

NOTE: Discriminatory Discipline

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UMKC Law Review

Spring, 2017

UMKC Law Review

85 UMKC L. Rev. 739

LENGTH: 10233 words**ARTICLE:** DISCRIMINATORY DISCIPLINE: THE RACIAL CRISIS IN AMERICA'S PUBLIC SCHOOLS**NAME:** Leland Ware ***BIO:**

* **Leland Ware**, Louis L. Redding Professor, Kendra Brumfield, PhD student, University of Delaware. Professor **Ware** would like to express his appreciation of the attendees of the 2016 Mid Atlantic People of Color Legal Scholarship Conference January 29, American University College of Law.

TEXT:**[*739] INTRODUCTION**

A police officer assigned to a high school in Columbia, S.C., was asked to remove a disruptive female student from a classroom this afternoon. He responded by violently flipping the young student out of her chair and throwing her across the room. ⁿ¹ The incident sparked strong condemnation after a video from Spring Valley High School went viral. This is merely one vivid example of ways in which African Americans students are mistreated in the nation's schools.

Teachers and other school officials in districts across the nation are exercising their discretion in ways that treat African American students differently and less favorably than similarly situated white students. Academic studies produced over the past 30 years have consistently found racial disparities in the administration of discipline. Discipline is imposed more frequently and with heavier penalties on African American students than White students who engage in the same conduct.

Researchers also found the large and persistent overrepresentation of African American students in misconduct referrals, suspensions, and other forms of discipline was not attributable to racial differences in classroom conduct. When researchers controlled for differences in behavior, student demeanor, or personality traits (concentration, extroversion, closeness with teacher), grades, and other factors, African-American students were still far more likely to be disciplined than White students.

Until recently, the academic research focused on specific geographic regions within the nation. However, the U.S. Department of Education's Office for Civil Rights' 2014 report on school discipline collected data on nationwide basis and found glaring racial disparities in the imposition of discipline. This meant the depth and scope of the problem was much greater than previously known. An entire generation of African American students is denied access to equal educational opportunities.

Although the racial disparities have been documented, the underlying causes have not been explored. Over the last three decades a substantial body of research in cognitive psychology and other disciplines have confirmed that the causes of discriminatory actions often operate at an unconscious level without the [*740] perpetrator's awareness of the source. Explicit expressions of racial attitudes have become less frequent, but people often harbor more racially prejudiced views than they consciously realize. Implicit biases are supplanting explicit racism but they have the same deleterious effects.

This article analyzes the influence of implicit bias on student discipline. Part I examines the research documenting racial disparities in student discipline. Part II examines the Department of Education's discipline data which shows, on a nationwide level, the extreme racial disparities in student discipline. Part III explains how unconscious discrimination operates and its influence on student discipline. Part IV shows the perpetuation and ubiquity of African American stereotypes that trigger implicit bias. Part V examines the stereotype of young, African American males as dangerous, intellectually deficient, predators. Part VI examines the unique forms of intersectional discrimination that young women endure. Part VII explains how discriminatory discipline practices Violate Title VI of the Civil Rights Act. The final Part examines the Department of Justice and Education's efforts to address discipline disparities. The discipline disparities reflect a racial crisis in America's schools. More than 60 years after *Brown v. Board of Education* ⁿ² African American students are being denied equal access to educational opportunities in the nation's public schools.

I. RACIAL DISPARITIES IN STUDENT DISCIPLINE

Research spanning four decades has documented racial disparities in student discipline. In 1975 the Children's Defense Fund assessed national data from the United States Department of Health, Education and Welfare's Office of Civil Rights (OCR) and compared disciplinary outcomes in schools across a several dependent variables. ⁿ³ Drawing on a sample of 2,862 school districts that served 53% of America's public school students and 86% of the nation's minority student enrollment, the Defense Fund was able to analyze suspension rates for schools across the United States. ⁿ⁴ The researchers found that over 1 million students had been suspended in the 1972-1973 school year. Investigators conducted interviews with students who had been adversely affected by schools' misconduct policies and several administrators who had been involved in developing alternatives to out-of-school suspensions and expulsions.

The report presented data gathered from grade schools across the nation to illustrate the scope of exclusionary punishment in America and to call attention to its impact on students' access to educational opportunities. The study's scrutiny of the demographics of suspended students revealed the racial dynamics of schools' responses to misbehavior. The Defense Fund determined [*741] that Black students had a significantly higher rate of school suspensions than their White counterparts. African American elementary school students were suspended at three times the rate of their White classmates. ⁿ⁵ In secondary school, Black students were twice as likely to be suspended as White students. ⁿ⁶

Researchers found that 29 states had suspension rates indicating that over 5% of the total number of enrolled Black students had been subject to exclusionary punishment. ⁿ⁷ By contrast, only four states were found to have suspended as much as 5% of their enrolled White students. ⁿ⁸ The Children's Defense Fund reported that Black students had a greater chance of being suspended more than once. ⁿ⁹ Minorities constituted 38% of total student enrollment, but the proportion of Black students who were suspended twice was equal to that of White students. ⁿ¹⁰ Those being suspended three or more times were 27%, compared to an 11% rate for White students. ⁿ¹¹ The Defense Fund recommended disciplinary disparities be examined more closely and addressed by schools and administrators. ⁿ¹²

Other studies had similar findings. Using the OCR's 1976 data on student discipline, in *Corporal Punishment, School Suspension, and the Civil Rights of Students: An Analysis of Office for Civil Rights School Surveys* researchers conducted a study that examined the extent of corporal punishment, the racial distribution of punishment, and the use of corporal punishment in lieu of exclusionary punishment. ⁿ¹³ From a five-state sample of 64 elementary schools and 52 secondary schools, incidents of corporal punishment were compared to student suspensions disaggregated by the race and sex. ⁿ¹⁴

The schools with high rates of corporal punishment correlated to those with high suspension rates. This finding ran counter to school administrators' argument that corporal punishment was used in lieu of suspensions. Minority students were subjected to corporal punishment more frequently than White students. Although the proportion of African Americans in the general student body was 24%, they constituted 37% of the students who received corporal punishment.ⁿ¹⁵ White students comprised 74.8% of the student population and received 61.8% of the corporal punishment.ⁿ¹⁶ The researchers found that White [*742] students' risks of punishment were lower for younger students. The risks of disparate punishment were as high for Black elementary students as they were for Black high schoolers.ⁿ¹⁷

In *Pupil Race and Sex Determinants of Office and Exceptional Education Referrals* researchers studied a sample of 416 students in a large, midwestern school to determine whether there were racial or sex differences in the incident levels and nature of interventions employed to address problem behavior.ⁿ¹⁸ By examining the race and sex of students referred for therapeutic interventions (exceptional educational referrals) to those recommended for punitive interventions (office referrals), the researchers determined that the proportion of students receiving exceptional educational referrals did not point to racial disparities.ⁿ¹⁹ A racially diverse school that reflected the demographics of the wider community had disparities in office referrals that were statistically significant in the treatment of Black students as compared to their White counterparts. While roughly 62% of African American students sent to the office received disciplinary referrals, only about half of White students visiting the office were referred for punitive interventions.ⁿ²⁰ Based on these findings, researchers concluded that, "Although undoubtedly related, these teacher judgments may not correspond with the actual incidence of misconduct or underachievement for a given race or sex."ⁿ²¹

