Indian-Alaskan Natives students are most disproportionately disciplined.

Figure 14. CRDC Discipline, by Race & Ethnicity: Suspension/Expulsion¹²⁵



NOTE: Detail may not sum to 100% due to rounding. Totals: Enrollment is 49 million students, in-school suspension is 3.5 million students, single out-of-school suspension is 1.9 million students, multiple out-of-school suspension is 1.55 million students, and expulsion is 130,000 students. Data reported in this figure represents 99% of responding schools.

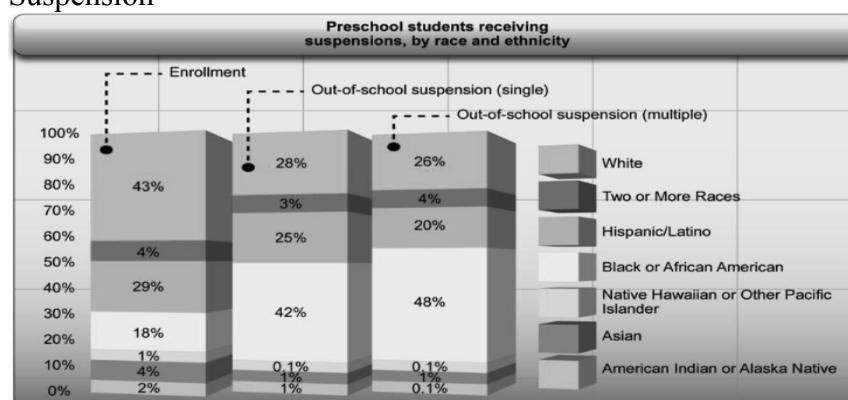
SOURCE: U.S. Department of Education, Office for Civil Rights, Civil Rights Data Collection, 2011-12.

American Indian-Alaskan Natives were only 0.5% of the student population but accounted for 3% of expulsions, 2% of multiple out of school suspensions, 2% of single out of school suspensions, and 0.2% of in school suspensions. African-American students, who represented 16% of the student population in the CRDC data, are a much higher percentage of students suspended or expelled: 34% expelled, 42% subjected to multiple out of school suspensions, 33% to single out of school suspensions, and 32% to in school suspensions. In comparison, White students in the CRDC data showed a similar range between 31–40% of students suspend-

125. U.S. DEP'T OF EDUC. OFFICE FOR CIVIL RIGHTS, *supra* note 5, at 2.

ed or expelled, but from 51% base.¹²⁶ Similarly, African-American children are 18% of the preschool population, and they represent 48% of preschool children suspended (out of school) more than once; White students, who are 43% of the preschool population, are only 26% of the children so disciplined.¹²⁷ All other reported groups show preschool suspensions very close to their proportion of the population.

Figure 15. CRDC Discipline, by Race & Ethnicity: Preschool Suspension¹²⁸



This kind of disproportionality is especially evident for offenses that are not serious and that call for subjective judgment.¹²⁹ Among students who were seriously disciplined—that is suspended for more than five days, removed from school with no services, or placed in disciplinary alternative education settings—only about 1% of the cases involved firearms or explosives.¹³⁰ By compari-

126. U.S. DEP'T OF EDUC. OFFICE FOR CIVIL RIGHTS, *supra* note 5, at 2.

127. Lhamon, *supra* note 117; Trymaine Lee, *Preschool to Prison: No Child too Young for Zero-Tolerance*, MSNBC (Mar. 21, 2014, 12:53 PM), <http://www.msnbc.com/msnbc/preschool-prison-no-child-too-young>; see also TEXAS APPLESEED, *SUSPENDED CHILDHOOD: AN ANALYSIS OF EXCLUSIONARY DISCIPLINE OF TEXAS' PRE-K AND ELEMENTARY SCHOOL STUDENTS* (2015), <https://slate.adobe.com/a/6dvQB/> [hereinafter *SUSPENDED CHILDHOOD*] (concluding similarly for Texas' youngest students, where African-Americans are 13% of the school population but account for 42% of the students suspended).

128. U.S. DEP'T OF EDUC. OFFICE FOR CIVIL RIGHTS, *supra* note 5, at 7 (showing percent of all suspensions this grade).

129. See *supra* notes 24, 48–50 and accompanying text.

130. NAT'L CTR. FOR EDUC. STATISTICS, *supra* note 95, at 337 tbl.233.10.

son, insubordination accounted for 42.5% of the serious discipline cases.¹³¹ For discipline with less serious consequences—particularly out of school suspension—the most common offenses also included insubordination together with disruption and physical or verbal aggression.¹³²

Multnomah County, Oregon, data further illustrates this problem. With a population of 28,115 White students and 23,950 students of color, data show that in the categories that mostly involve discretion in identifying facts or interpretation of behavior, students of color (46% of population) accounted for 61% of the discipline incidents and White students (54% of population), 37%.¹³³ The relative rate of discipline incidents was 3.3 for African-American students, 1.88 for Latino, 2.13 for Native American, and 0.46 for Asian (with White equaling 1).¹³⁴ In this study, one of the most common bases for discipline for both groups was fighting at about the same proportion of discipline incidents for each group.¹³⁵ In another example, in the *Breaking Schools' Rules* study of disciplinary practice in Texas, researchers observed that almost 60% of the public school students studied were either suspended or expelled at least once from grade 7 to 12.¹³⁶ Controlling for other variables, researchers concluded that African-American students were 31% more likely to be disciplined for in school discretionary categories than their “otherwise identical” White and Hispanic peers.¹³⁷

131. NAT'L CTR. FOR EDUC. STATISTICS, *supra* note 95, at 337 tbl.233.10.

132. OREGON, *supra* note 85, at 8–9.

133. *Id.* at 21, 22, 24.

134. *See* OREGON, *supra* note 85 at *Appendix C*.

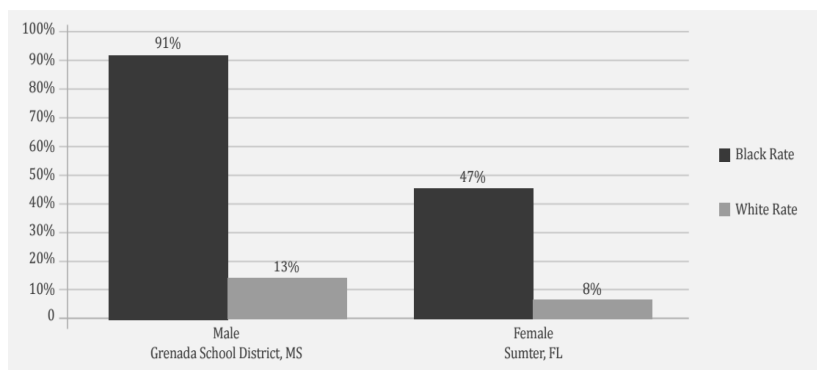
135. *Id.* at 19.

136. FABELLO ET AL., *supra* note 10, at ix.

137. *Id.* at 45.

Figure 16. Suspension Disproportionality by Race & Gender MS & FL examples.¹³⁸

Figure 10. Districts with Largest Black/White Racial and Gender Gaps



This kind of disproportionality is most commonly discussed for boys but is also evident among certain groups of girls. As the CRDC reported, “While boys receive more than two out of three suspensions, black girls are suspended at higher rates (12%) than girls of any other race or ethnicity and most boys; American Indian and Native-Alaskan girls (7%) are suspended at higher rates than White boys (6%) or girls (2%).”¹³⁹

e. Students of color are disproportionately referred to law enforcement or subject to school-related arrest

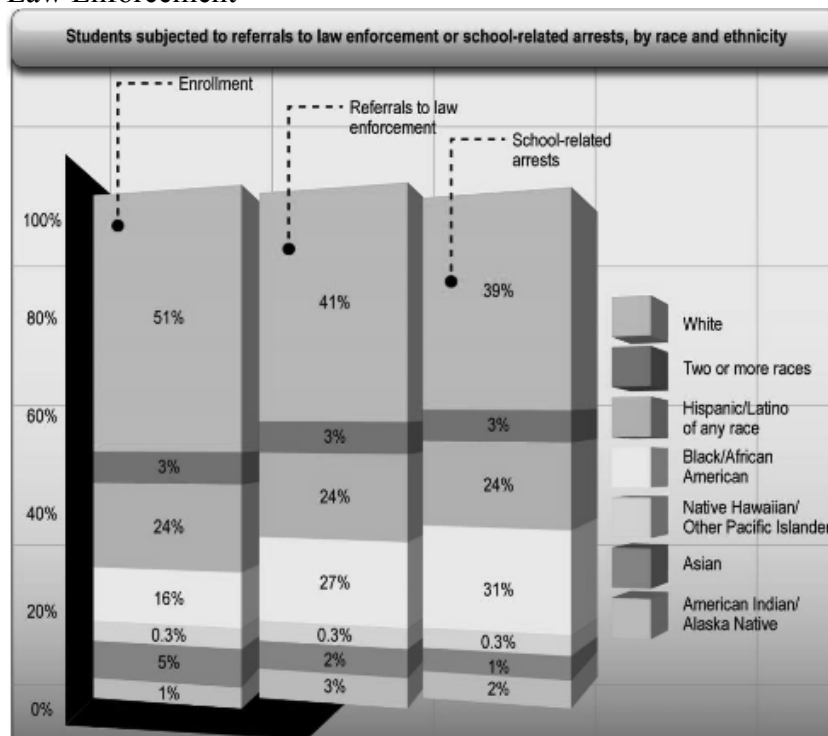
The CRDC also shows that African-American students (who are 16% of population reported in the CRDC sample) are 27% of students referred to law enforcement and 31% of students subject to school-related arrest. American Indian-Alaskan Native (AIAN) numbers are also out of proportion. Although AIAN students amount to 1% of the student population, they are 3% of students referred to law enforcement and 2% of students subject to school-related arrest. For White students, only 41% are referred to

138. ARE WE CLOSING, *supra* note 21, at 30.

139. U.S. DEP’T OF EDUC. OFF. FOR CIVIL RIGHTS, *supra* note 5, at 1. Research also shows that suspensions are particularly high for girls with darker skin tones. *Id.*

law enforcement and 39% subject to school related arrest, both lower than their part of the population.¹⁴⁰

Figure 17. CRDC Discipline, by Race & Ethnicity: Referral to Law Enforcement¹⁴¹



NOTE: Detail may not sum to 100% due to rounding. Totals are 49 million students for overall enrollment, 260,000 students referred to law enforcement, and 92,000 students subject to school-related arrests. Data on referrals to law enforcement represents 98% of schools and data on school related arrests represents 94% of schools in the CRDC universe.

SOURCE: U.S. Department of Education, Office for Civil Rights, Civil Rights Data Collection, 2011-12.

f. Students of color are disproportionately placed in alternative schools

Originally conceived as a setting that could provide optimum environments for students not doing well academically or behaviorally in regular school settings, these schools now primari-

140. U.S. DEP'T OF EDUC. OFF. FOR CIVIL RIGHTS, *supra* note 5, at 6.

141. *Id.* at 6.

ly serve students labeled as “disruptive or dangerous.”¹⁴² While alternative schools may be seen as an alternative to exclusion, they are both increasingly used and in demand and increasingly seen as punitive. In a study of Jefferson County, Kentucky, public schools, researchers found that “total cumulative proportion of students that experienced placement in a disciplinary school between 3rd and 12th grade is 9%, or nearly 1 in 10 students.”¹⁴³ They also found that racial gaps were pronounced as 13% of all African-American students in the cohort experienced placement compared to 4% of the White students.¹⁴⁴

g. Students of color disproportionately drop out of school and fail to graduate from high school

Graduation rates and comparative graduation rates have improved—indeed they are widely reported to have reached 80% in 2014¹⁴⁵—but differences remain.¹⁴⁶ It is still the case that minority students as a group continue to lag behind.¹⁴⁷ Comparative

142. Judi Vanderhaar et al., *Reconsidering the Alternatives: The Relationship Between Suspension, Disciplinary Alternative School Placement, Subsequent Juvenile Detention, and the Salience of Race*, 5 J. APPLIED RES. ON CHILD.: INFORMING POL’Y FOR CHILD. RISK 1, 1–3 (2014). See generally NAT’L CTR. FOR EDUC. STATISTICS, U.S. DEP’T OF EDUC., ALTERNATIVE SCHOOLS AND PROGRAMS FOR PUBLIC SCHOOL STUDENTS AT RISK OF EDUCATIONAL FAILURE: 2007–08, at 8 tbl.4 (2010), <http://nces.ed.gov/pubs2010/2010026.pdf>.

143. Vanderhaar et al., *supra* note 142, at 10.

144. *Id.*

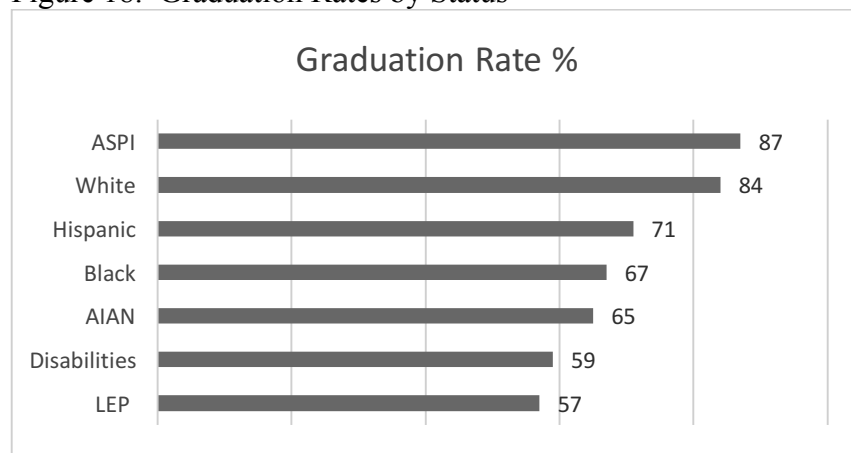
145. *US High School Graduation Rate Hits All-Time High, Per Report*, NPR (Apr. 29, 2014), <http://www.npr.org/2014/04/29/307968835/us-high-school-graduation-rate-hits-all-time-high-per-report>.

146. See *infra* Figure 18.

147. Lalita Clozel, *National High School Graduation Rate Exceeds 80% for the First Time*, L.A. TIMES (Apr. 28, 2014, 12:29 PM), <http://www.latimes.com/nation/nationnow/la-na-nn-national-graduation-rate-record-20140428-story.html>; see also, e.g., Marchbanks III et al., *supra* note 73, at 59; THE URGENCY OF NOW, *supra* note 106, at 7–9 (summarizing that “at the current pace of progress for both, it would take nearly 50 years for Black males to secure the same high school graduation rates as their White male peers. . . . Educationally this represents the point at which Black males can secure a high school diploma on par with their White male peers; economically it represents the point at which they will be equally equipped to secure post-secondary educa-

graduation rates are 62% for African-American students, 51% for American Indian-Alaskan Native students, and 68% for Hispanic students; as compared to about 80% for White and 81% for Asian students.¹⁴⁸

Figure 18. Graduation Rates by Status¹⁴⁹



Like the graduation rate, the status dropout rate¹⁵⁰ (young people who are out of school without achieving a high school level

tional and labor opportunities available as a result of possessing a high school diploma.”).

148. NAT’L CTR. FOR EDUC. STATISTICS, U.S. DEP’T OF EDUC., STATUS AND TRENDS IN THE EDUCATION OF RACIAL AND ETHNIC GROUPS 99 tbl.18.1b. (2010), <http://nces.ed.gov/pubs2010/2010015.pdf>; *see also* GARY ORFIELD ET AL., LOSING OUR FUTURE: HOW MINORITY YOUTH ARE BEING LEFT BEHIND BY THE GRADUATION RATE CRISIS (2004), <http://www.urban.org/sites/default/files/alfresco/publication-pdfs/410936-Losing-Our-Future.pdf>.

149. MARIE C. STETSER & ROBERT STILLWELL, NAT’L CTR. FOR EDUC. STATISTICS, U.S. DEP’T OF EDUC., PUBLIC HIGH SCHOOL FOUR-YEAR ON-TIME GRADUATION RATES AND EVENT DROPOUT RATES: SCHOOL YEARS 2010-11 AND 2011-12, at 7 tbl.1 (2014), <http://nces.ed.gov/pubs2014/2014391.pdf>.

150. Dropout includes students who are pushed out, pulled out, or fall out. JONATHAN JACOB DOLL, ZOHREH ESLAMI & LYNNE WALTERS, UNDERSTANDING WHY STUDENTS DROP OUT OF HIGH SCHOOL, ACCORDING TO THEIR OWN REPORTS (2013), <http://sgo.sagepub.com/content/3/4/2158244013503834>; *see also* HILARY BURDGE, ZAMI T. HYEMINGWAY & ADELA C. LICONA, GAY-STRAIGHT ALLIANCE NETWORK, GENDER NONCONFORMING YOUTH: DISCIPLINE DISPARITIES, SCHOOL PUSH-OUT, AND THE SCHOOL-TO-PRISON PIPELINE 8 (2014), <http://b3cdn.net/advancement/>

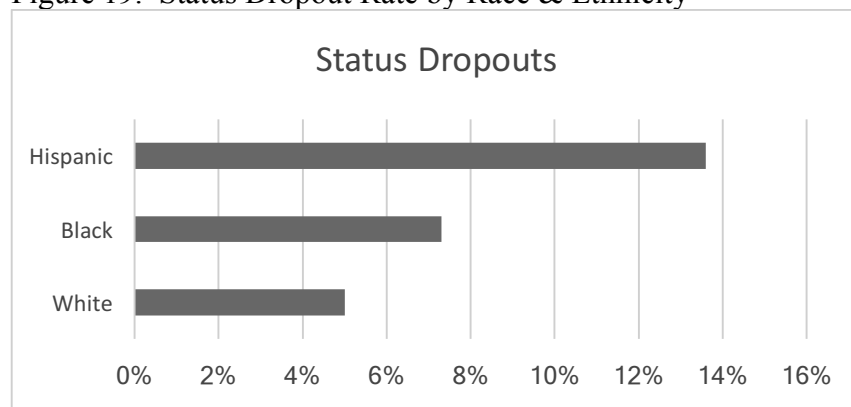
of educational attainment) is improving—now reported to be at 9.3% overall, though this still represents about five thousand students a day, over a million a year.¹⁵¹ But like the graduation rate, despite general improvement, the dropout rate remains high for some groups, disproportionately so,¹⁵² particularly for American Indian-Alaskan Native and Pacific Islanders: Asian, 3.0%; White, 6.1%; Hawaiian/Pacific Islander, 7.6%; African-American, 11.5%; Hispanic, 19.9%; American Indian-Alaskan Native, 5.3%.¹⁵³

e2df7ec74f895dd5bb_86m6vosva.pdf (defining pushout as “a student being marginalized in school and/or driven out of school prior to graduation. It differs from the term ‘drop-out’ in that it acknowledges the multiple school-based conditions and forces at play in marginalizing students in the classroom and in school as well as pressuring students to leave school prematurely. Students who are pushed out of school stop going to school altogether, enroll in an alternative or disciplinary school, or enroll in a GED program”).

151. *Economic Impacts*, ALLIANCE FOR EXCELLENT EDUC., <http://all4ed.org/issues/economic-impacts/> (last visited Oct. 31, 2016).

152. See NAT’L CTR. FOR EDUC. STATISTICS, *supra* note 148, at 95 tbl.18.1b.

153. *Status Dropout Rates*, NAT’L CTR. FOR EDUC. STATISTICS fig.2, http://nces.ed.gov/programs/coe/indicator_coj.asp (last updated May 2016); NAT’L CTR. FOR EDUC. STATISTICS, *supra* note 95, at 217 tbl.219.70; see also Tobin & Vincent, *supra* note 68 (discussing Latino/a rates).

Figure 19. Status Dropout Rate by Race & Ethnicity¹⁵⁴

Some researchers suggest that these rates are understated “by as much as 12.5 percent for young White men and by as much as 40 percent for young black men” because conventional sources for the data do not include incarcerated populations, so much so that when inmates are included the data on educational attainment suggests that “black men have experienced no improvement in high school completion rates since the early 1990s.”¹⁵⁵

Excluding a student from school also increases the likelihood that a student very soon will become involved in the juvenile justice system. The American Academy of Pediatrics Committee on School Health observed that when students are not monitored

154. *Digest of Education Statistics*, NAT’L CTR. FOR EDUC. STATS. tbl.128, http://nces.ed.gov/programs/digest/d12/tables/dt12_128.asp (last visited Oct. 30, 2016).

Status’ dropouts are 16- to 24-year-olds who are not enrolled in school and who have not completed a high school program, regardless of when they left school. People who have received GED credentials are counted as high school completers. All data except for 1960 are based on October counts. Data are based on sample surveys of the civilian noninstitutionalized population, which excludes persons in prisons, persons in the military, and other persons not living in households. Race categories exclude persons of Hispanic ethnicity except where otherwise noted.

Id.

155. Stephanie Ewert et al., *The Degree of Disadvantage: Incarceration and Inequality in Education*, 651 ANNALS AM. ACAD. POL. & SOC. SCI. 24, 39 (2014).

by trained professionals and are at home without parental supervision, they are far more likely to commit crimes, such as becoming involved in a physical altercation or carrying a weapon.¹⁵⁶ In their longitudinal study of Texas students, scholar Tony Fabelo and his colleagues found that when a school suspended or expelled a student for a discretionary offense, that student was approximately 2.85 times more likely to have contact with the juvenile justice system during the next academic year.¹⁵⁷ With each subsequent exclusionary punishment the student received, the odds of involvement with the juvenile justice system further increased.¹⁵⁸ Tracey Shollenberger's national longitudinal survey of youth also confirms that students are more likely to be arrested and incarcerated when they are suspended, and those odds increase as students receive more suspensions.¹⁵⁹

This data directly relates to later life data. Dropouts are far more likely to be institutionalized in prisons and health care facilities, 45.9% compared to 8.8% in total for all racial categories.¹⁶⁰ More specifically, "schooling significantly reduces the probability of incarceration,"¹⁶¹ more so for African-Americans than Whites, so much so that some researchers have found that different levels

156. Am. Acad. of Pediatrics Comm. on Sch. Health, *Out-of-School Suspension and Expulsion*, 112 PEDIATRICS 1206, 1207 (2003).

157. See FABELO ET AL., *supra* note 10, at 70.

158. *Id.*

159. Tracy L. Shollenberger, *Racial Disparities in School Suspension and Subsequent Outcomes: Evidence from the National Longitudinal Survey of Youth*, in CLOSING THE SCHOOL DISCIPLINE GAP, *supra* note 16, at 31, 37.

160. AUD ET AL., *supra* note 110, at 100 tbl.18.1c.; THE SILENT EPIDEMIC, *supra* note 42, at i (explaining that not graduating from high school leads to many social ills such as future involvement in the criminal justice system, unemployment, bad health, and poverty); OJJDP 2014 NATIONAL REPORT, *supra* note 24, at 15 (reporting that in 2009, 40% of all institutionalized individuals had dropped out of school). Status dropout rates are highest for institutionalized youth, with Hispanic highest among males and Hispanic and AIAN highest among females. OJJDP 2014 NATIONAL REPORT, *supra* note 24, at 15.

161. Enrico Moretti, *Crime and the Costs of Criminal Justice*, in THE PRICE WE PAY: ECONOMIC AND SOCIAL CONSEQUENCES OF INADEQUATE EDUCATION 142, 146 (Clive R. Belfield & Henry M. Levin eds., The Brookings Institute 2007).

of “educational attainment between black and white men explain 23% of the black-white gap in male incarceration rates.”¹⁶²

h. Students of color disproportionately feel threatened at school and suffer consequences as victims

Hispanic, African-American, American Indian-Alaskan Native, and Native Hawaiian Pacific Islander (NHPI) students are more likely to report feeling threatened or being injured by weapons, more likely to perceive gang activity at school, and more likely to have been in a physical fight at school.¹⁶³ Hispanic, American Indian-Alaskan Native, and NHPI students are significantly more likely to report drug availability at school,¹⁶⁴ and Hispanic students are most likely to report avoiding certain areas of school because they fear being attacked or harmed.¹⁶⁵ African-American students report being among students who are victims of nonfatal crime at school more often than any other group.¹⁶⁶ In comparison, White students are more likely to report having access to a loaded gun.¹⁶⁷

162. Lance Lochner & Enrico Moretti, *The Effect of Education on Crime: Evidence from Prison Inmates, Arrests, and Self-Reports* 1 (2003), <http://eml.berkeley.edu/~moretti/lm46.pdf> (last visited Jan. 08, 2016).

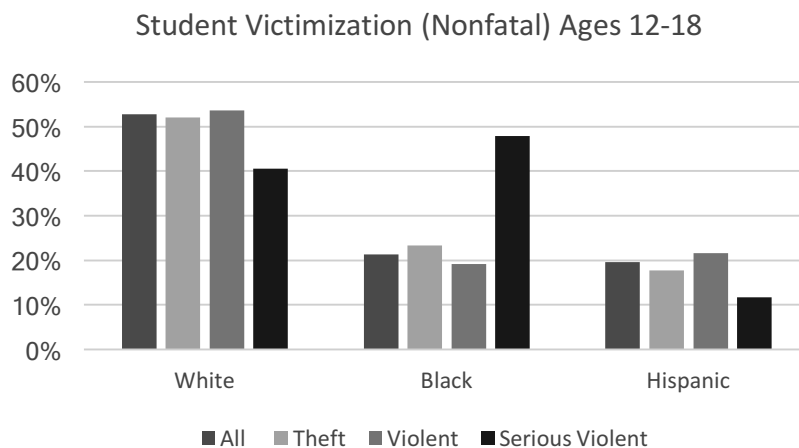
163. SIMONE ROBERTS ET AL., NAT'L CTR. FOR EDUC. STATISTICS, *INDICATORS OF SCHOOL CRIME AND SAFETY: 2012*, at 19 fig.4.2, 37 figs.8.1 & 8.2, 57 figs.13.1 & 13.2 (2012), <http://www.bjs.gov/content/pub/pdf/iscs12.pdf>.

164. *Id.* at 39 figs.9.2.

165. *Id.* at 78 fig.18.2; *see also* Tobin & Vincent, *supra* note 68 (reporting that Latino/a students experience depression and anxiety disproportionately).

166. SIMONE ROBERTS ET AL., *supra* note 163, at 101 tbl.2.2.

167. *Id.*

Figure 20. Victimization by Race & Ethnicity¹⁶⁸

As victims, these students suffer additional consequences. As the Bureau of Justice Statistics summarizes:

Our nation's schools should be safe havens for teaching and learning free of crime and violence. Any instance of crime or violence at school not only affects the individuals involved but also may disrupt the educational process and affect bystanders, the school itself, and the surrounding community. For both students and teachers, victimization at school can have lasting effects. In addition to experiencing loneliness, depression, and adjustment difficulties, victimized children are more prone to truancy, poor academic performance, dropping out of school, and violent behaviors. For teachers, incidents of victimization may lead to professional disenchantment and even departure from the profession altogether.¹⁶⁹

168. *Id.* at 154 tbl.14.4.

169. *Id.* at 2 (citations omitted).

2. For students with disabilities, disproportionality manifests itself all along the pipeline in areas similar to those outlined in the preceding section on students of color
 - a. *Students with disabilities are disproportionately students of color, especially in discretionary categories and these categories compound*

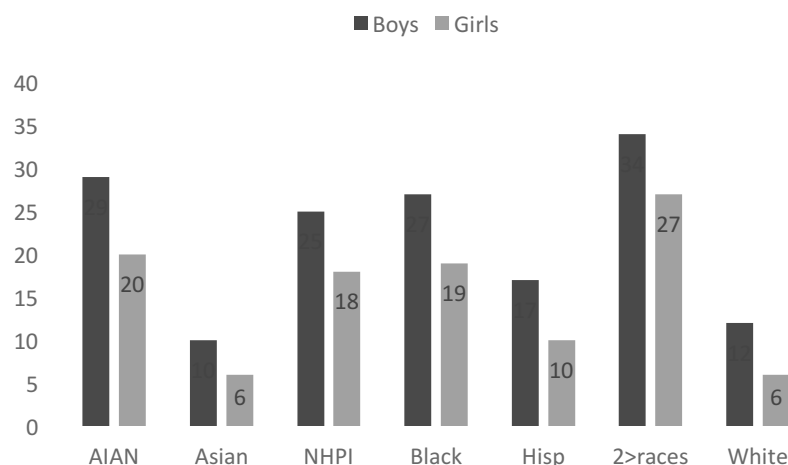
Especially in discretionary categories, students with disabilities are disproportionately students of color.¹⁷⁰ In 2011–12, about 13% of the school population received services under the Individuals with Disabilities Education Act (IDEA), Part B, special education;¹⁷¹ this is almost 6.5 million students of whom 3.6 million of were White and Asian and 2.8 million students of color. As with regular education, some groups in the special education population differ from their representation in the juvenile population. In its annual report to Congress on IDEA, the Department of Education reported as to overall identification that differences existed based on race and ethnicity with the risk index being largest for American Indian-Alaskan Native students, followed by African-American and then Hispanic students. The 2011–12 data shows that, while American Indian-Alaskan Native students are 0.9% of the juvenile population, they are 1.4% of the special education population; Pacific Islanders are 0.2% of the juvenile population and 0.3% special education; African-American students, 15% of the juvenile population and 18.7% special education; all other groups have a smaller percentage in special education than in the juvenile population as a whole.¹⁷²

170. See generally, e.g., BETH HARRY & JANETTE KLINGNER, WHY ARE SO MANY MINORITY STUDENTS IN SPECIAL EDUCATION? 76–79 (2005); Russell J. Skiba et al., *Achieving Equity in Special Education: History, Status, and Current Challenges*, REDORBIT (April 2, 2008), http://www.redorbit.com/news/education/1322341/achieving_equity_in_special_education_history_status_and_current_challenges; Beth Harry et al., *Of Rocks and Soft Places: Using Qualitative Methods to Investigate Disproportionality*, in RACIAL INEQUITY IN SPECIAL EDUCATION 84–85 (Daniel J. Losen & Gary Orfield eds., 2002).

171. See generally 20 U.S.C.A. § 1401 (West 2016).

172. Compiled numbers from 2011–12 data and census numbers cited previously; NAT'L CTR. FOR EDUC. STATISTICS, *supra* note 95, at 107 tbl.204.50.

Figure 21. CRDC Students with Disabilities (IDEA) out of school suspensions by race/ethnicity and gender¹⁷³



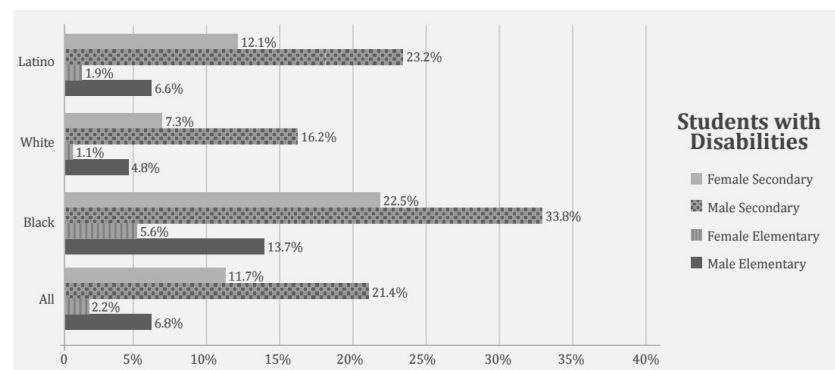
Some young people who are in more than one group are particularly negatively impacted. As the National Disabilities Rights Network puts it:

Applying these three lenses together—race, gender and disability—yields a more disturbing image than any one of the categories alone. The group that consistently had the highest rate of suspension is African-American male students with disabilities. In some of the largest districts in the U.S., suspension rates for this group reached more than 70% of their enrollment.¹⁷⁴

173. U.S. DEP'T OF EDUC. OFF. FOR CIVIL RIGHTS, *supra* note 5, at 4.

174. NAT'L DISABILITIES RIGHTS NETWORK, *supra* note 27, at 16 (citations omitted); see U.S. DEP'T OF EDUC. OFF. FOR CIVIL RIGHTS, *supra* note 5, at 3–7; Kalman R. Hettelman, *The Road to Nowhere: The Illusion and Broken Promises of Special Education in the Baltimore City and Other Public School Systems*, 17 ABELL REPORT 1, 30 (2004); Purdie-Vaughns & Eibach, *supra* note 27, at 380.

Figure 22. Special Education Discipline Disproportionality
Disaggregated by Race and Ethnicity, Gender, Grade¹⁷⁵



Disproportionality also appears within certain categories within special education. Among high incidence disability categorizations, three in particular have been highlighted as showing disproportionate representation—Intellectual Disability (formerly mental retardation), Specific Learning Disability, and Emotional Disturbance. These are discretionary categories;¹⁷⁶ they are “soft” identifications¹⁷⁷ which depend on judgment, not just medical or biological testing.¹⁷⁸ Unlike, for example, hearing impairment

175. ARE WE CLOSING, *supra* note 21, at 6.

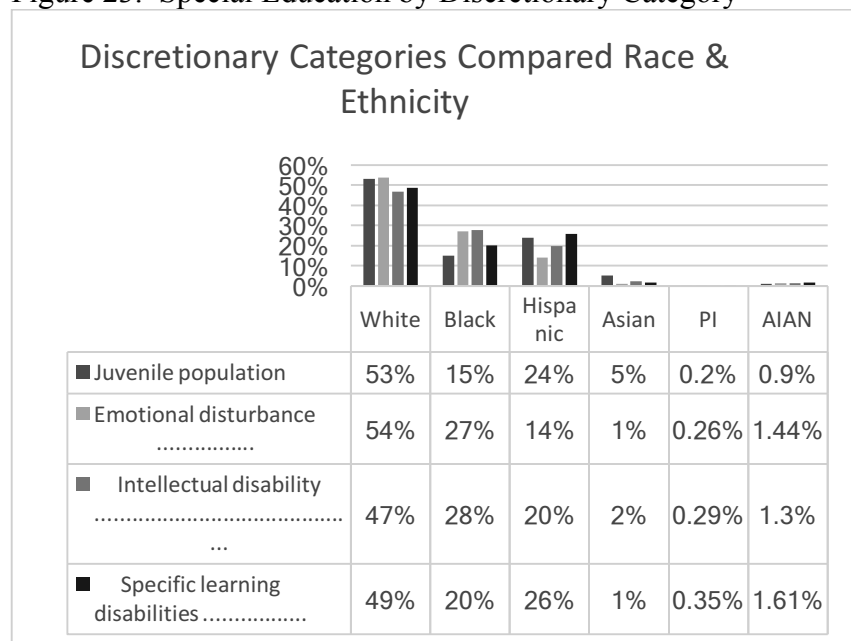
176. See COMM. ON MINORITY REPRESENTATION IN SPECIAL EDUCATION, NAT’L RESEARCH COUNCIL, MINORITY STUDENTS IN SPECIAL AND GIFTED EDUCATION 37 (M. Suzanne Donovan & Christopher T. Cross eds., 2002) [hereinafter NAT’L RESEARCH COUNCIL 2002].

177. HARRY & KLINGNER, *supra* note 170, at 8; Skiba et al., *supra* note 170 (describing how these disabilities stand on the “soft” side of science).

178. See, e.g., Thomas Parrish, *Disparities in the Identification, Funding, and Provision of Special Education*, in RACIAL INEQUITY IN SPECIAL EDUCATION 15 (Daniel J. Losen & Gary Orfield eds., 2002); Angela A. Ciolfi & James E. Ryan, *Race and Response-to-Intervention in Special Education*, 54 HOW. L.J. 303, 304 (2011) (discussing over representation in soft disability categories); Robert A. Garda, Jr., *The New Idea: Shifting Educational Paradigms to Achieve Racial Equality in Special Education*, 56 ALA. L. REV. 1071, 1072–73 (2005); Daniel J. Reschly, *Identification and Assessment of Students with Disabilities*, 6 THE FUTURE OF CHILDREN 40, 43 (1996) (providing a comparison chart of factors in medical and social models); Rebecca Vallas, *The Disproportionality Problem: The Overrepresentation of Black Students in Special Education and Recommendations for Reform*, 17 VA. J. SOC. POL’Y & L.

which is subject to expert testing, the softer categories involve children who “typically do not exhibit readily observable distinguishing features,” meaning that the “authoritative diagnosis of medical professionals, which is common in assessment of many of the low-incidence disabilities, is absent.”¹⁷⁹ In a pattern like special education classification overall, American Indian-Alaskan Native and African-American students are categorized as intellectually disabled in greater percentages than their representation in the juvenile population, 1.3% compared to 0.9% for the American Indian-Alaskan Native students and 28% compared to 15% for African-American students. For other groups the proportions are equal or less; for example, 47% of students classified as intellectually disabled are White, while White students are 53% of the juvenile population as a whole.

Figure 23. Special Education by Discretionary Category¹⁸⁰



181, 184–85 (2009) (focusing on disproportionality involving African-Americans); Mark C. Weber, *The IDEA Eligibility Mess*, 57 BUFF. L. REV. 83, 145 (2009).