In *Suspensions in School Discipline*, the researcher examined racial disparities in suspension rates. The researcher found that 46% of Cleveland's suspensions of senior high students were for attendance-related infractions.ⁿ²² Based on quantitative analysis of the OCR's 1972-1973 data for midwestern states, the researcher found that, even in states where the overall suspension rates were low, a disproportionate number of suspensions involved Black students.ⁿ²³ With two exceptions, all the states included in the sample had patterns of imposing suspensions of longer duration to Black students than White students. In Wisconsin--one of the exceptional states--the researcher found that the duration of Black and White students' suspensions were not significantly different, but Black students in Wisconsin were suspended more frequently than Black students in any other state in the midwestern region. In Michigan, White students received slightly longer suspensions than Black students, but fewer White students were suspended. The researcher noted that even in states with low overall suspension rates, disproportionality could be an issue. In Iowa, a state [*743] with the lowest overall suspension rates in the Midwest, Black suspension rates were the second highest in the region.ⁿ²⁴

In 1986, the Massachusetts Advocacy Center produced a report that examined exclusionary practices in Boston's middle schools as a response to public concerns about the 43% dropout rate in the Boston public school system.ⁿ²⁵ The Center examined aggregate suspension rates, the frequency and extent of the school system's use of suspension, and the racial proportions of the use of exclusionary punishment. Researchers found that over the course of three years the overall student suspension rate rose from 8.8% in 1982-1983 to 9.6% in the 1984-1985 school year.ⁿ²⁶ Black students' suspension rates were higher than suspension rates for all other racial or ethnic categories. While these students represented 49.6% of middle school student enrollment in Boston, their suspensions accounted for over 60% of student suspensions in every year the researcher recorded.ⁿ²⁷ Black students' suspension rates exceeded the aggregate student suspension rate across all three years studied and were twice the suspension rate for White middle schoolers in Boston.ⁿ²⁸

In *Ethnic/Racial and Gender Equity in School Suspensions* researchers found patterns of overrepresentation of students with certain racial or gender identities in disciplinary action. The researcher analyzed 6 months of disciplinary data gathered from three high schools in a large, urban southwestern community, each with varying racial compositions.ⁿ²⁹ "School A" was predominantly White and served an upper-middle class population.ⁿ³⁰ "School B," also predominantly White, had a proportion of racial/ethnic minorities roughly equal to the demographics of the wider community.ⁿ³¹ "School C" was predominantly Hispanic with students from the lower socioeconomic segment of the

community. ⁿ³² With the exception of "School A," the author found a pattern of White underrepresentation and minority overrepresentation in suspensions. ⁿ³³ In "School C," Black students were suspended at twice the rate of their general representation in the school. ⁿ³⁴

In a 1986 study *Bad Boys and School Suspensions: Public Policy Implications for Black Males* researchers examined the effects of disciplinary [*744] policies and practices on African American males in grade schools. ⁿ³⁵ The researchers compiled district records for the 1983-1984 school year for a sample of 10 elementary, five junior high, and four senior high schools and found pervasive racial disparities. Analyzing the incidents of punishment the study demonstrated that Black males in elementary, junior high, and senior high schools in the sample received 57%, 40%, and 50% of all suspensions given, respectively. ⁿ³⁶ The authors noted that the extent of schools' disciplinary disparities in the sample would have been larger if school "pushouts" were included. This refers to students who would have been punished if they had not dropped out or become truants. ⁿ³⁷

In 1987, *The Social Construction of School Punishment: Racial Disadvantage Out of Universalistic Process* considered whether racial disparities in punishment were attributable to differences in the behaviors of the two groups. ⁿ³⁸ Based on the responses of 945 participants surveyed over a period of three years, cross-referenced with student ratings, the researchers found that Black respondents did not report more misbehavior than White respondents. However, the researchers found significant differences in the rates at which Black and White students were sanctioned for misbehavior. ⁿ³⁹ The researchers concluded the punishment rates of Black students' was influenced by teachers' perceptions of students' demeanor, knowledge of students' academic performance, and knowledge of students' behavioral records. When Black students were perceived as low achievers who frequently misbehaved, they were more likely to be subjected to punishment. ⁿ⁴⁰

School Desegregation and Suspension in East Baton Rouge Parish: A Preliminary Report, a study of punishment in East Baton Rouge Parish in Louisiana, explored the role of desegregation efforts in school's responses to misconduct. ⁿ⁴¹ The researchers found significant racial disparities in the rates at which students were suspended from school. Using a sample of 33 of the parish's secondary schools, the study examined disciplinary outcomes immediately preceding and during the implementation of a 1981 court-ordered desegregation plan in the East Baton Rouge Parish school system. The researchers found that, in the 1981-1982 school year, White students comprised 58.7% of the secondary school population and received 33% of suspensions.

[*745] Black students constituted 42% of the school population and accounted for 66% of suspensions. In the following year, the researchers found that the racial gap in punishment had increased, with the percentage of White students in public schools decreasing to 55% and their proportion of suspensions to 27% while African American students accounted for 45% of students and received 73% of suspensions. ⁿ⁴² The rate of Black suspensions rose from 2.6 times higher than the White suspension rate in 1981-1982 to 3.3 times the White suspension rate in the 1982-1983 year. ⁿ⁴³ Despite the wide variation in suspension rates across schools, the researchers concluded that increases in suspension rates corresponded to the rising number of African American students. ⁿ⁴⁴

In *School Suspension: A Study with Secondary School Students*, researchers conducted a survey of 620 students in two school districts, 41% of whom had been suspended during the school year. ⁿ⁴⁵ In this study, researchers surveyed students who were suspended either internally or externally. Students receiving internal suspensions are excluded from their regular classrooms and placed in an "in-school suspension room" for the duration of their suspension. ⁿ⁴⁶ Externally suspended students are prohibited from attending school for the duration of their suspension.

One school district was located in a predominantly Black, inner city community where 56% of students responding to the survey identified their racial/ethnic background as African American. The other district was located in a predominantly White rural community where 72% of respondents identified themselves as White. ⁿ⁴⁷ Although the primary intent of their study was to understand the efficacy of suspension and implications for school psychologists, the researchers also found that the characteristics of those suspended from school were not inconsistent with previous studies. ⁿ⁴⁸ They noted that among Black students responding to the survey 45% reported that they had been externally

suspended as compared with 12% of White respondents and 18% of Hispanic respondents. ⁿ⁴⁹

In *Office Referrals and Suspension: Disciplinary Intervention in Middle Schools* the authors undertook two quantitative studies of middle school student [*746] populations in the Midwestern United States. ⁿ⁵⁰ The "Study I" population involved a large, urban public school district with approximately 50% African American enrollment. ⁿ⁵¹ The researchers found that 41% of students had a record of disciplinary referrals. Researchers found that African American students received more disciplinary referrals than all other racial/ethnic categories--with the exception of Native Americans. ⁿ⁵²

In "Study II" researchers illustrated the inconsistent and interpersonal nature of student discipline by examining the scale, official rationales, and consequences of disciplinary referrals. The researchers found that of the 610 students at the school, 846 office referrals were recorded during the academic year. This showed that students were referred to the office at a rate of 4.6 referrals per day--based on an academic calendar of 184 student days. Students were cited for an average of 1.7 infractions per referral form. ⁿ⁵³ The researchers found that a large proportion of referrals were generated by a small number of teachers. These referrals were most frequently related to students being uncooperative and/or disrespectful as opposed to more serious, criminal offenses. ⁿ⁵⁴

The researchers also found that there was an inconsistent relationship between the severity of students' misbehavior and the consequences they received. ⁿ⁵⁵ In this school with an African American student population of 5%, educators reported having reported students' behavior to their parents prior to a referral in 72% of the cases. In Study I's majority African American student population, conferencing directly with the student was the most frequently reported action prior to referring them to the office. ⁿ⁵⁶

A Darker Shade of Gray: A Year-End Analysis of Discipline and Suspension Data, a 1999 study of 32,000 students in a large, metropolitan Midwestern city, was conducted at the behest of a school superintendent concerned about racial disparities in disciplinary reporting. ⁿ⁵⁷ While the researchers' observations showed significant variations in suspension rates across schools, Black students were from 1.5 to 4.8 times more likely to be suspended than their White counterparts. ⁿ⁵⁸ The researchers' quantitative analysis, combined with qualitative interviews of school administrative staffs, the researchers [*747] determined that the "being young, male, economically deprived and of minority status served as a four-fold precipitator of possible disciplinary inequity in the public school setting." ⁿ⁵⁹

In *The Color of Discipline: Sources of Racial and Gender Disproportionality in School Punishment*, researchers traced the origins of minority overrepresentation in school discipline proceedings. ⁿ⁶⁰ Their study examined disciplinary practices in a school district situated in one of the 15 largest cities in the United States. ⁿ⁶¹ The authors reported that neither their investigation nor the previously published research found any evidence that the higher rates of discipline received by African American students were attributable to more serious or more disruptive behavior. ⁿ⁶² Examining the disciplinary reports of 11,001 students, they investigated the impact of race, gender, and socioeconomic status on punishment outcomes. ⁿ⁶³ Their findings indicated that Black male students were overrepresented in referrals, suspensions, and expulsions--even after controlling for their socioeconomic status. ⁿ⁶⁴ They also noted that the disparities in administrative responses to misbehavior appeared to increase when the focus shifted from comparisons of suspension rates to expulsion rates. ⁿ⁶⁵

A 2006 study, *Understanding the Antecedents of the School-To-Jail Link*, examined a sample of more than 22,000 students from 45 elementary schools in a large suburban/urban/rural consolidated school district in a mid-Atlantic state to examine the relationship between student punishment and race. ⁿ⁶⁶ The researchers analyzed racial disparities in discipline at three levels: the individual level, the classroom level, and the school level. ⁿ⁶⁷ At the individual level and classroom/teacher level, the researchers considered differences in behavior, teacher evaluations of student demeanor/attitudes, personality traits (concentration, extroversion, closeness with teacher), and grades, among other factors. At the school level, overall racial composition of the school, the levels of misbehavior, socioeconomic status, and teacher demographics were determined. They found that, even when controlling for these factors, African American students were more likely to be punished. Approximately 15% of Black [*748] elementary school students were

disciplined compared to 6% of the White students.ⁿ⁶⁸ They also found that Black students were more likely to receive a disciplinary referral at a rate of at least two to one, when compared with White students.ⁿ⁶⁹ They found that the racial variations in punishment were most evident at the classroom/teacher level and the school level.ⁿ⁷⁰ African American students had a 27% higher probability of receiving a referral than other students.ⁿ⁷¹

In a 2012 study, *Opportunities Suspended: The Disparate Impact of Disciplinary Exclusion from School*, researchers explored the role of school contexts in the discipline of African American students.ⁿ⁷² The study drew on OCR nationwide data on school suspensions to provide a sense of the scale of this issue. Analyses of students from kindergarten to twelfth grade revealed that approximately 17%--or nearly one in six--Black students were suspended from school in the 2009-2010 academic year.ⁿ⁷³ In the same year, 5%--or one in 20--White students was suspended from school.ⁿ⁷⁴ Among students with and without disabilities, African American students had the largest percentage of students to be suspended multiple times.ⁿ⁷⁵

Collectively, the studies discussed in this section firmly establish a pattern of gross statistical disparities in the imposition of punishment on African American students as compared to White students who engage in the *same* conduct. The researchers used data obtained from a range of geographic regions in the United States: North, South, East, and West. As the discussion in the following section demonstrates, this is a nationwide problem. A generation of African American students is subjected to punishments at rates that exceed by far the rates of discipline inflicted on White students for the same conduct. As the discussion in this and the following section shows, there is a nationwide pattern of discrimination that causes injuries that rival the damages inflicted by official segregation during the pre-*Brown* era.

II. THE DEPARTMENT OF EDUCATION'S DISCIPLINE DATA

The U.S. Department of Education's Office for Civil Rights' (OCR) recently released report on school discipline found glaring racial disparities in the [*749] imposition of discipline on a nationwide basis.ⁿ⁷⁶ The report, a compilation of disciplinary reports for 16,500 school districts, which are collectively responsible for 97,000 schools with 49 million students, revealed pervasive racial disparities across localities, age groups, and disability statuses.ⁿ⁷⁷

The data disclosed disparities in out-of-school suspensions beginning at the earliest stages of educational development. In the 2011-12 school year, African American children accounted for 18% of preschool enrollment and 48% of preschoolers who were given more than one out-of-school suspension. By contrast, of the 43% of White preschoolers, 26% were given more than one out-of-school suspension.ⁿ⁷⁸ The proportion of Black preschoolers receiving one or more out-of-school suspension exceeded all other racial/ethnic groups in 17 states.ⁿ⁷⁹ In 14 of these states, at least half of all preschoolers suspended out-of-school were African American.ⁿ⁸⁰ In Georgia, 1,657 Black preschoolers received at least one out-of-school suspension, of a total of 1,949 suspensions issued in the school year; African Americans accounted for 178 of the 186 preschoolers suspended at least once in the District of Columbia; and, in Wisconsin, 52 Black preschoolers were suspended compared to 13 White preschoolers.ⁿ⁸¹

Collectively, Black students were suspended and expelled at a rate three times greater than their White counterparts.ⁿ⁸² Although two-thirds of suspensions were given to boys, 12% or 3.7 million suspensions were given to African American girls, the highest proportion of any female racial or ethnic group.ⁿ⁸³ With respect to suspensions and expulsions, Black students represent 16% of the student population, and approximately 32 to 42% of students suspended or expelled from their schools. White students, who made up slightly over half of students enrolled in school, account for about 31 to 40% of students who are suspended or expelled.ⁿ⁸⁴ Disciplinary disparities were also present in other forms of punishment. In the same period of time, 27% of Black students were referred to law enforcement officials, and 31% were involved in school-related arrests.ⁿ⁸⁵ [*750] White students represented 41% of law enforcement referrals and 39% of arrests.ⁿ⁸⁶ In all types of punishment, the proportion of African American students punished was at least 10 percentage points higher than their proportion in the general student population.ⁿ⁸⁷

A. Corporal Punishment

Black students constituted 34.6% of students who received corporal punishment in the 2011-12 school year, although they made up only 16% of the student population. ⁿ⁸⁸ This indicates that their representation amongst the corporally punished was 18 percentage points higher than their representation in the general school population. ⁿ⁸⁹ In the states of Georgia, Louisiana, Maine, Missouri, Ohio, Pennsylvania, and Rhode Island, African American students' share of corporal punishment was at least 10 percentage points higher than their share of the student population. ⁿ⁹⁰ In these same states, the percentage of White students receiving corporal punishment was 7 to 37 percentage points lower than their proportion in the student population. ⁿ⁹¹

B. Suspensions

At the national level, the proportion of in-school suspensions given to Black students was 15 percentage points higher than their overall proportion of the student population. ⁿ⁹² The proportion of White students with in-school [*751] suspensions was 10% less than their proportion in the student population. ⁿ⁹³ Within all of the 24 states where Black students were overrepresented by more than 10 percentage points, White students were underrepresented by at least 6 percentage points. ⁿ⁹⁴

Image 1

Over 1.2 million African American students were suspended out-of-school at least once while 1.08 million White students received this punishment. ⁿ⁹⁵ Although 51% of all public students were White in the 2011-2012 academic year, they constituted only 34% of those suspended out-of-school. ⁿ⁹⁶ African American students were suspended at a higher proportion than their general enrollment in every state. ⁿ⁹⁷ On average, Black students were overrepresented in out-of-school suspensions by 22 percentage points. ⁿ⁹⁸ In 33 states and the District of Columbia, the proportion of African American students suspended from school was at least 10 percentage points higher than their representation in student enrollment. ⁿ⁹⁹ In Georgia, Louisiana, Maryland, and Mississippi twice as many Black students were suspended as compared to White [*752] students. ⁿ¹⁰⁰ In Delaware, three times more African American students were suspended out-of-school than their White counterparts. ⁿ¹⁰¹