179. NAT'L RESEARCH COUNCIL 2002, *supra* note 176, at 37.

180. *Id.* at 107 tbl.204.50.

b. Students with disabilities are disproportionately less likely to be academically proficient

The achievement gap between students with disabilities and students without disabilities is longstanding and deep.¹⁸¹ In “virtually every case, special education students have the lowest average proficiency level on standardized tests and are unable to close the achievement gap over time.”¹⁸² Based on the limited results available, at the fourth grade level, students with disabilities consistently score forty-five points lower than students without disabilities score in reading.¹⁸³ At eighth grade, the difference was forty-three points and at twelfth grade forty-two.¹⁸⁴ At fourth grade, 65% of

181. See, e.g., KATHERINE KERSTEN, OUR IMMENSE ACHIEVEMENT GAP 1–2 (2012), <https://www.scribd.com/document/93114965/Our-Immense-Achievement-Gap-WEB> (observing about Minnesota, but broadly applicable, that closing the achievement gap has involved moving “figurative mountains” and invested “billions of dollars—in an unsuccessful attempt to significantly boost minority achievement.”); NORM FRUCHTER ET AL., ANNENBERG INST. FOR SCH. REFORM, IS DEMOGRAPHY STILL DESTINY? NEIGHBORHOOD DEMOGRAPHICS AND PUBLIC HIGH SCHOOL STUDENTS’ READINESS FOR COLLEGE IN NEW YORK CITY 1 (Margaret Balch-Gonzalez ed. 2012), <http://annenberginstitute.org/sites/default/files/Demography%20is%20Destiny.pdf> (concluding that despite massive initiatives, college readiness still predicted by residence); IMPROVING THE ODDS FOR AMERICA’S CHILDREN: FUTURE DIRECTIONS IN POLICY AND PRACTICE ch. 7 (Kathleen McCartney, Hirokazu Yoshikawa & Laurie B. Forcier eds., 2014).

182. Suzanne Eckes & Julie Swando, *Special Education Subgroups under NCLB: Issues to Consider*, 111 TCHRS. C. REC. 2479, 2483 (2009), <http://www.tcrecord.org/Content.asp?ContentID=15437>.

183. See *NAEP Data Explorer*, NAT’L CTR. FOR EDUC. STATS., <http://nces.ed.gov/nationsreportcard/naepdata/dataset.aspx> (last visited Sept. 11, 2016) (select “Reading” and “Grade 4”; highlight “2013,” “deselect 2015,” and select “National” under “Jurisdiction”; click “Select Variables”; select “Disability status of student, excluding those with 504 plan” and “Disability status of student, including those with 504 plan”; select “Edit Reports”; select “Build Reports”).

184. *Id.* (select “Reading” and either “Grade 8 or Grade 12”; highlight “2013,” “deselect 2015,” and select “National” under “Jurisdiction”; click “Select Variables”; select “Disability status of student, excluding those with 504 plan” and “Disability status of student, including those with 504 plan”; select “Edit Reports”; select “Build Reports”).

students with disabilities scored below basic levels and in the eighth grade, 62%.¹⁸⁵

c. Students with disabilities are disproportionately disciplined

The IDEA requires that students with disabilities be in the “least restrictive environment”¹⁸⁶ and also limits suspension from school or change of placement for behavior that violates the school’s code of conduct but was caused by or substantially related to the students’ disabilities.¹⁸⁷ These provisions would suggest that students with disabilities would be less likely to be suspended or expelled; however, this is not the case.¹⁸⁸ Special education students are far more likely to be suspended from school and expelled with and without services than other students.¹⁸⁹ For all racial groups, over 13% percent of students with disabilities were subject to out of school suspension compared to 6% of students without

185. *National Assessment of Educational Progress (NAEP): What Is It and Why Should We Care?*, THE ADVOC. INST., http://www.advocacyinstitute.org/advocacyinaction/NAEP_SWDs.shtml (last visited Nov. 6, 2016).

186. 20 U.S.C.A. § 1412(a)(5) (2016).

187. 20 U.S.C.A. § 1415(k) (West 2016). *See generally* Lynn M. Daggett, *Student Rights: Book ‘em?: Navigating Student Privacy, Disability, and Civil Rights and School Safety in the Context of School-Police Cooperation*, 45 URB. LAW. REP. 203 (2013) (discussing legal issues limits on schools’ reporting to law enforcement regarding students with disabilities).

188. ARE WE CLOSING, *supra* note 21, at 21 (“As with the elementary school analysis, at the secondary level we observe tremendous disciplinary gaps between students with and without disabilities, which holds for each racial group. Typically, students with disabilities at this level are twice as likely to be suspended as their non-disabled peers, which raises serious questions as to whether schools are denying students with disabilities a free appropriate public education (FAPE), and whether they are unlawfully suspending students because of behavior caused by their disability or that results from the district’s failure to meet their special education needs.”).

189. *Suspended Childhood*, *supra* note 127 (concluding similarly for Texas’ special education students who “are 9% of the student population . . . but they account for 22% of all pre-K–5th grade out of school suspensions.”).

disabilities,¹⁹⁰ and the largest racial disparities occur among these students.¹⁹¹

Further disaggregation of the data among these students, American Indian-Alaskan Native and African-American students, together with students identifying as two or more races, were most likely to be suspended. For example, with respect to boys with disabilities, 29% of those students receiving out of school suspensions were American Indian-Alaskan Native, 27% African-American, and 34% two or more races; with respect to girls with disabilities, these groups are 20%, 19%, and 27% respectively. By comparison, White boys and girls, who, again, are a much larger part of the population, were reported at 12% and 6% of the out of school suspensions.¹⁹²

State reports on this issue show similar patterns. For example, the Texas *Breaking Schools' Rules* study showed high levels of discipline for special education students, finding that almost three-quarters of this group were suspended or expelled at least once during the period of the study; some categories, such as Emotional Disturbance, were more prominent in this group.¹⁹³ The Oregon study showed special education suspensions (out-of-school) 3.6 times higher than those of other students in elementary school and 2.2–2.3 times higher in middle and high school.¹⁹⁴

190. See *supra* Figure 18. Graduation Rates by Status; *supra* Figure 19. Status Dropout Rate by Race & Ethnicity; *supra* Figure 20. Victimization by Race and Ethnicity.

191. DANIEL J. LOSEN & TIA ELENA MARTINEZ, CTR. FOR CIVIL RIGHTS REMEDIES, THE CIVIL RIGHTS PROJECT, OUT OF SCHOOL & OFF TRACK: THE USE OF SUSPENSIONS IN AMERICAN MIDDLE AND HIGH SCHOOLS 10 (2013), <http://files.eric.ed.gov/fulltext/ED541735.pdf>.

192. U.S. DEP'T OF EDUC. OFF. FOR CIVIL RIGHTS, *supra* note 5; see also *supra* Figure 19. Status Dropout Rate by Race & Ethnicity.

193. FABELO ET AL., *supra* note 10, at 47; see also Metze, *supra* note 74, at 241–42 (describing special education students' overrepresentation in Texas in Disciplinary Alternative Education programs or in or out-of-school suspensions); Vanderhaar et al., *supra* note 142, at 7 (summarizing as to disparity in students identified with the disability of Emotional Disturbance, "With respect to EBD, there was a race gap as 2.3% of the Black students were identified as EBD, while less than 1% (0.8%) of White students were labeled EBD.").

194. OREGON, *supra* note 85, at 8, 19.

d. Students with disabilities are disproportionately retained in grade but still dropping and out failing to graduate

Students with disabilities are retained in grade more than their percentage of the student population might suggest. The CRDC reports that IDEA students are 12% of high school enrollment but 19% of students retained.¹⁹⁵ Overall, only 57% of students with disabilities graduate. Only 39.2% of African-American (not Hispanic) special education students graduate with regular diplomas, with 35.1% dropping out; for Hispanics, the numbers are 47.1% graduating with regular diplomas, with 34.9% dropping out.¹⁹⁶

e. Students with disabilities are disproportionately likely to spend time out of the regular classroom, to be secluded, restrained or placed in alternative schools

IDEA imposes a requirement that special education students be mainstreamed in the “least restrictive environment” wherever possible.¹⁹⁷ Notwithstanding the statutory requirement, special education students are often out of the regular school environment. Students with disabilities are 75% of students restrained at school and 58% of students who are secluded (though only 12% of the CRDC student population).¹⁹⁸ As a whole, students with disabilities spend between 40 and 52 percent of their time outside their regular classrooms.¹⁹⁹ In particular, students in high incidence, high discretion special education categories are out of their class-

195. Lhamon, *supra* note 117.

196. U.S. DEP’T OF EDUC., 29TH ANNUAL REPORT TO CONGRESS ON THE IMPLEMENTATION OF THE INDIVIDUALS WITH DISABILITIES EDUCATION ACT 83 tbl.1-17 (2007).

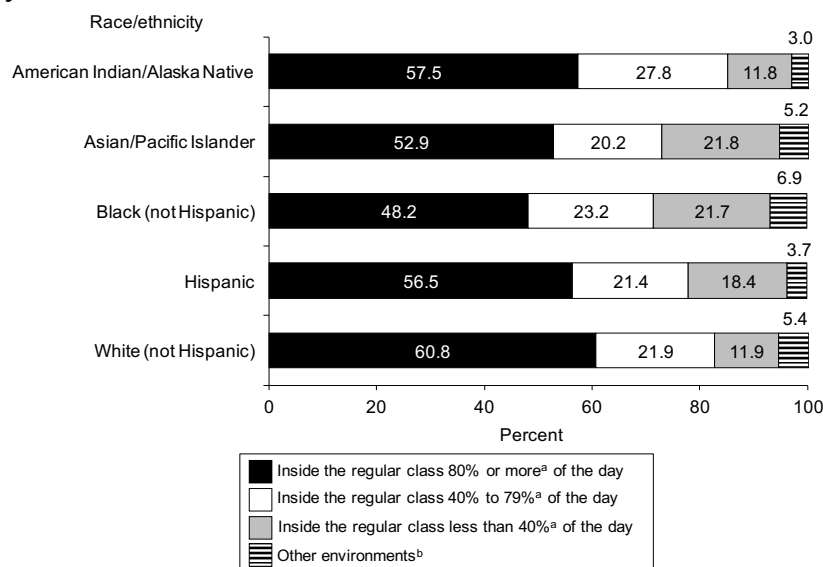
197. 20 U.S.C.A. § 1412(a)(5) (West 2016); SCOTT JOHNSON & SARAH REDFIELD, EDUCATION LAW: A PROBLEM-BASED APPROACH Ch. 12 (LexisNexis 2d ed., 2012); MARK WEBER, RALPH MAWDSLEY & SARAH REDFIELD, SPECIAL EDUCATION LAW: CASES AND MATERIALS Ch. 6 (LexisNexis 3d ed., 2010).

198. U.S. DEP’T OF EDUC. OFF. FOR CIVIL RIGHTS, *supra* note 5.

199. U.S. DEP’T OF EDUC., 30TH ANNUAL REPORT TO CONGRESS ON THE IMPLEMENTATION OF THE INDIVIDUALS WITH DISABILITIES EDUCATION ACT xxi (2008), <http://www2.ed.gov/about/reports/annual/osep/2008/parts-b-c/30th-idea-arc.pdf>.

rooms; for example, 48% of students labeled “intellectually disabled” spend less than 40% of their time in regular classrooms, and 74% of those students spend less than 80% in regular classrooms.²⁰⁰ Given what we know about the racial and ethnic special education population, this means more minority students are likely to spend more time outside of regular classrooms.

Figure 24. Special Ed, Education Environment by Race & Ethnicity²⁰¹



Percentage of students ages 6 through 21 served under IDEA, Part B, within racial/ethnic groups, by educational environment: Fall 2007

As is the case with students of color, many students with disabilities are placed in alternative schools.²⁰² Research suggests that this strategy has exacerbated inequities.²⁰³

200. Table 50, NAT'L CTR. FOR EDUC. STAT. tbl.50, https://nces.ed.gov/programs/digest/d12/tables/dt12_050.asp (last visited Nov. 6, 2016).

201. U.S. DEP'T OF EDUC., *supra* note 199, at 61.

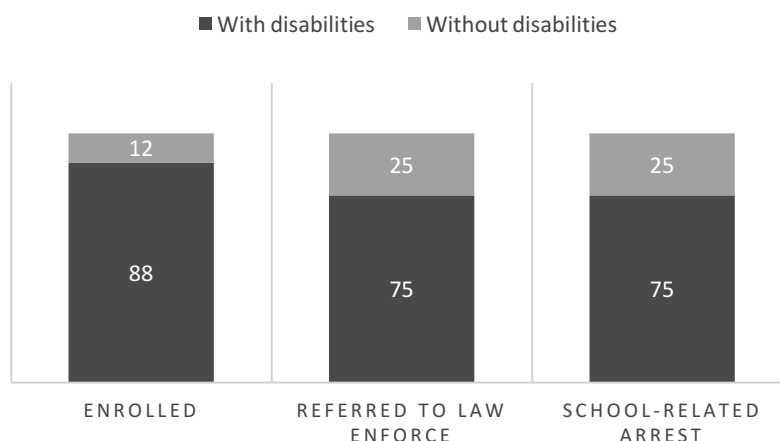
202. Vanderhaar et al., *supra* note 142, at 12–13.

203. *Id.*

f. Students with disabilities are disproportionately referred to law enforcement or subject to school-related arrest and incarceration

Special education students are 25% of students referred to law enforcement, and 25% of those subject to school-related arrest, over twice their representation in the student population.²⁰⁴

Figure 25. CRDC Discipline, % Special Education Students Referred to Law Enforcement & Subject to School-related Arrest²⁰⁵



Not surprisingly, we have long known that students with disabilities are disproportionately represented in the correctional system.²⁰⁶ It is estimated that 65% the youth in juvenile or adult criminal justice systems meet the criteria for disability.²⁰⁷ Almost

204. U.S. DEP'T OF EDUC. OFF. FOR CIVIL RIGHTS, *supra* note 5.

205. *Id.* at 7.

206. ROBERT B. RUTHERFORD JR. ET AL., YOUTH WITH DISABILITIES IN THE CORRECTIONAL SYSTEM: PREVALENCE RATES AND IDENTIFICATION ISSUES 19 (2002), <http://cecp.air.org/juvenilejustice/docs/Youth%20with%20Disabilities.pdf> (last visited Nov. 8, 2016) (discussing disproportionality and difficulty in identification in incarcerated settings); *see also* SUE BURRELL & LOREN WARBOYS, U.S. DEP'T OF JUST., OFF. OF JUV. JUST. AND DELINQUENCY PROGRAMS, SPECIAL EDUCATION AND THE JUVENILE JUSTICE SYSTEM (2000), <https://www.ncjrs.gov/pdffiles1/ojdp/179359.pdf> (reporting data and reviewing IDEA requirements).

207. NAT'L DISABILITIES RIGHTS NETWORK, *supra* note 27, at 7; Elizabeth Cate, *Teach Your Children Well: Proposed Challenges to Inadequacies of Correctional Special Education for Juvenile Inmates*, 34 N.Y.U. REV. L. & SOC.

1 in 3 of young people who are incarcerated are identified as having or needing special education.²⁰⁸ These students are incarcerated at rates four times higher than young people attending regular schools.²⁰⁹

The 2005 report under the auspices of the Coordinating Council on Juvenile Justice and Delinquency Prevention showed that most of the students who are incarcerated are categorized as “emotionally disturbed” (47.7%); the next highest category is “specific learning disability” (38.6%), then “mental retardation” (9.7%), followed by “other health impaired” (2.9%) and “multiple disabilities” (0.8%).²¹⁰ Although their numbers are significant and disproportionate, the education provided to these students is limited at best.²¹¹

CHANGE 1, 10, 53 (2010) (noting that the rate of juvenile offenders qualifying for special education services almost quadruples the rate among students in the same age range nationally).

208. LOCKED OUT, *supra* note 76, at 1; *see also* THE NAT’L EVALUATION AND TECH. ASSISTANCE CTR. FOR THE EDUC. OF CHILDREN AND YOUTH WHO ARE NEGLECTED, DELINQUENT, OR AT-RISK, FACT SHEET 1 (2014), http://www.neglected-delinquent.org/sites/default/files/NDTAC_Special_Ed_FS_508.pdf.

209. LOCKED OUT, *supra* note 76, at 1.

210. Mary Magee Quinn et al., *Youth with Disabilities in Juvenile Corrections: A National Survey*, 71 EXCEPTIONAL CHILD. 339, 342 (2005).

211. PETER LEONE & LOIS WEINBERG, ADDRESSING THE UNMET EDUCATIONAL NEEDS OF CHILDREN AND YOUTH IN THE JUVENILE JUSTICE AND CHILD WELFARE SYSTEMS 1 (2012), http://cjjr.georgetown.edu/wp-content/uploads/2015/03/EducationalNeedsOfChildrenandYouth_May2010.pdf; *see also* ANGELINA INESIA-FORDE, THE PRESENCE OF LEARNING DISABLED YOUTH IN OUR JUVENILE INSTITUTIONS (May 2005) (unpublished graduate thesis, The University of Tennessee, Chattanooga), <https://www.ncjrs.gov/pdffiles1/nij/grants/213894.pdf>; LOCKED OUT, *supra* note 76, at 12–13 (suggesting steps to improve educational experiences for incarcerated and transitional youths).

g. Students with disabilities are disproportionately bullied and victimized

Like students of color, students with disabilities are highly likely to be bullied or victimized, both by other students and by teachers;²¹² and they suffer the related psychological distress.²¹³

3. Similar disproportionalities and difficulties impact LGBTQ and GNC young people

Data on Lesbian, Gay, Bisexual, Transgender, Questioning (LGBTQ) and Gender Nonconforming (GNC) students is more difficult to cumulate than data on other groups,²¹⁴ but the data available shows that they suffer many of the same negative distinctions as other groups reviewed in this report, if not more.²¹⁵ They also are likely to suffer the compounding problem that occurs when they are part of two such groups.²¹⁶

212. Michael T. Hartley et al., *Comparative Study of Bullying Victimization Among Students in General and Special Education*, 81 EXCEPTIONAL CHILD. 176, 187 (2015) (reporting that “adult [teachers and staff] were more likely to verbally, relationally, and physically bully students with disabilities,” according to student self-reports); *see also* DEAR COLLEAGUE LETTER, *supra* note 4 (discussing the impact of race-based discrimination in schools).

213. Hartley et al., *supra* note 212, at 189.

214. JASON CIANCOTTO & SEAN CAHILL, LGBT YOUTH IN AMERICA’S SCHOOLS 9–11 (2012); ADVANCEMENT PROJECT, POWER IN PARTNERSHIPS: BUILDING CONNECTIONS AT THE INTERSECTIONS OF RACIAL JUSTICE AND LGBTQ MOVEMENTS TO END THE SCHOOL-TO-PRISON PIPELINE 4 (2015) [hereinafter ADVANCEMENT POWER], http://b3cdn.net/advancement/85066c4a18d249e72b_r23m68j37.pdf.

215. JOSEPH G. KOSCIW ET AL., GAY, LESBIAN & STRAIGHT EDUC. NETWORK (“GLSEN”), THE 2013 NATIONAL SCHOOL CLIMATE SURVEY: THE EXPERIENCES OF LESBIAN, GAY, BISEXUAL AND TRANSGENDER YOUTH IN OUR NATION’S SCHOOLS 23–24 (2014), http://www.glsen.org/sites/default/files/2013%20National%20School%20Climate%20Survey%20Full%20Report_0.pdf.

216. CIANCOTTO & CAHILL, *supra* note 214, at 21–22 (discussing tricultural experience). *See generally* M. SOMJEN FRAZER & HARLAN PRUDEN, RECLAIMING OUR VOICES: TWO SPIRIT HEALTH & HUMAN SERVICE NEEDS IN NEW YORK STATE (2010), http://www.health.ny.gov/diseases/aids/providers/reports/native_people/docs/reclaiming_our_voices.pdf (discussing Native and LGBT health issues).

a. LGBTQ youth suffer in a disproportionately difficult school climate

LGBTQ and GNC youth are subject to hostile school climates with attendant negative consequences.²¹⁷ As the Gay, Lesbian & Straight Education Network (GLESN) explains, “Schools nationwide are hostile environments for a distressing number of LGBTQ students, the overwhelming majority of whom routinely hear anti-LGBTQ language and experience victimization and discrimination at school.”²¹⁸ Because of their sexual orientation or gender expression, these students do not feel safe at school,²¹⁹ where they are more often victimized and often blamed even while they are victims.²²⁰ These students are far less likely to find support for stopping the harassing or assaultive behavior.²²¹ As one student put it, “The time I did report, the process of being heard was more demeaning than the harassment.”²²² Another student observed, “Almost all of the time, I would end up being the one in trouble because it’s ‘my fault for drawing negative attention to myself.’”²²³

As GLESN reports, in these conditions, LGBTQ students are far more likely to miss school or avoid certain parts of the

217. See PRESTON MITCHUM & AISHA C. MOODIE-MILLS, CTR. FOR AM. PROGRESS, BEYOND BULLYING: HOW HOSTILE SCHOOL CLIMATE PERPETUATES THE SCHOOL-TO-PRISON PIPELINE FOR LGBT YOUTH 1 (2014), <https://cdn.americanprogress.org/wp-content/uploads/2014/02/BeyondBullying.pdf>.

218. KOSCIW ET AL., *supra* note 215, at xvi.

219. *Id.*, at 12 (summarizing that 55.5% reported feeling unsafe because of their sexual orientation, 38.7% because gender expression, and 20.0% because of their academic achievement).

220. BURDGE, HYEMINGWAY, & LICONA, *supra* note 150, at 6; ADVANCEMENT POWER, *supra* note 214, at 4 (“Phrases like ‘if they’d just pull up their pants,’ and ‘if they didn’t flaunt it’ reemphasize the culture of victim blaming when it comes to school discipline. Instead of responding in respectful and culturally competent ways, administrators penalize young people for this minor misbehavior.”).

221. See KOSCIW ET AL., *supra* note 215, at 27–35 (describing reasons why such students do not report harassment, as well as their emotional experiences of that harassment).

222. *Id.* at 33.

223. *Id.* at 32.

school facilities or activities.²²⁴ They are also more likely to have lower GPAs, lower expectations for post-secondary education, lower levels of self-esteem, and higher levels of depression.²²⁵

b. LGBTQ and GNC youth are disciplined more severely in school and juvenile justice

Recognizing that LGBTQ juveniles have higher health risks, a longitudinal study published in Journal of the American Academy of Pediatrics found that, controlling for other variables, non-heterosexual youth were disproportionately subject to sanctions including school expulsion, police stops and arrests, and juvenile convictions, with girls more likely to suffer these differences than boys.²²⁶

LGBTQ young people who are also students of color are also harshly penalized.²²⁷ Treated unfairly, these young people “learn to mistrust not just school police, but all school administration and staff.”²²⁸

4. These same disproportionalities experienced in school plague the juvenile justice system

Students enter and stay in the juvenile justice system following a variety of paths.²²⁹

224. KOSCIW ET AL., *supra* note 215, at xvi.

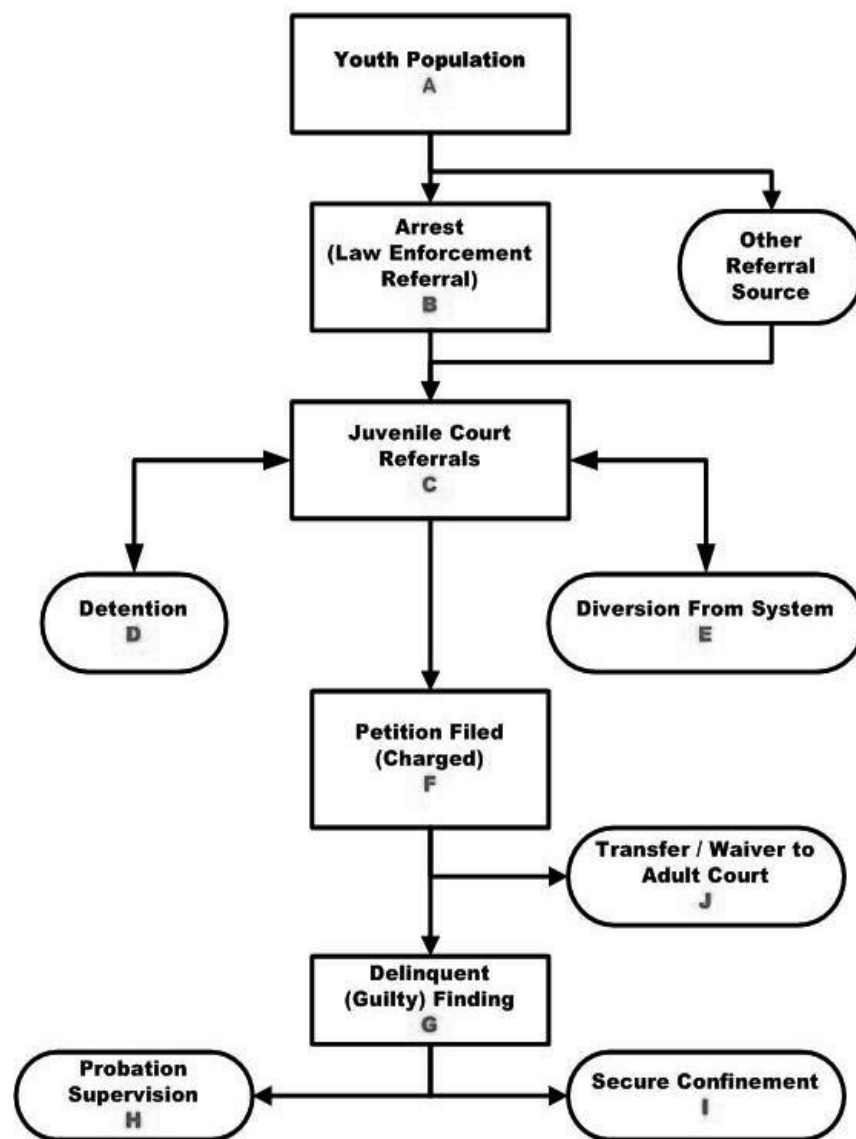
225. *Id.*, at xviii.

226. Kathryn E. W. Himmelstein & Hannah Brückner, *Criminal-Justice and School Sanctions against Nonheterosexual Youth*, 127 PEDIATRICS 49, 49 (2011); BURDGE, HYEMINGWAY, & LICONA, *supra* note 150, at 4.

227. See ADVANCEMENT POWER, *supra* note 214, at 4 (noting the similar negative impacts of harsher discipline for both groups).

228. *Id.* (noting the lack of training many officers receive regarding how to work with LGBTQ students).

229. See *infra* Figure 26. Contact Points Juvenile Justice.

Figure 26. Contact Points Juvenile Justice²³⁰

230. WILLIAM FEYERHERM ET AL., U.S. DEP'T OF JUSTICE, OFFICE OF JUVENILE JUSTICE & DELINQUENCY PREVENTION, DISPROPORTIONATE MINORITY CONTACT TECHNICAL ASSISTANCE MANUAL 1-5 fig.1 (4th ed. 2009), http://www.ojjdp.gov/compliance/dmc_ta_manual.pdf.

While the numbers of young people detained have declined, the numbers of students who find themselves in court—juvenile courts and municipal or justice courts with authority to impose criminal sanctions—because of behavior at school has dramatically increased.²³¹ The Juvenile Section of the Texas bar writing in 2010 described this as a “paradigm shift” where student behavior that previously resulted in “trips to the principal’s office, corporal punishment, or extra laps under the supervision of a middle school or high school coach,” now result in criminal prosecution and records for children ages 10 through 16.²³² On any given day, some 20,000 young people are in juvenile detention centers;²³³ 54,000 in youth prisons or other confinement;²³⁴ 4,200 in adult jails,²³⁵ and 1,200 in adult prisons.²³⁶ Eighty-seven percent of these young people are incarcerated for nonviolent offenses, and the “majority (66 percent) were youth of color.”²³⁷ These young people are all too often mistreated and increasingly abused.²³⁸

231. See, e.g., Christopher A. Mallett, *The School-to-Prison Pipeline: A Critical Review of the Punitive Paradigm Shift*, 33 CHILD ADOLESCENT SOC. WORK J. 15, 16 (2015) (describing changing attitudes in disciplinary methods over the last several decades in schools and courts).

232. Ryan Kellus Turner & Mark Goodner, *Passing the Paddle: Nondisclosure of Children’s Criminal Cases*, 24 JUV. L. 13, 13 (2010).

233. MENDEL, *supra* note 58 at 2.

234. OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION, THE NUMBER OF JUVENILES IN RESIDENTIAL PLACEMENT CONTINUED TO DECLINE IN 2013, http://www.ojjdp.gov/ojstatbb/snapshots/DataSnapshot_CJRP2013.pdf.

235. BUREAU OF JUSTICE STATISTICS, JAIL INMATES AT MIDYEAR 2014 3 (2014), <http://www.bjs.gov/content/pub/pdf/jim14.pdf>.

236. BUREAU OF JUSTICE STATISTICS, PRISONERS IN 2013 19 (2013), <http://www.bjs.gov/content/pub/pdf/p13.pdf>.

237. *Unbalanced Juvenile Justice*, THE W. HAYWOOD BURNS INST., <http://data.burnsinstitute.org/about> (last visited Nov. 12, 2016) (providing data sets for state by state comparative analysis at various juvenile justice decision points); see *supra* Figure 7. Discipline Disproportionality Girls, Figure 23. Special Education by Discretionary Category & Figure 24. Special Ed, Education Environment by Race & Ethnicity; see also SOUTH DAKOTA JUVENILE JUSTICE REINVESTMENT INITIATIVE WORK GROUP, FINAL REPORT 1–2 (2014), http://jjri.sd.gov/docs/JJRI%20WG%20Report_Final.pdf (reporting similarly for youth in South Dakota).

238. THE ANNIE E. CASEY FOUND., MALTREATMENT OF YOUTH IN U.S. JUVENILE CORRECTIONAL FACILITIES 2 (2015), <http://www.aecf.org/m-re-sourcedoc/aecf-maltreatmentyouthuscorrections-2015.pdf>; THE ANNIE E. CASEY

“With few exceptions, data consistently show that youth of color have been overrepresented at every stage of the juvenile justice system.”²³⁹ Specific groups in specific situations show particular disproportionalities. For example, while Native American youth are not generally disproportionately arrested, in South Dakota they are very much so, 9% of the population and 40% of the arrests.²⁴⁰ Overall, minority youth are disproportionately represented in this system.²⁴¹ As the recent National Academy of Science report on *Reforming Juvenile Justice* summarized: “There is evidence that

FOUND., NO PLACE FOR KIDS (2011), <http://www.aecf.org/m/resourcedoc/aecf-NoPlaceForKidsFullReport-2011.pdf>; see, e.g., Jennifer Gonnerman, *Kalief Browder: 1993-2015*, NEW YORKER (June 7, 2015), <http://www.newyorker.com/news/news-desk/kalief-browder-1993-2015>; Jennifer Gonnerman, *Before the Law*, NEW YORKER (Oct. 6, 2014), <http://www.newyorker.com/magazine/2014/10/06/before-the-law> (cataloguing the story of Kalief Browder, arrested for stealing a backup, incarcerated at Rikers); Bruce Selcraig, *Camp Fear*, MOTHER JONES, Nov./Dec. 2000, <http://www.motherjones.com/politics/2000/11/camp-fear> (recounting death of 14 year old Native American Gina Score in state custody in a boot camp for teenage girls). But see Christina Rose, *Lock ‘Em Up With a Hug: Native Detention Programs Connect Youth to Community*, INDIAN COUNTRY TODAY MEDIA NETWORK (Oct. 28, 2015), <http://indiancountrytodaymedianetwork.com/2015/10/28/lock-em-hug-native-detention-programs-connect-youth-community-162232>.

239. REFORMING JUVENILE JUSTICE, *supra* note 86, at 3; see *supra* Figure 23. Special Education by Discretionary Category; THE SENTENCING PROJECT, POLICY BRIEF: DISPROPORTIONATE MINORITY CONTACT 1 (2014), http://sentencingproject.org/doc/publications/jj_Disproportionate%20Minority%20Contact.pdf [hereinafter THE SENTENCING PROJECT]. See generally JJDP, *Easy Access*, *supra* note 1 (providing access to detailed information on juvenile crime and the juvenile justice system).

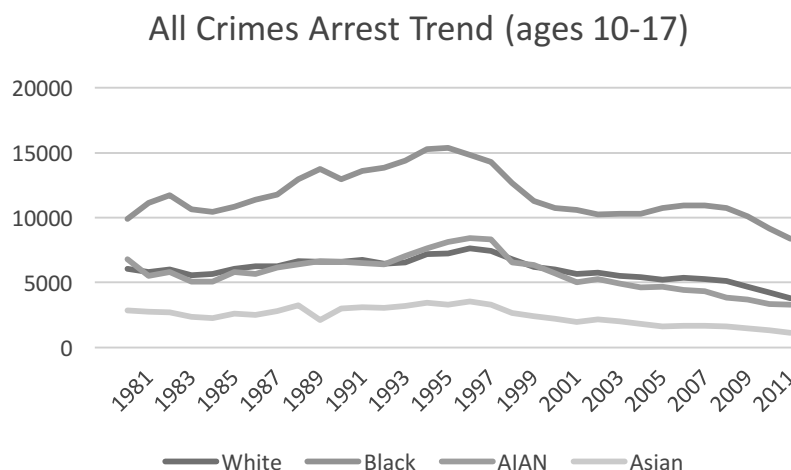
240. See Christina Rose, ‘Terrible Racial Disparities’ Not Fixed with SD Juvenile Justice Reform, INDIAN COUNTRY TODAY MEDIA NETWORK (June 24, 2015), <https://indiancountrytodaymedianetwork.com/2015/06/24/terrible-racial-disparities-not-fixed-sd-juvenile-justice-reform-160831>.

241. The Office of Juvenile Justice Delinquency Prevention lists nine points of contact in the juvenile justice system: arrest, referral, diversion (handled without formal complaint), detention, petitioned (charge filing), delinquent findings (adjudication), probation, confinement in secure correctional facilities, transferred to adult court. *Evaluation Data*, OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION, <http://www.ojjdp.gov/dmc/evaluationdata.html> (last visited Nov. 12, 2016).

‘race matters’ above and beyond the characteristics of an offense.”²⁴²

*a. Youth of color are disproportionately arrested*²⁴³

Figure 27. Juveniles Arrested by Race²⁴⁴



Arrest²⁴⁵ is the decision that is most significant to the total level of disproportionality in the juvenile justice system.²⁴⁶ While

242. REFORMING JUVENILE JUSTICE, *supra* note 86, at 3.

243. The juvenile justice literature refers to arrest as “when law enforcement agencies apprehend, stop, or otherwise contact [youth] and suspect them of having committed a delinquent act.” WILLIAM FEYERHERM ET AL., *supra* note 230, at 1–7 tbl.1. Delinquent acts are defined as acts that “if an adult commits them, would be criminal, including crimes against persons, crimes against property, drug offenses, and crimes against the public order.” WILLIAM FEYERHERM ET AL., *supra* note 230, at 1–7 tbl.1.

244. NAT’L CTR. FOR JUVENILE JUSTICE, JUVENILE ARREST RATES BY OFFENSE, SEX, AND RACE: 1980–2011 (2014), http://www.ojjdp.gov/ojstatbb/crime/excel/JAR_2011.xls (Hispanics not included in this data set).

245. WILLIAM FEYERHERM ET AL., *supra* note 230, at 1–7 tbl.1.

246. *Interpretation of the National DMC Relative Rate Indices for Juvenile Justice System Processing in 2010: Delinquency Offenses*, OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION <http://www.ojjdp.gov/ojstatbb/dmcdab/asp/offensedef.asp?offense=1> (last visited Nov. 12, 2016) [hereinafter *Delinquency Offenses*]; see OJJDP 2014 NATIONAL REPORT, *supra* note 24, at

arrest rates have declined considerably, those under eighteen still represent 12.5% of those arrested,²⁴⁷ and there is still a significant gap among juveniles of different races with African-American and American Indian rates remaining higher than White and Asian.²⁴⁸ The Office of Juvenile Justice and Delinquency Prevention (OJJDP) uses Relative Rate Indices (RRI) to describe disproportionality between treatment of White youth and those of other races;²⁴⁹ for minorities, the RRI is 1.7 at the arrest decision point showing a minority youth arrest rate 70% more than the arrest rate of White youth.²⁵⁰ The RRI for African-Americans is 2.2.

115 (“Once a juvenile is apprehended for a law violation, it is the police officer who first determines if the juvenile will move deeper into the justice system or will be diverted.”); Cynthia Conward, *There is No Justice: There is “Just Us”: A Look at Overrepresentation of Minority Youth in the Juvenile and Criminal Justice System*, 4 WHITTIER J. OF CHILD & FAM. ADVOC. 35, 44–47 (2004), http://heinonline.org/HOL/Page?handle=hein.journals/wjcfad4&div=6&g_sent=1&collection=journals (“[Youth arrest] disparit[ities] [are] most pronounced at the beginning stages of the criminal justice system.”).

247. Samantha A. Goodrich et al., *Evaluation of a Program Designed to Promote Positive Police and Youth Interactions*, 3 J. JUV. JUST. 55, 55 (2014) <http://www.journalofjuvjustice.org/JOJJ0302/JOJJ0302.pdf#page=60>; OJJDP 2014 NATIONAL REPORT, *supra* note 24, at 120, 125 (noting a decrease in juvenile arrests for violent crimes in recent years).

248. NAT’L CTR. FOR JUVENILE JUSTICE, JUVENILE ARREST RATES BY OFFENSE, SEX, AND RACE (1980-2011) (2014), http://www.ojjdp.gov/ojstatbb/crime/excel/JAR_2011.xls; *National Disproportionate Minority Contact Data-book*, OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION http://www.ojjdp.gov/ojstatbb/dmcdm/db/asp/display.asp?display_in=1 (last visited Nov. 12, 2016); *supra* Figure 24. Special Ed, Education by Race & Ethnicity. See generally, *Statistical Briefing Book*, OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION <http://www.ojjdp.gov/ojstatbb/default.asp> (last visited Nov. 12, 2016) (providing annual overview of data).

249. FEYERHERM ET AL., *supra* note 230, at 1-2, 1-3.

250. DELINQUENCY OFFENSES, *supra* note 246.

Figure 28. Relative Rates for JJ Contact²⁵¹

RELATIVE RATES	Minority	Black	AIAN*	AHPI**
Arrest	1.7	2.2	0.9	0.3
Referral	1.1	1.1	1.2	1
Diversion	0.7	0.7	0.8	0.9
Detention	1.2	1.2	1.4	1.1
Petitioned	1.2	1.2	1.1	1.1
Adjudicated	0.9	0.9	1.1	0.9
Probation	1.2	1.2	1	0.9
Placement	0.9	0.9	1	1.1
Waiver	1.2	1.2	1.3	0.4

These rates have remained essentially stable since 1990.²⁵² Recent research suggests that while the risk of arrest is generally disproportionate for African-American youth, this is particularly so in communities that are predominantly non-Black.²⁵³

Arrest is an especially worrisome point given its impact on subsequent points in the juvenile justice system.²⁵⁴ “[B]ias, either

251. See FEYERHERM ET AL., *supra* note 230.

252. See OJJDP 2014 NATIONAL REPORT, *supra* note 24, at 177–78; THE SENTENCING PROJECT, *supra* note 239, at 2.

253. Tia Stevens Andersen, *Race, Ethnicity, and Structural Variations in Youth Risk of Arrest: Evidence from a National Longitudinal Sample*, 42 CRIM. JUST. & BEHAV. 900, 910–11 (2015), <http://cjb.sagepub.com/content/42/9/900>; cf. Shaun A. Thomas et al., *The Contingent Effect of Race in Juvenile Court Detention Decisions: The Role of Racial and Symbolic Threat*, 3 RACE & JUST. 239, 258 (2012) (finding that Black youths’ risk of detention decreased when the relative size of the Black population in a community increased).

254. Akiva M. Liberman et al., *Labeling Effects of First Juvenile Arrests: Secondary Deviance and Secondary Sanctioning*, 53 CRIMINOLOGY 345, 354–57 (2014); see also Antonis Katsiyannis et al., *Juvenile Offenders with Disabilities:*

overt or covert (also known as selection bias), that is introduced by the police is very likely to affect outcomes at later stages, even if no bias occurs at later stages.”²⁵⁵ When minority youth are more likely to be arrested and formally processed than their White peers who have engaged in like behavior, then those youth will obviously “more readily accumulate offense histories and dispositions from which inferences are drawn about their character and capacity for reform”—which will influence later outcomes.²⁵⁶

b. Youth of color are disproportionately referred, detained (longer), charged, and held

Once arrested, the rate of referral to juvenile court further increases disparities. For example, for 2010, “even after controlling for possible disparities up to the arrest decision, minority youth were more likely than white youth to be referred to juvenile court for a delinquent offense.”²⁵⁷ Youth of color are then detained disproportionately: “In 2010, the likelihood of detention was greatest for [B]lack youth for all but public order offenses—American Indian and Asian youth had slightly greater proportions

Challenges and Promises, in HANDBOOK OF JUV. FORENSIC PSYCHOL. AND PSYCHIATRY 521, 525 (Elena Grigorenko ed., 2012) (“Age at first arrest has been generally found to be one of the strongest predictors of recidivism.”).

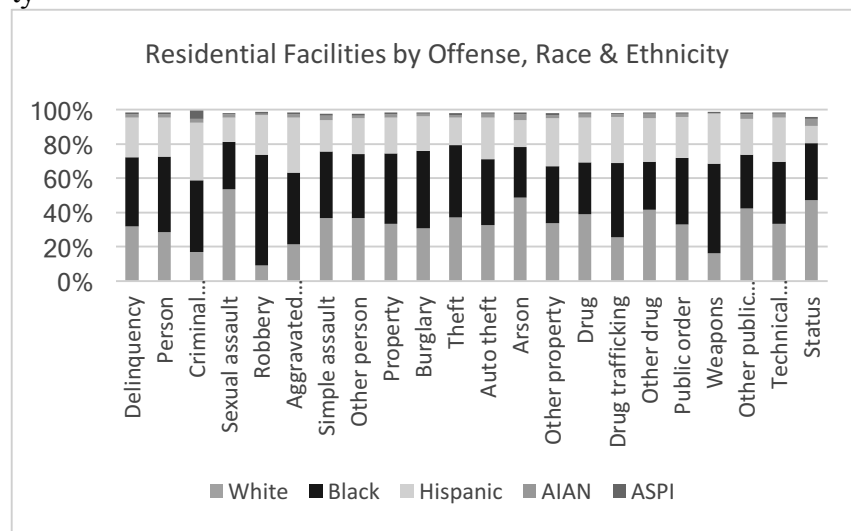
255. Leiber & Peck, *supra* note 60, at 348.

256. Leiber & Peck, *supra* note 60, at 355; Donna Bishop & Michael Leiber, *Racial and Ethnic Differences in Delinquency and Justice System Responses*, in THE OXFORD HANDBOOK OF JUV. CRIME AND JUV. JUST. 445–84 (Barry C. Feld & Donna M. Bishop eds., 2012); see Himmelstein & Brückner, *supra* note 226.

257. *Delinquency Offenses*, *supra* note 246; see also OJJDP 2014 NATIONAL REPORT, *supra* note 24, at 164 (finding racial disparities in detention constant after controlling for gender). See generally Mark Soler, *Missed Opportunity: Waiver, Race, Data, and Policy Reform*, 71 LA. L. REV. 17, 22–23 (2010) (finding that minority youth are 99% of transfers); JUVENILE JUSTICE INITIATIVE, AUTOMATIC ADULT PROSECUTION OF CHILDREN IN COOK COUNTY, ILLINOIS 2010-2012 7–8 (2014), <http://jjjustice.org/wordpress/wp-content/uploads/Automatic-Adult-Prosecution-of-Children-in-Cook-County-IL.pdf> (last visited Nov. 12, 2016); THE SENTENCING PROJECT, *supra* note 239, at 7 (noting that minority youths make up a disparate proportion of youths in confinement)..

of public order cases detained (30% and 29%, respectively) than black youth (26%).”²⁵⁸

Figure 29. Juveniles in Residential Facilities by Race & Ethnicity²⁵⁹



Once detained, minority youth are more likely to stay in the system longer than their White peers and more likely to be locked up.²⁶⁰ Some analysts have concluded that youth detention “is [the] most significant” stage of the juvenile justice process “for the rest of a young person’s life” because “[a]n adolescent who has spent

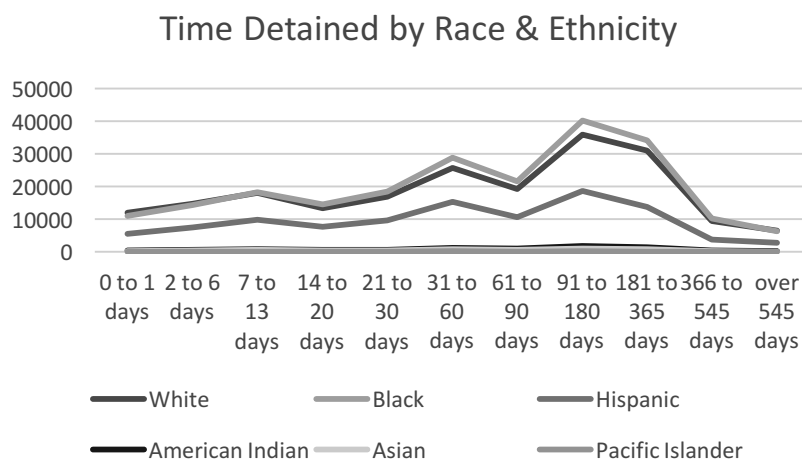
258. OJJDP 2014 NATIONAL REPORT, *supra* note 24, at 163; NAT’L COUNCIL ON CRIME AND DELINQUENCY, JUSTICE FOR SOME 2 (2007), http://www.nccdglobal.org/sites/default/files/publication_pdf/justice-for-some.pdf; *see also* Soler, *supra* note 257, at 23; Leiber & Peck, *supra* note 60, at 333; JJDP, *Easy Access*, *supra* note 1 (select “Race” and “Most Serious Offense General”; click “Show Table”). The greatest disparity exists in drug offenses, for which Black youth are two times more likely to be detained than White youth. OJJDP 2014 NATIONAL REPORT, *supra* note 24, at 164; *see supra* Figure 7. Discipline Disproportionality Girls & Figure 25. CRDS Discipline, % Special Education Students Referred to Law Enforcement & Subject to School-related Arrest.

259. *Statistical Briefing Book: Juveniles in Corrections*, OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION <http://ojjdp.gov/ojstatbb/corrections/qa08205.asp?qaDate=2011> (last visited Nov. 12, 2016).

260. *Id.*

time in secure detention is far less likely to attain a high school diploma or consistently participate in the labor force in the future.”²⁶¹

Figure 30. Time Detained by Race & Ethnicity²⁶²



Massachusetts data is illustrative at the state level. Although the number of detained/committed youth has decreased, minority youth remain disproportionately represented in the system. Minority youth who represent about 20% of the juvenile population are “nearly 60% of the young people securely detained after arraignment and before adjudication, and 60% of those committed to the Commonwealth’s Department of Youth Services (DYS) after an adjudication of delinquency.”²⁶³

261. THE SENTENCING PROJECT, *supra* note 239, at 7 (citing J.H. Keeley, *Will Adjudicated Youth Return to School After Residential Placement? Results of a Predictive Variable Study*, J. CORRECT. EDUC. 57, 65–85 (2006)); see also BARRY HOLMAN & JASON ZIEDENBERG, *THE DANGERS OF DETENTION 2* (2006), http://www.justicepolicy.org/images/upload/06-11_rep_dangersofdetention_jj.pdf.

262. JJDP, *Easy Access*, *supra* note 1 (select “Days Since Admission” and “Race”; click “Show Table”).

263. ROBIN L. DAHLBERG, AM. CIVIL LIBERTIES UNION, *LOCKING UP OUR CHILDREN: THE SECURE DETENTION OF MASSACHUSETTS YOUTH AFTER ARRAIGNMENT AND BEFORE ADJUDICATION 5* (2008), <https://aclum.org/app/uploads/2015/06/reports-locking-up-our-children.pdf>.

Once in the system, there are various disproportionalities. Black youth have been found to be “more likely than white youth or youth of other races to receive formal delinquency petitions, although they were less likely to be adjudicated delinquent.”²⁶⁴ However, “Black youth [are] more likely than White youth to be prosecuted for serious crimes.”²⁶⁵ Then they are disproportionately confined as compared to being placed on probation²⁶⁶ and more likely to be transferred to adult facilities for detention.²⁶⁷

c. Youth with disabilities show the same disproportionalities and experiences in juvenile justice as well

Statistics on disabled youth in the juvenile justice system are less precise than data disaggregated by race, ethnicity, class, and other demographic categories because not all studies define disability in the same way,²⁶⁸ and few jurisdictions maintain con-

264. Emily R. Cabaniss et al., *Reducing Disproportionate Minority Contact in the Juvenile Justice System: Promising Practices*, 12 AGGRESSION & VIOLENT BEHAV. 393, 394 (2007); see also OJJDP 2014 NATIONAL REPORT, *supra* note 24, at 167 (“Black youth were less likely to be adjudicated [delinquent] than were youth of other races.”).

265. David E. Barrett & Antonis Katsiyannis, *Juvenile Delinquency Recidivism: Are Black and White Youth Vulnerable to the Same Risk Factors?*, 40 BEHAV. DISORDERS 184, 184 (2015).

266. OJJDP 2014 NATIONAL REPORT, *supra* note 24, at 169; SARAH HOCKENBERRY, OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION, JUVENILE IN RESIDENTIAL PLACEMENT, 2011 1 (2014), <http://www.ojjdp.gov/pubs/246826.pdf>; see also Cabaniss et al., *supra* note 264, at 394; Barrett & Katsiyannis, *supra* note 265, at 184–85.

267. Barrett & Katsiyannis, *supra* note 265, at 184; see also BENJAMIN ADAMS & SEAN ADDIE, OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PROGRAMS, OJJDP FACT SHEET: DELINQUENCY CASES WAIVED TO CRIMINAL COURT, 2008 4 (2011), <http://www.ojjdp.gov/pubs/236481.pdf> (“Racial differences in case waivers stem primarily from differences in person and drug offense cases.”).

268. CHRISTOPHER A. MALLETT, NAT’L COUNCIL OF JUVENILE & FAMILY COURT JUDGES, SEVEN THINGS JUVENILE COURTS SHOULD KNOW ABOUT LEARNING DISABILITIES 5 (2011) [hereinafter SEVEN THINGS]; Connie L. Kvarfordt et al., *Youth with Learning Disabilities in the Juvenile Justice System: A Training Needs Assessment of Detention and Courts Services Personnel*, 34 CHILD & YOUTH CARE FORUM 27, 28 (2005); Christopher A. Mallett, *Youthful Offending and Delinquency: The Comorbid Treatment of Maltreatment, Mental*

sistent and comprehensive databases regarding youth with disabilities being processed through the system.²⁶⁹ However, there is wide agreement that disabled youth are overrepresented in the juvenile justice system, especially with regard to detention.²⁷⁰ Estimates of the percentage of incarcerated youth offenders with learning disabilities range from 28-50%,²⁷¹ although disabled youth make up only 4-9% of the adolescent population.²⁷²

Health Problems, and Learning Disabilities, 31 CHILD & ADOLESCENT SOCIAL WORK J. 369, 375 (2014) [hereinafter *Youthful Offending*] (“A lack of consistent definitions across systems that address some of the special education disability impairments of at-risk children and adolescents further complicates an already difficult situation.”); see Julie C. Duvall & Richard J. Morris, *Assessing Mental Retardation in Death Penalty Cases: Critical Issues for Psychology and Psychological Practice*, 37 PROF. PSYCHOL.: RES. & PRAC. 658, 664 (2006), <http://www.iapsych.com/iqmr/duvall2006.pdf> (noting that definitions vary by state and within the same field of practice).

269. NAT’L COUNCIL ON DISABILITY, ADDRESSING THE NEEDS OF YOUTH WITH DISABILITIES IN THE JUVENILE JUSTICE SYSTEM: THE CURRENT STATUS OF EVIDENCE-BASED RESEARCH 49 (2003), https://www.ncd.gov/rawmedia_repository/381fe89a_6565_446b_ba18_bad024a59476.pdf.

270. DANIEL P. MEARS & LAUDAN Y. ARON, URBAN INST., ADDRESSING THE NEEDS OF YOUTH WITH DISABILITIES IN THE JUVENILE JUSTICE SYSTEM: THE CURRENT STATE OF KNOWLEDGE v (2003), <http://www.urban.org/sites/default/files/alfresco/publication-pdfs/410885-Addressing-the-Needs-of-Youth-with-Disabilities-in-the-Juvenile-Justice-System.PDF> (noting that despite a lack of empirical support for some aspects of disabled juveniles’ interactions with the justice system, “research consistently suggests that youth with disabilities are overrepresented in [long-term] correctional settings”).

271. SEVEN THINGS, *supra* note 268, at 5 (estimating 28-43%); David E. Barrett et al., *Delinquency and Recidivism: A Multicohort, Matched-Control Study of the Role of Early Adverse Experiences, Mental Health Problems, and Disabilities*, 22 J. EMOTIONAL & BEHAV. DISORDERS 3, 4 (2014) (estimating that 30-50% of incarcerated youth have “documented disabilities”); Kvarfordt et al., *supra* note 268, at 28 (estimating 35.6-46% with learning disabilities); *Youthful Offending*, *supra* note 268, at 372 (estimating 28-45% with special education disabilities). But see Antonis Katsiyannis et al., *Juvenile Offenders with Disabilities: Challenges and Promises*, in HANDBOOK OF JUV. FORENSIC PSYCHOL. AND PSYCHIATRY 521, 521 (2012), (stating in prevalence of disabilities among incarcerated youth may be “as high as 90%”).

272. *Youthful Offending*, *supra* note 268, at 372; see also Christopher A. Mallett, *The ‘Learning Disabilities to Juvenile Detention’ Pipeline: A Case Study*, 36 CHILD. & SCHS. 147, 147 (2014) [hereinafter *Learning Disabilities*]

Recent studies have shown that disabilities are predictive both of delinquency and of recidivism.²⁷³ Research focusing on arrest rates for minors with serious emotional disabilities shows a predictably broad range, reported by one researcher as 21–58%.²⁷⁴ Beyond the initial offense, there is more substantial evidence that juveniles with learning disabilities are at greater risk of recidivism and may face difficulty reentering a school environment in which they are already at a disadvantage.²⁷⁵ The precise causes of this higher rate of recidivism, however, represent an unresolved topic of scholarly debate.²⁷⁶

The intersection between race and disability in juvenile justice has not been extensively researched. However, a recent study examining the combination of race and disability as a predictor of recidivism found that disability status increases the likelihood of repeat offending for both Black and White adolescents.²⁷⁷ Interestingly, a mental health diagnosis (but not a learning disability) “relating to aggression or impulse control” was the strongest predictor of recidivism for both groups, but a school-classified learning disability increased the risk for Black youth more than for White youth.²⁷⁸

273. See e.g., Barrett et al., *supra* note 271, at 10; *Learning Disabilities*, *supra* note 272, at 149–50; see Barrett & Katsiyannis, *supra* note 265, at 190; Katsiyannis et al., *supra* note 271, at 525–26.

274. Maryann Davis, *Arrest Patterns into Adulthood of Adolescents with Serious Emotional Disability*, in 14TH ANNUAL CONFERENCE PROCEEDINGS: A SYSTEM OF CARE FOR CHILDREN’S MENTAL HEALTH: EXPANDING THE RESEARCH BASE 150 (2001), <https://www.gpo.gov/fdsys/pkg/ERIC-ED465248/pdf/ERIC-ED465248.pdf>.

275. See HOLMAN & ZIEDENBERG, *supra* note 261, at 2, 9; Katsiyannis et al., *supra* note 271, at 525–26; *Learning Disabilities*, *supra* note 272, at 148 (“[M]any detained adolescents with learning disabilities fail to return to school.”).

276. See Barrett et al., *supra* note 271, at 4; *Learning Disabilities*, *supra* note 272, at 148–49.

277. Barrett & Katsiyannis, *supra* note 265, at 190.

278. *Id.* at 190–91.

d. LGBTQ youth are also disproportionately represented in juvenile settings

While LGBTQ youth are thought to be about 7% of the overall youth population,²⁷⁹ they represent 13–15% of those in the juvenile justice system.²⁸⁰ Consistent with this, youths who have self-identified have been significantly more likely to be stopped by police than their peers identifying as heterosexual.²⁸¹ They are twice as likely to be detained and held in secure facilities for “truancy, warrants, probation violations, running away, and prostitution” compared with their heterosexual and gender-normative peers, though they are on a par for more violent offenses.²⁸² While youth who do continue with education in juvenile justice are less likely to be recidivists, education within juvenile justice settings is lacking.²⁸³ It is difficult to return to school for youths coming from alternative schools or juvenile justice settings.²⁸⁴

279. See ROBERT P. JONES & DANIEL COX, PUB. RELIGION RESEARCH INST., HOW RACE AND RELIGION SHAPE MILLENNIAL ATTITUDES ON SEXUAL AND REPRODUCTIVE HEALTH 46, <http://publicreligion.org/site/wp-content/uploads/2015/03/PRRI-Millennials-Web-FINAL.pdf> (finding this percent among 18-35 year olds and also finding that “[t]here are no significant differences across races in LGBT identity, but there are modest religious and political differences.”).

280. DEV. SERVS. GRP., OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION, LGBTQ YOUTHS IN THE JUVENILE JUSTICE SYSTEM 2 (2014), <http://www.ojjdp.gov/mpg/litreviews/LGBTQYouthsInTheJuvenileJusticeSystem.pdf>; KATAYOON MAJD ET AL., THE EQUITY PROJECT, HIDDEN INJUSTICE: LESBIAN, GAY, BISEXUAL, AND TRANSGENDER YOUTH IN JUVENILE COURTS 1–2 (2009), http://web.archive.org/web/20160401085258/http://www.equityproject.org/wp-content/uploads/2014/08/hidden_injustice.pdf.

281. Himmelstein & Brückner, *supra* note 226.

282. Angela Irvine, “We’ve Had Three of Them”: Addressing the Invisibility of Lesbian, Gay, Bisexual and Gender Non-conforming Youths in the Juvenile Justice System, 19 COLUM. J. GENDER & L. 675, 689 (2010).

283. NELLIS, *supra* note 91, at 67.

284. See, e.g., Elizabeth Lamura, *Our Children, Ourselves: Ensuring the Education of America’s At-Risk Youth*, 31 BUFF. PUB. INT. L.J. 117, 150-154 (2013) (discussing difficulty at reentry).

II. SOCIETAL CONSEQUENCES FOR IMPRISONING YOUTH

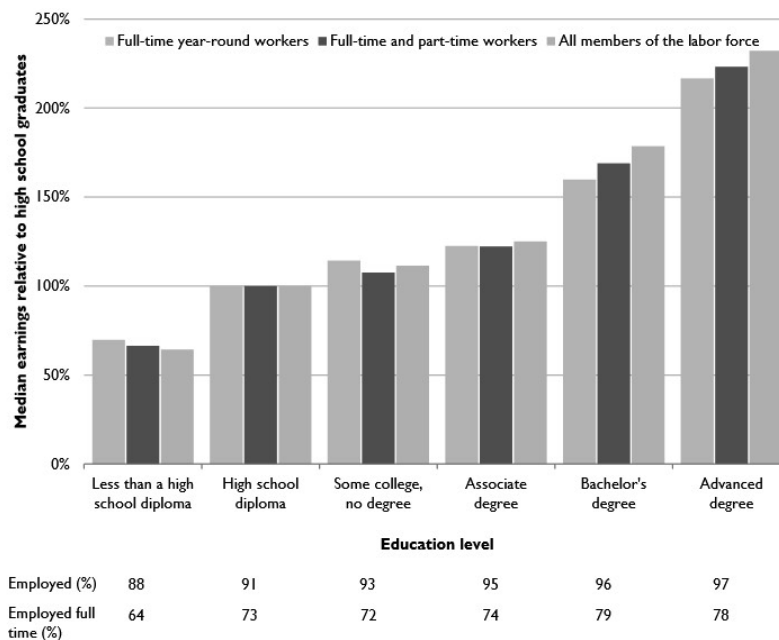
[T]he total exclusion from the education process for more than a trivial period . . . is a serious event in the life of the suspended child. Neither the property interest in educational benefits temporarily denied nor the liberty interest in reputation, which is also implicated, is so insubstantial that suspensions may constitutionally be imposed by any procedure the school chooses²⁸⁵

The costs of maintaining the status quo are extraordinarily high for individual students, their families, their communities, and the economy as a whole. Individuals in the school-to-prison-pipeline lose the chance for educational achievement and related life opportunities.

285. Goss v. Lopez, 419 U.S. 565, 576 (1975).

Figure 31. Earnings by Status²⁸⁶

Figure 1. Median Earnings of Individuals Ages 25 and Older Relative to High School Graduates, by Work Experience and Level of Educational Attainment, 2012



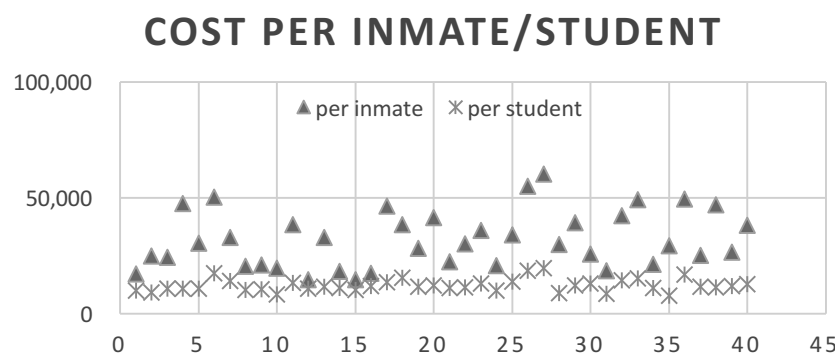
They are lost to the workforce and costly.²⁸⁷ Estimates vary on exactly how costly, depending on what is being counted, e.g., dropout v. juvenile detainee, but by all accounts they are staggering in terms of lost wages and taxes and extra medical, increased crime-related expenditures, and other costs:

286. SANDY BAUM, URBAN INST., HIGHER EDUC. EARNINGS PREMIUM: VALUE, VARIATION, AND TRENDS 2, tbl.1 (2014).

287. See *The Graduation Effect: The Economic Impact of a High School Diploma*, ALL. FOR EXCELLENT EDUC. (Dec. 15, 2015), <http://all4ed.org/webinar-event/dec-15-2015-2/> (“Nationally, increasing the high school graduation rate to 90 percent for just one high school class – the class of 2013 for instance, or now 2015 – increasing the high school graduation rate to 90 percent for just one class would create more than 65,000 jobs.”); see also *U.S. Graduation Rate, Unemployment Compared to Other Nations in Infographic*, HUFFINGTON POST (June 26, 2012, 3:31 PM), http://www.huffingtonpost.com/2012/06/26/infographic-shows-how-us-_n_1628187.html.

The Center for Labor Market Studies estimates the social and economic costs of dropouts as a consequence of lower earning power and job opportunities, unemployment, incarceration, and government assistance. High school dropouts are estimated to earn \$400,000 less than high school graduates across their working lives. The lifetime earning loss for males can exceed \$500,000. In addition, because of lower lifetime earnings, dropouts contribute far less in federal, state, and local taxes than they receive in cash benefits, in-kind transfer costs, and incarceration costs as compared to typical high school graduates.²⁸⁸

Figure 32. Annual Costs per Inmate/Student²⁸⁹



288. OJJDP 2014 NATIONAL REPORT, *supra* note 24, at 15; *see also* HENRY LEVIN ET AL., THE COSTS AND BENEFITS OF AN EXCELLENT EDUCATION FOR ALL OF AMERICA'S CHILDREN 18 (2006), http://www3.nd.edu/~jwarlick/documents/Levin_Belfield_Muennig_Rouse.pdf ("The fiscal consequence is \$148 billion in lost tax revenues and additional public expenditures over the lifetime.").

289. *See* Christian HENRICHSON & RUTH DELANEY, VERA INST. OF JUSTICE, THE PRICE OF PRISONS: WHAT INCARCERATION COSTS TAXPAYERS 10 fig.4 (2012), http://www.vera.org/sites/default/files/resources/downloads/Price_of_Prisons_updated_version_072512.pdf; *Total and Current Expenditures Per Pupil in Fall Enrollment in Public Elementary and Secondary Education, by Function and State or Jurisdiction: 2009–10*, NAT'L CTR. FOR EDUC. STATS. tbl.215, http://nces.ed.gov/programs/digest/d12/tables/dt12_215.asp (last visited Oct. 25, 2016).

In contrast, students who do not drop out and who are not incarcerated,²⁹⁰ but continue their education and graduate from high school and beyond are more likely to be employed and enjoy more earning power over their lifetimes.²⁹¹ Empirical research demonstrates that they suffer additional long-term detrimental effects, including reinforcement of violent attitudes and behaviors²⁹² and heightened mental health concerns.²⁹³ They are “more likely than their peers who graduate to be unemployed, living in poverty, receiving public assistance, in prison, on death row, unhealthy, divorced, and ultimately single parents with children who drop out from high school themselves.”²⁹⁴

290. See HOLMAN & ZIEDENBERG, *supra* note 261 (explaining that formerly detained youth have less success finding employment). It is also important to recognize that once incarcerated, juveniles often do not have access to adequate education services or, worse, cannot complete their education and develop career skills to obtain employment once released. See Peter E. Leone, *Doing Things Differently: Education as a Vehicle for Youth Transformation and Finland as a Model for Juvenile Justice Reform*, in A NEW JUVENILE JUSTICE SYSTEM: TOTAL REFORM FOR A BROKEN SYSTEM 86, 91 (Nancy E. Dowd ed., 2015).

291. PEW RESEARCH CTR., THE RISING COST OF NOT GOING TO COLLEGE 6 (2014), <http://www.pewsocialtrends.org/files/2014/02/SDT-higher-ed-FINAL-02-11-2014.pdf>. (“For example, among those ages 25 to 32, fully 22% with only a high school diploma are living in poverty, compared with 6% of today’s college-educated young adults. In contrast, only 7% of Baby Boomers who had only a high school diploma were in poverty in 1979 when they were in their late 20s and early 30s.”).

292. See Hobbs et al., *supra* note 75, at 81; Mark J. Van Ryzin & Thomas J. Dishion, *From Antisocial Behavior to Violence: A Model for the Amplifying Role of Coercive Joining in Adolescent Friendships*, 54 J. OF CHILD PSYCH. 661, 661 (2013) (finding that coercive friendships at age 16–17 predicted early-adulthood violent behavior).

293. HOLMAN & ZIEDENBERG, *supra* note 261, at 8; Javid H. Kashani et al., *Depression Among Incarcerated Delinquents*, 3 PSYCH. RES. 185, 190–91 (1980) (demonstrating that mental health issues such as depression increased among incarcerated youth); Christopher B. Forrest et al., *The Health Profile of Incarcerated Male Youths*, 105 PEDIATRICS 286, 288–89 (2000) (finding that incarcerated males suffered from significant mental health concerns).

294. THE SILENT EPIDEMIC, *supra* note 42, at 2 (citation omitted); see also DON BEZRUKI, DAVID VARANA, AND CHERRY HILL, AN EVALUATION: SECURE JUVENILE DETENTION 4 (1999) (finding that detaining youth does not deter most juveniles and does not reduce the likelihood of recidivism); THE CAMPAIGN FOR EDUC. EQUITY & TEACHERS COLL., COLUMBIA UNIV., THE SOCIAL COSTS OF

In this context, some have described increasing the high school graduation rate as the nation's best economic *stimulus*.²⁹⁵ As the Alliance for Excellent Education summarizes:

Lower local, state, and national tax revenues are the most obvious consequences of higher dropout rates; even when dropouts are employed, they earn, on average, \$8,000 less annually than high school graduates and they pay less in taxes. State and local economies suffer further when they have less-educated populations, as they find it more difficult to attract new business investments. Simultaneously, these entities must spend more on social programs when they have lower educational levels.²⁹⁶

Noting that two-thirds of the U.S. economy is driven by consumer spending, some researchers point out that raising individuals' education levels will boost their purchasing power and increase the national economy.²⁹⁷

There are also more direct costs. Staying in the education pipeline and out of the prison pipeline is a huge cost savings to society.²⁹⁸ The Alliance for Excellent Education, for example, has

INADEQUATE EDUCATION (2005), http://www.tc.columbia.edu/i/a/3082_SocialCostsofinadequateeducation.pdf; HOLMAN & ZIEDENBERG, *supra* note 261, at 4; Brent B. Benda & Connie L. Tollett, *A Study of Recidivism of Serious and Persistent Offenders Among Adolescents*, 27 J. OF CRIM. JUST. 111, 119 (1999) (demonstrating that prior incarceration was a stronger predictor of recidivism than being neglected or abused by parents, gang membership, being with peers at the time the offense was committed, or carrying a weapon); *supra* Figure 31. Earnings by Status.

295. ALL. FOR EXCELLENT EDUC., INSEPARABLE IMPERATIVES: EQUITY IN EDUCATION AND THE FUTURE OF THE AMERICAN ECONOMY (2012), [hereinafter EQUITY IN EDUCATION], <http://all4ed.org/reports-factsheets/inseparable-imperatives-equity-in-education-and-the-future-of-the-american-economy/>.

296. *Economic Impacts*, *supra* note 151; see also David Leonhardt, *A Link Between Fidgety Boys and a Sputtering Economy*, N.Y. TIMES, April 29, 2014, at A3.

297. EQUITY IN EDUCATION, *supra* note 295.

298. See ALL. FOR EXCELLENT EDUC., SAVING FUTURES, SAVING DOLLARS: THE IMPACT OF EDUCATION ON CRIME REDUCTION AND EARNINGS (2013) [hereinafter SAVING FUTURES], <http://all4ed.org/wp-content/uploads/2013/09/SavingFutures.pdf>; JUSTICE POLICY INST., THE COSTS

calculated that \$18.5 billion in crime costs could be saved annually if the male high school graduation rate increased by 5 percent.²⁹⁹ More directly, juvenile detention costs are extremely high, averaging \$148,767 per juvenile per year and ranging as high as \$352,663 in the state of New York.³⁰⁰ This extraordinary expense dwarfs the amount that on average our nation spends to educate one youth per year in our public schools (\$12,296 in 2014–2015).³⁰¹ And incarceration beyond juvenile years just adds to these expenditures; for New York City, the cost of an inmate is higher than Harvard tuition.³⁰²

OF CONFINEMENT: WHY GOOD JUVENILE JUSTICE POLICIES MAKE GOOD FISCAL SENSE 2 (2009) [hereinafter COSTS OF CONFINEMENT], http://www.justicepolicy.org/images/upload/09_05_rep_costsofconfinement_jj_ps.pdf (last visited Oct. 25, 2016); see also NAT'L JUVENILE JUSTICE NETWORK & TEX. PUB. POLICY FOUND., THE COMEBACK STATES: REDUCING YOUTH INCARCERATION IN THE UNITED STATES 2 [hereinafter COMEBACK STATES], http://www.njjn.org/uploads/digital-library/Comeback-States-Report_FINAL.pdf (discussing states that have been successful in reducing confinement, California, Connecticut, Illinois, Ohio; Mississippi, New York, Texas, Washington, and Wisconsin); NAT'L JUVENILE JUSTICE NETWORK & THE TEX. PUB. POLICY FOUND., THE COMEBACK AND COMING-FROM-BEHIND STATES: AN UPDATE ON YOUTH INCARCERATION IN THE UNITED STATES (2013) [hereinafter COMING-FROM-BEHIND STATES], <http://www.njjn.org/uploads/digital-library/The-Comeback-and-Coming-from-Behind-States.pdf>.

299. SAVING FUTURES, *supra* note 298.

300. See JUSTICE POLICY INST., STICKER SHOCK: CALCULATING THE FULL PRICE TAG FOR YOUTH INCARCERATION 11 (2014) [hereinafter STICKER SHOCK], http://www.justicepolicy.org/uploads/justicepolicy/documents/sticker_shock_final_v2.pdf.

301. See *Fast Facts: Expenditures*, NAT'L CTR. FOR EDUC. STATS., <https://nces.ed.gov/fastfacts/display.asp?id=66> (last visited on Oct. 25, 2016).

302. See *NYC's Yearly Cost Per Inmate Almost as Expensive as Ivy League Tuition*, FOX NEWS (Sept. 20, 2013), <http://www.foxnews.com/us/2013/09/30/nyc-cost-per-inmate-almost-equals-ivy-league-education-expenses-tied-to-rikers/>; Marc Santora, *City's Annual Cost Per Inmate Is \$168,000, Study Finds*, N.Y. TIMES, Aug. 23, 2013, at A16; see *supra* Figure 32. Annual Costs per Inmate/Student.

Figure 33. Reducing the Number of Youth in Juvenile Facilities³⁰³

Top 10 States that lowered the number of youth in juvenile justice facilities from 1997 to 2006. Seven of the 10 states that reduced the number of youth in juvenile justice facilities saw drops in the total number of violent offenses reported to law enforcement.