In the period studied 604,181 African American students were suspended from school multiple times while 444,670 White students received the same punishment. ⁿ¹⁰² Proportionally, Black students accounted for 43% of those sanctioned. ⁿ¹⁰³ This was 27% higher than their proportion in the general population. ⁿ¹⁰⁴ The proportion of White students with more than one out-of-school suspension was 20% less than their proportion in the school population. ⁿ¹⁰⁵ In 31 states and the District of Columbia, African American students constituted at least a 10% greater proportion of students receiving multiple suspensions than their proportion in the student population. ⁿ¹⁰⁶ White students were underrepresented by anywhere from 3 to 38% in these same states. ⁿ¹⁰⁷

C. Expulsions, Referrals, and Arrests

In the expulsion category, Black students were overrepresented by 20 percentage points while White students were underrepresented by 15%. ⁿ¹⁰⁸ Of the 1,476 students expelled in Maryland, 1,156 were African American. ⁿ¹⁰⁹ African American students accounted for 55% of the expulsions in New Jersey although they constituted only 16% of all the state's public school students. ⁿ¹¹⁰ In Tennessee, where White students constitute 68% of the student population, only 26% were expelled. 70% of expulsions were given to African American students, who represent 23% of public school enrollment. ⁿ¹¹¹

At the national level, the proportion of Black students referred to law enforcement and arrested in school-related incidents exceeded their proportion in enrollment by 11% and 14% respectively. ⁿ¹¹² African American students were overrepresented in law enforcement referrals by at least 10 percentage points in 20 states, as well as the District of Columbia. ⁿ¹¹³ School-related arrests of Black students exceeded their enrollment proportions by more than 10 percent in 26 [*753] states. ⁿ¹¹⁴ White students were underrepresented by at least 5% in relation to their enrollment proportions in 40 states. ⁿ¹¹⁵

D. Zero Tolerance Policies

African American students' proportion in zero tolerance expulsions was 7% higher than their enrollment proportions.ⁿ¹¹⁶ White students' expulsions were 12% less than their enrollment proportions.ⁿ¹¹⁷ Black students' zero tolerance expulsions in Connecticut were more than twice their proportion in enrollment. Oklahoma's Black students accounted for 9% of enrollment and 38% of expulsions in this category.ⁿ¹¹⁸ Massachusetts' Black students accounted for 8% of the public school population and 20% of expulsions under zero tolerance.ⁿ¹¹⁹

Image 2

III. UNCONSCIOUS DISCRIMINATION

The discussion in this and the following sections of this article explain how unconscious bias contributes significantly to racial disparities in school discipline. Over the last three decades, a substantial body of empirical and theoretical work across a range of academic disciplines has determined that the [*754] causes of discriminatory actions often operate at an unconscious level without the individual's awareness of the source. Building on well-established scientific methods and principles from the field of cognitive psychology, researchers have provided a solid empirical foundation for understanding implicit bias. The studies have been replicated in hundreds of peer-reviewed articles.ⁿ¹²⁰ They demonstrate that individuals can possess attitudes, stereotypes, and prejudices in the absence of awareness, intention, or deliberation. Decades of research on automatic, associative links in memory among words and concepts that are related to one another led to the discovery that stereotyping and prejudice might also operate implicitly. By the early 1980s, a scientific consensus emerged regarding the ubiquity of unconscious and automatic cognition.

The first demonstrations of implicit stereotyping and prejudice were extensions of the well-established cognitive principle that knowledge is organized in memory in the form of associations that are derived from personal experiences as well as normative procedures and rules. The discovery of implicit prejudice evolved from nearly a century's worth of research on perception, memory, and learning. The phenomenon of implicit bias was incorporated into existing principles of human information processing. It fits the current consensus in brain and behavioral sciences that a substantial amount of cognition occurs automatically, effortlessly, and outside of an individual's conscious awareness of the source.

Some of the earliest experiments were conducted by Professors Dovidio and Gaertner who used the term "aversive racism" to describe the conduct of individuals who support policies that promote racial equality and regard themselves as not prejudiced, but act in ways that disadvantage minorities.ⁿ¹²¹ Aversive racists, they explained, often experience feelings of *uneasiness or fear* in the presence of African Americans.ⁿ¹²² Their negative attitudes towards minorities are usually unacknowledged.ⁿ¹²³ Their attitudes are rooted in cognitive, motivational and socio-cultural forces that affect many White Americans. Aversive racists typically do not discriminate against African Americans when it would be obvious to others and themselves, but they are likely to engage such behavior when there are race-neutral justifications for their actions.ⁿ¹²⁴ In one [*755] frequently cited study concerning the provision of emergency assistance, White bystanders were as likely to help a Black victim as a White victim when they were the only witness to an emergency and their personal responsibility was clear. In circumstances in which there were other witnesses to the emergency, they would justify not helping on the belief that someone else would intervene. In this situation, Whites helped the Black victim half as often as they helped the White victim. Racial bias was expressed in a way that could be justified by a race neutral reason.ⁿ¹²⁵

Legal scholars began to study this phenomenon in the late 1980s which they labeled "unconscious discrimination." In one of the seminal articles Professor Charles Lawrence employed social cognition and Freudian theories in his critique of the limitations of antidiscrimination law. In *The Id, the Ego and Equal Protection Reckoning with Unconscious Racism*, Professor Lawrence relied on Freudian psychology to explain that our culture transmits various beliefs and preferences that are not experienced as explicit lessons.ⁿ¹²⁶ Instead, they are part of the individuals' rational ordering of their perceptions of the world. These individuals are not aware of how the ubiquitous presence of

cultural stereotypes influences their perception that blacks are lazy or unintelligent. Young children may not be told that blacks are inferior, but they learn that lesson through observing the behavior of others. ⁿ¹²⁷ Professor Frances Aboud, who conducted research on prejudice in young children, found that stereotypes develop between the ages of 3 and 5 and are retained in the unconscious psyche as children mature into adulthood. ⁿ¹²⁸

In a 1995 article, *The Content of Our Categories*, ⁿ¹²⁹ Professor Linda Krieger explained that much of the discrimination that occurs now is not the result of conscious animus. Krieger relied on social cognition theory to explain that decision making relies on "categorization" which is a fundamental part of the process of human cognition. ⁿ¹³⁰ Categorization simplifies the task of processing and retaining information. It allows individuals to identify objects to make predictions about future events. Categorization operates atomically at an unconscious level. Individuals perceive, categorize, and evaluate information differently depending on the ways in which information is presented and the [*756] context in which it is received. The process occurs in milliseconds without the individual experiencing a conscious awareness that it is happening. ⁿ¹³¹

The danger of categorization is that it can cause judgment errors that bias decision making. Categorization can make it difficult for an observer to recognize a person's individual characteristics. When an individual is seen as a member of a social group, perceptions about that group's characteristics and behavior influence judgments made about them. As stereotypes can be so deeply internalized that they persist even in the face of information that directly contradicts the stereotype. ⁿ¹³²

Krieger and Fiske explained that subtle forms of intergroup bias can affect decision making long before any decision is made. These biases can distort the perceptual data set on which decisions are premised. Operating outside of the decision maker's awareness, stereotypes can powerfully influence the way information about the stereotyped target is processed. They can shape the interpretation of incoming information, influence the manner in which that information is encoded into and stored in memory. Decision makers can act on the basis of a person's race and/or sex, while subjectively believing they are acting on the basis of a legitimate, nondiscriminatory reason. ⁿ¹³³