State	Percent change in number of youth in juvenile facilities	Percent change in total number of violent offenses reported	Percent change in number of property offenses reported
Louisiana	-57%	-20%	-30%
Mississippi	-41%	-32%	-18%
New Mexico	-39%	-15%	-27%
Washington	-34%	-11%	-7%
Maine	-34%	2%	-11%
Wisconsin	-33%	13%	-11%
Tennessee	-33%	8%	-2%
Georgia	-27%	-3%	-6%
Connecticut	-27%	-23%	-25%
Maryland	-26%	-12%	-20%
<i>Average</i>	<i>-35%</i>	<i>-9%</i>	<i>-16%</i>
US Total	-12%	-13%	-14%

These numbers, which far too often serve to achieve their intended purpose, lead to the conclusions, “[w]e cannot afford the financial or the societal costs of unnecessary juvenile incarceration. By shifting our focus—and our investments—to the front end of the system, we will save not only money, but also lives.”³⁰⁴

III. CAUSES OF THE SCHOOL-TO-PRISON PIPELINE

As previously described, causes of the school-to-prison pipeline are many and complex. Here we discuss in some detail three, which relate particularly to work of the American Bar Association on this issue: criminalization of school discipline; the presence and role of School Resource Officers; and the role implicit bias plays in disproportionality. Other law-related causes discussed in somewhat less detail include the impact of zero tolerance policies,³⁰⁵ the limited constitutional rights of students in school,³⁰⁶ low academic achievement,³⁰⁷ and high stakes testing.³⁰⁸

303. COSTS OF CONFINEMENT, *supra* note 298, at 10.

304. STICKER SHOCK, *supra* note 300, at 3 (quoting Rick Scott, *Governor's OpEds*, (Jan. 2012)).

305. The ABA has opposed these policies. *See also* Am. Psychol. Ass'n Zero Tolerance Task Force, *supra* note 10, at 852 (explaining that a ten-year-old

A. Criminalization of School Discipline

Over the last three decades, there has been a distinct shift among many lawmakers, school officials, and teachers regarding how to discipline children for violations of school rules. While at one time it was common for educators to send students involved in a fight to the principal's office for assessment and discipline, in too many schools today it is just as common to refer those students to law enforcement for arrest and prosecution.³⁰⁹ Several scholars

girl was expelled because her mother put a small knife in her lunchbox to cut up an apple and describing that another student was expelled for talking on a cell phone to his mother who was on deployment as a soldier to Iraq and with whom he had not spoken to for thirty days). Nor is there evidence that zero tolerance policies have made schools safer. See ADVANCEMENT PROJECT & THE CIVIL RIGHTS PROJECT AT HARVARD UNIV., OPPORTUNITIES SUSPENDED: THE DEVASTATING CONSEQUENCES OF ZERO TOLERANCE AND SCHOOL DISCIPLINE 17 (2000) [hereinafter OPPORTUNITIES SUSPENDED], <http://civilrightsproject.ucla.edu/research/k-12-education/school-discipline/opportunities-suspended-the-devastating-consequences-of-zero-tolerance-and-school-discipline-policies/crp-opportunities-suspended-zero-tolerance-2000.pdf> (stating that after four years of implementation, schools that used zero tolerance policies were less safe than those that did not use them); ARRESTING DEVELOPMENT, *supra* note 7, at 10; Am. Psychol. Ass'n Zero Tolerance Task Force, *supra* note 10, at 857 (finding that "zero tolerance policies have not provided evidence that such approaches can guarantee safe and productive school climates"); Krezmien et al., *supra* note 122, at 274. These policies have pushed more students out of schools and into the juvenile justice system. See KIM ET AL., *supra* note 94, at 78.

306. See *Schools, Police*, *supra* note 2.

307. See discussion *supra* starting at note 94 regarding disproportionality in academic achievements.

308. According to Professor James Ryan, "the temptation to exclude low-performing students, enhanced by the NCLBA, can hardly be denied: One less student performing below the proficiency level increases the overall percentage of students who have hit that benchmark." Ryan, *supra* note 122, at 969; see also NAACP LEGAL DEFENSE & EDUC. FUND, *supra* note 122, at 5 (explaining that accountability laws encourage schools to exclude students from school whom school officials believe may bring down the school's test scores); Darling-Hammond, *supra* note 122, at 252 ("Perhaps the most adverse, unintended consequence of NCLB's accountability strategy is that it undermines safety nets for struggling students rather than expanding them.").

309. See, e.g., FED. ADVISORY COMM. ON JUVENILE JUSTICE, *supra* note 122, at 10; ARRESTING DEVELOPMENT, *supra* note 7, at 10; EDUCATION UNDER ARREST, *supra* note 7, at 15 (stating that during the 2007–2008 school year in Jefferson County, Alabama, ninety-six percent of students referred to juvenile

have referred to this shift as the “criminalization of school discipline.”³¹⁰

The reasons behind the criminalization of school discipline are complex. Several scholars have observed that the criminalization of school discipline has emerged parallel to and in connection with the criminalization of social problems generally in the United States.³¹¹ When violent crime rates for juveniles increased from the mid-1980s to 1994, particularly among minority youth in the inner cities, elected officials felt political pressure to respond in the same fashion that they responded to the increase in adult crime.³¹²

court were for misdemeanors that included disorderly conduct and fighting without a weapon); Kristin Henning, *Criminalizing Normal Adolescent Behavior in Communities of Color: The Role of Prosecutors in Juvenile Justice Reform*, 98 CORNELL L. REV. 383, 410 (2013) (“Whereas schoolteachers, principals, and school counselors once handled school-based incidents such as fighting, disorderly conduct, and destruction of property in school, school officials now rely on local police or in-house SROs to handle even the most minor of school infractions.”).

310. See Kathleen Nolan & Jean Anyon, *Learning to Do Time: Willis’s Model of Cultural Reproduction in an Era of Postindustrialism, Globalization, and Mass Incarceration*, in *LEARNING TO LABOR IN NEW TIMES* 133, 136 (Nadine Dolby et al. eds., 2004); Henry A. Giroux, *Racial Injustice and Disposable Youth in the Age of Zero Tolerance*, 16 INT’L J. QUALITATIVE STUD. 553, 562 (2003); Matthew T. Theriot, *School Resource Officers and the Criminalization of Student Behavior*, 37 J. OF CRIM. JUST. 280, 282 (2009); Kerrin C. Wolf, *Arrest Decision Making by School Resource Officers*, 12 YOUTH VIOLENCE AND JUV. JUST. 136, 137 (2013).

311. See, e.g., Donna M. Bishop & Barry C. Feld, *Juvenile Justice in the Get Tough Era*, in *ENCYCLOPEDIA OF CRIMINOLOGY AND CRIMINAL JUSTICE* 2766, 2770 (Gerben Bruinsma & Davis Weisburd eds., 2014); KATHLEEN NOLAN, *POLICE IN THE HALLWAYS: DISCIPLINE IN AN URBAN HIGH SCHOOL* 22–24 (2011); Giroux, *supra* note 310, at 557–58 (2010); Hirschfield, *supra* note 115, at 88 (2008); Nolan & Anyon, *supra* note 310, at 136.

312. See BARRY C. FELD, *BAD KIDS: RACE AND THE TRANSFORMATION OF THE JUVENILE COURT* 14 (1999) (explaining as youth crime rates increased, especially among urban African-Americans, public fear of social disorder also increased, leading to a denouncement of coddling youth criminals); Giroux, *supra* note 310, at 561 (observing that the zero tolerance policies in schools were modeled on minimum sentencing and “three strikes” laws); Hirschfield, *supra* note 115, at 89–90; Pedro A. Noguera, *The Trouble with Black Boys: The Role and Influence of Environmental and Cultural Factors on the Academic Performance of African American Males*, 38 URBAN EDUC. 431 (2003). As Donna Bishop and Barry Feld describe, these violent incidents received an ex-

Moreover, although juvenile crime rates have steadily declined since 1994,³¹³ a series of high-profile school shootings further propelled lawmakers to respond in this manner.³¹⁴ Consequently, lawmakers passed a series of harsh laws designed to deter juvenile crime on the streets and in schools.³¹⁵ At the same time, many school officials, also facing pressure to respond to high-profile incidents of school violence,³¹⁶ began embracing strict, heavy-handed disciplinary methods to maintain order and control in their buildings.³¹⁷ The end result is a series of laws, policies, and prac-

traordinary amount of media attention, resulting in a “moral panic,” in which “the media, politicians, and the public reinforce each other in an escalating alarmist response that exaggerates the magnitude of the threat and produces urgent calls to ‘do something.’” Bishop & Feld, *supra* note 311, at 2770; *see also* Elizabeth S. Scott, “*Children are Different*”: *Constitutional Values and Justice Policy*, 11 OHIO ST. J. CRIM. L. 71, 94 (2013) (“The hostility and fear that characterized attitudes toward young offenders in the 1990s resulted in policies and decisions driven primarily by immediate public safety concerns and the goal of punishing young criminals.”).

313. *See* JEFFREY A. BUTTS, JOHN JAY COLL. OF CRIM. JUST., VIOLENT YOUTH CRIME PLUMMETS TO A 30-YEAR LOW (2012), <http://johnjayresearch.org/rec/files/2012/11/databit201211.pdf>; KANG-BROWN ET AL., *supra* note 8, at 2.

314. *See* Monahan & Torres, *supra* note 121, at 1, 2–3 (“[T]he threat of ‘another Columbine’ (or Virginia Tech, and so on) haunts the social imaginary, leading parents, policy makers, and others to the sober conclusion that any security measure is worth whatever trade-offs are involved in order to ensure safety.”); Elizabeth S. Scott, *Miller v. Alabama and the (Past and) Future of Juvenile Crime Regulation*, 31 L. & INEQ. 535, 541 (2013) (observing that although serious acts of school violence are rare events, after the Columbine shootings “legislatures across the country rushed to pass strict zero tolerance laws, making it a crime to threaten violence in school”).

315. *See* PATRICIA TORBET ET AL., NAT’L CTR. FOR JUVENILE JUSTICE, STATE RESPONSES TO SERIOUS AND VIOLENT JUVENILE CRIME: RESEARCH REPORT xi (1996) (documenting states’ legislative and executive action that shifted towards the goal of punishing criminal behavior rather than rehabilitating the offenders in response to increases in juvenile crime).

316. *See* Kevin P. Brady et al., *School-Police Partnership Effectiveness in Urban Schools*, 39 EDUC. & URBAN SOC. 455, 456 (2007) (“An increasing fear of school violence coupled with the public’s misperceptions of the actual degree of violence in our nation’s schools has caused school officials, especially those located in urban areas, to implement more punitive-based school discipline policies and practices for responding to and preventing student crime and violence.”).

317. Hirschfield, *supra* note 115, at 91.

tices that have pushed more students out of school and into the justice system.

Many of the laws, policies, practices, and trends that have converged over the last three decades, resulting in the creation of a pathway from school-to-prison for too many students. Some of these laws, policies, practices, and trends stem directly from the “tough on crime,” punitive mindset described above. Others are less related to that mindset but still contribute to the pipeline in other ways.

B. The Increased Presence of Law Enforcement Officers in Schools

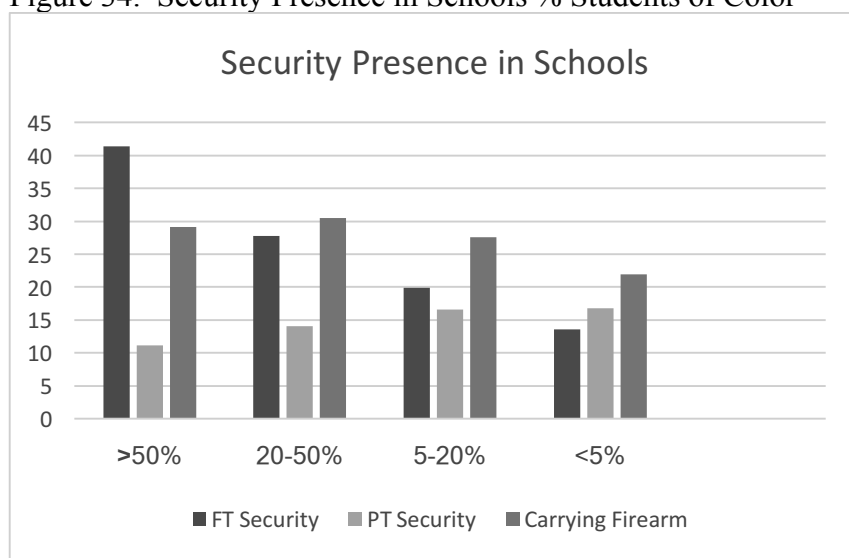
A key component of the pipeline is the increased presence of law enforcement officers in schools. Law enforcement officers have interacted with and provided services to schools for decades.³¹⁸ However, the practice of having law enforcement officers, or school resource officers (SROs),³¹⁹ regularly present in schools on a large scale is a relatively new phenomenon, part of the larger

318. See NATHAN JAMES & GAIL MCCALLION, CONG. RESEARCH SERV., SCHOOL RESOURCE OFFICERS: LAW ENFORCEMENT OFFICERS IN SCHOOLS 2 (2013), <https://www.fas.org/sgp/crs/misc/R43126.pdf>; Paul J. Hirschfield & Katarzyna Celinska, *Beyond Fear: Sociological Perspectives on the Criminalization of School Discipline*, 5 SOC. COMPASS 1, 1 (2011). These traditional services include visible patrols, criminal investigations, and responses to calls for service. BARBARA RAYMOND, OFFICE OF CMTY. ORIENTED POLICING SERVS., U.S. DEP’T OF JUSTICE, ASSIGNING POLICE OFFICERS TO SCHOOLS 1 (2010), http://www.popcenter.org/Responses/pdfs/school_police.pdf.

319. According to the Community Oriented Policing Services (COPS) program and the Safe and Drug Free Schools and Community Act, a SRO is a “career law enforcement officer, with sworn authority, deployed in community-oriented policing, and assigned by the employing police department or agency to work in collaboration with schools and community-based organizations.” 42 U.S.C. § 3796dd-8(4) (2012); 20 U.S.C. § 7161 (2012) (repealed 2015). SROs typically are sworn police officers employed by the police department and assigned to work in schools full-time, but in larger jurisdictions such as Los Angeles or Houston, SROs might be employed by the school districts. See CATHERINE Y. KIM & INDIA GERONIMO, ACLU, POLICING IN SCHOOLS: DEVELOPING A GOVERNANCE DOCUMENT FOR SCHOOL RESOURCE OFFICERS IN K–12 SCHOOLS 5 (2009).

overall movement towards criminalizing school discipline.³²⁰ In the late 1970s there were fewer than one hundred police officers in our public schools,³²¹ but this number grew significantly in the years that followed. According to the Bureau of Justice Statistics' Law Enforcement Management and Administrative Statistics survey, in 1997 there were approximately 12,300 SROs employed by local law enforcement agencies nationwide.³²² In 2003, the number of full time SROs jumped to a high of 19,900.³²³ In 2007, the number of SROs dropped slightly to 19,088.³²⁴

Figure 34. Security Presence in Schools % Students of Color³²⁵



*Students of color = combined Black, Hispanic, ASPI AIAN

320. See JAMES & MCCALLION, *supra* note 318, at 21–22; RAYMOND, *supra* note 318, at 1; Krezmien et al., *supra* note 122, at 275; Theriot, *supra* note 310, at 281.

321. See Brady et al., *supra* note 316, at 457; Hirschfield & Celinska, *supra* note 318, at 1.

322. JAMES & MCCALLION, *supra* note 318, at 19.

323. *Id.*; see also Theriot, *supra* note 310, at 281 (“While it is difficult to know the exact number of school resource officers, it is estimated that there might be more than 20,000 law enforcement officers patrolling schools in the United States.”).

324. JAMES & MCCALLION, *supra* note 318, at 5 fig.1.

325. SIMONE ROBERS ET AL., BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF EDUC., INDICATORS OF SCHOOL CRIME AND SAFETY: 2014, at 162 tbl.20.3 (2014), <http://nces.ed.gov/pubs2015/2015072.pdf>.

Security = security guard, security personnel, School Resource Officers (SROs), or sworn law enforcement officers who are not SROs

SRO programs vary from state to state, county to county, and even district to district.³²⁶ In some states and counties, police agencies assign SROs to schools, either by request of school district officials or by the police agencies.³²⁷ In a handful of states, school districts have the authority to create school district-run police departments.³²⁸ SRO programs are very expensive.³²⁹ A rough estimate of the cost of employing 19,088 full time SROs is almost \$619 million a year.³³⁰ To put an SRO in every public school, as some recommend, would cost approximately \$3.2 billion each year.³³¹ Despite this high cost, federal and state governments have encouraged the use of law enforcement and other strict security measures in schools by passing laws granting money for these purposes. For example, the U.S. Department of Justice Community Oriented Policing Services (COPS) program and the Safe and Drug-Free Schools and Communities Act have provided millions of dollars for law enforcement, metal detectors, surveillance cameras, and other deterrent and security measures in schools.³³² Several states also have their own programs to fund

326. See Ben Brown, *Understanding and Assessing School Police Officers: A Conceptual and Methodological Comment*, 34 J. CRIM. JUST. 591, 592 (2006); THE COUNCIL OF STATE GOV'TS JUSTICE CTR., OFFICERS IN SCHOOLS: A SNAPSHOT OF LEGISLATIVE ACTION 1 (2014) [hereinafter A SNAPSHOT OF LEGISLATIVE ACTION], <http://csgjusticecenter.org/wp-content/uploads/2014/03/NCSL-School-Police-Brief.pdf>.

327. See Brown, *supra* note 326, at 592; A SNAPSHOT OF LEGISLATIVE ACTION, *supra* note 326, at 1–2.

328. See Brown, *supra* note 326, at 592; A SNAPSHOT OF LEGISLATIVE ACTION, *supra* note 326, at 1–2; see also KIM & GERONIMO, *supra* note 319, at 5 (explaining that SROs are sworn police officers typically employed by the police department and assigned to work in schools full-time, but in larger jurisdictions such as Los Angeles or Houston, SROs might be employed by the school districts).

329. JAMES & MCCALLION, *supra* note 318, at 20.

330. *Id.*

331. *Id.* The average minimum salary for an entry-level police officer is \$32,412. *Id.*

332. See 20 U.S.C. §§ 7115(b)(2)(E)(ii), (vi) (2012) (authorizing funding for metal detectors, electronic locks, surveillance cameras, and SROs); JAMES &

these strict measures in schools, even prior to the Newtown shootings.³³³

Although lawmakers, police departments, and school officials expanded SRO programs to enhance school safety in the wake of rising juvenile crime rates and high-profile school shootings,³³⁴ the programs were largely unevaluated and may have the opposite effect.³³⁵ According to a recent Congressional Research Service Report,

The body of research on the effectiveness of SRO programs is limited, both in terms of the number of studies published and the methodological rigor of the studies conducted. The research that is available draws conflicting conclusions about whether SRO programs are effective at reducing school violence. In addition, the research does not address

MCCALLION, *supra* note 318, at 7–8; OFFICE OF CMTY. ORIENTED POLICING SERVS., U.S. DEP'T OF JUST., 2011 SECURE OUR SCHOOLS PROGRAM 1, <http://www.cops.usdoj.gov/pdf/2011AwardDocs/CSPP-SOS-CHP/SOSMethodology.pdf>.

333. See, e.g., ALA. CODE § 41-15B-2.2(b)(2)(a) (2012); GA. CODE ANN. § 20-2-1185(b) (West 2012); 24 PA. STAT. § 13-1302-A(c) (West 2012).

334. See JAMES & MCCALLION, *supra* note 318, at 10–11; RAYMOND, *supra* note 318, at 5; Brown, *supra* note 326, at 591; Theriot, *supra* note 310, at 280. In 2002, the U.S. Department of Justice sponsored a survey of school principals nationwide to ascertain the reasons why schools established SRO programs. See LAWRENCE F. TRAVIS III & JULIE K. COON, CTR. FOR CRIMINAL JUSTICE RESEARCH, THE ROLE OF LAW ENFORCEMENT IN PUBLIC SCHOOL SAFETY: A NATIONAL SURVEY (2005), <https://www.ncjrs.gov/pdffiles1/nij/grants/211676.pdf>. The responses were mixed. Principals indicated that “national media attention about school violence” (24.5%) and “disorder problems (e.g., rowdiness, vandalism)” (17.5%) were the reasons behind establishing the program. *Id.* at 85 tbl.6.1. Interestingly, the most common response was “other,” which included reasons such as receiving a grant, “part of community policing,” “part of a drug awareness program,” “to improve school safety,” and “to build relationships with students.” *Id.* at 84. Only 3.7% of respondents indicated that the level of violence in the school was the reason for establishing an SRO program. *Id.* at 85.

335. See JAMES & MCCALLION, *supra* note 318, at 9; Brown, *supra* note 326, at 592 (observing that despite the enormous expense associated with SRO programs, it is not clear whether SROs enhance student safety); Theriot, *supra* note 310, at 280.

whether SRO programs deter school shootings, one of the key reasons for renewed congressional interest in these programs.³³⁶

Absent evaluation, lawmakers and school officials expanded SRO programs despite the potentially harmful effects that SROs may have on the educational setting.³³⁷ For example, strict security measures in and of themselves can harm the educational climate by alienating students and generating mistrust,³³⁸ which, paradoxically, may lead to even more disorder and violence.³³⁹

336. JAMES & MCCALLION, *supra* note 318, at 10–11; Theriot, *supra* note 310, at 280 (“Empirical evaluations of these various security strategies are limited, have varying levels of methodological rigor, and often report conflicting findings.” (internal citations omitted)). Another summary of the research on the effectiveness of SRO programs states: “Studies of SRO effectiveness that have measured actual safety outcomes have mixed results. Some show an improvement in safety and a reduction in crime; others show no change. Typically, studies that report positive results from SRO programs rely on participants’ perceptions of the effectiveness of the program rather than on objective evidence. Other studies fail to isolate incidents of crime and violence, so it is impossible to know whether the positive results stem from the presence of SRO programs or are the results of other factors.” RAYMOND, *supra* note 318, at 8; *see also* Benjamin W. Fisher & Emily A. Hennessy, *School Resource Officers and Exclusionary Discipline in U.S. High Schools: A Systematic Review and Meta-analysis*, ADOLESCENT RES. REV., June 2015, at 217 (presenting results of meta-analyses on impact of SROs).

337. *See* Brown, *supra* note 326, at 592 (lamenting that such little attention has been devoted to measuring the impact SROs have on the school environment); Theriot, *supra* note 310, at 281 (observing that the research on SROs rarely discusses criminalization of school discipline or provided data about arrests).

338. *See* Paul Hirschfield, *School Surveillance in America*, in SCHOOLS UNDER SURVEILLANCE: CULTURES OF CONTROL IN PUBLIC EDUCATION 38, 46 (observing that strict security measures are “a frequent cause of disunity or discord within the school community”); Randall R. Beger, *The “Worst of Both Worlds”: School Security and the Disappearing Fourth Amendment Rights of Students*, 28 CRIM. JUST. REV. 336, 340 (2003) (concluding that “aggressive security measures produce alienation and mistrust among students”); *Ending the School-to-Prison Pipeline: Hearing Before the Subcomm. on the Constitution, Civil Rights & Human Rights of the S. Comm. on the Judiciary*, 112th Cong. 1–4 (2012) (testimony of Edward Ward, Blocks Together, Dignity in Schools Campaign) (describing his school environment as “very tense,” “antagonizing,” and “dishearten[ing],” where “the halls were full with school security officers whose

Further, several empirical studies demonstrate that putting more SROs in school is associated with involving more students in the criminal justice system, even for low-level violations of school behavioral codes.³⁴⁰ For example, examining restricted data from the U.S. Department of Education, Jason Nance found that a police officer's regular presence at a school significantly increased the odds that schools referred students to law enforcement for several lower-level offenses.³⁴¹ These findings held true even after taking into account other variables that might influence whether schools refer students to law enforcement such as general levels of criminal activity and disorder in the schools and neighborhood crime.³⁴² Matthew Theriot took advantage of a natural experiment in which

only purpose seemed to be to serve students with detentions or suspensions"); cf. Tom R. Tyler & Lindsay E. Rankin, *Legal Socialization and Delinquency*, in THE OXFORD HANDBOOK OF JUVENILE CRIME AND JUVENILE JUSTICE, *supra* note 256, at 361 (observing that "surveillance systems have deleterious effects on the social climate of groups because their use implies distrust, which decreases people's ability to feel positively about themselves, their groups, and the system itself").

339. See Clifford H. Edwards, *Student Violence and the Moral Dimensions of Education*, 38 PSYCHOL. SCHS. 249, 250 (2001) (stating that "intrusive strategies are likely to undermine the trust needed to build cooperative school communities capable of really preventing violence"); Pedro A. Noguera, *Preventing and Producing Violence: A Critical Analysis of Responses to School Violence*, 65 HARV. EDUC. REV. 189, 190–91 (1995) (observing that the "get tough" approach undermines school safety because coercive measures create mistrust and resistance among students); Matthew J. Mayer & Peter E. Leone, *A Structural Analysis of School Violence and Disruption: Implications for Creating Safer Schools*, 22 EDUC. & TREATMENT CHILD. 333, 350, 352 (1999) (finding that student disorder and student victimization were higher in schools using strict security measures); Steinberg, Allensworth, & Johnson, *What Conditions Support Safety in Urban Schools*, *supra* note 16, at 127–29 (finding that students and teachers reported lower levels of perceived safety in schools that had higher suspension rates, even after controlling for community and contextual variables).

340. See U.S. DEP'T OF JUSTICE CIVIL RIGHTS DIV., INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT 37–38 (2015) [hereinafter DOJ FERGUSON], http://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson_police_department_report.pdf (finding that the Ferguson Missouri Police treated "routine discipline issues as criminal matters").

341. See Nance, *supra* note 82, at 35–47.

342. See *id.* (describing and analyzing this empirical study).

a school district in the southeastern United States assigned full-time SROs to schools residing within the city limits, but not to those outside the city limits.³⁴³ Theriot found that schools with SROs were more likely to arrest students for lower-level offenses such as disorderly conduct than schools without SROs but not for more serious crimes.³⁴⁴ In a very recent study, Emily Owens discovered that police jurisdictions that received federal grants to hire more SROs in schools learned about more crimes taking place in schools, and those law enforcement agencies were more likely to arrest students who commit crimes in schools.³⁴⁵

Perhaps the most significant challenge of having SROs in schools is that while SROs may be in schools primarily to enhance school safety, many SROs also become involved in student disciplinary matters that educators traditionally have handled and should continue to handle.³⁴⁶ It is easy to see how this happens. Most SROs spend their time each day patrolling buildings and grounds, investigating complaints, minimizing disruptions, and maintaining order.³⁴⁷ When SROs observe students being disruptive and disorderly, they intervene because they view this as one of their duties, even when those duties overlap with the traditional

343. See Theriot, *supra* note 310, at 282.

344. *Id.* at 284–85.

345. Emily G. Owens, *Testing the School-to-Prison Pipeline* 3–4 (Univ. of Pa. Dep't of Criminology, Working Paper No. 2015-5.1, 2015), <https://crim.sas.upenn.edu/working-papers/police>.

346. See Brown, *supra* note 326, at 591; see also DOJ FERGUSON, *supra* note 340, at 37–38.

347. See Theriot, *supra* note 310, at 281; JAMES & MCCALLION, *supra* note 318, at 2. According to the COPS program an SRO's duties include the following:

(A) to address crime and disorder problems, gangs, and drug activities affecting or occurring in or around an elementary or secondary school; (B) to develop or expand crime prevention efforts for students; (C) to educate likely school-age victims in crime prevention and safety; (D) to develop or expand community justice initiatives for students; (E) to train students in conflict resolution, restorative justice, and crime awareness; (F) to assist in the identification of physical changes in the environment that may reduce crime in or around the school; and (G) to assist in developing school policy that addresses crime and to recommend procedural changes.

42 U.S.C. § 3796dd-8(4) (2012).

duties of school officials.³⁴⁸ Furthermore, SROs apparently have the legal authority to intervene in almost all student disciplinary matters. For example, most states have criminal laws that prohibit assault, disorderly conduct, larceny, and disturbing the peace,³⁴⁹ and several states have passed statutes that explicitly criminalize the disruption of school activities³⁵⁰ or talking back to teachers.³⁵¹ Accordingly, if a student is involved in a scuffle with another student, talks back to a teacher, yells at another student, steals another student's pencil, or exhibits other types of poor behavior, SROs have legal authority to arrest that student, even a six-year old student who is throwing a temper tantrum.³⁵² Thus, in many schools, SROs have become the "new authoritative agents" of discipline.³⁵³

348. Interestingly, the SRO handbook developed by COPS provides an example of an SRO who "once had to threaten to arrest a principal for interfering with a police officer in the performance of his duty when the administrator was physically barring [the SRO] from arresting a student," reminding SROs that they have the power to arrest students over the objections of school officials. PETER FINN ET AL., U.S. DEP'T OF JUSTICE, OFFICE OF CMTY. ORIENTED POLICING SERVS., A GUIDE TO DEVELOPING, MAINTAINING, AND SUCCEEDING WITH YOUR SCHOOL RESOURCE OFFICER PROGRAM 51 (2005), http://www.popcenter.org/Responses/school_police/PDFs/Finn_et_al_2005.pdf.

349. See, e.g., CAL. PENAL CODE § 241.1 (West 2014) (prohibiting assault); FLA. STAT. ANN. § 877.03 (West 2014) (prohibiting acts that breach the peace and disorderly conduct); N.Y. PENAL LAW § 155.05 (McKinney 2014) (prohibiting larceny); VA. CODE ANN. § 18.2-415 (West 2014) (prohibiting disorderly conduct).

350. See ARIZ. REV. STAT. ANN. § 13-2911 (West, Westlaw through 2016 Sess.); CAL. PENAL CODE § 415.5 (West 2010); FLA. STAT. ANN. § 871.01 (West 2014); MASS. GEN. LAWS ch. 272, § 40 (2014); NEV. REV. STAT. ANN. § 392.910 (West, Westlaw through 2015 Sess.); S.C. CODE ANN. § 16-17-420 (West, Westlaw through 2016 Sess.); S.D. CODIFIED LAWS § 13-32-6 (2014); TEX. EDUC. CODE ANN. § 37.123 (West 2014); WASH. REV. CODE ANN. § 28A.635.030 (West 2014); W. VA. CODE ANN. § 61-6-14 (West 2014).

351. See ARIZ. REV. STAT. ANN. § 15-507 (West 2009 & Supp. 2012); ARK. CODE ANN. § 6-17-106(a)(1)(A)–(C) (LexisNexis 2013); IDAHO CODE ANN. § 18-916 (West 2016); MONT. CODE ANN. § 20-4-303 (2011); N.D. CENT. CODE § 15.1-06-16 (2003).

352. See Bob Herbert, *6-Year-Olds Under Arrest*, N.Y. TIMES, Apr. 9, 2007, at A17 (reporting the arrest of a six-year-old student for throwing a temper tantrum at school).

353. Brown, *supra* note 326, at 591.

The problems with SROs handling student disciplinary issues are multifaceted. Whereas teachers and school officials have advanced academic credentials, receive training in child psychology, discipline, pedagogy, educational theory and practice, and are accountable to local school boards,³⁵⁴ SROs are trained in law enforcement, have little or no training in developmental psychology or pedagogy, and may not be accountable to school boards.³⁵⁵ Thus, an SRO's decision to arrest a student may be based on criteria that are wholly distinct from and even anathema to the best interests of the student or the school as a whole.³⁵⁶ The anecdotal evidence of SROs mishandling student discipline problems abounds.³⁵⁷ In its investigation of the Ferguson Missouri Police

354. This does not imply that teachers and school officials do not need more training in these areas. In fact, as previously noted, too many school officials and teachers rely too heavily on overly-punitive disciplinary methods. It is critical for school officials and teachers to become aware of and support using alternative methods to create safe, supportive learning environments. See Nance, *Dismantling the School-to-Prison Pipeline: Tools for Change*, *supra* note 2.

355. Brown, *supra* note 326, at 591.

356. *Id.*; DOJ FERGUSON, *supra* note 340, at 8. Of course, this does not imply that educators or school officials always use their training well. In fact, over the last few decades many teachers and school officials have adopted a punitive mindset to discipline children that may also contribute to the Pipeline. See *supra* text and discussion at note 309.

357. See Kaitlin Banner, *Breaking the School-to-Prison Pipeline: New Models for School Discipline and Community Accountable Schools*, in A NEW JUVENILE JUSTICE SYSTEM: TOTAL REFORM FOR A BROKEN SYSTEM 302–03 (describing events of SROs mishandling student disciplinary issues); SHAKTI BELWAY, S. POVERTY LAW CTR., ACCESS DENIED: NEW ORLEANS STUDENTS AND PARENTS IDENTIFY BARRIERS TO PUBLIC EDUCATION 4, 6 (2010), https://www.splcenter.org/sites/default/files/d6_legacy_files/downloads/publication/SPLC_report_Access_Denied.pdf; Nancy A. Heitzeg, *Criminalizing Education: Zero Tolerance Policies, Police in the Hallways, and the School-to-Prison Pipeline*, in FROM EDUCATION TO INCARCERATION: DISMANTLING THE SCHOOL-TO-PRISON PIPELINE 11, 22 (Anthony J. Nocella II, Priya Parmar & David Stovall eds., 2014) (describing various incidents where students were arrested for minor offenses); ELORA MUKHERJEE, N.Y. CIVIL LIBERTIES UNION, CRIMINALIZING THE CLASSROOM: THE OVER-POLICING OF NEW YORK CITY SCHOOLS 6, 14 (Phyllis Eckaus et al. eds., 2007), http://www.nyclu.org/pdfs/criminalizing_the_classroom_report.pdf (describing the arrests of students resulting from bringing cell phones to school and being late to class); DOJ FERGUSON, *supra* note 340, at 37–38; Sharif Durhams, *Tosa East Student Ar-*

Department, the United States Department of Justice recently determined the following:

SROs' propensity for arresting students demonstrates a lack of understanding of the negative consequences associated with such arrests. In fact, SROs told us that they viewed increased arrests in the schools as a positive result of their work. This perspective suggests a failure of training (including training in mental health, counseling, and the development of the teenage brain); a lack of priority given to de-escalation and conflict resolution; and insufficient appreciation for the negative educational and long-term outcomes that can result from treating disciplinary concerns as crimes and using force on students.³⁵⁸

rested, Fined After Repeated Texting, MILWAUKEE J. SENTINEL, Feb. 18, 2009, at B8; Herbert, *supra* note 352, at A17; Ann M. Simmons, *High School Scuffle Exposes a Racial Rift*, L.A. TIMES (Oct. 11, 2007), <http://articles.latimes.com/2007/oct/11/local/me-palmdale11>; *Student Arrested for 'Passing Gas' at Fla. School*, NBCNEWS.COM, http://www.nbcnews.com/id/27898395/ns/us_news-weird_news/t/student-arrested-passing-gas-fla-school/#.VFIEEPnF98E (last updated Nov. 24, 2008); Thomas C. Tobin, *Video Shows Police Handcuffing 5-Year-Old*, TAMPA BAY TIMES (Apr. 22, 2005), http://www.sptimes.com/2005/04/22/Southpinellas/Video_shows_police_ha.shtml.

358. DOJ FERGUSON, *supra* note 340, at 38.

*C. The Role of Implicit Bias and Related Unconscious Associations/Decisions*³⁵⁹

A particularly alarming aspect of the school-to-prison pipeline is that certain groups of students, especially minority students, are disproportionately affected. At each juncture of the pipeline—from failing to receive a quality education, failing to graduate, being suspended or expelled, or being referred to law enforcement for violating a school rule and then on into the juvenile justice system—there are differences along group lines that are not readily explicable. The differences and disproportionalities discussed in this report are so well documented, so large, and so well known that one must question why the pattern has not yielded to change.

When one considers the statistical overview from a high level, it may sometimes be difficult to remember that these appalling numbers represent decision after decision point in the lives of individual students. Many—if not most—of the critical decisions impacting young people along the educational pipeline are discretionary individual decisions.³⁶⁰ For the most part, these decisions will have been made by people acting in good faith—a teacher who recommends a student to take advanced courses in mathematics or science (or not); the school official who decided to suspend a student for disruptive behavior (or not); the special education team that classifies a child as emotionally disturbed (or not); the police officer who decides to arrest (or not); the prosecutor who decides to prosecute (or not); the judge who decides divert or detain; and so on. In these instances, it is hardly likely that the teacher explicitly thought, “Oh, J won’t make it in school, he’s Black;” or “Oh,

359. Some of this part is taken from Professor Redfield’s work on the American Bar Association’s *Achieving an Impartial Jury: Addressing Bias in Voir Dire and Deliberations* project, which can be viewed at http://www.americanbar.org/groups/criminal_justice/voir_dire.html, and from various of her presentations, all on file with the author. See, e.g., Sarah E. Redfield, Professor of Law, Presentation to the Nebraska State Bar Association: Understanding Implicit Bias to Gain Justice & Equal Opportunity (Oct. 2015); Sarah E. Redfield & Bernice B. Donald, Joint Training to the Warren County Department of Human Services: Implicit Bias & the School-to-Prison Pipeline (May 2015); Sarah E. Redfield & Jason Nance, Joint Training to the Warren County Department of Human Services: Implicit Bias & the School-to-Prison Pipeline (May 2015).

360. See *supra* text and discussion accompanying notes 29–35.

let's call the police about K, he's ADHD and his family are Hispanic so we might as well get some help getting him out of here." It is unlikely that the police officer thought similarly and explicitly decided on these bases to arrest rather than call J or K's parents; it is even less likely that the judge was so motivated. It is hardly likely that any of these decision makers would consciously agree with these sentiments, in fact, the opposite.

If these explicit biases are not the reasons underlying the seemingly intractable data on disparity, then what are the reasons?³⁶¹ While there are several factors that may contribute to these disparities, if we accept as given that most educators and juvenile justice decision makers are acting in good faith when they *explicitly* exercise their discretion, then a possible explanation lies with *implicit associations* that influence their discretionary decisions. That is, as many researchers now agree, a primary cause of differential treatment is the implicit bias of decision makers.³⁶² This part of the report discusses the issues from this perspective.