A widely used experiment demonstrates how unconscious discrimination operates. The IAT measures automatic association response times between representations for race, gender, and age, and other classifications of positive and negative characteristics. ⁿ¹³⁴ To measure racial associations, test takers' preferences are measured by their response times in pairing positive words or negative words with depictions of alternating White and Black faces. Quicker response times to pairing black faces with negative words and White faces with positive words indicate an implicit preference for a Black or White face with a negative or positive word. ⁿ¹³⁵

The test is premised on the conclusion that it takes participants longer to associate words and faces that the test takers consider incompatible. The test developers determined that the time differential could be quantified to provide an objective assessment of a test taker's unconscious attitudes. Using the IAT, researchers have documented a marked preference for Whites among test takers of different races who consciously believed that their views about race were neutral. The test results indicate that the test taker's attitudes about race were [*757] influenced by unconscious bias. ⁿ¹³⁶ In a recent study, the authors analyzed 122 research reports to establish the validity and efficacy of implicit association tests. They found that the tests are highly effective in measuring implicit bias. ⁿ¹³⁷

In the case of student discipline, the minority students suffer injuries caused by teachers treating them differently and less favorably than similarly situated white students. In *Advocacy Against the Stereotype: Lessons From Cognitive Social Psychology*, Professor Gary Blasi surveyed experiments, theories, and models in cognitive social psychology and social neuroscience that explain how unconscious stereotypes function in the human mind. ⁿ¹³⁸ The extensive body of research that Blasi catalogued showed that individuals behave in ways that demonstrate that they are heavily influenced by stereotypes, including those that they consciously disavow. ⁿ¹³⁹

A few commentators have claimed that the existing research permits neither the prediction nor the identification of discriminatory conduct at the individual level. ⁿ¹⁴⁰ They assert that the research on unconscious bias does not permit an

inference of unlawful racial discrimination in any particular case as there may be other explanations for the disparities. However, in studies examining racial disparities in student discipline researchers examined differences in behavior, student demeanor, and other personality traits such as concentration, extroversion, closeness with teacher and determined that these race-neutral factors did not explain the disparities. The elimination of the race-neutral explanations for racial disparities leaves unconscious bias as the only inference that can reasonably be drawn. ⁿ¹⁴¹

[*758] One of the leading opponents to unconscious discrimination analysis relied heavily on the Supreme Court's decision in *Walmart Stores v. Dukes* ⁿ¹⁴² to support her theory. ⁿ¹⁴³ The author's analysis of that case is an example of just how flawed the arguments against unconscious discrimination have been. In *Dukes* a greeter at a California store and five other women filed a class action lawsuit in which they alleged that Walmart's nationwide policies resulted in lower pay for women than men in comparable positions and a longer wait for management promotions than men.

The Supreme Court ruled unanimously that the women could not maintain a class action. However, the ruling was based entirely on the Court's interpretation of the "commonality" requirement of Rule 23 Federal Rules of Civil Procedure. ⁿ¹⁴⁴ The ruling emphasized that Rule 23 required that all the members of the class must have a "common" legal claim that the company's bias was targeted at each of them. The Court held that the claimants in *Dukes* could not meet that standard. The decision did not preclude smaller class actions or claims asserted by individual women. Most importantly, *Dukes* did not address the merits of the claims of unconscious discrimination. A thorough and exhaustive review of the social science literature authored by John T. Jost and others was published in 2009. After reviewing hundreds of studies conducted over more than three decades, the authors concluded "the existence of implicit bias is beyond a reasonable doubt." ⁿ¹⁴⁵

IV. THE PERPETUATION OF AFRICAN AMERICAN STEREOTYPES

Unconscious stereotypes about African American students has a significant influence how their conduct is evaluated by teachers. Stereotyping involves the creation of a mental image of a typical member of a particular category. ⁿ¹⁴⁶ Individuals are perceived as undifferentiated members of a group, lacking any significant differences from other individuals within the group. Common traits are assigned to the entire group. When a particular behavior by a group member is observed, the viewer evaluates the behavior through the lens of the stereotype. This causes the observer to conclude that the conduct has empirically confirmed their stereotyped belief about the group.

Stereotypes and the ideology of Black inferiority are deeply embedded in American culture. Some of the best-selling popular literature of the late 19th and [*759] early 20th century perpetuated negative stereotypes. Thomas Dixon Jr., one of the popular authors of the period, published a number of novels depicting the Reconstruction Era. One of these, *The Clansman: A Historical Romance of the Ku Klux Klan*, ⁿ¹⁴⁷ glorified activities of the Klan and portrayed it as a protector of the Southern way of life. Charles Carroll's the "*Negro a Beast*" or "*In the Image of God*" ⁿ¹⁴⁸ was patterned along the same lines. African American stereotypes became a popular vehicle for entertainment. Beginning in the early 19th century, white performers darkened their faces with burnt cork, painted exaggerated white mouths, donned woolly wigs and took to the stage.

The common themes in all these shows were jokes highlighting laziness, ignorance and other negative traits using crude versions of the Black dialect. One of the black-faced characters created in the mid-19th Century was Jim Crow, whose name became synonymous with the system of segregation. During the closing years of the 19th century, minstrel shows featuring White performers in blackfaces were a popular mainstay of traveling shows and vaudeville productions. ⁿ¹⁴⁹ Later, African American entertainers performed in minstrel shows. ⁿ¹⁵⁰

With the advent of motion pictures in the early 20th century, negative depictions of African Americans moved from the stage to the screen. African American stereotypes were prominently featured in films for most of the 20th century. In *Toms, Coons, Mulattoes, Mammies, and Bucks* ⁿ¹⁵¹ Donald Bogle identified the principal stereotypes depicted in films. These included "Toms," "Coons," "Mammies," "Mulattoes," and "Bucks." The "Toms" were usually humiliated, harassed, flogged, and insulted. The name Tom was derived from the character in Harriett Beecher Stowe's 19th century

bestseller, *Uncle Tom's Cabin*. In films, "Toms" were always loyal, never turning against their white masters or employers. ⁿ¹⁵² "Toms" were always depicted as submissive, selfless and kind--traits that endeared them to white audiences.

[*760] "Coons" were unreliable, irresponsible, lazy and dishonest. They were frequently depicted eating watermelons, stealing chickens, or shooting craps while speaking grammatically incorrect English. ⁿ¹⁵³ The "Mammy" was similar to the "Coon," except for her outspokenness and independence. She was usually depicted as overweight and cantankerous. ⁿ¹⁵⁴ The "Tragic Mulatto" was a fair-skinned Black (usually female) attempting to pass for White. ⁿ¹⁵⁵ The "Mulatto" was a tragic, but sympathetic character whose fate would have been better had she not been confused by a divided racial heritage. The "Black Buck" was a large, brutal, fearsome, and oversexed male. ⁿ¹⁵⁶

D.W. Griffith's 1915 *Birth of a Nation* depicted Reconstruction in the Jim Crow South and contributed to the image of "Black Buck" stereotype of men who lusted after innocent white women. It also glorified and romanticized the Ku Klux Klan. The film was based on Thomas Dixon's *The Clansman* and *The Leopard's Spots*. The film's message was that Blacks could not be integrated into White society as equals. The Klan's violent actions were necessary to overthrow the corrupt local governments of the Reconstruction Era South. President Woodrow Wilson, who was a friend of Thomas Dixon's, screened *Birth of a Nation* in the White House. After viewing the film, Wilson said "[i]t is like writing history with lightning." ⁿ¹⁵⁷ For many years, it was the top grossing film and is still viewed as a historic advance in cinematography. ⁿ¹⁵⁸

In the 1939 film, *Gone With the Wind*, The "Mammy" character in this film is actually called Mammy. *Gone With the Wind's* Mammy was a surrogate mother to her master's White children. The "Mammy" character was depicted as loving her White children more than her own. The character was happy, humorous, and steadfast as the world crumbled around Scarlet O'Hara's family during the Civil War. ⁿ¹⁵⁹

Song of the South ⁿ¹⁶⁰ was a Walt Disney film adaptation of African American folk tales transcribed in the late nineteenth century by Joel Chandler [*761] Harris in Uncle Remus tales. ⁿ¹⁶¹ The film, which was released in 1946, presented a romanticized version of the South with no references to racial problems in the post-Civil War era. The African American characters were portrayed as being happy and content in their subservient roles. Groups of African American field workers sang happily as they returned home each day from work. The Uncle Remus character fit Bogle's "Tom" model, and the film was replete with other demeaning stereotypes. *Song of the South* was popular and successful but several years later, was withdrawn from distribution after repeated protests by civil rights groups.

Stereotyped representations of African Americans were a staple of films, cartoons and novels well into the 1960s. They reflected Whites' perceptions of Blacks and they institutionalized stereotypes in American popular culture. *Amos and Andy* was one of the most popular radio programs in the 1930s. One of the principal characters, Kingfish, was a dishonest schemer who entertained audiences with his failed schemes and mangled grammar. Andy was slightly dimwitted and was gullible to Kingfish's schemes. Lightnin' was a slow moving, slow talking janitor. Andy was portrayed as a philosophical taxi driver. Kingfish fit Bogle's "Coon" paradigm. The female character, Sapphire, was Kingfish's loud and abrasive wife, who was a variation on the "Mammy" theme. The program was broadcast on radio in the 1930s and 1940s. It was a popular television program in the 1950s. ⁿ¹⁶²

African American stereotypes were featured in product advertisements. ⁿ¹⁶³ Aunt Jemima promoted pancake mixes, Uncle Ben sold rice and Uncle Rastus was the Cream of Wheat chef. Aunt Jemima's character was based on a real woman, Nancy Green; her image is still the icon for pancake mixes. ⁿ¹⁶⁴ She is an example of the "Mammy" image. Uncle Ben is based on a photograph of Chicago maitre d', Frank Brown, a friend of the product's developers. ⁿ¹⁶⁵ Both characters are representations of a smiling, kindly "Tom" character. ⁿ¹⁶⁶ Rastus, the Cream of Wheat chef, was derived from a photograph of a Black Chicago waiter, whose name is unknown. The product is still marketed with that image. ⁿ¹⁶⁷

African American stereotypes were a staple in consumer products. They were represented in dolls, toys, children's

books, salt and pepper shakers, [*762] packaged food, and many other household items. In popular periodicals such as *Harper's Weekly*, *The Saturday Evening Post*, and *The Atlantic Monthly*, African-Americans were routinely portrayed as buffoons, criminals or rapists.ⁿ¹⁶⁸ The negative stereotypes of African Americans were ubiquitous, and taken for granted as accurate portrayals. Newspapers, books, radio programs, and films reinforced negative stereotypes on a daily basis. Stereotypes rooted in our national consciousness for centuries, including the dangerous, Black male persist into today.

V. YOUNG, AFRICAN AMERICAN MALE STEREOTYPES

Black males experience the highest levels of discipline in schools. Young, African American males have long been stereotyped as violent, drug-involved criminals.ⁿ¹⁶⁹ They are seen as angry, withdrawn, crude, disrespectful, provocative, unfeeling thugs.ⁿ¹⁷⁰ One study showed that Blacks are more likely than other racial or ethnic groups to be characterized by Whites as violent, more likely to abuse drugs, and more likely to engage in crime.ⁿ¹⁷¹ The results of another study corroborated the prevalence of this belief after finding that a majority of Whites characterize Blacks as aggressive.ⁿ¹⁷² "Other nationwide research has shown that the public perceives that Blacks are involved in a greater percentage of violent crime than official statistics indicate they actually are."ⁿ¹⁷³

In *Challenging Colorblind Education: A Descriptive Analysis of Teacher Racial Attitudes* the authors found that African American students were treated less favorably by teachers and are less likely to be placed on the talented and gifted track than White students.ⁿ¹⁷⁴ A national survey of more than 3,000 public [*763] school teachers found that the teaching population in 2011-2012 was 81.9% White and 76.3% female.ⁿ¹⁷⁵ Many teachers have not had the experience or desire to respond effectively to African American students' cultural norms.ⁿ¹⁷⁶ "Many students in pre-service education programs enter" the teaching profession "with little previous contact" with individuals from other racial backgrounds.ⁿ¹⁷⁷ Black boys are seen as older and less innocent than their White, same age peers.ⁿ¹⁷⁸

Teachers perceived Black children in the primary grades as having more behavior problems and lower academic competencies than White students.ⁿ¹⁷⁹ Instructors did not expect Black students in the secondary grades to perform as well as their White counterparts.ⁿ¹⁸⁰ In response to the stereotype that African Americans' behavior poses greater danger and threat, school decision makers are more likely to consider students' conduct as suspension worthy in ambiguous situations.ⁿ¹⁸¹ This triggers the subtle conviction that behavior is threatening and dangerous when an African American individual engages in it as compared to White students who engage in the same conduct.ⁿ¹⁸²

The student-teacher relationship relies on trust and respect. "Psychological research has indicated that youths are likely to disengage from the educational process if they perceive negative information about themselves or their racial group in the school environment."ⁿ¹⁸³ A stereotype by teachers that Black students are academically deficient and hostile to educators' goals could lead teachers to see Black students as "troublemakers" or menaces.ⁿ¹⁸⁴ With this mindset, teachers are likely to have a more punitive response to the conduct of Black students than to similar behavior by White students.ⁿ¹⁸⁵

Black students were referred more frequently to school psychologists, counselors, social workers, or hospitals for evaluation than White students.ⁿ¹⁸⁶ Teachers assumed that their Black students came from home environments in [*764] which parents did not value education.ⁿ¹⁸⁷ White teachers felt Black students were intimidating and some admitted to being afraid of them.ⁿ¹⁸⁸ Other teachers confessed that they often tried not to speak to Black students, or avoided eye contact with Black students.ⁿ¹⁸⁹ Some even admitted that they did not bother learning the names of African American students unless they were planning on writing a disciplinary note about their behavior.ⁿ¹⁹⁰ This sort of distancing and negativity creates an unwelcoming environment for Black students.

VI. AFRICAN AMERICAN FEMALES

Boys are not the only group suffering from negative images. In *Stereotype and School Pushout: Race, Gender, and Discipline Disparities*, Janel George explained that African American girls are subjected to race and gender stereotypes

that influence school officials' responses to their behavior. ⁿ¹⁹¹ African American girls are penalized for deviating from gender norms and expectations of "feminine" behavior, which are based models of White womanhood. ⁿ¹⁹²

Race and gender stereotypes about African American women are rooted in our nation's history and legacy of institutionalized racism. Stereotypes depicting African American women as "seductive, hypersexual, and immoral" emerged in order to justify the sexual abuse and exploitation to which they were subjected. ⁿ¹⁹³ "For African American girls, expectations in schools mirror the prevailing ideals of womanhood, which leads to social correction by teachers inculcated with these social norms and stereotypes." ⁿ¹⁹⁴

Janel George explained that women and girls who are able to mirror normative expectations of femininity during their interactions with others are evaluated as appropriately feminine, "good" girls. ⁿ¹⁹⁵ Women and girls who are not perceived as fitting within normative expectations of femininity can suffer harsh consequences. ⁿ¹⁹⁶ For African American girls who are perceived as not conforming to the ideals of womanhood in the school setting the consequences can be punitive. ⁿ¹⁹⁷

[*765] African American girls are punished for their nonconformity to notions of White, middle class femininity. Stereotypes of African American girls as assertive, loud, aggressive, and confrontational are used to justify the punitive sanctions. ⁿ¹⁹⁸ African American girls are often criticized for qualities that were developed sustain their survival as Black females. Failing to conform to prevailing notions of femininity justify punishment, and qualities of strength and resiliency developed by African American women to negotiate complicated social circumstances are devalued. Black girls must conform to White, middle class notions of femininity by being quiet and passive, or speak up and get disciplined for defying those expectations and conforming to educators' stereotyped expectations for African American girls. ⁿ¹⁹⁹