Explicit bias is a preference deliberately generated and consciously experienced as one's own; implicit bias is an association or preference that is unconscious and experienced without awareness.³⁶³ Implicit biases may well be dissociated from what we ac-

361. This is not to say that explicitly held views are not part of the problem.

362. See, e.g., van den Bergh et al., *supra* note 40, at 518; McIntosh et al., *supra* note 35, at 6 (explaining that conscious or unconscious bias is an important factor in the discipline gap); L. Song Richardson, *Police Efficiency and the Fourth Amendment*, 87 IND. L.J. 1143, 1146–47 (2012) (explaining that individuals have nonconscious reactions to others that negatively influences their decisions and behaviors to those individuals); see also Cynthia Lee, *Making Race Salient: Trayvon Martin and Implicit Bias in a Not Yet Post-Racial Society*, 91 N.C. L. REV. 1555, 1570 (2013) ("Despite our largely egalitarian attitudes and beliefs, social science research over the past decade has shown that a majority of Americans are implicitly biased against Blacks.").

363. See JERRY KANG, NAT'L CTR. FOR STATE COURTS, IMPLICIT BIAS: A PRIMER FOR COURTS 1 (2009), <http://wp.jerrykang.net.s110363.gridserver.com/wp-content/uploads/2010/10/kang-Implicit-Bias-Primer-for-courts-09.pdf>. See generally NEUROSCIENCE OF PREJUDICE AND INTERGROUP RELATIONS 175 (Belle Derks, Daan Scheepers & Naomi Ellemers eds., 2013) ("Stereotypes are cognitive structures stored in memory that represent attributes associated with a social group.") (citation omitted). We use the implicit bias/association vocabulary here, but the vocabulary describing the brain's dual response mechanisms

tively and honestly believe.³⁶⁴ When a teacher says that the boys will be better choices for the math team than the girls, that teacher is displaying an explicit bias; but when that teacher asserts he is selecting students for the team equitably, yet the team repeatedly is disproportionately male dominated, that teacher is likely displaying an implicit bias in selecting members.³⁶⁵ When Jennifer Mendoza made baseball history as the first woman to call a nationally televised game, and a fan that “[n]o one wants to hear a women in the booth . . . [sic] I will not listen or watch those games she is on,” that fan is expressing an explicit bias.³⁶⁶ When an employer selects men over women based on names or pictures making gender clear, that employer is likely responding with implicit bias.³⁶⁷

does vary. See Matthew D. Lieberman, *Reflective and Reflexive Judgment Processes: A Social Cognitive Neuroscience Approach*, in SOCIAL JUDGMENTS: IMPLICIT AND EXPLICIT PROCESSES 44 (Joseph P. Forgas et al. eds., 2003) (using reflexive/reflective or x/c); DANIEL KAHNEMAN, THINKING, FAST AND SLOW 13 (2011) (using fast/slow and System1/System 2); Matthew D. Lieberman, *Research*, UCLA SOC. COGNITIVE NEUROSCIENCE LABORATORIES <http://www.scn.ucla.edu/research.html> (last visited Nov. 5, 2016). See generally PAMELA CASEY ET AL., AM. JUDGES ASS’N, MINDING THE COURT: ENHANCING THE DECISION-MAKING PROCESS (2012), <http://aja.ncsc.dni.us/pdfs/Minding-the-Court.pdf> (discussing terminology and approach).

364. See Patricia G. Devine, *Stereotypes and Prejudice: Their Automatic and Controlled Components*, 56 J. PERSONALITY & SOC. PSYCHOL. 5, 5–6, 15 (1989); Brian A. Nosek & Rachel G. Riskind, *Policy Implications of Implicit Social Cognition*, 6 SOC. ISSUES & POL’Y REV. 113, 128–29 (2012); Kate A. Ratliff & Brian A. Nosek, *Negativity and Outgroup Biases in Attitude Formation and Transfer*, 37 PERSONALITY & SOC. PSYCHOL. BULL. 1692, 1692 (2011); see also PAMELA M. CASEY ET AL., NAT’L CTR. FOR STATE COURTS, HELPING COURTS ADDRESS IMPLICIT BIAS: RESOURCES FOR EDUCATION app. B at B9–B14 (2012), http://www.ncsc.org/~media/Files/PDF/Topics/Gender%20and%20Racial%20Fairness/IB_report_033012.ashx (cumulating references).

365. See Ernesto Reuben et al., *How Stereotypes Impair Women’s Careers in Science*, 111 PROC. NAT’L ACAD. SCI. 4403, 4403 (2014) (showing that employers will choose a male employee over a female employee for a job requiring arithmetic skills even where actual task results show the female with better test scores).

366. Dominique Mosberger, *Jessica Mendoza Makes Baseball History, Prompting Sexist Backlash*, HUFFINGTON POST (Oct. 7, 2015, 5:57 AM), http://www.huffingtonpost.com/entry/jessica-mendoza-playoffs_5614d906e4b0cf9984d7a353.

367. See Marianne Bertrand & Sendhil Mullainathan, *Are Emily and Greg More Employable than Lakisha and Jamal? A Field Experiment on Labor Mar-*

It used to be the case that if we wanted to know a person's bias, we asked.³⁶⁸ Not surprisingly, the answers, particularly in socially sensitive situations,³⁶⁹ were often less than accurate, whether because we believe we are not biased, because we do not want those around us to know we think we may be biased, or because we do not know ourselves.³⁷⁰

ket Discrimination, 94 AM. ECON. REV. 991, 991 (2004) ("White names receive 50 percent more callbacks for interviews."); Rhea E. Steinpreis, Katie A. Anders & Dawn Ritzke, *The Impact of Gender on the Review of the Curricula Vitae of Job Applicants and Tenure Candidates: A National Empirical Study*, 41 SEX ROLES 509, 509 (1999) ("Both men and women were more likely to vote to hire a male job applicant than a female job applicant with an identical record. Similarly, both sexes reported that the male job applicant had done adequate teaching, research, and service experience compared to the female job applicant with an identical record."); see also ARIN N. REEVES, COLORED BY RACE: BIAS IN THE EVALUATION OF CANDIDATES OF COLOR BY LAW FIRM HIRING COMMITTEES: THE 2015 UPDATE & SUMMARY OF DATA FROM 2005 (2015), http://www.nextions.com/wp-content/files_mf/144793674920151115ColoredbyRaceYPS.pdf ("Racial/ethnic minority candidates are also more likely to receive negative comments about their names, the lack of 'polish' in their overall appearance, and their 'comfort levels' in talking with people in the firm."); ARIN N. REEVES, WRITTEN IN BLACK & WHITE: EXPLORING CONFIRMATION BIAS IN RACIALIZED PERCEPTIONS OF WRITING SKILLS (2014), http://www.nextions.com/wp-content/files_mf/14468226472014040114WritteninBlackandWhiteYPS.pdf (discussing significant evaluation differences with blind evaluation of White names and African-American names on writing samples).

368. See, e.g., John B. McConahay, *Modern Racism, Ambivalence, and the Modern Racism Scale*, in PREJUDICE, DISCRIMINATION, AND RACISM 91 (John Dovidio et al. eds., 1986); YO JACKSON, *ENCYCLOPEDIA OF MULTICULTURAL PSYCHOLOGY* 294 (2006) (discussing the Modern Racism Scale).

369. See David M. Amodio & Patricia G. Devine, *On the Interpersonal Functions of Implicit Stereotyping and Evaluative Race Bias: Insights from Social Neuroscience*, in ATTITUDES: INSIGHTS FROM THE NEW IMPLICIT MEASURES 193 (Richard E. Petty et al. eds., 2009); Adam R. Pearson et al., *The Nature of Contemporary Racial Prejudice*, 3 SOC. & PERSONALITY PSYCHOL. COMPASS 314, 324 (2009).

370. Willhem Hoffman et al., *A Meta-Analysis on the Correlation Between the Implicit Association Test and Explicit Self-Report Measures*, 31 PERSONALITY & SOC. PSYCHOL. BULL. 1369, 1376 (2005); Brian A. Nosek et al., *The Implicit Association Test at Age 7: A Methodological and Conceptual Review*, in SOCIAL PSYCHOLOGY AND THE UNCONSCIOUS: THE AUTOMATICITY OF HIGHER MENTAL PROCESSES 265 (John A. Bargh ed., 2007) [hereinafter *IAT at Age 7*].

Asking measured explicit bias. Over the past twenty years, we have developed new approaches that can measure bias without asking directly. Now rather than ask, we measure bias by measuring reaction time (response latency) to paired stimuli, such as matching the word *male* with the name *Greg*, or *female* with *Emily*, as compared to *male* with *Emily*. These are automatic associations,³⁷¹ and they exist in many domains. The underlying theory in the research is that we will respond more accurately and quickly to associations that fit with our pre-formed mental templates or schemas, *female* with *Emily*;³⁷² that is, we respond more quickly to acquired associations that are largely involuntary.³⁷³

These automatic associations or implicit biases can now be reliably tested at an unconscious level.³⁷⁴ The Implicit Association Test (IAT)³⁷⁵ is the leading social science measure of this type of unconscious response.³⁷⁶ There is a wealth of literature, including meta-analyses, on the IAT generally and on its relationship to ex-

371. See, e.g., MAZARIN R. BANAJI & ANTHONY G. GREENWALD, *BLINDSPOT: HIDDEN BIASES OF GOOD PEOPLE* (2013).

372. PROJECT IMPLICIT, <https://implicit.harvard.edu/implicit/> (last visited Nov. 5, 2016). There are other implicit association tests available online such as fat/thin, elderly/young, skin color. See *About the IAT*, PROJECT IMPLICIT, <https://implicit.harvard.edu/implicit/iatdetails.html> (last visited Nov. 5, 2016); Leslie Ashburn-Nardo, Presentation, *The Implicit Association Test: Its Uses (and Potential Misuses) in Organizations*, <http://slideplayer.com/slide/4281514/> (last visited Nov. 5, 2016).

373. See, e.g., Anthony G. Greenwald & Linda Hamilton Krieger, *Implicit Bias: Scientific Foundations*, 94 CALIF. L. REV. 945, 948 (2006); Brian Nosek et al., *Pervasiveness and Correlates of Implicit Attitudes and Stereotypes*, 18 EUR. REV. SOC. PSYCHOL. 36, 45 (2007) [hereinafter *Pervasiveness and Correlates*].

374. 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, 18–19 (2009); *Pervasiveness and Correlates*, supra note 373, at 36; STAATS, supra note 40, at 26 (summarizing review of reliability and validity).

375. See Anthony G. Greenwald et al., *Measuring Individual Differences in Implicit Cognition: The Implicit Association Test*, 74 J. PERSONALITY & SOC. PSYCHOL. 1464, 1464 (1998); Anthony G. Greenwald, *The Psychology of Blink: Understanding How Our Minds Work Unconsciously, Part 1 - 2008*, YOUTUBE (Nov. 26, 2013), <https://www.youtube.com/watch?v=wA01Viu-P4U>; PROJECT IMPLICIT, supra note 372.

376. See generally STAATS, supra note 40, at 24–26 (providing an overview of the IAT approach).

PLICIT bias and its value as a predictor of the same.³⁷⁷ While most researchers support the IAT as an accurate measure of implicit bias,³⁷⁸ the research is not unanimous.³⁷⁹ Nevertheless, as the use of the IAT has increased, there has been an explosion of research in both social and neuroscience arenas concerning implicit bias,³⁸⁰

377. See, e.g., Amodio & Devine, *supra* note 369, at 193; Anthony G. Greenwald, Mazarin R. Banaji & Brian A. Nosek, *Statistically Small Effects of the Implicit Association Test Can Have Societally Large Effects*, 108 J. PERSONALITY & SOC. PSYCHOL. 553, 557 (2015); Greenwald et al., *supra* note 374, at 17; John T. Jost et al., *The Existence of Implicit Bias Is Beyond Reasonable Doubt: A Refutation of Ideological and Methodological Objections and Executive Summary of Ten Studies that No Manager Should Ignore*, 29 RES. ORGANIZATIONAL BEHAV. 39, 39 (2009); *IAT at Age 7*, *supra* note 370, at 265; Thomas F. Pettigrew & Linda R. Tropp, *A Meta-Analytic Test of Intergroup Contact Theory*, 90 J. PERSONALITY & SOC. PSYCHOL. 751, 751 (2006). But see H. Anna Han et al., *Malleability of Attitudes or Malleability of the IAT?*, 46 J. EXPERIMENTAL SOC. PSYCHOL. 286, 298 (2010) (questioning influence of perspective on IAT results); Frederick L. Oswald et al., *Predicting Ethnic and Racial Discrimination: A Meta-Analysis of IAT Criterion Studies*, 105 J. PERSONALITY & SOC. PSYCHOL. 171, 171 (2013) (“IATs were poor predictors of every criterion category other than brain activity, and the IATs performed no better than simple explicit measures.”); Philip E. Tetlock & Gregory Mitchell, *Implicit Bias and Accountability Systems: What Must Organizations Do to Prevent Discrimination?*, 29 RES. ORGANIZATIONAL BEHAV. 3, 3 (2009) (questioning construct validity and reliability). See generally STAATS, *supra* note 40, at 24 (discussing the IAT approach).

378. See, e.g., Emily L. Fisher & Eugene Borgida, *Intergroup Disparities and Implicit Bias: A Commentary*, 68 J. SOC. ISSUES 385, 396 (2012) (“Taken together, the research included in this terrific special issue represents a strong body of evidence in support of the claim that implicit biases are contributing to an understanding of ongoing real-world disparities. As such, we believe that implicit bias research will continue to play a crucial role in understanding and hopefully reducing these aggregate-level disparities as they surface in employment, legal, and health care domains.”).

379. See, e.g., *id.* at 393 (summarizing criticism and response to criticism and noting that “[r]egardless of any debate over IAT validity, the broader point that is often lost amidst the methodological and ideological cacophony is that considerable implicit bias research goes beyond the IAT and uses methods that have been regarded with less criticism. . . . [U]sing these types of techniques also finds that implicit bias predicts a variety of behavioral outcomes in intergroup domains”); Justine E. Tinkler, *Controversies in Implicit Race Bias Research*, 6 SOC. COMPASS 987, 987 (2012).

380. See Nancy Hopkins, Amgen, Inc. Professor of Biology at MIT, Baccalaureate Address at Boston University: Invisible Barriers and Social Change

and the social science is increasingly confirmed by neuroscience research.³⁸¹ For example, functional magnetic resonance imaging (fMRI) (evidenced by the higher blood oxygenation level throughout the brain)³⁸² of the amygdala (the part of the brain identified as involved with emotional reactions) has found activation response to be predictive of race bias when measured indirectly by the IAT even if not shown when measured explicitly by (self-reported) responses to the Modern Racism Scale.³⁸³

IAT results can be surprising and disturbing, perhaps particularly so for those who consider themselves egalitarian but whose IAT results show the typical American preferences for European American as compared to African-American, the abled as compared to the disabled, and for women with families as com-

(May 18, 2014), <http://www.bu.edu/news/2014/05/19/boston-universitys-141st-commencement-baccalaureate-address-nancy-hopkins/> (describing discovery of unconscious bias as one of greatest scientific discoveries of the past 50 years); Johanna Wald, Director of Strategic Planning, Charles Hamilton Houston Inst., Presentation at the Restorative Justice Conference: Implicit Racial Bias and the School-to-Prison Pipeline (Nov. 3, 2012) (using the explosion descriptor).

381. See Jennifer T. Kubota et al., *The Neuroscience of Race*, 15 NATURE NEUROSCIENCE 940, 944 (2012) (reviewing and cumulating the research finding “[a] network of interacting brain regions” including the Amygdala, dorsal anterior cingulate cortex (ACC), and fusiform gyrus, to be “important in the unintentional, implicit expression of racial attitudes and its control”); Lieberman, *Reflective and Reflexive Judgment Processes*, *supra* note 363, at 44; Damian Stanley et al., *The Neural Basis of Implicit Attitudes*, 17 CURRENT DIRECTIONS IN PSYCHOL. SCI. 164, 164–68 (2008) (summarizing the research to date on the function of the amygdala in relation to implicit automatic response); see also David M. Amodio et al., *Individual Differences in the Activation and Control of Affective Race Bias as Assessed by the Startle-Eyeblick Responses and Self-Report*, 84 J. PERSONALITY & SOC. PSYCHOL. 738, 738 (2003).

382. See generally Owen D. Jones et al., *Brain Imaging for Legal Thinkers: A Guide for the Perplexed*, 2009 STAN. TECH. L. REV. 5, ¶¶ 16, 18, 27, 31 (2009) (describing fMRI); Brian A. Nosek, *Implicit Social Cognition: From Measures to Mechanisms*, 15 TRENDS COGNITIVE SCI. 152, 152 (2011) [hereinafter *Measures to Mechanisms*] (describing Age of Measurement and various techniques).

383. David M. Amodio, *The Social Neuroscience of Prejudice: Then, Now, and What’s to Come*, in STEREOTYPING AND PREJUDICE 1 (Charles Stangor & Christian S. Crandall eds., 2013) (discussing amygdala/fear response in relation to overriding implicit bias); Elizabeth A. Phelps et al., *Performance on Indirect Measures of Race Evaluation Predicts Amygdala Activation*, 12 J. COGNITIVE NEUROSCIENCE 729, 729 (2000).

pared to women with careers.³⁸⁴ Surprising or not, these results can be connected with real world response: “Notably, implicit attitudes show predicative validity; the magnitude of preference exhibited on the test predicts a host of discriminative behaviors, from nonverbal avoidance to evaluating an individual’s work.”³⁸⁵

1. Acknowledging that prior intervention has not proven sufficient

Decades of study and calls for action have not removed concerns about disproportionality along the educational pipeline and in juvenile justice. The Coleman Report in 1966 on educational opportunity,³⁸⁶ the two National Research Council reports on special education in 1982 and 2002,³⁸⁷ and the National Coalition of State Juvenile Justice Advisory Groups Report on the Delicate Balance to the President, the Congress, and the Administrator of the Office of Juvenile Justice and Delinquency Prevention in 1989,³⁸⁸ all identified the issue. These studies have been followed by study after study and call after call for action as disproportionality is identified and decried all along the school-to-prison pipeline.

384. See discussion *infra* notes 400–403 and accompanying text.

385. Kubota et al., *supra* note 381, at 942; see also Allen R. McConnell & Jill M. Liebold, *Relations Among the Implicit Association Test, Discriminatory Behavior, and Explicit Measures of Attitudes*, 37 J. EXPERIMENTAL SOC. PSYCHOL. 435, 440 (2001) (“[R]esearchers can be confident that attitudes assessed by the IAT do relate to intergroup behavior.”); ANTHONY G. GREENWALD, IAT STUDIES SHOWING VALIDITY WITH “REAL-WORLD” SUBJECT POPULATIONS 5–6 (2012), http://faculty.washington.edu/agg/pdf/Real-world_samples.pdf; PROJECT IMPLICIT, *supra* note 372.

386. *Equality of Educational Opportunity Study*, *supra* note 96.

387. See NAT’L RESEARCH COUNCIL, PLACING CHILDREN IN SPECIAL EDUCATION: A STRATEGY FOR EQUITY ix–xii (Kirby A. Heller, Wayne H. Holtzman & Samuel Messick eds., 1982); NAT’L RESEARCH COUNCIL 2002, *supra* note 176, at 56; Lloyd M. Dunn, *Special Education for the Mildly Retarded, Is Much of It Justifiable?*, 35 EXCEPTIONAL CHILD. 5, 5 (1968); see also, e.g., CHILDREN’S DEF. FUND OF THE WASH. RESEARCH PROJECT, SCHOOL SUSPENSIONS: ARE THEY HELPING CHILDREN? 1 (1975), http://diglib.lib.utk.edu/cdf/data/0116_000050_000205/0116_000050_000205.pdf.

388. NAT’L COAL. OF STATE JUVENILE JUSTICE ADVISORY GRPS., A DELICATE BALANCE (1989), <http://www.juvjustice.org/sites/default/files/resource-files/A%20Delicate%20Balance.compressed.pdf>.

There have been legislative and regulatory responses. Discrimination on the basis of sex,³⁸⁹ race,³⁹⁰ or disability³⁹¹ is unlawful. Specific Congressional mandates define and address disproportionality concerns. IDEA³⁹² and the Juvenile Justice and Delinquency Prevention Act³⁹³ specifically require monitoring and reporting on this very point; and NCLB's mandate on disaggregated data serves a similar purpose.³⁹⁴ Although the nation stands publicly committed to equality and equity in educational opportunity

389. See Title IX of the Education Amendments of 1972, 20 U.S.C.S. §§ 1681–88 (LexisNexis 2013) (prohibiting discrimination on the basis of sex under education programs or activities receiving Federal financial assistance); U.S. DEP'T OF JUSTICE, TITLE IX LEGAL MANUAL 5–6 (2001), <https://www.justice.gov/sites/default/files/crt/legacy/2010/12/14/ixlegal.pdf>.

390. Title VI of the Civil Rights Act of 1964, 42 U.S.C.S. §§ 2000d–2000d-7 (LexisNexis 2013) (prohibiting discrimination on the basis of race, color, or national origin under any programs or activities receiving Federal financial assistance); see also 28 C.F.R. § 50.3 (2014); 34 C.F.R. §§ 100.1–13 (2014). See generally U.S. DEP'T OF JUSTICE, TITLE VI LEGAL MANUAL 1–2 (2001), <https://www.justice.gov/sites/default/files/crt/legacy/2011/06/23/vimanual.pdf> (describing relationship among the antidiscrimination provisions).

391. Section 504 of the Rehabilitation Act of 1973, 29 U.S.C.S. § 794 (LexisNexis 2013) (prohibiting discrimination against any “otherwise qualified individual with a disability” under Federal grants and programs); Title II of the Americans with Disabilities Act of 1990, 42 U.S.C.S. §§ 12131–12134 (LexisNexis 2013) (prohibiting discrimination on the basis of disability by public entities); see also 28 C.F.R. §§ 35.101, 39.101 (2014); 34 C.F.R. Part 104.1-61 (2014).

392. 20 U.S.C.S. § 1412(24) (LexisNexis 2014); 20 U.S.C.S. § 1416(a)(3)(C) (LexisNexis 2014); 20 U.S.C.S. § 1418(d) (LexisNexis 2014). “The State [must have] in effect, consistent with the purposes of this title . . . policies and procedures designed to prevent the inappropriate overidentification or disproportionate representation by race and ethnicity of children as children with disabilities, including children with disabilities with a particular impairment” 20 U.S.C.S. § 1412(24).

393. 42 U.S.C.S. § 5633(a)(22) (LexisNexis 2014) (requiring state plans to “address juvenile delinquency prevention efforts and system improvement efforts designed to reduce, without establishing or requiring numerical standards or quotas, the disproportionate number of juvenile members of minority groups, who come into contact with the juvenile justice system”).

394. See 20 U.S.C.S. § 6301 (LexisNexis 2014).

and juvenile justice,³⁹⁵ such government interventions, including related regulatory enforcement, have yielded change, but these approaches remain limited, costly, and, in some cases, controversial.³⁹⁶

Similarly, the extensive work of many public interest groups has proved extremely valuable. Still, that the data and research continues to show sustained and substantial inequality suggests that past explanations are inadequate and approaches insufficient.³⁹⁷ A quick internet search on school improvement strategies to close the seemingly intransigent achievement gap³⁹⁸ easily yields well over four million results including entries from leaders such as the NEA, the NAACP, and other organizations committed deeply and historically to these efforts.³⁹⁹ A similar search for var-

395. See generally KIM ET AL., *supra* note 94, at 34–50 (providing an overview of unlawful discrimination); SAMUEL WALKER ET AL., *THE COLOR OF JUSTICE: RACE, ETHNICITY, AND CRIME IN AMERICA* 26–29 (5th ed. 2011) (discussing continuum disparity to discrimination); Arne Duncan, Secretary, U.S. Dep’t of Educ., Remarks on the 45th Anniversary of “Bloody Sunday” at the Edmund Pettus Bridge, Selma, Alabama (Mar. 8, 2010), <http://www2.ed.gov/news/speeches/2010/03/03082010.html>.

396. See DEAR COLLEAGUE LETTER, *supra* note 4; Comm. on Educ. and the Workforce, U.S. House of Representatives, Letter to Arne Duncan, Secretary, U.S. Dep’t of Educ. & Eric Holder, Attorney Gen., U.S. Dep’t of Justice (Feb. 12, 2014) (on file with author) (criticizing the Department’s Dear Colleague Letter and preferring local interventions).

397. See Elizabeth N. Jones, *Disproportionate Representation of Minority Youth in the Juvenile Justice System: A Lack of Clarity and Too Much Disparity among States “Addressing” the Issue*, 16 U.C. DAVIS J. JUV. L. & POL’Y 155, 159 (2012) (“Interestingly, of the four ‘core’ areas of JJDPa concern, it is this section – the only one implicating race as a concerning factor – that has not produced results of consequence.”); see also REFORMING JUVENILE JUSTICE, *supra* note 86, at 130, 205 (emphasizing the importance of fairness and perceived fairness).

398. See, e.g., *Student Achievement in California: Statement on 2013 STAR Data*, EDUC. TRUST—WEST (Aug. 8, 2013), https://west.edtrust.org/press_release/student-achievement-in-california-ed-trust-west-statement-on-2013-star-data-2/ (finding no change in California scores).

399. Indeed, each of us knows of at least one school that beat the odds, one student who became a poster child for beating the odds; one program that can show results in terms of student success. The search also reveals an interesting trend toward programs that are focused not only on closing the achievement gap (academic) but also on closing cultural gaps.

ious aspects of the school-to-prison pipeline garners similar results. Reviewing the scope and history of these seemingly intransigent differences—setting after setting, decision after decision, outcome after outcome—is important background for offering a new approach to answer the question why change remains *so slow*?⁴⁰⁰

2. Summary of implicit bias research and its implications for the school-to-prison pipeline

The following summary of concepts of implicit bias research suggests how an understanding of implicit bias and its implications might offer a new approach for understanding and decreasing disproportionality in education and juvenile justice decisions:

- Implicit biases are measurable by social psychology and neuroimaging.⁴⁰¹
- Implicit biases are “pervasive.”⁴⁰²
- Implicit biases are different from what we self-report.⁴⁰³
- IAT results show high levels of implicit bias against the disabled (78% of the sample show a pro-abled implicit preference, 9% pro-disabled).⁴⁰⁴
- IAT results show that women are more strongly associated with family and men more strongly with careers (75% of the

400. VIRGINIA VALIAN, *WHY SO SLOW?: THE ADVANCEMENT OF WOMEN* xi–xii (1999) (asking this very question and discussing women in academia but equally applicable to other settings).

401. See discussion *supra* notes 377, 381, and 383 and accompanying text.

402. PROJECT IMPLICIT, *supra* note 372.

403. See discussion *supra* note 370 and accompanying text.

404. PROJECT IMPLICIT, <https://implicit.harvard.edu/implicit/takeatest.html> (click “I wish to proceed”; click “Disability IAT”; then proceed with test to see statistics) (last visited Nov. 5, 2016) (testing available that shows one’s implicit biases against the disabled relative to others, with the statistics cited). While research concerning implicit bias in favor of the abled and against the disabled is less developed than the research on race, this is one of the strongest and widely held of biases. See *Pervasiveness and Correlates*, *supra* note 373, at 36; see also Mark E. Archambault et al., *Utilizing Implicit Association Testing to Promote Awareness of Biases Regarding Age and Disability*, 19 J. PHYSICIAN ASSISTANT EDUC. 20, 20–23 (2008) (discussing health care providers and suggesting a link between implicit bias and clinical decision making including IAT results for medical students biased toward abled).

sample show women-family preference, 9% women career preference).⁴⁰⁵

- IAT results shows that women are more strongly associated with liberal arts, and men more strongly with science (70% show men-science preference, 11%, a women-science preference).⁴⁰⁶
- IAT results show high levels of implicit bias against African-Americans (68% of the sample show a pro-White implicit preference, 14% pro-African-American).⁴⁰⁷

405. PROJECT IMPLICIT, <https://implicit.harvard.edu/implicit/takeatest.html> (click “I wish to proceed”; click “Gender-Career IAT”; then proceed with test to see statistics) (last visited Nov. 5, 2016) (testing available that shows one’s implicit biases on gender relative to others, with the statistics cited).

406. PROJECT IMPLICIT, <https://implicit.harvard.edu/implicit/takeatest.html> (click “I wish to proceed”; click “Gender-Science IAT”; then proceed with test to see statistics) (last visited Nov. 5, 2016) (testing available that shows one’s implicit biases on gender relative to others, with the statistics cited). And these associations have impact on women’s career pathways. See JOANN MOODY, RISING ABOVE COGNITIVE ERRORS: IMPROVING SEARCHES, EVALUATIONS, AND DECISION-MAKING (2010), <http://huadvanceit.howard.edu/wp-content/uploads/2015/01/Moody-Article.pdf> [<http://web.archive.org/web/20150910050012/http://huadvanceit.howard.edu/wp-content/uploads/2015/01/Moody-Article.pdf>]; Sarah Redfield, Professor, Univ. of N.H., Presentation at UNH New Faculty Seminar: What You Don’t Know Does(n’t) Hurt You? (Feb. 2013); Lyneka Little, *Women Studying Science Face Gender Bias, Study Finds*, ABC NEWS (Sep. 27, 2012), <http://abcnews.go.com/blogs/business/2012/09/women-studying-science-face-gender-bias-study-finds/>.

407. PROJECT IMPLICIT, <https://implicit.harvard.edu/implicit/takeatest.html> (click “I wish to proceed”; click “Race IAT”; then proceed with test to see statistics) (last visited Nov. 5, 2016) (testing available that shows one’s implicit biases on gender relative to others, with the statistics cited). The remaining percent score shows preference in neither direction. The bias is more dominant in White test takers, but some Blacks also show pro-White results, though in a more nuanced way. Project Implicit reports that:

Data collected from this website consistently reveal approximately even numbers of Black respondents showing a pro-White bias as show a pro-Black bias. Part of this might be understood as Black respondents experiencing the similar negative associations about their group from experience in their cultural environments, and also experiencing competing positive associations about their group based on their own group membership and that of close relations.

FAQs, PROJECT IMPLICIT, <https://implicit.harvard.edu/implicit/demo/>

- Implicit biases are sensitive to being primed.⁴⁰⁸
- Implicit biases may “become activated automatically, without a person’s awareness or intention, and can meaningfully influence people’s evaluations and judgments.”⁴⁰⁹
- Implicit biases are often dissociated from what a person actively and honestly believes or endorses.⁴¹⁰
- But are not necessarily dissociated from—indeed often predictive of—explicit action or decisions.⁴¹¹
- Implicit bias may cause some youth to seem more threatening than others.⁴¹²
- Implicit biases are more prevalent in ambiguous situations.⁴¹³
- Implicit biases can cause anxiety.⁴¹⁴

background/faqs.html#faq19 (last visited Nov. 5, 2016); see also Elizabeth A. Phelps, Julius Silver Professor of Psychology and Neural Science, N.Y. Univ., Presentation at the Macarthur Neuroscience and the Law Conference: Race Bias, Decisions, and the Brain (Apr. 27, 2013).

408. See Laurie A. Rudman, *Sources of Implicit Attitudes*, 13 CURRENT DIRECTIONS PSYCHOL. SCI. 79 (2004); see also Danielle M. Young et al., *Innocent until Primed: Mock Jurors’ Racially Biased Response to the Presumption of Innocence*, PLOS ONE (Mar. 18, 2014), <http://www.plosone.org/article/info%3Adoi%2F10.1371%2Fjournal.pone.0092365>. To better understand the concept of “priming,” see KANEMAN, *supra* note 363, at 52–58.

409. See generally MASON D. BURNS ET AL., SELF-REGULATION STRATEGIES FOR COMBATTING PREJUDICE 3 (2016) (on file with author).

410. See discussion *supra* note 364 and accompanying text.

411. See, e.g., *Measures to Mechanisms*, *supra* note 382, at 152.

412. Joshua Correll et al., *The Police Officer’s Dilemma: Using Ethnicity to Disambiguate Potentially Threatening Individuals*, 83 J. PERSONALITY & SOC. PSYCHOL. 1314, 1314 (2002) (“[M]ildly aggressive behavior [may be seen as more threatening] when it is performed by an African-American than when it is performed by a White person.”). See generally Jennifer L. Eberhardt et al., *Seeing Black: Race, Crime, and Visual Processing*, 87 J. PERSONALITY & SOC. PSYCHOL. 876, 876 (2004) (describing the existence of an African-American/criminal stereotype as well-documented).

413. Kurt Hugenberg & Galen V. Bodenhausen, *Facing Prejudice: Implicit Prejudice and the Perception of Facial Threat*, 14 PSYCHOL. SCI. 640, 640 (2003) (showing White observers are quicker to observe anger in ambiguously hostile African-American faces than in White); see also Kurt Hugenberg & Galen V. Bodenhausen, *Ambiguity in Social Categorization: The Role of Prejudice and Facial Affect in Race Categorization*, 15 PSYCHOL. SCI. 342 (2004) (finding that hostility influences categorization of racially ambiguous faces).

414. Jacoby-Senghor et al., *supra* note 31, at 53.

- Implicit biases can cause misremembering.⁴¹⁵

*These errors are related not to consciously racist attitudes or preferences but to participants “systematically and implicitly mak[ing] stereotype-driven memory errors.” (Levinson, *Forgotten Racial Equality*)*

- Implicit bias reduces student academic performance.⁴¹⁶
- Implicit bias is at play in discretionary situations and influences disciplinary and other youth related decisions.⁴¹⁷

3. Summary of group dynamics research and its implications for the school-to-prison pipeline

415. See 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, 596–97 (1976) (describing research involving viewing a video of an ambiguous shove where White observers were much quicker to call the shove violent where performed by a Black than by a White); Justin D. Levinson, *Forgotten Racial Equality: Implicit Bias, Decisionmaking, and Misremembering*, 57 DUKE L.J. 345, 394, 399–401 (2007) (finding that when participants read two short stories, with some participants assigned to the story with the protagonist with a typically African-American name, Tyronne, some to stories with a typically Hawaiian name, Kawika, and some to stories with typically White name, William, they recalled facts from the stories such that Tyronne and Kawika were more aggressive with fewer mitigating factors than William); see also Charles Ogletree et al., *Criminal Law: Coloring Punishment: Implicit Social Cognition and Criminal Justice*, in IMPLICIT RACIAL BIAS ACROSS THE LAW 45 (Justin D. Levinson & Robert J. Smith eds., 2012).

416. See discussion *infra* notes 441–466 and accompanying text.

417. See discussion *supra* notes 28–35, 362 and accompanying text.

*“[M]ere classification of people into social groups allows people to understand others with regard to one or a few main characteristics, such as their age, gender, social role, physical appearance, or relation to the self. One should not confuse the process of categorization, which facilitates the ability to think clearly, with the “cultural baggage” associated with these categories.” (Eberhardt, *Confronting Racism*)*

The findings on implicit bias are augmented by a second area of social science research, which considers group dynamics. We all are part of cultural groups, and cultural groups are one of the major categorization mechanisms that all humans use to process information.⁴¹⁸ Traits that define cultural groups include race, ethnicity, religion, gender, sexual orientation, national origin, family, or professional status.⁴¹⁹

The following summary of concepts of group-oriented research suggests how an understanding of group dynamics and in-group preference might offer a new approach for understanding and decreasing disproportionality in special education and other education and juvenile justice decisions:

- Categorization of and preference for people based on group identity is a normal, fundamental process of the human brain.⁴²⁰
- Culture and cultural groups link to decision-making.⁴²¹

418. See ABA CRIMINAL JUSTICE SECTION, BUILDING COMMUNITY TRUST IMPROVING CROSS-CULTURAL COMMUNICATION IN THE CRIMINAL JUSTICE SYSTEM 12–25 (2010), <http://www.americanbar.org/content/dam/aba/migrated/sections/criminaljustice/PublicDocuments/bctext.authcheckdam.pdf>.

419. Culture is also described as shared meanings and shared language or representational communications. See *id.*

420. Galen V. Bodenhausen et al., *Social Categorization and the Perception of Social Groups*, in SAGE HANDBOOK OF SOCIAL COGNITION 311 (Susan T. Fiske & C. Neil Macrae eds., 2012).

421. Merlin Donald, *How Culture and Brain Mechanisms Interact in Decision Making*, in BETTER THAN CONSCIOUS? DECISION MAKING, THE HUMAN MIND, AND IMPLICATIONS FOR INSTITUTIONS 191, 191 (Christoph Engel & Wolf Singer eds., 2008) (“The human brain does not acquire language, symbolic skills, or any form of symbolic cognition without the pedagogical guidance of

- Our automatic group identification is significant.⁴²²
- We make connections when someone appears or is labeled a certain way.⁴²³
- We tend to prefer our own, no matter how we define our own.⁴²⁴
- Our response is influenced by our self-concept, which transfers to others like ourselves. Without conscious attention, we start with this assumption: If I am good and I am White, then White is good⁴²⁵ . . . and you are White, then you are also good.⁴²⁶

culture and, as a result, most decisions made in modern society engage learned algorithms of thought that are imported from culture.”).

422. See Anthony G. Greenwald & Thomas F. Pettigrew, *With Malice Toward None and Charity for Some: Ingroup Favoritism Enables Discrimination*, 69 AM. PSYCHOLOGIST 669 (2014); Pettigrew & Tropp, *supra* note 377, at 751.