Unconscious stereotypes can create cultural barriers that separate Black students from White teachers. ⁿ²⁰⁰ Body language, accents, speech, dress, and behaviors of African American students are foreign and sometimes threatening to America's overwhelmingly White and female teaching force. Cultural misunderstandings between students and teachers can lead to unwarranted discipline for perceived unruliness. A lively debate may be interpreted as aggressive and contentious rather than the verbal sparring common among African American teenagers. Overlapping speech, such as the active "call response" participatory pattern familiar to African American students, may be seen as disruptive and/or rude. Energetic horseplay may be mistakenly regarded as genuine aggression. Black females perceived as engaging in loud and defiant behavior may actually be manifesting important survival qualities that reflect resilience against racism, sexism, and classism. ⁿ²⁰¹ For Black students, these disconnects are confusing when teachers sanction them for behavior that is accepted in their communities. ⁿ²⁰²

Another way in which implicit racial biases can disadvantage consequences for minority students involves teachers' culturally-influenced perceptions of student behavior. ⁿ²⁰³ Far too often, White teachers treat cultural differences as intellectual deficits and respond by imposing special education [*766] designations on a disproportionate number of Black students. Children in various cultures learn different rules for communicating with adults through facial expressions, body language, and physical gestures. In everyday conversation, spoken words are only one way to communicate. As little as seven percent of a message may be expressed in words. The rest is conveyed through facial expression, voice tone, body gestures, and overall posture. Unconscious bias can affect how behavior is perceived and interpreted. The research indicates that a teacher's race influences perceptions of students' behavior. ⁿ²⁰⁴ This unconscious process may be one of the reasons students of color often experience suspension in the absence of violent behavior. ⁿ²⁰⁵

Much of the prevailing stereotypes about African American youth are the result of "cultural deficit thinking." ⁿ²⁰⁶ Cultural deficit thinking "creates the perception that poor African American and other marginalized students and their parents as disconnected from the education process." ⁿ²⁰⁷ Teachers and administrators "may harbor negative assumptions about the ability, aspirations and work ethic of these students--especially poor students of color--based on an assumption that they and their families do not value education in the same way it is valued by middle and upper

income White students." n208 This perception of divestment can create a stereotype of low-income Black students as "unruly, disruptive and disrespectful." n209

VII. DISCIPLINE DISPARITIES VIOLATE TITLE VI

Patterns and/or practices of disciplining black students more frequently and more severely than White students who engage in the same conduct violate Title VI of the Civil Rights Act of 1964. The Act states "[n]o person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." n210 Although Title VI bars only intentional discrimination, the regulations promulgated pursuant to the statute expressly prohibit actions that have a disparate impact on groups protected by the law, even when those actions are not intentionally discriminatory. The Supreme Court has consistently affirmed the [*767] validity of these regulations. n211 The Department of Education's Title VI regulations at 34 C.F.R. section 100.3(b) (2) state that:

[a] recipient, in determining the types of services, financial aid, or other benefits, or facilities which will be provided under any such program, or the class of individuals to whom, or the situations in which, such services, financial aid, other benefits, or facilities will be provided under any such program, or the class of individuals to be afforded an opportunity to participate in any such program, may not, directly or through contractual or other arrangements, utilize criteria or methods of administration which have the effect of subjecting individuals to discrimination because of their race, color, or national origin, or have the effect of defeating or substantially impairing accomplishment of the objectives of the program as respect individuals of a particular race, color, or national origin. n212

Under the disparate impact theory, practices or policies that are facially neutral but exclude a disproportionate percentage of a protected group violate Title VII if they are not shown to be "job related." n213 A showing of discriminatory intent is not required. If the plaintiff shows that a policy or practice has a disparate impact, the employer must demonstrate that the challenged practice is job related and supported by a business necessity. n214 If an employer satisfies those requirements, a plaintiff can still prevail if she or he can show that there is an equally effective alternative employment practice and the employer refuses to adopt the practice. n215

Title VI follows Title VII's standard of proof for disparate impact. To establish liability under the Department of Education's disparate impact [*768] regulations, a plaintiff must demonstrate that a facially neutral practice has a disproportionate impact on a group protected by Title VI. n216 If the plaintiff demonstrates a disparate impact, the defendant must prove that the challenged practice is supported by a "substantial legitimate justification." n217

A defendant attempting to meet the "substantial legitimate justification" burden must demonstrate, by a preponderance of evidence, the "educational necessity" of their practices, that is, to show that the challenged practices "bear a manifest demonstrable relationship to classroom education." n218 As one court explained, the defendant must prove that "the requirement which caused the disproportionate impact was required by educational necessity," i.e., that "any given requirement has a manifest relationship to the education in question." n219 If the defendant sustains this rebuttal burden, the plaintiff can still prevail if it can be shown that there is an equally effective alternative practice that would not cause an adverse impact. In this case the imposition of discipline has an adverse effect on African American students, and there is no educational necessity for the school districts' actions.

VIII. THE DEPARTMENTS OF JUSTICE AND DEPARTMENT OF EDUCATION'S GUIDANCE FOR SCHOOL DISCIPLINE

The U.S. Department of Education in collaboration with the U.S. Department of Justice issued a school discipline guidance package intended to assist states, districts, and schools in developing practices and strategies to enhance school climate, and ensure those policies and practices comply with federal laws. The guidance package provides resources for creating safe and positive school climates. n220

A "**Dear Colleague**" letter on civil rights and discipline, explaining how schools can meet their legal obligations under federal law to administer student discipline without discriminating against students on the basis of race, color or national origin.

[*769] A **Guiding Principles** document based on research and best practices describing three key principles and related action steps that can help guide state and local efforts to improve school climate and school discipline.

A **Directory of Federal School Climate and Discipline Resources** indexing the extensive federal technical assistance and other resources related to school discipline and climate available to schools and districts.

A **Compendium of School Discipline Laws and Regulations**, an online catalogue of the laws and regulations related to school discipline in each of the 50 states, the District of Columbia and Puerto Rico, comparing laws across states and jurisdictions. ⁿ²²¹

The report confirms that racial discrimination in school discipline is a significant problem. Over the past few years, secondary schools have suspended or expelled an estimated two million students per year. The guidance package explains how schools and districts can meet their obligations to administer student discipline without discriminating on the basis of race, color, or national origin. The documents contain voluntary action steps for local leaders and educators. The report lays out three core principles and related action steps to guide efforts to improve school climate and school discipline. The Report also recommends:

[A]ccurately documenting the school's discipline process and its implementation, including its racial impact; and keeping data on teacher referrals and discipline, to assess whether particular teachers may be referring large numbers of students by race for discipline (and following up with these teachers, as appropriate, to determine the underlying causes). ⁿ²²²

This is particularly important as teachers are often not aware of the influence of unconscious bias on discipline decisions. It is also important that school personnel take the implicit bias test which will make them aware of their unconscious stereotypes. Subjective determination based on vague standards should be eliminated. When discipline is imposed the school official recommending punishment should identify the rule(s) the student's conduct violated and explain how the conduct violated the rule. The penalty should be congruent to conduct. The school should develop a progressive discipline standard that begins with warnings and ends with expulsions with lesser and greater punishments between the two extremes.