423. See HATTIE, *supra* note 29, at 291; Nayeli Y. Chavez-Dueña et al., *Skin-Color Prejudice and Within-Group Racial Discrimination: Historical and Current Impact on Latino/a Populations*, 36 HISP. J. BEHAV. SCI. 3 (2014); Thierry Devos & Mahzarin Banaji, *American = White?*, 88 J. PERSONALITY & SOC. PSYCHOL. 447 (2005); Charles W. Perdue et al., *Us and Them: Social Categorization and the Process of Intergroup Bias*, 59 J. PERSONALITY & SOC. PSYCHOL. 475, 478–79, 482–84 (1990).

424. Henri Tajfel, *Experiments in Intergroup Discrimination*, SCI. AM., Nov. 1970, at 96 (showing that group loyalty occurs even if factors that put you in a group are random and arbitrary, that is, the very act of categorization may be enough to create an in-group preference).

425. See Bertram Gawronski et al., *I Like It, Because I Like Myself: Associative Self-Anchoring and Post-Decisional Change of Implicit Attitudes*, 43 J. EXPERIMENTAL SOC. PSYCHOL. 221 (2007); Laurie A. Rudman, *Social Justice in Our Minds, Homes, and Society: The Nature, Causes, and Consequences of Implicit Bias*, 17 SOC. JUSTICE RES. 129, 137 (2004).

426. It is not always thus. See, e.g., *Brown v. Bd. of Educ.*, 347 U.S. 483, 495 n.11 (1954) (referencing Dr. K. B. Clark’s work studying the response of African-American children to White dolls about which he testified,

[t]he conclusion which I was forced to reach was that these children in Clarendon County, like other human beings who are subjected to an obviously inferior status in the society in which they live, have been definitely harmed in the development of their personalities; that the signs of instability in their personalities are clear, and I think that every psychologist would accept and interpret these signs as such.

RICHARD KLUEGER, *SIMPLE JUSTICE* (1976)); Gordon J. Beggs, *Novel Expert Evidence in Federal Civil Rights Litigation*, 45 AM. U. L. REV. 1 (1995) (dis-

- In-group members (however defined) enjoy a presumptive advantage as to expectations and response.⁴²⁷
- Differences between groups are exaggerated and those in the out-group are viewed as worse, not as competent or warm as the in-group, more threatening.⁴²⁸
- The attitudes of one's group influence an individual group member's attitudes.⁴²⁹ For example, if our fellow teachers have an association regarding certain groups of students, then we will likely follow suit.
- Group identification, or mismatch,⁴³⁰ can impact a wide range of behaviors and decisions—placement, class participation, en-

curring social science evidence of African-American children's preference for White dolls); see also Emily Falk & Matthew B. Lieberman, *The Neural Bases of Attitudes, Evaluation, and Behavior Change*, in THE NEURAL BASIS OF HUMAN BELIEF SYSTEMS 71 (Frank Krueger & Jordan Grafman eds., 2013).

427. See Nilanjana Dasgupta, *Implicit Ingroup Favoritism, Outgroup Favoritism, and Their Behavioral Manifestations*, 17 SOC. JUST. RES. 143 (2004); Charles W. Perdue et al., *supra* note 423, at 478–79, 482–84 (explaining that we view in-group members as more competent, cooperative, confident, independent, intelligent, warmer, more affirming, tolerant, good-natured, sincere, and more concerned with group goals); Pettigrew & Tropp, *supra* note 377, at 751; see also Croft & Schmader, *supra* note 32, at 1143 (suggesting that differing in-category standards may result in higher grades from the out-group).

428. See Bodenhausen et al., *supra* note 420, at 317; Bernadette Park & Myron Rothbart, *Perception of Out-Group Homogeneity and Levels of Social Categorization: Memory for the Subordinate Attributes of In-Group and Out-Group Members*, 42 J. PERSONALITY AND SOC. PSYCHOL. 1051 (1982); see also Yael Granot et al., *Justice Is Not Blind: Visual Attention Exaggerates Effects of Group Identification on Legal Punishment*, 143 J. EXPERIMENTAL PSYCHOL. 2196 (2014).

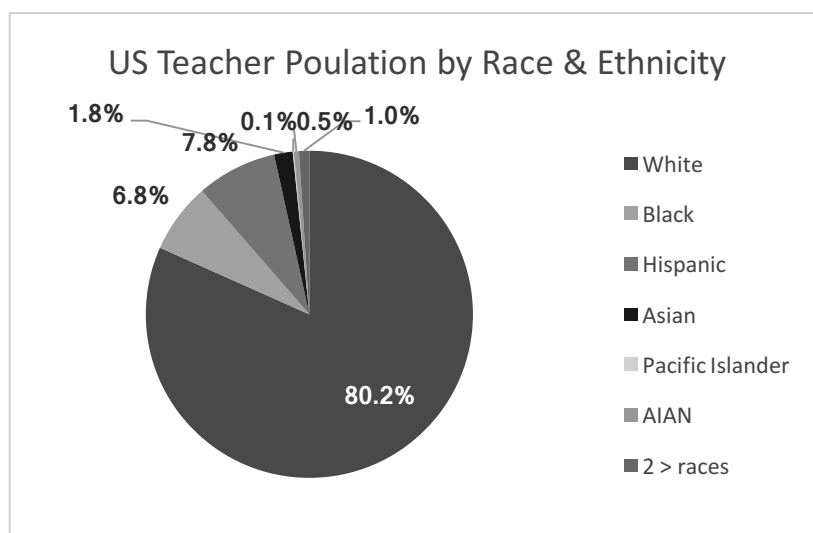
429. See, e.g., *IAT at Age 7*, *supra* note 370, at 265.

430. Compare Littisha A. Bates & Jennifer E. Glick, *Does It Matter If Teachers and Schools Match the Student? Racial and Ethnic Disparities in Problem Behaviors*, 42 SOC. SCI. RES. 1180, 1182, 1187 (2013) (answering in the affirmative whether “teacher-student racial/ethnic matches result in evaluations of student behaviors that are different from instances in which children are taught and assessed by a teacher from outside their racial or ethnic group”), with Geert Driessen, *Teacher Ethnicity, Student Ethnicity, and Student Outcomes*, 26 INTERCULTURAL EDUC. 179, 188 (2015) (“The conclusion seems justified that there is as yet little unambiguous empirical evidence that a stronger degree of ethnic match be it in the form of a one-to-one coupling of teachers to students with the same ethnic background, or a larger share of minority teachers at an ethnically mixed school, leads to predominantly positive results. Insofar favora-

gagement, evaluation, referral for special education, discipline, and on along the pipeline.⁴³¹

- There is particular significance in school and juvenile justice settings where the teaching and administrative force remains largely White and the population increasingly of color.⁴³²

Figure 35. U.S. Teacher Population by Race & Ethnicity⁴³³

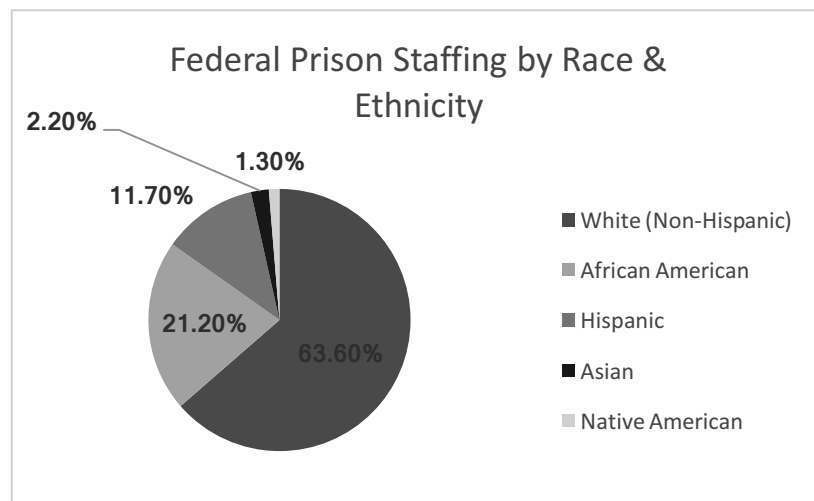


ble effects were found, they apply to a greater extent to subjective teacher evaluations than to objective achievement outcome measures.”).

431. See generally, e.g., WRITTEN IN BLACK & WHITE, *supra* note 367 (showing implicit bias in evaluation of law associate writing); Chris C. Goodman & Sarah E. Redfield, *A Teacher Who Looks Like Me*, 27 J. C.R. & ECON. DEV. 105 (2013) (discussing issues where teaching force differs from student body); Sarah E. Redfield & Theresa Kraft, *What Color is Special Education*, 41 J. L. & EDUC. 129 (2012).

432. See Bates & Glick, *supra* note 430, at 1188; Charles W. Perdue et al., *supra* note 423, at 478–79, 482–84; see also WILLIAM PETERS, *A CLASS DIVIDED: THEN AND NOW* (1987).

433. NAT’L CTR. FOR EDUC. STATISTICS, *supra* note 95, at 134 tbl.209.10.

Figure 36. Federal Prison Staffing by Race & Ethnicity⁴³⁴

4. Summary of micromessaging research and its implications for the school-to-prison pipeline

Group dynamics are reinforced then again by what we know about micromessaging. Like implicit bias and group dynamics, micromessages can involve implicit unconscious communications and results.⁴³⁵ The following summary of micromessaging suggests how an understanding of these concepts might offer a new approach for understanding and decreasing disproportionality:

- Micromessages can be either affirming (conveying inclusion and respect, for example having your class contribution meaningfully acknowledged) or negative (conveying disrespect, for

434. *Staff Ethnicity/Race*, FED. BUREAU OF PRISONS (Aug. 27, 2016), http://www.bop.gov/about/statistics/statistics_staff_ethnicity_race.jsp.

435. They may also be explicitly racist. *See, e.g.*, Julio Cammarota, *Misspoken in Arizona: Latina/o Students Document the Articulations of Racism*, 47 EQUITY & EXCELLENCE EDUC. 321, 324 (citing as examples of explicit addressing an “African American young male by calling him ‘boy,’ or telling a student that he or she derives from a racial background in which ‘intelligence’ is an uncommon trait.”).

example being ignored when you volunteer an answer in class).⁴³⁶

- If you are in my in-group, you are more likely to be the recipient of micro-affirmations than microinequities.⁴³⁷
- Once received, positive or negative, micromessages accumulate and influence behavior.⁴³⁸
- These messages can have power for the recipient and others. For example, when a person with higher status acknowledges someone, that acknowledgement influences others to also think better of the acknowledged person; the reverse is also true.⁴³⁹
- Micromessages can influence learning dynamics and interactions of youth with teachers and juvenile justice personnel.⁴⁴⁰

5. Putting Implicit together to understand the pipeline

Implicit bias, group dynamics, and micromessaging have obvious implications for teachers and others who deal with young people and the messages they send day in and day out, and for the students who receive them, also day in and day out. For example, consider a teacher who decides that a student's name is too hard to learn to pronounce so calls that student "Frank" (which is the

436. See, e.g., STEPHEN YOUNG, *MICROMESSAGING: WHY GREAT LEADERSHIP IS BEYOND WORDS* (2007); Dávila, *supra* note 27, at 458 (describing "disregard" as a microaggression).

437. See MOODY, *supra* note 406; Mary Rowe, *Micro-affirmations & Micro-inequities*, 1 J. INT'L OMBUDSMAN ASS'N 45 (2008); Mary Rowe, *The Saturn's Rings Phenomenon*, 50 HARV. MED. ALUMNI BULL. 14 (1975).

438. See Jennifer Wang, Janxin Leu & Yuichi Shoda, *When the Seemingly Innocuous "Stings": Racial Microaggressions and Their Emotional Consequences*, 37 PERSONALITY & SOC. PSYCHOL. BULL. 1666, 1666 (2011) (conflating microaggression and race bias); Caroline E. Simpson, Professor at Fla. Int'l Univ., Presentation Entitled: Accumulation of Advantage and Disadvantage or Nibbled to Death by Ducks (June 1, 2010), http://www.aas.org/cswa/MAY10/Simpson_UncBias.pdf; Alexandra Svokos, *College Campuses Are Full of Subtle Racism and Sexism, Study Says*, HUFFINGTON POST (Jan. 12, 2015, 5:22 PM), http://www.huffingtonpost.com/2015/01/12/microaggressions-college-racism-sexism_n_6457106.html ("[D]iscrimination, often manifested in what are called 'microaggressions,' creates unwelcoming environments and can be detrimental to academic performance . . .").

439. VALIAN, *supra* note 400, at 4.

440. See discussion *infra* starting at note 442.

teacher's name) to the amusement of the rest of the class.⁴⁴¹ Or a teacher who only calls on certain students, or only continues a dialogue with certain students, and disregards others—sending a message both to those students who are engaged and to the rest of the class.⁴⁴²

When implicit bias and its correlates in group dynamics and messaging are read together with what we know about the delivery of public education and juvenile justice overall, the ramifications are obvious.⁴⁴³ The teaching force, which is at least 83.5% White and 56% female (*in Special Education, 83.9% White and 72.5% female*),⁴⁴⁴ will *most likely* share the implicit biases shown by other Americans for White, abled, and women-and-families.

There is evidence⁴⁴⁵ that these perceptions—again, albeit unintentional—will directly influence student outcomes,⁴⁴⁶ particu-

441. Rita Kohlia & Daniel G. Solórzano, *Teachers, Please Learn Our Names!: Racial Microaggressions and the K-12 Classroom*, 15 RACE ETHNICITY & EDUC. 441, 451 (2012).

442. See, e.g., STACY A. HARWOOD ET AL., RACIAL MICROAGGRESSIONS AT THE UNIVERSITY OF ILLINOIS AT URBANA-CHAMPAIGN: VOICES OF STUDENTS OF COLOR IN THE CLASSROOM 1 (2015), <http://www.racialmicroaggressions.illinois.edu/files/2015/03/RMA-Classroom-Report.pdf> (“Over half of participants (51 percent) reported experiences of stereotyping in the classroom. About a third (27 percent) of the students of color reported feeling that their contributions in different learning contexts were minimized and that they were made to feel inferior because of the way they spoke. Additionally, a quarter (25 percent) of students of color reported feeling that they were not taken seriously in class because of their race.”); Dávila, *supra* note 27, at 455 (describing low expectations as a form of microaggression); Goodman & Redfield, *supra* note 431, at 133–34 (discussing cumulative messaging).

443. See Chris C. Goodman, *Retaining Diversity in the Classroom: Strategies for Maximizing the Benefits that Flow from a Diverse Student Body*, 35 PEPP. L. REV. 663 (2008). See generally discussion *supra* notes 431–443 and accompanying text.

444. Snyder & Dillow, *supra* note 104, at 117 tbl.75.

445. See HARRY & KLINGNER, *supra* note 170, at 75–81; Skiba et al., *supra* note 170, at 264; Alvin Y. So, *Hispanic Teachers and the Labeling of Hispanic Students*, 71 HIGH SCH. J. 5, 7 (1987) (reviewing the High School and Beyond Study, U.S. Dep’t of Educ. National Education Longitudinal Studies (NELS), and identifying both a differential attitude and differential treatment of Hispanic students by Anglo compared to Hispanic teachers).

446. See, e.g., MARCOS PIZZARO, CHICANAS AND CHICANOS IN SCHOOL RACIAL PROFILING, IDENTITY BATTLES, AND EMPOWERMENT 240 (2005) (“Just

larly so for students of color and students with disabilities.⁴⁴⁷ For example, Russell Skiba and his colleagues have found that “when the teacher thought the child was either black or Hispanic, he or she more often judged special education placement as appropriate compared with when the teacher believed the child was white.”⁴⁴⁸ Beth Harry and her colleagues found similarly that negative beliefs about African-American families are pervasive among educators and influenced special education evaluation in harmful ways.⁴⁴⁹ A recent study by Drew Jacoby-Senghora, Stacey Sinclair, and Nicole Shelton demonstrated that increased anxiety and reduced student learning in White instructor/Black student situations are such that “instructors’ implicit bias affects their lessons and their students’ subsequent performance irrespective of instructors’ explicit prejudice.”⁴⁵⁰ Another study by Linda van den Bergh and her colleagues in the Netherlands documents these very concerns and confirms, in an education setting, the significance of comparisons of implicit and explicit measures of bias.⁴⁵¹ This study of teachers and elementary students found that differential teacher expectations were related to the size of the ethnic achievement gap and to teachers’ implicit prejudice, as measured on an IAT. Teachers showing greater biases “appeared more predisposed to evaluate their ethnic minority students as being less intelligent and having less promising prospects for their school careers.”⁴⁵²

The teacher and societal perceptions highlighted by Jacoby-Senghor, van den Bergh, and others also have an indirect negative impact as a foundation for stereotypes turned inward as stereotype

as the police often use racial profiles to determine who are potential criminals and who do not need to be pulled over, teachers use racial profiles to determine who will and who will not excel in school.”).

447. LOSEN & GILLESPIE, *supra* note 12, at 35. See generally Jeffrey Stone & Gordon B. Moskowitz, *Non-Conscious Bias in Medical Decision Making: What Can Be Done to Reduce It?*, 45 MED. EDUC. 768 (describing underlying biased attitudes “leaking” to patients); STAATS, *supra* note 40, at 30–32 (reviewing and summarizing the relevant literature).

448. Skiba et al., *supra* note 170, at 264.

449. HARRY & KLINGER, *supra* note 170, at 75–81.

450. Jacoby-Senghor et al., *supra* note 31, at 53.

451. See van den Bergh et al., *supra* note 40, at 518.

452. *Id.*

threats.⁴⁵³ Students know how they are perceived and labeled.⁴⁵⁴ Young people perceive the unfairness inherent in these labels;⁴⁵⁵ they understand the societal perceptions that create them and turn them inward in what is described as stereotype threat (or stereotype consciousness), a threat which can further negatively impact student performance.⁴⁵⁶ A phenomenon first identified by psychologist Claude Steele and now well documented across a wide variety of groups,⁴⁵⁷ stereotype threat describes the anxiety students expe-

453. See, e.g., Jacoby-Senghor et al., *supra* note 31, at 54 (“When anxiety and poorer lesson quality associated with instructors’ implicit bias cause black students to perform worse, their relatively poor performance may trigger identity threats and belonging concerns that further diminish performance.”).

454. See Michelle Fine et al., *Civics Lessons: The Color and Class of Betrayal*, 106 TCHRS. C. REC. 2193, 2204–05 (2004) (finding that students believed that their teachers considered them to be “animals,” “inmates,” or “killers”); Paul J. Hirschfield, *supra* note 115, at 92 (“Owing to a dominant image of black males as criminals and prisoners, many school authorities view chronically disobedient black boys as ‘bound for jail’ and ‘unsalvageable.’”); Noguera, *supra* note 312, at 448 fig.1 (observing that African-American students were less inclined than White students to believe that their teachers were concerned about and supported them); see also EDUC. ALLIANCE, STUDENT VOICE: WEST VIRGINIA STUDENTS SPEAK OUT ABOUT THE ACHIEVEMENT GAP 62 (2004); EDUC. ALLIANCE, THROUGH DIFFERENT LENSES: WEST VIRGINIA SCHOOL STAFF AND STUDENTS REACT TO SCHOOL CLIMATE 39 (2006), http://www.academia.edu/290024/Through_Different_Lenses_West_Virginia_School_Staff_and_Students_React_to_School_Climate.

455. See discussion *supra* note 37 and accompanying text; see also Gregory et al., *supra* note 56, at 59; Sherry Marx, *Not Blending In: Latino Students in a Predominantly White School*, 30 HISP. J. BEHAV. SCI. 69, 69 (2008).

456. See CLAUDE M. STEELE, WHISTLING VIVALDI AND OTHER CLUES TO HOW STEREOTYPES AFFECT US (2010); Clark McKown & Rhona S. Weinstein, *The Development and Consequences of Stereotype Consciousness in Middle Childhood*, 74 CHILD DEV. 498, 498 (2003); PIZZARO, *supra* note 446; Barbara Schneider et al., *Barriers to Educational Opportunities for Hispanics in the United States*, in HISPANICS AND THE FUTURE OF AMERICA 188–89 (Marta. Tienda & Faith Mitchell eds., 2006); Claude M. Steele, *A Threat in the Air: How Stereotypes Shape Intellectual Identity and Performance*, 52 AM. PSYCHOLOGIST 613, 614 (1997); Claude M. Steele, *Stereotyping and Its Threat Are Real*, 53 AM. PSYCHOLOGIST 680, 680–81 (1998).

457. See, e.g., STEELE, *supra* note 456; Matt McGlone, *Stereotype Threat* (Oct. 14, 2008), <https://itunes.apple.com/us/podcast/stereotype-threat-by-matt/id295430869> (summarizing research).

rience because of societal stereotypes (girls aren't good at math),⁴⁵⁸ even where students do not believe the stereotype.⁴⁵⁹ Girls' performance lessens as they worry about confirming the stereotypes about their group: *I am a girl, girls are not expected to be good at math, and this is a difficult math test.*⁴⁶⁰ Like other aspects of disengagement, stereotype threat demonstrably lowers student achievement,⁴⁶¹ and may reduce student interest in a particular domain of study.⁴⁶² While research specifically on this point for special education remains to be developed, one can readily imagine the impact of race/ethnicity connections with the label of seriously emotionally disturbed or intellectually disabled.

De-biasing is possible and necessary; new training, de-biasing tools, and system monitoring is called for.⁴⁶³ Research continues to mount as to effective approaches to interrupt and suppress

458. See *Laurel School's Center for Research on Girls*, LAUREL SCHOOL, <https://www.laurelschool.org/page.cfm?p=625&LockSSL=true>, (last visited Jan. 11, 2016).

459. See, e.g., *id.*; McGlone, *supra* note 457.

460. See *What is Stereotype Threat?*, REDUCINGSTEREOTYPETHREAT.ORG, <http://www.reducingstereotypethreat.org/definition.html> (last visited Nov. 7, 2016).

461. See Nancy H. Murri et al., *Reducing Disproportionate Minority Representation in Special Education Programs for Students With Emotional Disturbances: Toward a Culturally Responsive Response To Intervention Model*, 29 EDUC. & TREATMENT CHILD. 779 (2006); Claude M. Steele & Joshua Aronson, *Stereotype Threat and the Intellectual Test Performance of African Americans*, 69 J. PERSONALITY & SOC. PSYCHOL. 797, 808 (1995).

462. FREDERICK L. SMYTH ET AL., IMPLICIT GENDER-SCIENCE STEREOTYPE OUTPERFORMS MATH SCHOLASTIC APTITUDE IN IDENTIFYING SCIENCE MAJORS 1, 10 (2009), <http://projectimplicit.net/nosek/papers/SGN2010gensci.pdf> (reporting that "implicit stereotyping was more strongly related to majoring in STEM than was SAT-math performance," showing a "potent link between implicit stereotyping and scientific self-concept"). Perhaps even more concerning is their conclusion: "Remarkably, the negative correlation of implicit stereotyping with women's choices of STEM majors was as powerful for the most mathematically-able women as for the least." *Id.* at 8.

463. See generally, e.g., BURNS ET AL., *supra* note 409, at 21–22; Patricia G. Devine et al., *Long-Term Reduction in Implicit Bias: A Prejudice Habit-Breaking Intervention*, 48 J. EXPERIMENTAL SOC. PSYCHOL. 1267 (2012) (describing successful training).

reflexive responses in appropriate situations—de-biasing.⁴⁶⁴ The research supports initiatives that train us to engage in more intentional and mindful reflection to avoid implicit biases at critical decision points.⁴⁶⁵ This report recommends this training for decision makers all along the education and school-to-prison pipeline. Once de-biased, it is likely that our education system will look very different from the disproportional picture it presents today.

464. See, e.g., Devine et al., *supra* note 463, at 1267; Patricia G. Devine et al., *The Regulation of Explicit and Implicit Race Bias: The Role of Motivations To Respond Without Prejudice*, 82 J. PERSONALITY & SOC. PSYCHOL. 835 (2002); Kerry Kawakami et al., *The Impact of Counterstereotypic Training and Related Correction Processes on the Application of Stereotypes*, 10 GROUP PROCESSES & INTERGROUP RELATIONS 139, 147 (2007) (“In general, the results of the present research support the hypothesis that correction is a deliberate and calibrated process that people use strategically to compensate for undesired external influence.”). The research is still coming in on what may or may not be effective. For example, there is caution about potential “backlash” from use of the IAT. See, e.g., Jacquie D. Vorauer, *Completing the Implicit Association Test Reduces Positive Intergroup Interaction Behavior*, 23 PSYCHOL. SCI. 1168 (2012) (finding that White participants’ taking race-based IAT led to their non-White (Aboriginal) partners feeling less well regarded than after interactions after a non-race-based IAT); Jennifer K. Elek & Paula Hannaford-Agor, *First, Do No Harm: On Addressing the Problem of Implicit Bias in Juror Decision Making*, 49 CT. REV. 190 (2013) (suggesting that mock jurors who were given the implicit bias instruction responded to it in subtle ways although the instruction did not produce any backfire or harmful effect); Margo J. Monteith et al., *Schooling the Cognitive Monster: The Role of Motivation in the Regulation and Control of Prejudice*, 3 SOC. & PERSONALITY PSYCHOL. COMPASS 211 (2009) (discussing motivation); Jessi L. Smith, et al., *Now Hiring! Empirically Testing a Three-Step Intervention to Increase Faculty Gender Diversity in STEM*, 65 BIOSCI. 1084 (2015) (describing successful training regarding faculty STEM hiring).

465. See, e.g., Smith et al., *supra* note 464; Tom R. Tyler et al., *The Impact of Psychological Science on Policing in the United States: Procedural Justice, Legitimacy, and Effective Law Enforcement*, 16 PSYCHOL. SCI. PUB. INT. 75 (2015); Lorie Fridell & Sandra Brown, *Fair and Impartial Policing: A Science Based Approach*, POLICE CHIEF, June 2015, at 20–25; Jason P. Nance & Sarah E. Redfield, Clark County Training Presentation: Reversing the School-to-Prison Pipeline, (Dec. 10, 2015) (on file with authors); Jason P. Nance & Sarah E. Redfield, Warren County Training Presentation: Reversing the School-to-Prison Pipeline (May 29, 2015) (on file with authors).

What is needed is a commitment of resources to appropriate training to this end.⁴⁶⁶

6. New Response to the School-to-Prison Pipeline: A Focus on Implicit

Previous sections of the report reviewed implicit bias, group dynamics and micromessaging, all unconscious responses that often influence decisions in unintended ways and result in unintended results, thought by many to account in part for the disproportionalities identified. The differences in expectations and results previously discussed play out in specific arenas and cry out for individuation rather than group-triggered response.

It is easy to conceptualize how a White female educator or decision-maker, facing a decision involving disciplining a twelve year old African-American boy who was involved in a shoving incident finds herself in a context where race has been shown to matter (at least implicitly).⁴⁶⁷ That White educator is more likely to implicitly respond negatively to him (than to a similarly situated White boy) based on implicit associations and group identification.⁴⁶⁸ If she is in a poor, urban school with a majority of students of color, there are more likely to be School Resource Officers present.⁴⁶⁹ She is more likely to call for help from the SRO than to send the boy to the principal's office or some lesser intervention.⁴⁷⁰ When the SRO arrives he/she is likely to view the scene less favorably than he/she might for a White student, especially if the teacher

466. See, e.g., BURKE & NISHIOKA, *supra* note 85.

467. See, e.g., discussion *supra* notes 415–417 and accompanying text; Eberhardt et al., *supra* note 412, at 876; Phillip Atiba Goff et al., *The Essence of Innocence: Consequences of Dehumanizing Black Children*, 106 J. PERSONALITY & SOC. PSYCHOL. 526 (2014).

468. Michael J. Bernstein et al., *The Cross-Category Effect: Mere Social Categorization Is Sufficient To Elicit an Own-Group Bias in Face Recognition*, 18 PSYCHOL. SCI. 706, 706 (2007); see also, e.g., 2 HANDBOOK OF SOCIAL PSYCHOLOGY (Susan T. Fiske et al. eds., 5th ed. 2010).

469. See *supra* Figure 34.

470. See, e.g., discussion *supra* notes 38–39 and accompanying text; see also Granot et al., *supra* note 428, at 2196 (finding that where study participants “fixated frequently on outgroup targets, prior identification influenced punishment decisions”).

labels the *offender* as a *troublemaker*.⁴⁷¹ As the incident proceeds along, it is also easy to see how misremembering might come into play and the behavior of the Black boy remembered as more aggressive.⁴⁷² And these first decisions will carry on along the pipeline, where this young student will more likely find himself arrested and detained.⁴⁷³

When these implicit dynamics are viewed in the context of the tremendous discretion at play along the pipeline, in decisions like this one and in so many others, including *discretionary* special education decisions, *discretionary* referral to law enforcement, *discretionary* arrest and detention, the critical role of the decision maker is obvious.⁴⁷⁴ As one of the recent supplementary papers issued by the Disparity Collaborative summarizes:

[T]here is clear evidence that children of color are punished more severely than White children for relatively minor, subjective offenses in schools. These are the very types of behaviors that require judgment and discretion by the decision-maker in determining punishment. There is also research that illustrates how the implicit biases or assumptions held by adults with decision-making authority lead to harsher treatment of Blacks than Whites for similar behaviors. Considered in tandem, these two sets of studies strongly suggest that implicit racial bias contributes to the differential treatment of children of color—particularly Black boys—in school settings.⁴⁷⁵

471. See discussion *supra* note 423 and accompanying text.

472. See, e.g., discussion *supra* note 415 and accompanying text.

473. See discussion *supra* pp. 48–49; see also Dara Lind, *Why Having Police in Schools Is a Problem, in 3 Charts*, VOX (Oct. 28, 2015, 12:10 PM), <http://www.vox.com/2015/10/28/9626820/police-school-resource-officers>.

474. See, e.g., Decoteau J. Irby, *Net-Deepening of School Discipline*, 45 URB. REV. 197 (2013) (summarizing research); Kelly Welch & Allison Ann Payne, *Exclusionary School Punishment: The Effect of Racial Threat on Expulsion and Suspension*, 10 YOUTH VIOLENCE & JUV. JUST. 155, 165 (2012).

475. JOHANNA WALD, CAN “DE-BIASING” STRATEGIES HELP TO REDUCE RACIAL DISPARITIES IN SCHOOL DISCIPLINE?: A SUMMARY OF THE LITERATURE

That is, what we know about implicit associations and biases call for a pause in the process. Not every decision is one that calls for a stare not a blink, but some are. That the decision maker needs to be deciding without bias, explicit or implicit, is also critical. In its recent report on *Reforming Juvenile Justice*, the National Academies of Science highlighted the importance of addressing bias in discretionary decision-making for juvenile justice, though their conclusion is equally important to decisions further back on the school-to-prison pipeline:

Because bias (whether conscious or unconscious) also plays some role, albeit of unknown magnitude, juvenile justice officials should embrace activities designed to increase awareness of unconscious biases and to counteract them, as well as to detect and respond to overt instances of discrimination. Although the juvenile justice system itself cannot alter the underlying structural causes of racial/ethnic disparities in juvenile justice, many conventional practices in enforcement and administration magnify these underlying disparities, and these contributors *are* within the reach of justice system policy makers.⁴⁷⁶

As the Academy suggests, it is in reach of decision makers to bring about change by becoming aware of the implicit aspects of their decisions and responding with conscious attention to the individual. One can now imagine a context where the decision makers have become aware of their implicit biases, where before the teacher calls for the School Resource Officer, she quickly asks herself, *Would I be doing this if this were Emily, a twelve-year-old white girl in my class?* Or where the SRO presence is minimal or not existent and the student is sent to the principal, who asks him/herself the same type of questions. Or if an SRO is called, he/she has been trained with a quick checklist of points to consider.

2

(2014),

http://www.indiana.edu/~atlantic/wp-content/uploads/2014/03/Implicit-Bias_031214.pdf.476. REFORMING JUVENILE JUSTICE, *supra* note 86, at 7.

Or if the student is to be suspended, a lawyer or law student is present to represent him and so on down the line.

IV. OVERVIEW OF TOWN HALL MEETINGS

A. *Background Information Provided for 2014-15 Town Halls*

The issue: For too many of our young people, particularly those who are Black, Hispanic, American Indian, disabled, LGBTQ, and/or low-income, the education pipeline stands broken, and the doors to meaningful education remain closed. The problem is particularly acute in regard to students being pushed or dropping out of school, often into the juvenile or prison system—the so-called school-to-prison pipeline. Disproportionality—where certain racial or other groups are represented out of proportion to their student numbers—remains virtually unchecked in regard to academic achievement, discipline, suspension, and expulsion and in regard to certain special education categorizations and placements. The disproportionate minority contact in juvenile justice and delinquency matters is equally troubling. While the availability and visibility of data on pipeline issues is increasing, the problems have been known for decades and have been resistant to change.

The issues posed by the school-to-prison pipeline are a civil rights challenge for our society. The economics alone are enough reason to address it: students who drop out or are pushed out of school are disengaged first as students and then as citizens; they lose earning capacity; they become more dependent on welfare or join the expensive prison population. The U.S. spends an average of \$12,296 per year per student while states' average per inmate cost is over twice that, \$31,286;⁴⁷⁷ and juvenile detention even higher, an estimated \$88,000 per year.⁴⁷⁸

The goals: The Town Halls use the convening power of the ABA to host a series of national gatherings of key individuals and

477. *Fast Facts: Expenditures*, *supra* note 301; HENRICHSON & DELANEY, *supra* note 289, at 10 fig.4 (providing the average of the forty states reporting in the Vera Survey).

478. COSTS OF CONFINEMENT, *supra* note 298, at 4; *see also* DETENTION REFORM: A COST-SAVING APPROACH, ANNIE E. CASEY FOUND. (2007), <http://www.aecf.org/work/juvenile-justice/jdai/> (estimating costs between \$32,000 and \$65,000).

organizations 1) to call particular attention to the role of the legal community in addressing pipeline issues; 2) to direct focus to the role implicit bias may play in these issues; 3) to recognize ongoing research and programmatic intervention and allow opportunity for networking to support replication of successful efforts; and 4) to develop an action plan to address the components of the school-to-prison pipeline dilemma.

The typical format: The Town Halls follow a proven format for engagement for change. The first hour features an expert panel drawn largely from the local area and led by two experienced ABA moderators. The panelists speak to the designated topic area and to their experience with pipeline programs and interventions. The second hour opens the program to the audience for questions, comments, and discussion. The formal program is followed by an informal networking opportunity, and, where possible, a reception hosted by local participants.

Within this framework, the Task Force held eight Town Hall meetings and a roundtable discussion during 2014 and 2015. The purpose of these meetings was to understand the causes and effects of the school-to-prison pipeline at different regions of the country, connect constituencies and individuals interested in reversing these negative trends, recognize ongoing research, discuss potential solutions, and showcase successful local programmatic interventions.

Introductory Note: Because we did not have court reporters at each Town Hall, we are unable to reproduce full testimony here, though all was considered in formulating the report's recommendations. The materials that follow provide a glimpse of what the expert panels offered during the Town Halls, but cannot begin to reflect the depth and breadth of knowledge experts brought to the sessions.

B. Chicago Town Hall Meeting – February 7, 2014

The inaugural Town Hall was convened at the ABA mid-year meeting in Chicago to discuss issues posed by the school-to-prison pipeline. Entitled, “The School-to-Prison Pipeline: What Are the Problems? What Are the Solutions?” the Town Hall offered expert information on the nature of the problem, together with presentations of local Chicago leaders who have programs on the ground to help find solutions. Speakers provided an overview

of the problems associated with the school-to-prison pipeline; discussed the role that implicit bias plays in producing disparities relating to disciplining students; and discussed the role that lawyers can take to prevent more students from becoming involved in the justice system.

The first Town Hall aptly illustrated the convening power of the ABA and brought together an expert panel and an extraordinary audience (a standing room only crowd, almost all of whom stayed for the entire program). Those commenting and writing about the session⁴⁷⁹ uniformly lauded the ABA's ability to connect people from different perspectives who came armed with varying solutions; they also praised the Town Hall emphasis on facilitating taking action and implementing real solutions at all levels. One example illustrates the potential here: Three law students traveled from New Orleans (sponsored by their deans at Tulane and Loyola) to talk about Stand Up For Each Other ("SUFE0"), where New Orleans law students represent K-12 students in suspension hearings; Chicago area law students attended as well, took these young people out for lunch, and started a conversation about replicating SUFE0 in Chicago (which they did).

Speakers included:

- Julie Biehl, Professor, Children and Family Justice Center, Bluhm Legal Clinic, Northwestern University School of Law, Chicago, Illinois
- Nancy Hietzeg, Professor, Sociology and Critical Studies of Race and Ethnicity, St. Catherine University, St. Paul, Minnesota
- Justice Michael Hyman, Chair of the ABA Coalition on Racial and Ethnic Justice
- Mariame Kaba, Project NIA, Chicago, Illinois
- Sarah Redfield, Professor of Law Emerita, University of New Hampshire School of Law

479. See Monica Llorente, *Help Us Dismantle the School-to-Prison Pipeline*, ABA CHILDREN'S RIGHTS LITIG. (Apr. 10, 2014), <https://apps.americanbar.org/litigation/committees/childrights/content/articles/spring2014-0414-dismantle-school-to-prison-pipeline.html>.

- Robert Saunooke, Law Offices of Robert Saunooke, Miramar, Florida, and legal and policy advisor to the chairman, Seminole Tribe of Florida
- Wesley Sunu, Tribler Orpett & Meyer
- Dr. Artika Tyner, Community Justice Project, Clinical Faculty, Director of Diversity, University of St. Thomas Law School, Minneapolis, Minnesota
- Rev. Janette Wilson, National Rainbow PUSH Coalition, Chicago, Illinois

Selected points from the testimony:

- The problem is “our” fault, the fault of all adults in our community.
- The problem is a complex web of mass incarcerations, which is extremely difficult to exit.
- That children enter the web through an interaction with a police officer, which commonly occurs at school, is an improper role for police officers in Chicago schools.
- Currently in Chicago, two police officers are stationed within each Chicago school, and eighty-four percent of arrests occurring in these schools are for misdemeanor offenses.
- Reframing policing in schools is absolutely necessary.
- Reverend Wilson discussed the punitive environment that permeates many schools and maintained that we are “feeding bodies to the criminal system.”
- Dr. Tyner maintained that we are depriving too many youth “of meaningful opportunities for education, future employment, and participation in our democracy.”
- Ms. Kaba reminded participants that the school-to-prison pipeline is “almost a misnomer in some cases;” “we should really be talking about a community-to-prison pipeline or a cradle-to-prison pipeline. It starts even before young people enter the school building.” She also observed that matters that school principals and counselors should handle are being handled by police.
- Professor Heitzeg observed that students are indirectly funneled into the justice system through suspension and expulsion

policies and directly routed through the growing number of police in schools.

- Mr. Saunooke pointed out that the lack of funding for education contributes the pipeline and observed that teachers, especially in schools that serve high concentrations of Native American students, rarely stay more than two or three years.
- Professor Biehl emphasized that students need to remain in school and that we should not revoke parole for students because they were not in school and incarcerate them, which inhibits their ability to obtain an education. Professor Biehl also debunked the myth that a juvenile's record is confidential. She maintained that a young person's record can be significant barrier to school reentry, employment, financial aid for college, and housing.
- Participants observed that to successfully interrupt the pipeline, schools must focus on ideas of community and cultural understanding.
- Participants identified numerous factors that pose a challenge to dismantling the school to prison pipeline, including implicit bias, funding, and related trends in education, but collective action beyond the dialogue is needed to achieve change.

"Before we push children into a criminal system, we need to push them into a loving setting that allows them to understand the consequence of negative behavior." Reverend Wilson.

C. Boston Town Hall Meeting – August 8, 2014

The second Town Hall was held at the annual ABA meeting in Boston. Speakers provided an overview of the problems and consequences of the school-to-prison pipeline. Again, it was an extraordinary panel of experts and an extraordinary audience. The panel and audience focused on the excellent on-the-ground programs in Massachusetts (including legislation and class action litigation on point); discussed the role implicit bias plays in producing disparities along racial lines; discussed the disproportionate effect that schools' current punitive policies and actions have on students

with disabilities, and discussed certain initiatives that organizations and schools in Massachusetts are taking to reverse these trends. As was the case in Chicago, after the Town Hall, speakers continued to engage in extended networking conversations on next steps.

Speakers included:

- Robert Fleischner, Assistant Director, Center for Public Representation, Northampton, Massachusetts
- Damon Hewitt, Senior Advisor, U.S. Programs, Open Society Foundations, New York, New York
- Mike Ortiz, Staff Counsel, Student Services, Lowell Public Schools, Lowell, Massachusetts
- Sarah Redfield, Professor of Law Emerita, University of New Hampshire School of Law
- Marlies Spanjaard, Director of Education Advocacy, The Ed-Law Project – Children’s Law Center of Massachusetts and the Committee for Public Counsel Services, Boston, Massachusetts
- Wesley Sunu, General Counsel, Sentry Insurance a Mutual Company
- Judge Gloria Y. Tan, Middlesex County Juvenile Court, Massachusetts

Selected points from the testimony:

- While there has been some traction on aspects of school-based discipline, the conversation has to be more comprehensive and include discussions on class and race.
- Mike Ortiz, Staff Counsel for Lowell Public Schools, stated that the phrase “school-to-prison pipeline” is too narrow and argued that “community-to-prison pipeline” more accurately reflects the scope of the problem. Based on a high poverty level in a community, schools in that community will often encounter students with more emotional and learning disability issues than wealthier schools. As a result, poorer communities become further burdened when their schools are asked to do more but with less resources.
- Judge Tan, Middlesex County Juvenile Court, stated that when children are removed from their home, efforts must be made to

ensure they are able to attend and stay in their school of origin unless it is shown it is not in their best interest.

- Damon Hewitt, Senior Advisor for U.S. Programs, Open Society Foundations, articulated the depth and intransigency of the problem and highlighted that more school resource officers in schools are not the solution.
- Marlies Spanjaard, Director of Education Advocacy for The Edlaw Project, stated that of the districts where people found resource officers helpful, it was not in their arresting function but in their function as additional adults in school buildings. Since schools actually desire more adult presence in their buildings, the better choice is to hire more school counselors and fewer school resource officers.
- Robert Fleischner, Assistant Director for the Center for Public Representation, discussed the federal class action lawsuit against the city of Springfield, Massachusetts and the city's school system. The lawsuit raises concerns over the school system's public day programs, which are supposed to provide alternate pathways for students with disabilities. Bob added that the case claims that students are facing segregation in violation of the Americans with Disabilities Act. Because the ADA requires that public schools provide services in integrated environments, this segregated setting denies them equal educational opportunity.

D. Houston Town Hall Meeting – February 6, 2015

The third Town Hall meeting took place in Houston, Texas, in connection with the ABA's 2014 mid-year meeting. Speakers discussed the issues and consequences of the school-to-prison pipeline and local initiatives to reverse these trends.

Speakers included:

- Marilyn Armour, Director, The Institute for Restorative Justice and Restorative Dialogue, University of Texas, Austin, Texas
- Cynthia D. Mares, President, Hispanic National Bar Association
- Miner "Trey" P. Marchbanks, Texas A&M University, Public Policy Research Institute

- Wykisha McKinney, Child Health Outreach Program Manager, Children's Defense Fund Texas
- Pamela Meanes, President of the National Bar Association
- Mary Schmid Mergler, Director, School-to-Prison Pipeline Project, Texas Appleseed
- Sarah Redfield, Professor of Law Emerita, University of New Hampshire School of Law
- Wesley Sunu, General Counsel, Sentry Insurance a Mutual Company

Selected points from the testimony:

- Pamela Meanes, President of the National Bar Association, identified the school to prison pipeline as one of the many reasons for achievement gaps between black and white students. Ms. Meanes stated that it is in our collective interest to educate schools on how to fix this issue and discussed programs, such as the use of classical academies, which are schools that students have the option to attend as an alternative to jail. Unlike an alternative school, this is a "regular" school where students are engaged and educated. Additionally, the role of mentors in all fifty states, as well as programs conducted by Alpha Kappa Alpha, for example, have played a role in diverting students away from the justice system at an early age.
- Methods that schools can use to better handle disciplinary matters need to be identified to avoid the streamlined path into prison caused by swift referral of students to school police officers and the juvenile justice systems for catch-all offenses/Class C crimes.
- Dr. Armour, the Director of the Institute of Restorative Justice and Restorative Dialogue discussed the vast improvement that the "RJ Project" has produced in specific school districts. Ms. Armour stated that this new technique has reduced eighty-four percent of out of school discipline, as well as dropped tardiness by thirty-nine percent. By changing the school climate and shifting the focus on altering the punitive model, Ms. Armour explained that shifting the focus to building relationships, rather than punishing students, will halt the school to prison pipeline.
- Dr. Marchbanks, of the Public Policy Research Institute at Texas A&M, discussed the "Breaking School Rules" study,

which looked to individual, school level data for every student in the state of Texas in grades seven through twelve. Mr. Marchbanks explained that if a student is suspended in Texas, the state must be notified of the occurrence of, and reason for, the suspension. Further, school data was linked to the justice system, because each time a student was referred to the justice system, the state was made aware. The study found that sixty percent of students in Texas were suspended at least once, and while discrepancies were bad, even white students experienced a fifty percent suspension rate. Therefore, proper leadership and school policies are needed to mitigate the negative academic outcomes and increased social costs associated with suspensions.

- Cynthia Mares, President of the Hispanic National Bar Association, reported additional statistics on the school to prison pipeline. While discussing what is being done to solve this problem, Ms. Mares talked about groups that have come together to advocate as a community. Once such group is “Law School Sí Se Puede,” which helps students gain acceptance into the law school of their choice by providing mentoring and funding for the LSAT.
- Wykisha McKinney, Child Health Outreach Program Manager of the Children’s Defense Fund – Texas, further discussed the importance of sending students to counseling instead of funneling them straight to the juvenile justice system, which can be achieved through the creation of new codes, greater parental involvement in the classroom, and continued advocacy.
- Additionally, in her discussion of how to reduce the number of students who are entering into the school to prison pipeline, Mary Schmid Mergler, Director of the School to Prison Pipeline Project (Texas Appleseed), stated that internal drivers, as well as direct referrals to the juvenile justice system by school police, are forcing students into the pipeline. Ms. Mergler stated that school policing must be altered to decrease school arrests.
- This should not be the last discussion on how to solve the school to prison pipeline, as continued help with advocacy is needed to solve this problem in all states and school districts.

E. Washington, D.C. Town Hall Meeting—February 26, 2015

The fourth Town Hall occurred in the District of Columbia at Jones Day, in conjunction with the Criminal Justice Sections Collateral Consequences Summit. Speakers discussed issues of the pipeline from a national perspective, focusing on the disproportionate effects of disciplinary policies on students of color and students with disabilities and the role of federal policy and interventions.

Speakers included:

- The Honorable Bernice Donald, 6th Circuit Court of Appeals & incoming Chair Criminal Justice Section of the ABA
- Renee Wolenhaus, Deputy Chief, Educational Opportunities Section, Civil Rights Division, Department of Justice
- Lara Kaufmann, Senior Counsel & Director of Education Policy for At-Risk Students, National Women's Law Center
- Dawn Sturdevant Baum, Senior Attorney Department of the Interior, Indian Education Team Leader, Division of Indian Affairs, Office of the Solicitor
- William Alvarado Rivera, past President of the Hispanic Bar of the District of Columbia and Deputy Chief Counsel, U.S. Department of Health and Human Services
- Barbara R. Arnwine, President & Executive Director of the National Lawyers' Committee for Civil Rights Under Law (Lawyers' Committee)
- Kristin Harper, Special Assistant, Office of Special Education and Rehabilitative Services, U.S. Department of Education
- Sarah Redfield, Professor of Law Emerita, University of New Hampshire School of Law, Moderator

Selected points from the testimony:

- Highly punitive measures do not improve safety nor do they improve performance.
- Lara Kaufmann observed that our failure to address issues in students such as trauma leads to students acting out and that we need to train educators better to understand the role implicit bias plays in disproportionalities associated with student discipline.
- William Rivera, Deputy Chief Counsel of the Office of General Counsel at the U.S. Department of Health and Human Services,

provided data indicating that the disproportionate use of discipline starts early in pre-schools. As a solution to pre-school expulsion, he recommended that pre-schools use Positive Behavioral Intervention & Supports (PBIS) instead of expelling these students.

- Barbara Arnwine reminded participants that Minneapolis School District dramatically reduced its student suspension rate by placing a moratorium on suspending students in early grades, having higher-level school administrators review suspensions and expulsions of students, and reducing the police presence in the schools.
- Kristen Harper maintained that when students are incarcerated, that we must educate them better, focusing on improving their reading skills. This will ease the transition back into society upon their release.

F. Arizona State University Town Hall Meeting – March 27, 2015

The fifth Town Hall meeting occurred at the Arizona State University Sandra Day O'Connor College of Law. It was held in connection with a symposium hosted by the Arizona State Law Journal and had a special focus on school-to-prison pipeline problems in Indian Country. This convening included both a Town Hall session and a research symposium, the papers from which will be published in the Arizona State Law Review.

Speakers included:

- Denise E. Bates, Interdisciplinary Studies and Organizational Leadership Faculty, College of Letters and Sciences, Arizona State University
- Bryan McKinley Jones Brayboy, Special Advisor to the President, Professor of Justice and Social Inquiry; Director, Center for Indian Education, School of Social Transformation, Arizona State University
- Nicholas Bustamante, M.S. student in Justice Studies and Social Inquiry
- Jeremiah Chin, Ph.D. and J.D. candidate, Research Associate, Center for Indian Education, Arizona State University
- Tiffani Darden, Associate Professor of Law, Michigan State University College of Law; Chair, AALS Education Law
- Philip S. (Sam) Deloria, Director, American Indian Graduate Center

- Patty Ferguson-Bohnee, Faculty Director, Indian Legal Program, Sandra Day O'Connor College of Law
- Sheri Freemont, Director, Family Advocacy Center, Salt River Pima-Maricopa Indian Community
- Leonard Gorman, Director, Navajo Nation Human Rights Commission
- Jenifer Kasten, Director of Public Policy, Decoding Dyslexia Arizona
- John Lewis, Former Executive Director, Inter Tribal Council of Arizona
- Dr. Laura McNeal, Assistant Professor of Law, Brandeis School of Law, University of Louisville
- Jason Nance, Associate Professor of Law, Associate Director of Education Law and Policy for the Center on Children and Families, University of Florida Levin College of Law
- Guenevere Nelson-Melby, Assistant Juvenile Public Defender, Pima County Juvenile Court
- Stephen Pevar, Senior Staff Attorney, American Civil Liberties Union, Racial Justice Program
- Claire Raj, Assistant Professor, Clinical Program, University of South Carolina School of Law
- Sarah E. Redfield, ABA Coalition on Racial and Ethnic Justice, University of New Hampshire School of Law
- Dr. Charles "Monty" Roessel, Director, Bureau of Indian Education
- Kenneth G. Standard, Board of Governors, American Bar Association
- Dr. Sabina E. Vaught, Associate Professor of Urban Education, Tufts University
- Malia Villegas, Director, Policy and Research, National Congress of American Indians
- Vanessa Walsh, J.D. candidate, S.J. Quinney College of Law
- Ron J. Whitener, Associate Judge, Tulalip Tribal Court; Affiliated Assistant Professor of Law, University of Washington School of Law
- Dorothy (Dottie) Wodraska, Director of Juvenile Transition, Maricopa County Education Services Agency.

Selected points from the testimony:

- As a result of their rural geography and concentration in medically underserved areas, Native students face unique health issues. Among these issues is toxic stress, a condition caused by adverse experiences in childhood that occur without the buffer of supportive relationships. To help address the effects of toxic stress, the panelists proposed federal policies that aim at fostering resilience.
- Native students are more likely to experience poverty.
- All these factors have led to a lack of academic achievement among Native students.
- Dr. Bryan Brayboy, President's Professor and Borderlands Professor of Indigenous Education and Justice in the School of Social Transformation at Arizona State University, made several recommendations, including preparing all teachers to work in, with, and for Native communities, re-prioritizing the school process for Native children, connecting Native languages and cultures in both curriculum and pedagogy, and funding these efforts at the same level we fund prisons.
- Guenevere Nelson-Melby, Assistant Juvenile Public Defender for Pima County Juvenile Court, discussed her participation in a taskforce that created a rubric to minimize law enforcement calls by schools. This rubric uses objective criteria in the form of a checklist model to determine when police involvement is necessary and seeks to reduce disproportionate minority contact throughout the juvenile criminal system. Based on preliminary numbers, this rubric has significantly decreased arrests throughout several school systems in Pima County.
- Dr. Charles Roessel, Director of the Bureau of Indian Education, discussed his undertaking of a major reform endeavor of the Bureau of Indian Education to create a school improvement agency.
- Sheri Freemont, Director of the Salt River Pima-Maricopa Indian Community Family Advocacy Center, discussed the SRPMIC Multi-Disciplinary Team (MDT) Model. She credits the model's success to the fact that it is applied to all incidents regardless of the severity of the incident. The MDT consists of core and secondary team members who meet biweekly for updates, training, and challenges, and meet at any time as needed for immediate needs.

G. New Orleans Town Hall Meeting – April 14, 2015

The sixth Town Hall meeting was held in conjunction with the Section of Litigation Annual Conference 2015 at Loyola University New Orleans College of Law. Speakers discussed the problems and consequences of the school-to-prison pipeline generally; specific problems associated with charter schools; and local initiatives that schools and organizations are taking to reverse these trends.

Speakers included:

- Christopher Bowman, Counselor to the District Attorney, Orleans Parish District Attorney's Office
- Nancy Degan, Chair, ABA Section of Litigation
- Robert Garda, Professor, Loyola University New Orleans College of Law, Moderator
- Meghan Garvey, Managing Director, Louisiana Center for Children's Rights
- The Honorable Ernestine S. Gray, Judge, Orleans Parish Juvenile Court
- Eden Heilman, Director, Southern Poverty Law Center
- Rosa K. Hirji, Attorney & Co-Chair, ABA Section of Litigation, Children's Rights Litigation Committee
- Diane Holt, Attorney, Columbia, South Carolina
- Rahsaan Ishon, Families and Friends of Louisiana's Incarcerated Children
- María Pabón López, Dean, Loyola University New Orleans College of Law
- Jason P. Nance, Levin College of Law, University of Florida
- Devan Petersen, Foster Youth Advocate, New Orleans
- Dana Peterson, Deputy Superintendent of External Affairs, Recovery School District, New Orleans
- Sarah Redfield, Professor of Law, Co-Chair, ABA Joint Task Force Reversing the School-to-Prison Pipeline, Moderator
- Student Leaders and Students, SUFEO, Stand Up For Each Other, New Orleans
- Rosie Washington, Executive Director, Micah Project, New Orleans
- Gina Womack, Families and Friends of Louisiana's Incarcerated Children, invited

Selected points from the testimony:

- Meghan Garvey, Managing Director of the Louisiana Center for Children's Rights, described the Louisiana Charter School System as a fractured system, citing lack of detailed oversight as one of the chief problems facing educators in Louisiana. Moreover, no centralized education office exists that is able to provide resources, such as mental health resources, to all the different schools.
- Eden Heilman, Managing Attorney from the Southern Poverty Law Center, outlined the various entry points into the pipeline and the factors that keep children trapped in the system. To address these issues, she suggested both legal and political strategies including individual client representation, filing administrative complaints to federal agencies, looking at the Individuals with Disabilities Education Act to address issues on a larger systems level, class action litigation, and using legislation and policy to effect change.
- Judge Ernestine S. Gray strongly believes students should get the full experience of being meaningfully engaged in school. She stated that if communities want to keep children from becoming arrested or becoming homeless, communities have to work harder to afford these children an education.

H. Honolulu Town Hall Meeting – April 18, 2015

The seventh Town Hall meeting took place in Honolulu, Hawai'i in conjunction with the ABA's Solo, Small Firm, and General Practice Division and the National Asian Pacific American Bar Association. Speakers discussed the school-to-prison pipeline program in Hawai'i, particularly with respect to native Hawaiians, specific programs in Hawai'i designed to reverse the negative trends, and sought to develop an action plan to address the unique components of this issue.

Speakers included:

- Carl Ackerman, Director, Clarence T.C. Ching PUEO Program, Punahou School
- Nancy J. Budd, Attorney, State of Hawai'i Board of Education
- Beth Bulgeron, Academic Performance Manager, Hawai'i State Public Charter Commission

- Kim Greeley, Attorney, COREJ, Honolulu, Hawai'i, Moderator
- Jenny Lee, Staff Attorney, Hawai'i Appleseed Center for Law and Economic Justice
- Justin D. Levinson, Professor, William S. Richardson School of Law, University of Hawai'i
- Kamaile Maldonado, Office of Hawaiian Affairs
- Mark Patterson, Warden, Hawai'i Youth Correctional Facility
- The Honorable Karen M. Radius, Founding Judge, Hawai'i Girl's Court
- Dr. Karen Umemoto Ph.D., Professor, University of Hawai'i at Manoa

Selected points from the testimony:

- Too many young people are having the doors to meaningful education closed because they are being pushed out of school and into the juvenile justice system.
- Consequently, these young people are being disengaged as citizens, thus creating a serious civil rights challenge for Hawaiian school districts and society as a whole.
- The shift toward punitive approaches to school discipline does not focus on the root of the problem, which for many native Hawaiians likely relates back to elements of colonialism and intergenerational trauma that has yet to cease.
- Statistics show severe disproportionate treatment of native Hawaiians in schools.
- Turning to the police for educational infractions compounds the problems. This gives a student a criminal mindset before that student ever has the chance to rehabilitate.
- Hawaiian law provides school administrators with a high level of discretion to assess disciplinary situations and impose punishment, which could be a positive factor in eliminating the school to prison pipeline if administrators are educated to use suspension as a last resort disciplinary tactic.
- Professor Levinson stated that the role of implicit biases and stereotype threat will always pose an issue, unless specific measures are taken to resolve these issues. Therefore, as Mr. Levinson discussed, it is necessary for us to understand how teachers and other students perceive students at a young age, and how these perceptions affect behavior.

- Judge Radius, referencing the Girl's Court, which she founded, emphasized the importance of gender-specific understanding re: delinquency. The Girl's Court provides open courtroom sessions and gender-specific programming for girls and their families. Her court has experienced great success in reducing runaways and arrests, as well as helped girls to receive diplomas, enroll in community college, obtain vocational training, become drug free, obtain employment, and mend troubled relationships with family.
- All panelists agreed that to best help students, each department must work together to provide comprehensive mental health care, family involvement, trauma informed care, culturally specific care, and gender specific care.

I. Miami Town Hall Meeting – May 14, 2015

The last Town Hall meeting for 2015 was held in Miami, Florida and hosted by the Wilkie D. Ferguson, Jr. Bar Association and The Law Center at Miami Dade College. Speakers discussed the problems associated with the school-to-prison pipeline generally; and issues and programs unique to Miami school districts.

Speakers included:

- Colleen Adams, Founder & Executive Director, Empowered Youth
- Leigh-Ann A. Buchanan, President, Wilkie D. Ferguson, Jr. Bar Association, Moderator
- Dwight Bullard, Florida State Senate
- Norman Hemming III, Special Counsel, Office of the United States Attorney, Southern District of Florida
- Ruth Jeannoel, Lead Organizer, Power U Center for Social Change
- Christopher Lomax, Associate, Jones Day
- Carlos Martinez, Public Defender, Miami-Dade County Office of the Public Defender
- Marvelle McIntyre-Hall, Law Center Director, Miami Dade College Wolfson Campus
- Arnold R. Montgomery, Administrative Director, Office of Educational Equity, Access, and Diversity, Miami Dade Public Schools

- Jason P. Nance, Associate Professor of Law & Associate Director for Education Law and Policy, Center on Children and Families, University of Florida Levin College of Law, Moderator
- The Honorable Orlando Prescott, Senior Administrative Judge, Eleventh Judicial Circuit Juvenile Division, Miami-Dade County
- Maurice Sikes, Sergeant, Coral Gables Police Department

Selected points from the testimony:

- A call to action is needed to reverse the school to prison pipeline.
- Miami is a unique educational environment, which ultimately calls for unique solutions to eliminate the school to prison pipeline. The role of community programs, such as Empowered Youth, is critical. Empowered Youth first enforces character and skill building, and second focuses on job development.
- The focus should be on programs that can give students the opportunity to be cared for and believed in, instead of on zero tolerance.
- Arnold Montgomery, Administrative Director of the Education Transformation Office of the Miami-Dade school system, maintained that zero tolerance policies in schools are not effective in deterring student misbehavior, as they “limit or remove access to experience opportunities to achieve success.” Mr. Montgomery proposed that the solution to dismantling the school to prison pipeline includes three steps. First, schools must have codes of conduct that establish consequences, not punishment, which will balance the need for student safety while optimizing student success. Second, students and their families must be provided with learning opportunities that foster academic excellence, career pathways, and real world learning. Finally, the school district must “create a system of oversight, and build collaborative working relationships between municipal law enforcement agencies, and also juvenile justice systems.”

J. Chicago Roundtable Discussion – July 31, 2015

This interactive roundtable discussion was presented via the American Bar Association Coalition on Racial and Ethnic Justice,

the Council for Racial and Ethnic Diversity in the Educational Pipeline and the ABA Criminal Justice Section. This program was part of the American Bar Association's 2015 Annual Meeting. The roundtable highlighted what we learned from the Town Hall meetings and focused on solutions that the ABA could support to reverse the negative trends.

Speakers included:

- Paulette Brown, President-Elect, American Bar Association 2014–2015
- Leigh-Ann Buchanan, Business Litigation Attorney; Incoming Chair, COREJ
- Patty Ferguson-Bohnee, Faculty Director, Indian Legal Program; Director, Indian Legal Clinic
- Dr. Nancy Heitzeg, Professor of Sociology, St. Catherine University; Co-Director, Interdisciplinary Critical Studies of Race/Ethnicity Program
- Craig Holden, President, California State Bar
- Sarah E. Redfield, Professor Emeritus, University of New Hampshire School of Law, Moderator
- Jessica Schneider, Staff Attorney, Educational Equity and Fair Housing Projects, Chicago Lawyers' Committee for Civil Rights Under Law
- Rev. Dr. Janette C. Wilson, Senior Advisor, Operation PUSH, Chicago, IL

APPENDIX A. SELECTED CURRENT LEGISLATIVE INITIATIVES

Legislation eliminating criminalizing student misbehavior that does not endanger others

Several states have undertaken reforms to reduce the severity of punishments for non-violent infractions. These measures have generally been enacted as part of repealing zero-tolerance policies that mandated suspension or expulsion for certain offenses. In 2013, **Oregon** repealed its zero-tolerance policy⁴⁸⁰ and replaced it with a set of guidelines⁴⁸¹ that limit expulsions to “con-

480. H.B. 2192, 77th Leg., 2013 Reg. Sess. § 5 (Or. 2013).

481. *Id.* § 5(2)(a).

duct that poses a threat to the health and safety of students or school employees.”⁴⁸² In 2009, **Florida** significantly amended its zero-tolerance policy⁴⁸³ to clarify that the provision is “not intended to be rigorously applied to petty acts of misconduct.”⁴⁸⁴ The amendment also requires school boards to “[d]efine acts that pose a serious threat to school safety” and thus warrant the application of zero-tolerance.⁴⁸⁵

More sweeping legislation goes beyond the repeal of harsh punishment and prescribes alternative methods of discipline for student behavior that does not endanger others. Legislators in **Tennessee** and **Texas** are currently debating bills that would mandate alternative punishments and graduated disciplinary models for truancy offenses.⁴⁸⁶ The **Florida** Senate is considering broader legislation that would prohibit schools from referring students to the criminal justice system for “petty acts of misconduct.”⁴⁸⁷ It would also require law enforcement officials to notify a school’s administration of student arrests, thereby creating a barrier between student misconduct and the criminal justice system.⁴⁸⁸

Legislation eliminating the use of suspensions, expulsions, and referrals to law enforcement for lower-level offenses

Three states have taken concrete steps to reduce the use of suspensions and expulsions as a discipline strategy. In September 2014, **California** signed Assembly Bill 420, which eliminated “willful defiance” and “disruption of school activities” as a basis to

482. *Id.* § 5(2)(b)(A).

483. S.B. 1540, 2009 Leg., 111th Reg. Sess. (Fla. 2009) (amending FLA. STAT. § 1006.13 (2015)).

484. FLA. STAT. § 1006.13(1) (2015).

485. *Id.* § 1006.13(2)(b).

486. H.B. 1349, 190th Gen. Assemb., Reg. Sess. (Tenn. 2015) (“As an alternative to criminal prosecution for education neglect, a school district shall adopt progressive truancy interventions . . . [to] [m]inimize the need for referral to juvenile court.”); H.B. 1490, 84th Legis., Reg. Sess (Tex. 2015) (introducing a “Progressive Truancy Intervention System” and requiring that systems adopted by school districts “must include at least three tiers of interventions”).

487. S.B. 490, 2016 Leg., 118th Reg. Sess. (Fla. 2015). Existing law allows school boards to define “petty acts of misconduct.” *See* FLA. STAT. § 1006.13(2)(c).

488. *See* S.B. 490, 2016 Leg., 118th Reg. Sess. (Fla. 2015).

expel students.⁴⁸⁹ Further, Assembly Bill 420 also prohibits schools from using those reasons as a basis to suspend students enrolled in kindergarten through the third grade.⁴⁹⁰ **Connecticut**,⁴⁹¹ **Louisiana**,⁴⁹² and the **District of Columbia**⁴⁹³ have passed similar laws prohibiting the suspension or expulsion of young students. **Georgia**⁴⁹⁴ and **Minnesota**⁴⁹⁵ are considering such legislation during the current session. **Maryland** now requires school districts to adopt policies that impose certain requirements on schools before they can suspend or expel a student. For example, regarding suspensions of ten days or more or expulsion, the superintendent (or his designated representative) must investigate and approve the suspension and meet with the student's parents.⁴⁹⁶ **Illinois** also passed significant reforms. Under a new law passed in 2015, suspensions of three days or less are allowed only if a student poses a threat to others or "substantially disrupts, impedes, or interferes with the operation of the school."⁴⁹⁷ Suspensions longer than three days, expulsions, or transfers to alternative schools are only permitted if the student poses a threat or significantly disrupts

489. See Assemb. B. 420, 2014 Leg., Reg. Sess. (Cal. 2014) (amending CAL. EDUC. CODE § 48900 (2015)); see also Susan Frey, *New Law Limits Student Discipline Measure*, EDSOURCE (Sept. 28, 2014), <http://edsource.org/2014/new-law-limits-student-discipline-measure/67836>.

490. See Cal. Assemb. B. 420.

491. Act of June 22, 2015, Pub. Act No. 15-96, 2015 Conn. Pub. Acts 96 (Conn. 2015) (prohibiting expulsion and out-of-school suspensions for students in grades pre-kindergarten through two).

492. S.B. 54, 2015 Leg., Reg. Sess. (La. 2015) (prohibiting the suspension or expulsion of students in grades pre-kindergarten through five).

493. Act of May 6, 2015, D.C. Act No. 21-50, 2015 D.C. Sess. Leg. Serv. 21-12 (D.C. 2015) (prohibiting the suspension or expulsion of pre-kindergarten students).

494. Too Young to Suspend Act, H.B. 135, 153rd Gen. Assemb., Reg. Sess. (Ga. 2015) (prohibiting the suspension or expulsion of pre-kindergarten and kindergarten students for most offenses).

495. S.F. 1001, 2015 Leg., 89th Sess. (Minn. 2015) (prohibiting the suspension, exclusion, or expulsion of students in grades pre-kindergarten through three).

496. MD. CODE ANN., EDUC. § 7-305(a)-(d) (West 2015).

497. 105 ILL. COMP. STAT. ANN. 5/10-22.6(b-20) (West 2015).

the learning environment, but only after other disciplinary options have been exhausted.⁴⁹⁸

Legislation to Support school policy and agreements that clarify the distinction between educator discipline and law enforcement discipline

State legislatures should require schools that rely on SROs to enter into written agreements or memorandums of understandings (MOUs), ideally before establishing an SRO program, to ensure that SROs and school officials understand that SROs and other law enforcement should not become involved in routine-discipline matters. There may be philosophical differences between school officials and SROs that must be addressed before SROs begin working inside schools.⁴⁹⁹ This MOU should clearly delineate all actors' roles and responsibilities.⁵⁰⁰ A report that evaluated nineteen SRO programs stated that "[w]hen SRO programs fail to define the SROs' roles and responsibilities in detail before—or even after—the officers take up the posts in the schools, problems are often rampant—and often last for months and even years."⁵⁰¹ The U.S. Department of Education, the American Civil Liberties Union, the Congressional Research Service, the National Association for School Resource Officers, and the United States Department of Justice.⁵⁰² Several states support the

498. See *id.*; see also Evie Blad, *New Illinois Law to Prompt Changes in Discipline Policies*, EDUC. WEEK (Sept. 8, 2015), <http://www.edweek.org/ew/articles/2015/09/09/new-illinois-law-to-prompt-changes-in.html>.

499. See JAMES & MCCALLION, *supra* note 318, at 11.

500. *Id.*; see also DOJ FERGUSON, *supra* note 340, at 37.

501. PETER FINN ET AL., NAT'L INST. OF JUSTICE, COMPARISON OF PROGRAM ACTIVITIES AND LESSONS LEARNED AMONG 19 SCHOOL RESOURCE OFFICER (SRO) PROGRAMS 2 (2005), <http://files.eric.ed.gov/fulltext/ED486266.pdf>.

502. See JAMES & MCCALLION, *supra* note 318, at 11; KIM & GERONIMO, *supra* note 319, at 5; RAYMOND, *supra* note 318, at 30; U.S. DEP'T OF EDUC., GUIDING PRINCIPLES: A RESOURCE GUIDE FOR IMPROVING SCHOOL CLIMATE AND DISCIPLINE 9–10 (2014), <http://www2.ed.gov/policy/gen/guid/school-discipline/guiding-principles.pdf>; Lisa H. Thureau & Johanna Wald, *Controlling Partners: When Law Enforcement Meets Discipline in Public Schools*, 54 N.Y. L. SCH. L. REV. 977, 991 (2010).

use of MOUs if schools use SROs, including **Indiana, Texas, Maryland, and Pennsylvania.**⁵⁰³

Legislation requiring and providing financial support for training of SROs and police dealing with youth on appropriate strategies for LGBTQ students and students with disabilities.

In June 2015, **Texas** passed a law requiring the state's education commission to create a model training curriculum for SROs.⁵⁰⁴ The legislature left the details of the training program to the commission, but it listed several objectives the curriculum must incorporate.⁵⁰⁵ These objectives include "positive behavioral interventions and supports"⁵⁰⁶ (PBIS), "restorative justice techniques,"⁵⁰⁷ "de-escalation techniques and techniques for the limited use of force."⁵⁰⁸

503. See IND. CODE § 20-26-18.2 (2013); MD. CODE ANN., EDUC. § 26-102 (West 2014); TEX. EDUC. CODE ANN. § 37.0021 (West 2013). Pennsylvania has several fairly thorough regulations in regard to memorandums of understanding between police departments and schools. See 22 PA. CODE § 10.1 (2012) (setting forth the state's intent to "maintain a cooperative relationship between school entities and local police departments"); 22 PA. CODE § 10.2 (2012) (defining memorandum of understanding); 22 PA. CODE § 10.11 (2012) (requiring each school administrator to "execute and update, on a biennial basis, a memorandum of understanding with each local police department having jurisdiction over school property of the school entity."); 22 PA. CODE § 10 app. A (2012) (providing a model memorandum of understanding).

504. Act of June 20, 2015, ch. 2684 (Tex. 2015) (codified as TEX. OCC. CODE ANN. § 1701.262 (West 2015)). The curriculum will also apply to "school district peace officers," defined by TEX. EDUC. CODE ANN. § 37.081 (West 2015). TEX. OCC. CODE ANN. § 1701.262(a)(3) (West 2015).

505. TEX. OCC. CODE ANN. § 1701.262(c) (West 2015).

506. *Id.* § 1701.262(c)(2).

507. *Id.*; see The Institute for Restorative Justice and Restorative Dialogue, *Restorative Discipline in Schools*, <http://www.utexas.edu/research/cswr/rji/rdinschools.html> (explaining the philosophy of restorative justice); see also Thalia N.C. González & Benjamin Cairns, *Moving Beyond Exclusion: Integrating Restorative Practices and Impacting School Culture in Denver Public Schools*, in JUSTICE FOR KIDS: KEEPING KIDS OUT OF THE JUVENILE JUSTICE SYSTEM 241, 241 (Nancy E. Dowd ed., 2011); González, *supra* note 92 (discussing use of restorative justice to repair harm and change behavior, enhance school safety, and improve graduation rates).

508. *Id.* § 1701.262(c)(3).

Proposed legislation in several states is also attempting to rectify uncertainty about the role of SROs. **Massachusetts** House Bill 335 would create a fund to train SROs in de-escalation strategies—“strategies such as restorative justice.”⁵⁰⁹ Similarly, **New Hampshire** House Bill 527 seeks to establish guidelines for SRO education, including at least forty hours of training in techniques like PBIS and restorative justice.⁵¹⁰ Additionally, a bill under consideration in the **Florida** Senate would both limit SROs’ authority to arrest students and direct police and school authorities to develop minimum qualifications for the selection of SROs.⁵¹¹

Legislation supporting alternative strategies to address student misbehavior, including Restorative Justice

In May 2015, **Indiana** passed a law⁵¹² to amend the parameters of the state’s “Safe Schools Fund,” which was created in 1995 with a focus on detecting crime with methods such as drug-sniffing dogs.⁵¹³ This year’s amendment, in contrast, provides grants for programs designed “to improve school climate and professional development and training” through the development of “alternatives to suspension and expulsion; and . . . evidence based practices . . . [including] positive behavioral intervention and support, restorative practices, and social emotional learning.”⁵¹⁴

New education provisions in **Colorado**,⁵¹⁵ **Georgia**,⁵¹⁶ **Louisiana**,⁵¹⁷ **Maryland**,⁵¹⁸ and **Pennsylvania**⁵¹⁹ also recognize

509. H.B. 335, 2015 Leg., 189th Gen. Ct. (Mass. 2015).

510. H.B. 527, 2015 Leg., Gen. Ct. (N.H. 2015).

511. S.B. 490, 2016 Legis., 118th Reg. Sess. (Fla. 2015).

512. Act of July 1, 2015, Pub. L. No. 220, 2015 Ind. Acts. 220 (amending IND. CODE § 5-2-10.1-2 (2015)).

513. Act of July 1, 1995, Pub. L. No. 61, 1995 Ind. Acts 61; *see also* IND. CODE § 5-2-10.1-2(a)(1)(A) (2015).

514. IND. CODE § 5-2-10.1-2(a)(7). *See generally* OWEN ET AL., *supra* note 46.

515. COLO. REV. STAT. ANN. § 22-32-144 (West 2015) (“Restorative justice practices—legislative declaration.”).

516. GA. CODE ANN. § 20-2-741 (West 2015) (“Positive behavioral interventions and supports and response to intervention.”).

517. LA. STAT. ANN. §§ 17:252(A)(2)(g), (D)(1) (2015).

518. MD. CODE ANN., EDUC. § 7-304.1 (West 2015) (“Positive Behavioral Interventions and Support Program”).

the need to implement alternative strategies like PBIS and restorative justice techniques. However, prescriptions for change have not always been explicitly linked to state resources.

Alternative discipline is gaining support in other states as well. **Massachusetts**, for example, is considering a bill to create a three-year pilot “dropout prevention and recovery program” that would incentivize schools, through a competitive grant process, to implement “evidence-based” strategies, including “restorative justice and social service referrals.”⁵²⁰ Similarly, a **South Carolina** bill would create a “Restorative Justice Study Committee” with the aim of developing a pilot program much like the one being debated in **Massachusetts**.⁵²¹ **California** may also require schools to adopt “one or more research-based, whole school approaches, including . . . positive behavior intervention and support, restorative justice . . . [and] social-emotional learning.”⁵²²

Washington seems likely to pass Senate Bill 5688, which would allow school districts to use existing funds to develop “multitiered systems of support frameworks [including] . . . positive behavior interventions and supports and social emotional learning.”⁵²³

Legislation supporting continued and more detailed data reporting relating to school discipline and juvenile detention and disproportionality

Maintaining and reporting data about each aspect of the school-to-prison pipeline is a basic necessity for reform. This data need be sufficiently disaggregated as to reflect specific state or area conditions as well as national trends. As part of initiatives aimed at reducing exclusionary discipline and criminalization, states have started to require school districts and schools to report

519. PA. STAT. AND CONS. STAT. ANN. §§ 13-1302-A(c)(1), (c)(3) (West 2015).

520. H.B. 453, 2015 Leg., 189th Gen. Ct. (Mass. 2015).

521. H.B. 3239, 2015 Gen. Assemb., 121st Sess. (S.C. 2015) (Stop the School House to Jail House Pipeline Act).

522. S.B. 527, 2015 Leg., Reg. Sess. (Cal. 2015).

523. S.B. 5688, 64th Leg., Reg. Sess. (Wash. 2015) (as passed by S. Rules Comm. on Mar. 6, 2015); *see also* H.B. 2149, 64th Leg., Reg. Sess. (Wash. 2015).

detailed information about their disciplinary practices and outcomes.

A recent **Connecticut** law reining in the authority of SROs, discussed above, requires school boards to submit detailed disciplinary data, which the state department of education will examine and report annually.⁵²⁴

Several states are pushing for more comprehensive reviews of their schools' disciplinary outcomes. A proposed **Pennsylvania** resolution would initiate a thorough study of disciplinary policies at state schools and a review of other states' policies, ultimately establishing an advisory committee to recommend new legislation.⁵²⁵ Likewise, an Indiana bill would repeal and replace the state's existing data reporting requirement with a more detailed one.⁵²⁶ Based on the data collected under this new requirement, **Indiana's** department of education would develop "a model evidence based plan for improving behavior and discipline within schools."⁵²⁷ Additionally, in Louisiana, the state senate passed a resolution calling for the state's Board of Elementary and Secondary Education to study the effectiveness of PBIS programs as a means of reducing suspensions and expulsions.⁵²⁸

Connecticut has directed its department of education to disaggregate disciplinary data "by school, race, ethnicity, gender, age, students with disabilities, English language learners" and other categories.⁵²⁹ In 2013, **Arkansas** amended its education code to provide for the collection of data on the "rate of disciplinary disparity" in its schools and to require school boards to implement corrective measures, including restorative justice techniques.⁵³⁰ In the current session, a house bill under consideration in **North Carolina** would update the state board of education's reporting re-

524. H.B. 6834, 2015 Gen. Assemb., Jan. Sess., 2015 Conn. Pub. Acts 96 (Conn. 2015).

525. H.R. 540, 2015 Gen. Assemb., Reg. Sess. (Pa. 2015).

526. H.B. 1558, 2015 Gen. Assemb., Reg. Sess. (Ind. 2015).

527. *Id.*

528. S.R. 130, 2015 Leg., Reg. Sess. (La. 2015).

529. Act of July 1, 2015, Pub. Act No. 15-168, 2015 Conn. Pub. Acts 168.

530. ARK. CODE ANN. §§ 6-18-516(a)(3), (b), (e)(1)(B) (West 2015).

quirements to include data disaggregated by similar categories, with the express purpose of examining disproportionalities.⁵³¹

Proposed legislation in other states would go further by mandating reductions in disciplinary disparities or by linking positive changes to funding incentives. For example, **Indiana**'s House Bill 1558, discussed previously,⁵³² would require the state's department of education to "develop criteria and guidelines for determining the existence of disproportionality in discipline."⁵³³ It would also create "the positive discipline practices fund," under which schools could apply for grants "to assist in the reduction of disproportionality in discipline and to establish positive disciplinary practices."⁵³⁴ Similarly, a **Washington** bill designed to implement "strategies to close the educational opportunity gap" would create a task force to investigate disproportionalities, design model disciplinary practices, and adapt faculty and staff training to incorporate those practices.⁵³⁵

531. H.B. 819, 2015 Gen. Assemb., Reg. Sess. (N.C. 2015).

532. *See supra* note 526 and accompanying text.

533. H.B. 1558, 119th Gen. Assemb., Reg. Sess. (Ind. 2015).

534. *Id.*

535. H.B. 1541, 64th Leg., Reg. Sess. (Wash. 2015).

Court, School and Law Enforcement Collaborative Task Force:
Guidelines for Schools in Contacting Law Enforcement
Appendix A

TERM	REASONING
A:	
Aggravated Assault	Call law enforcement. This is a mandated report.
Alcohol	Call police unless the alcohol was not consumed, shared or sold if your security can handle the situation. There is no legal distinction between possession, consumption, sharing and selling. If there is more than one student involved, then liability concerns lead most schools to make a police report. An online report can be made to document the incident, but not require police to come on site. Many schools also refer to community counseling programs, but some do not have the resources or information to do so.
Armed Robbery	Call law enforcement. This is a mandated report.
Arson, of an occupied structure	Call law enforcement. This is a mandated report.
Arson, of a structure or property(not occupied)	Call unless it causes little or no damage, there are no safety concerns and no intent to cause harm.
Assault	<i>Defined as unwanted physical contact with injury.</i> This term would not be used for a mutual conflict without injury, but if there is injury, it is a mandated report.
B:	
Bomb Threat	Call law enforcement. This is a mandated report.
Bullying	Bullying is not a legal term, but can represent a range of offenses. The response should be based on the actual offense. If there was a threat, harassment, intimidation, an assault or the behavior is persistent then administrators should call law enforcement. If a crime was not committed, then do not call law enforcement.
Burglary/ Breaking & Entering (2 nd & 3 rd Degree)	Call law enforcement. The definition for burglary does not consider the value of the items; <i>it is about being in a place you are not supposed to be with intent to do something you are not supposed to do.</i> Value and the amount of damage is important but the act of burglary is enough to call.
Burglary (1 st Degree)	Call law enforcement. This is a mandated report. <i>The definition of 1st degree is that it is burglary committed with a deadly weapon or dangerous instrument.</i>
C:	

Court, School and Law Enforcement Collaborative Task Force:
Guidelines for Schools in Contacting Law Enforcement
Appendix A

TERM	REASONING
Cheating	Do not call law enforcement
Chemical or Biological Threat	Call law enforcement. This is a mandated report. These could be household items that can be mixed together to be explosive.
Computer and Telecommunications Device	Do not call unless the student commits another violation with a computer or telecommunication device. A computer violation alone would not require law enforcement contact.
Contraband	Be specific and list the violation under the type of contraband it is. If the student has illegal drugs, it should be documented as a drug violation. If an item is against school policy but legal, then <i>law enforcement should not be called</i> .
D:	
<i>Dangerous Items</i> (Air Soft Gun, BB Gun, Knife with blade less than 2.5 inches, Laser pointer, Letter Opener, Mace, Paintball Gun, Pellet Gun, Taser or Stun Gun)	Do not call law enforcement unless the items are used, or there is immediate danger that they will be used. These items are not illegal to possess, but are against school policy. They should be confiscated, and the school should give consequences for possessing them at school, but police should not be contacted.
Defiance, Disrespect of Authority, and Non-Compliance	Do not call unless there is a specified clear threat to the safety of students, staff or self. If the situation escalates, the violation should be classified as a higher offense.
Disruption	Do not call law enforcement.
Dress Code Violation	Do not call law enforcement.
Drug Paraphernalia	Call law enforcement if there is residue or if there is paraphernalia that is associated with narcotics. The residue is what makes the paraphernalia illegal to possess.
E:	
Endangerment	Using the term endangerment implies that it is a significant event that endangers someone's life, e.g. a large rock thrown at a moving car, or a bullet going through a wall. If this term is used, then the violation is significant enough to involve the police.
F:	
Fighting ^A	Do not call law enforcement for mutual combat, although it must be reported to ADE. If there was injury, or it was not mutual, use the term assault or aggravated assault depending on who was

Court, School and Law Enforcement Collaborative Task Force:
Guidelines for Schools in Contacting Law Enforcement
Appendix A

TERM	REASONING
	assaulted, the severity and whether a weapon was used.
Fire Alarm Misuse	Call law enforcement. This is a mandated report.
Firearms	Call law enforcement. This is a mandated report.
Forgery	Do not call law enforcement.
G:	
Gambling	Do not call law enforcement.
Graffiti or Tagging	Do not call unless there are at least \$250 in damages, which is classified as vandalism, or if any hate speech or threats are communicated in the tags / graffiti. Schools should document the graffiti with dates and pictures as they occur. This will help law enforcement if the graffiti becomes a larger problem and needs to be reported. Gang affiliation and symbols were purposefully omitted as factors because assumptions can be made about a student and this may contribute to disproportionate minority contact.
H:	
Harassment, Nonsexual	Do not call law enforcement, unless behavior is persistent.
Hazing	Do not use this term. Classify the violation based on the actual offense. Do not call law enforcement unless it is determined that a crime was committed. Like bullying, hazing can include a wide range of offenses and it is important to base the consequence on the actual violation.
Homicide	Call law enforcement. This is a mandated report.
I:	
Illicit / Illegal Drugs	Call law enforcement. Even small amounts are illegal for the school administrators to possess or dispose of, and it is a mandated report.
Indecent Exposure or Public Sexual Indecency	Call law enforcement if there is a victim. Consult with appropriate school personnel to assess the situation.
Inhalants	Do not call law enforcement unless there is some proof that the student used the inhalant (e.g. caught using, can see paint marks on the nose or other direct signs of use). TPD informed the group that it is not illegal for youth to have possession of inhalants. It is a felony for them to use them.

Court, School and Law Enforcement Collaborative Task Force:
Guidelines for Schools in Contacting Law Enforcement
Appendix A

TERM	REASONING
Inappropriate Language	Do not call law enforcement.
K: Kidnapping	Call law enforcement. This is a mandated report.
L: Leave School Grounds without permission	Do not call law enforcement unless it is coupled with another violation or there is concern for the student's safety.
Lying	Do not call law enforcement.
M: Minor Aggressive Act	Do not call law enforcement if the violation fits within this classification. If the situation escalates to assault and there is injury, then call law enforcement.
N: Negative Group Affiliation	Do not call law enforcement.
Network Infraction	Do not call unless the network was hacked to access sensitive information.
O: Over the Counter Drugs	Do not call law enforcement for personal use, sharing or selling. These items are not illegal, and the minor cannot be charged with any crime. If there is an emergency then call 911 for emergency assistance.
P: Parking Lot Violations	Do not call law enforcement.
Plagiarism	Do not call law enforcement.
Pornography	Do not call unless the student is distributing pornographic material, any of the materials contain someone who is known to the student (e.g. another student, a relative, etc), or the pornography is of a minor.
Prescription Drugs	Do not call law enforcement for personal use with a current prescription in the student's name. Parents should always be called to inform them of school policy regarding any prescription drugs.

Court, School and Law Enforcement Collaborative Task Force:
Guidelines for Schools in Contacting Law Enforcement
Appendix A

TERM	REASONING
Theft, Petty	Do not call law enforcement unless the value of the items is more than \$100. Then it is classified as theft, not petty theft.
Threat or Intimidation	Call law enforcement if there is intent to harm or behavior is persistent.
Tobacco	Do not call law enforcement.
Trespassing	Do not call law enforcement unless it is a student who was expelled or suspended for a serious violation, if the person has already been warned and will not leave, or if there is a specified, clear threat.
Truancy	Do not call law enforcement.
U:	
Unexcused Absence	Do not call law enforcement.
V:	
Vandalism of Personal Property	Do not call the police because the victim must make the report, not the school.
Vandalism of School Property	Call unless the damage is under \$250. The threshold can be higher if the school or district chooses. However, it cannot be lower; this is based on the criminal damage statute.
Verbal Provocation	Do not call law enforcement.
W:	
Weapons (Billy Club, Brass Knuckles, Knife with blade of at least 2.5 inches, & Nunchakus)	This is a mandated report, and it needs to be reported. However, there are times that administrators take something like a knife from a student who did not intend to bring it to campus, does not plan to use it, and has reason to be in possession of that type of weapon (for work or recreational purposes). Law Enforcement agencies as well as the County Attorney do suggest considering intent. For these situations, an online report can be completed to document the incident, but it will not trigger police response to the school. The school can then give school based consequences and law enforcement will not come to campus for a situation that was never intended to be dangerous. If there is any doubt about the intent police should be called for police presence.

APPENDIX B. RECOMMENDED PROGRAMS

From the Town Halls held to date, the RStPP Task Force has selected four approaches showing proven experience and promise, which it finds likely to be readily replicable. In selecting these, the Task Force does not intend to diminish other work being done by colleagues in law offices, courts, schools, and juvenile justice locales across the country, but rather to highlight possible starting points for further work. This preliminary report provides a summary listing; more detail will be provided in the final report and in further Town Halls and training sessions to follow. The final report will also include an expanded listing of other programs discussed by Town Hall participants.

1. Implicit Bias Training (All)

Implicit bias and its impact on the school to prison pipeline were discussed at all of the Town Halls. The research on implicit bias continues to grow. As discussed in this report, the research is increasingly clear that implicit bias is part of being human, that such bias can be measured by both social and neuroscience, and that such bias may, without intent, contribute to the kinds of disproportionality discussed in the report.

Implicit bias is an unconscious response that often is dissociated from our consciously held beliefs. Because so many decisions that impact young people along the school to prison pipeline are discretionary, openings for implicit bias to influence those decisions, albeit decisions made in all good faith, are many.

As discussed previously, research now shows that motivation to change implicit biases can help bring about change. But to be motivated, we have to first be aware of what implicit bias is and how it might operate in decisions about young people in education and juvenile justice. Training can bring about this awareness and offer possible de-biasing techniques.

More information: Professor Sarah Redfield, sarah.redfield@gmail.com, or 207-752-1721.

2. Checklist Implementation (Pima County, Arizona)

In Pima County, Arizona, under the direction of Guenevere Nelson-Melby, various stakeholders formed the Court, School, and Law Enforcement Collaborative Task Force to discuss reducing the number student referrals to law enforcement. The Task Force de-

veloped guidelines for schools and law enforcement to implement that are aimed at (a) discouraging schools from referring students to law enforcement for offenses that educators can and should handle on their own and (b) reducing ambiguity in school conduct codes that can often times lead to racial disparities.

More information: Natalie Carrillo, Research & Evaluation Assistant, Pima County Juvenile Court Center, Tucson, AZ, natalie.carrillo@pcjcc.pima.gov; Guenevere Nelson-Melby, Pima County Public Defender, Nelsonmelby@yahoo.com

3. Law Student/Lawyer Intervention (Sufeo, Massachusetts Model)

Massachusetts

The Massachusetts legal community has undertaken a broad approach to the issues. It is described briefly here. More information is available from Marlies Spanjaard, Director of Education Advocacy, The EdLaw Project, mspanjaard@publiccounsel.net, 617-910-5841.



THE EDLAW PROJECT



Every year, the school-to-prison pipeline continues to ensnare more of our youth. This national trend of criminalizing rather than educating our nation's children is reaching a crisis point. Thousands of young people in Massachusetts become entangled in this dead-end process annually due to inadequate educational programs and zero tolerance policies and practices. Lack of educational equity can start children on a downward spiral that ends in court, or prison, and has a crippling economic effect on their families and our communities.

The EdLaw Project, a partnership between the Children's Law Center of Massachusetts and the Committee for Public Counsel Services – Children and Family & Youth Advocacy Divisions has spent the last 15 years developing expertise in providing excellent education advocacy for Massachusetts highest-risk youth. Since its formal inception in January 2000, the EdLaw Project staff of four attorneys has directly advocated for over 1,800 low-income children to receive the education they need to succeed.

The EdLaw Project is currently focusing our expertise on training, empowering, and supporting the statewide juvenile indigent defense bar to engage in effective education advocacy for court-involved youth. Long-term positive legal outcomes are difficult to achieve without a solid educational foundation and therefore we believe that representation of children on child welfare, delinquency and youthful offender cases requires effective education advocacy. We are actively building the knowledge and skills of nearly one thousand attorneys, already expert child advocates in their own right, to permanently transform the standard of practice for child advocacy in Massachusetts. This approach will dramatically improve educational and life outcomes for thousands of poor children annually. Our proposed model focuses on promoting healthy child and adolescent development as a means to divert highly vulnerable children from the school-to-prison pipeline, while improving public safety and saving taxpayers millions of dollars. Our three to five year plan includes the creation of a sustainable state-funded education advocacy unit within the public defender agency to ensure ongoing leadership, training, and support of education advocacy provided by the juvenile indigent defense bar.

The school to prison pipeline cannot be shut down unless schools educate all their students. Many Massachusetts public schools are unwitting feeder systems for the courts, the Department of Children and Families (DCF), the Department of Youth Services (DYS), and adult prisons. Ill-conceived school disciplinary policies are a serious problem and there is an endemic failure to meet the academic needs of poor children, especially children of color.

Consider these statistics:

- Eighty-five percent of all juveniles who interface with the juvenile court system are functionally illiterate.
- Two thirds of children who cannot read proficiently by the end of fourth grade, will end up in jail or on welfare.
- African-American students are 3.5 times more likely than their white classmates to be suspended or expelled. Black children constitute 18 percent of students, but they account for 46 percent of those suspended more than once.
- For secondary school children, the suspension rate for black male students with disabilities is 34%, compared to 16.2% for white male students with disabilities. Black female students with disabilities have a suspension rate of 26%, while white female students with disabilities are at 7.3%.

Failing to provide young people with an adequate education has serious long-term consequences for the individual, the family, the community, and the Commonwealth, including low-wage jobs, lack of income, and prison. Undereducated parents struggle to support their families economically and struggle to advocate for the academic development of their own children. Neighborhoods with high concentrations of undereducated, chronically court-involved individuals also can be toxic environments with high rates of domestic violence, substance abuse, mental health concerns, and the resulting over-policing and over-incarceration. In Massachusetts, a high school dropout costs taxpayers an average of nearly \$275,000 over his or her lifetime. Sending a young person to a correctional facility costs taxpayers upwards of \$60,000 annually, and it is estimated that each youth who grows up to be ensnared in the criminal justice system will cost the taxpayer \$2 to \$4 million dollars.

Research shows that school success is one of the most cost effective strategies for preventing lifelong court involvement. Expert child advocates working to help parents and schools identify and access the appropriate educational services for court involved kids is not just a moral imperative; it is also a far more effective approach to issues of systemic poverty, public safety and state budget deficits, than ignoring the source of the problem and building more prisons. **With the support of the education law experts at the EdLaw Project, this dedicated and skilled juvenile bar can have a profound impact on the educational, legal, and life success of thousands of poor court-involved children and youth every year and in turn, help to address economic and social disparities affecting multiple communities throughout the Commonwealth.**

Court, School and Law Enforcement Collaborative Task Force: Guidelines for Schools in Contacting Law Enforcement

Violation	Guidelines			Explanations and Exceptions
	Call for Law Enforcement Presence	File Police Report (Online)	School based Consequence / Intervention	
A:				
Aggravated Assaults**	<input checked="" type="checkbox"/>		<input checked="" type="checkbox"/>	Do not call law enforcement unless they use or threaten someone with it.
Air Soft Gun [^] (dangerous item)				Call law enforcement unless:
Alcohol Violation [^]	<input checked="" type="checkbox"/>			<ul style="list-style-type: none"> • The alcohol was not consumed, and • The alcohol was not shared or sold, and • You have school security/personnel to handle the situation
Armed Robbery**	<input checked="" type="checkbox"/>			
Arson, of a structure or property [^]	<input checked="" type="checkbox"/>			Call law enforcement unless:
Arson, of an occupied structure**	<input checked="" type="checkbox"/>			<ul style="list-style-type: none"> • It does not cause damage, and • There are no safety concerns, and • There was no intent to cause harm
Assault [^]	<input checked="" type="checkbox"/>			
				If defined as unwanted physical contact with injury , then call for police presence. A violation that schools classify as sexual harassment with contact, law enforcement would classify as an assault. If the violation meets the guidelines for sexual harassment with contact, law enforcement should be contacted. (See Appendix A)
B:				
BB Gun [^] (dangerous item)			<input checked="" type="checkbox"/>	Do not call law enforcement unless they use or threaten someone with it.
Billy Club** (weapon)		<input checked="" type="checkbox"/>		Always report, but place online report if police presence is not needed based on the intent and culpability.

** Mandated Report to Law Enforcement & ADE

[^] Mandated Report to ADE

8/14/14

Court, School and Law Enforcement Collaborative Task Force: Guidelines for Schools in Contacting Law Enforcement

Bomb Threat**	<input checked="" type="checkbox"/>				Always report, but place online report if police presence is not needed based on the intent and culpability.
Brass Knuckles** (weapon)		<input checked="" type="checkbox"/>			Bullying is not a legal term. Call law enforcement if there was a threat, harassment, intimidation, an assault or if the behavior is persistent. See notes in appendix A
Bullying^					Explanation: <ul style="list-style-type: none"> Being in a place you are not supposed to be With intent of doing something you are not supposed to do See Appendix A or the definitions for more explanation
Burglary/Breaking & Entering (2 nd & 3 rd Degree)^	<input checked="" type="checkbox"/>				
Violation	Guidelines			School based Consequence / Intervention	Explanations and Exceptions
	Call for Law Enforcement Presence	File Police Report (Online)			
Burglary (1 st Degree, with a deadly weapon or dangerous instrument)**	<input checked="" type="checkbox"/>				See Appendix A
C:					
Cheating				<input checked="" type="checkbox"/>	
Chemical or Biological Threat**	<input checked="" type="checkbox"/>				Do not call for possession, but if it is lit, the violation then becomes a higher offense depending upon which type of combustible it was.
Combustible				<input checked="" type="checkbox"/>	Do not call unless they commit another violation with the computer or telecommunications device. (e.g. bullying, pornography, threats, etc.) If so, document violation as the other offense.
Computer and Telecommunications Device				<input checked="" type="checkbox"/>	If it is illegal contraband then it should be listed under the violation that corresponds (e.g. drugs, weapons, etc.). If it is legal but against school policy, list specifically what it is, but do not call law enforcement.
Contraband				<input checked="" type="checkbox"/>	

** Mandated Report to Law Enforcement & ADE

^ Mandated Report to ADE
8/14/14

Court, School and Law Enforcement Collaborative Task Force: Guidelines for Schools in Contacting Law Enforcement

D:			
Defiance, Disrespect toward Authority, and Non-Compliance		<input checked="" type="checkbox"/>	Do not call unless there is a specified, clear threat to the safety of students, staff or self.
Disorderly Conduct		<input checked="" type="checkbox"/>	Do not call law enforcement unless there is a specified clear threat to the safety of students, staff or self.
Disruption		<input checked="" type="checkbox"/>	
Dress Code Violation		<input checked="" type="checkbox"/>	
Drug Paraphernalia	<input checked="" type="checkbox"/>		Call law enforcement if the paraphernalia has residue.
E:			
Endangerment [^]	<input checked="" type="checkbox"/>		Call law enforcement unless: <ul style="list-style-type: none"> • Nobody was hurt, and • There was no intention to hurt anybody else Then the violation should be classified as recklessness.
Extortion		<input checked="" type="checkbox"/>	Do not call law enforcement unless there is repeated threat or intimidation.
Violations			
Violation	Guidelines		
	Call for Law Enforcement Presence	File Police Report (Online)	School based Consequence / Intervention
F:			
Fighting [^]			Do not call law enforcement for mutual combat, although it must be reported to ADE. If there was injury or it was not mutual, then classify as assault or aggravated assault.
Fire Alarm Misuse ^{**}	<input checked="" type="checkbox"/>		
Firearms ^{**} (weapon)	<input checked="" type="checkbox"/>		
Forgery			<input checked="" type="checkbox"/>

^{**} Mandated Report to Law Enforcement & ADE

[^] Mandated Report to ADE
8/14/14

Court, School and Law Enforcement Collaborative Task Force: Guidelines for Schools in Contacting Law Enforcement

G:			
Gambling		<input checked="" type="checkbox"/>	Do not call law enforcement unless:
Graffiti or Tagging		<input checked="" type="checkbox"/>	<ul style="list-style-type: none"> Damage exceeds \$250, then classify it as vandalism; or If it contains hate speech or threats
H:			
Harassment, Nonsexual		<input checked="" type="checkbox"/>	Do not call law enforcement unless behavior is persistent.
Hazing [^]			Do not call law enforcement unless it is determined that a crime has been committed. See notes in Appendix A for further explanation.
Homicide**	<input checked="" type="checkbox"/>		
I:			
Indecent Exposure or Public Sexual Indecency [^]	<input checked="" type="checkbox"/>		Call law enforcement if there is a victim. Consult with appropriate school personnel to assess the situation.
Illicit/Illegal Drugs** Including: Ecstasy, cocaine, crack, hallucinogens, heroin, marijuana, methamphetamine, etc	<input checked="" type="checkbox"/>		
Inappropriate Language			
Inhalants [^]		<input checked="" type="checkbox"/>	Do not call unless they have used the inhalant.
K:			
Kidnapping**	<input checked="" type="checkbox"/>		
Knife with blades of less than 2.5 inches [^] (dangerous item)		<input checked="" type="checkbox"/>	Do not call law enforcement unless they use or threaten someone with it.
Knife with blade length of at least 2.5 inches** (weapon)		<input checked="" type="checkbox"/>	Always report, but place online report if police presence is not needed based on the intent and culpability.
Violation	Guidelines		Explanations and Exceptions

** Mandated Report to Law Enforcement & ADE

[^] Mandated Report to ADE
8/14/14

Court, School and Law Enforcement Collaborative Task Force: Guidelines for Schools in Contacting Law Enforcement

	Call for Law Enforcement Presence	File Police Report (Online)	School based Consequence / Intervention	
L:				
Laser pointer [^] (dangerous item)			<input checked="" type="checkbox"/>	Do not call law enforcement unless they use or threaten someone with it.
Leaving School Grounds without Permission			<input checked="" type="checkbox"/>	Do not call unless there is a safety concern for the student or it is coupled with other violations that require police contact.
Letter Opener [^] (dangerous item)			<input checked="" type="checkbox"/>	Do not call unless they use it or threaten someone with it.
Lying			<input checked="" type="checkbox"/>	
M:				
Mace [^] (dangerous item)			<input checked="" type="checkbox"/>	Do not call law enforcement unless they use or threaten someone with it.
Minor Aggressive Act (hitting)			<input checked="" type="checkbox"/>	Do not call law enforcement; unless it causes injury, then it should be classified as assault.
N:				
Negative Group Affiliation			<input checked="" type="checkbox"/>	
Network Infraction			<input checked="" type="checkbox"/>	Do not call unless the student hacks into the network with intent to access sensitive information.
Nunchakus** (weapon)		<input checked="" type="checkbox"/>		Always report, but place online report if police presence is not needed based on the intent and culpability.
O:				
Other Dangerous Item [^]			<input checked="" type="checkbox"/>	Do not call law enforcement unless they use or threaten someone with it.
Over the Counter Drugs (Inappropriate Use of)			<input checked="" type="checkbox"/>	Do not call for possession. It is not illegal to possess. If it is a medical emergency, then call 911. See Appendix
P:				
Paintball Gun [^] (dangerous			<input checked="" type="checkbox"/>	Do not call law enforcement unless they use or threaten someone

** Mandated Report to Law Enforcement & ADE

[^] Mandated Report to ADE
8/14/14

Court, School and Law Enforcement Collaborative Task Force: Guidelines for Schools in Contacting Law Enforcement

Item)					with it.
Parking Lot Violation					
Pellet Gun [^] (dangerous item)				<input checked="" type="checkbox"/>	Do not call law enforcement unless they use or threaten someone with it.
Plagiarism				<input checked="" type="checkbox"/>	
Pornography [^]				<input checked="" type="checkbox"/>	Do not call law enforcement unless: <ul style="list-style-type: none"> • The student is distributing pornographic material • Any of the people in the pornographic material are known to the student • The pornography is of a minor

Violation	Guidelines			Explanations and Exceptions
	Call for Law Enforcement Presence	File Police Report (Online)	School based Consequence / Intervention	
Prescription Drugs ** (Inappropriate Use of)	<input checked="" type="checkbox"/>			Call law enforcement unless: <ul style="list-style-type: none"> • The student has a prescription in their name and • Prescription is current.
R: Recklessness			<input checked="" type="checkbox"/>	
Robbery [^]	<input checked="" type="checkbox"/>			Do not call law enforcement, if the violation is serious enough to call police, then the violation should be classified as endangerment.
S: Sexual Abuse/Sexual Conduct with a Minor/Child Molestation**	<input checked="" type="checkbox"/>			Call law enforcement unless there is a low level of threat and force.

** Mandated Report to Law Enforcement & ADE

[^] Mandated Report to ADE
8/14/14

Court, School and Law Enforcement Collaborative Task Force: Guidelines for Schools in Contacting Law Enforcement

Sexual Harassment ^			<input checked="" type="checkbox"/>	Do not call law enforcement unless: • Behavior is persistent, or • The victim feels threatened by the behavior
Sexual Harassment with Contact^	<input checked="" type="checkbox"/>			See Appendix A
Sexual Assault (Rape)**	<input checked="" type="checkbox"/>			
Simulated Firearm			<input checked="" type="checkbox"/>	Do not call law enforcement unless: • They were using it to threaten others, and • It cannot be discerned whether it is real or not.
Substance Represented as Illicit Drug	<input checked="" type="checkbox"/>			Call law enforcement, unless it can be determined that the substance is legal
T:				
Tardy			<input checked="" type="checkbox"/>	Do not call law enforcement unless they use or threaten someone with it.
Taser or Stun Gun^ (dangerous item)			<input checked="" type="checkbox"/>	It is not available for purchase, so law enforcement agencies want to be notified if anyone is in possession of it.
Tear Gas^ (dangerous item)	<input checked="" type="checkbox"/>			Do not call if items are valued at less than \$100.
Theft (Petty)			<input checked="" type="checkbox"/>	

Violation	Guidelines			Exceptions
	Call for Law Enforcement Presence	File Police Report (Online)	School based Consequence / Intervention	
Theft	<input checked="" type="checkbox"/>			Call law enforcement if value of the items is more than \$100. If it is personal property, the owner needs to make the report, not the school.
Threat or Intimidation^	<input checked="" type="checkbox"/>			Call law enforcement unless there is no intent of harm.
Tobacco Violation^			<input checked="" type="checkbox"/>	

** Mandated Report to Law Enforcement & ADE

^ Mandated Report to ADE

8/14/14

Court, School and Law Enforcement Collaborative Task Force: Guidelines for Schools in Contacting Law Enforcement

Trespassing				<input checked="" type="checkbox"/>	Do not call law enforcement unless: <ul style="list-style-type: none"> It is a student who was expelled or suspended for a serious violation, or The person has already been warned and will not leave, or There is a specified, clear threat.
Truancy				<input checked="" type="checkbox"/>	
U:					
Unexcused Absence				<input checked="" type="checkbox"/>	
Unknown Drug**		<input checked="" type="checkbox"/>			Call law enforcement if substance cannot be identified.
V:					
Vandalism of Personal Property^				<input checked="" type="checkbox"/>	Victim must call the police, the school should not call for them.
Vandalism of School Property^	<input checked="" type="checkbox"/>		<input checked="" type="checkbox"/>		Call law enforcement unless damage is under \$250. If no suspect, place an online report.
Verbal Provocation				<input checked="" type="checkbox"/>	

** Mandated Report to Law Enforcement & ADE

^ Mandated Report to ADE

8/14/14

SUFEO Stand Up For Each Other

This program was introduced at the first Town Hall and reviewed again at the New Orleans Town Hall. It is a program that has also been adopted in Chicago.

Stand Up for Each Other! (SUFEO) is an advocacy group led by law students at Tulane University Law School and Loyola University Law School in New Orleans, with an additional project at Loyola School of Law in Chicago. The New Orleans and Chicago groups collaborate with each other but operate separately. They are united by the goal of reducing suspensions and keeping students in school and out of the criminal justice system.

For students appealing a suspension or expulsion, SUFEO advocates assist with each step of the process. They advise parents and students on how to initiate an appeal of disciplinary action, conduct an investigation into the actions taken against students, and represent students in administrative hearings. Also, both sites operate an around-the-clock hotline for youth and parents who have questions or need assistance defending against school suspensions and expulsions.

The law students that run the SUFEO groups are aided by attorneys from organizations like the Louisiana Center for Children's Rights, which collaborates with the New Orleans SUFEO. The Center reports that SUFEO has worked with over 100 students in approximately fifty cases, most of which it says were successfully appealed. In addition to directly assisting students and parents, SUFEO's advocacy has drawn media attention to the staggering rates of suspension and expulsion at Louisiana schools and has brought the harsh effects of state legislation into the political conversation.

For references as quoted and more information, see STAND UP FOR EACH OTHER!, <http://sufeo.org/> *Suspension Advocacy Project*, LOY. U. CHI. SCH. L.: CIVITAS CHILDLAW CTR. http://www.luc.edu/law/centers/childlaw/institutes/child_education/suspensionadvocacyproject/

Tavis Smiley, *The "Community" Element of Education*, PBS: TAVIS SMILEY REP. (last modified Apr. 11, 2013), <http://www.pbs.org/wnet/tavissmiley/tsr/education-under-arrest/the-community-element-of-education/>.

4. Restorative Justice (Texas)

In 2012, Institute for Restorative Justice and Restorative Dialogue (IRJRD), led by Dr. Marilyn Armour, partnered with Ed H. White Middle School in San Antonio, Texas, to implement a *Restorative Discipline* program aimed at reducing the use of exclusionary practices like suspension and expulsion to discipline sixth, seventh, and eighth grade students. Total student suspensions at the White Middle School dropped by 44% during the first year of the program and by 57% the second year. Teachers' and administrators' experience with, and training in, restorative practices seems positively correlated with lower suspension rates. Dr. Armour described the program as a "relational approach to building school climate and addressing student behavior that fosters belonging over exclusion, social engagement over control, and meaningful accountability over punishment." An evaluation of Restorative Discipline at White Middle School authored by Dr. Armour also reported "substantial gains" in academic performance; "African American students, in particular" showed improvement in both math and reading.

For the points quoted here and further information see MARILYN ARMOUR, ED WHITE MIDDLE SCHOOL RESTORATIVE DISCIPLINE EVALUATION: IMPLEMENTATION AND IMPACT 12 (2014), <http://www.utexas.edu/research/cswr/rji/pdf/Year2-Final-EW-Report.pdf>; *Texas Schools Restorative Discipline Project*, U. TEX. AUSTIN: SCH. SOC. WORK, <https://socialwork.utexas.edu/projects/texas-schools-restorative-discipline-project>.

Dr. Armour can be reached at marmour@utexas.edu.

APPENDIX C. ADDITIONAL PROGRAMMATIC RESOURCES

ACES CONNECTION, <http://www.acesconnection.com/>;
CDC-KAISER PERMANENTE ADVERSE CHILDHOOD EXPERIENCES
(ACE) STUDY, <http://www.cdc.gov/violenceprevention/acestudy/>
(information on adverse childhood experience research and ap-
proaches)

PIPELINE TO PROSPERITY, VALLEJO UNIFIED SCHOOL
DISTRICT, [http://www.vallejo.k12.ca.us/cms/page_view?d=x&piid=
=&vpid=1308906523308](http://www.vallejo.k12.ca.us/cms/page_view?d=x&piid=&vpid=1308906523308) (YEAR) (for more information contact
Patricia Lee, State Bar of California, Patricia.Lee@calbar.ca.gov).