[*770] CONCLUSION

Not long after *Brown v. Board of Education* ⁿ²²³ was decided, W.E.B. DuBois sounded a note of caution:

[In racially] mixed schools, [black children will] suffer for years from southern white teachers and white hoodlums who sit beside them and under school authorities from janitors to superintendents who hate and despise them . . . The best Negro teachers will largely go because they will not and cannot teach what many white folk will long want taught. Much teaching of Negro history will leave the school and with it that brave story of Negro resistance. ⁿ²²⁴

Du Bois' prediction was prescient. The lawyers who argued *Brown* and their colleagues at the NAACP and other Civil Rights organizations assumed that they would encounter some difficulties in their efforts to implement *Brown's* mandate, but they also assumed that desegregation would ultimately proceed. However, the southern states reacted to *Brown* with a policy of "massive resistance." Senator Harry F. Byrd of Virginia promoted the *Declaration of Constitutional Principles*, which was known informally as the *Southern Manifesto*. ⁿ²²⁵ It was written in February and March 1956 and announced the southern states' opposition to racial integration of public places. Subsequently school desegregation proceeded at a glacial pace. "Ten years after *Brown*, only 1.2 percent of Black students in the South attended schools with Whites." ⁿ²²⁶ Moreover, "[i]n five states--Alabama, Mississippi, South Carolina, Florida and

Georgia--there were no Black students attending White schools." n227

By the late 1960s the *Brown's* "deliberate speed" standard was finally abandoned. n228 Southern school districts were ordered to desegregate immediately and were obligated to prove they had removed all vestiges of segregation, "root and branch," before they could be released from federal court supervision of their desegregation efforts. n229 Federal courts approved a variety of plans to integrate [*771] schools, including busing to achieve racial balance in individual schools. n230 Desegregation remained an elusive goal as segregated housing patterns persisted. Neighborhood attendance zones would have resulted in segregated schools in most urban communities. n231

Racial balance strategies proved to be a flawed measure of achieving racial equality. n232 The problem became the treatment of Black students inside of integrated schools. *De facto* segregation was created in racially mixed schools as Black students tended to be relegated to the lower tracks while the talented and gifted programs became the reserve of affluent White students. n233 Black students are still being disciplined at astonishing rates.

Educational success entails a wide range of cultural behaviors including such non-academic attributes such as comportment, dress, and accent. n234 Middle class children from suburban communities have learned this behavior, as have their teachers. n235 Children from low-income, inner-city backgrounds have not. Suburban students' speech, dress and mannerisms fit the expectations of their teachers. Urban students from low income families are often seen as "difficult" and presenting "challenges." n236 However, both groups behave in accordance with the norms of the communities in which they reside.

What is seen as the "natural" ability of affluent students is, in reality, the product of the social and economic status of their parents. Privileged children are inculcated with speech patterns, styles of dress, and comportment that facilitate their success in the educational system. Their affluent backgrounds, conditioning, and experiences equip them with the attributes needed to reproduce their parents' social position. Too often, teachers erroneously interpret these class based advantages as a reflection of "hard work" or "innate" ability. This is a reflection of implicit bias. Race and class intersect in ways that uniquely disadvantage [*772] Black students. The discipline disparities reflect a racial crisis in America's schools. Unconscious discrimination is the most significant factor in the persistent mistreatment of African American students.

Legal Topics:

For related research and practice materials, see the following legal topics:

Education LawStudentsDisciplinary ProceedingsGeneral OverviewEducation LawStudentsDiscipline MethodsSuspensionsEducation LawStudentsMisconductDisruptive Behavior

FOOTNOTES:

n1 Richard Fausset & Ashley Southhall, *Video Shows Officer Flipping Student in South Carolina, Prompting Inquiry*, N.Y. TIMES (Oct. 26, 2015), http://www.nytimes.com/2015/10/27/us/officers-classroom-fight-with-student-is-caught-on-video.html?_r=0; For the video, see Prem Mot, *Video Shows Officer Flipping Student in South Carolina, Prompting Inquiry*, YOUTUBE (Oct. 28, 2015), <https://www.youtube.com/watch?v=dqtnnxmAmY>.

n2 *Brown v. Bd. of Education*, 347 U.S. 483 (1954).

n3 *See generally School Suspensions: Are They Helping Children?*, CHILDREN'S DEFENSE FUND, (1975), http://diglib.lib.utk.edu/cdf/data/0116_000050_000205/0116_000050_000205.pdf.

n4 *Id.* at 55.

n5 *Id.* at 61.

n6 *Id.*

n7 *Id.* at 63.

n8 *Id.*

n9 *Id.* at 173.

n10 *Id.* at 71.

n11 *Id.*

n12 *Id.*

n13 See generally Ted Glackman et al., *Corporal Punishment, School Suspension, and the Civil Rights of Students: An Analysis of Office for Civil Rights School Surveys*, 23 INEQUALITY IN EDUC., 61-65 (1978).

n14 *Id.* at 61, 62.

n15 *Id.*

n16 *Id.* at 62, 63.

n17 *Id.* at 64.

n18 Jeremy J. Lietz & Mary K. Gregory, *Pupil Race and Sex Determinants of Office and Exceptional Education Referrals*, 3 EDUC. RES. Q. 61, 64 (1978).

n19 *Id.* at 64.

n20 *Id.* at 63.

n21 *Id.* at 62.

n22 S. C. Kaeser, *Suspensions in School Discipline*, 11 EDUC. URBAN SOC. 465, 467 (1979).

n23 *Id.* at 470-71.

n24 *Id.* at 472.

n25 *See generally* ANNE WHEELOCK, *THE WAY OUT: STUDENT EXCLUSION PRACTICES IN BOSTON MIDDLE SCHOOLS: A REPORT* (1986).

n26 *Id.* at 51.

n27 *Id.* at 52, 53.

n28 *Id.* at 5.

n29 *See generally* Janice L. Streitmatter, *Ethnic/Racial and Gender Equity in School Suspensions*, 69 HIGH SCH. J., 139 (1986).

n30 *Id.* at 140.

n31 *Id.*

n32 *Id.*

n33 *Id.* at 140-41.

n34 *Id.* at 141.

n35 *See generally* Maurice C. Taylor & Gerald A. Foster, *Bad Boys and School Suspensions: Public Policy Implications for Black Males*, 56 SOCIOL. INQUIRY 498 (1986).

n36 *Id.* at 500-01.

n37 *Id.* at 499.

n38 *See generally* John D. McCarthy & Dean R. Hoge, *The Social Construction of School Punishment: Racial Disadvantage Out of Universalistic Process*, 65 SOC. FORCES 1101 (1987).

n39 *Id.* at 1106.

n40 *Id.* at 1107-14.

n41 *See generally* Clarence H. Thornton & William T. Trent, *School Desegregation and Suspension in East Baton Rouge Parish: A Preliminary Report*, 57 J. NEGRO EDUC. 482 (1988).

n42 *Id.* at 486.

n43 *Id.* at 492.

n44 *Id.* at 495.

n45 *See* Virginia Costenbänder & Samia Markson, *School Suspension: A Study with Secondary School Students*, 36 J. SCH. PSYCHOL. 59, 65 (1998).

n46 *Id.* at 61.

n47 *Id.* at 65.

n48 *See generally* Frank Bickel & Robert Qualls, *The Impact of School Climate on Suspension Rates in Jefferson County Public Schools*, 12 URBAN REV. 79, 81 (1980); Anna C. McFadden et al., *A Study of Race and Gender Bias in the Punishment of Handicapped School Children*, 24 URBAN REV., 239, 239 (1992); Kaeser, *supra* note 22.

n49 Costenbänder & Markson, *supra* note 45.

n50 See generally Russell J. Skiba et al., *Office Referrals and Suspension: Disciplinary Intervention in Middle Schools*, 20 EDUC. AND TREATMENT CHILDREN 295 (1997) [hereinafter Skiba et al., *Office Referrals*].

n51 *Id.* at 297.

n52 *Id.* at 299.

n53 *Id.* at 304.

n54 *Id.* at 309.

n55 *Id.* at 311.

n56 *Id.* at 307-08.

n57 Joe D. Nichols et al., *A Darker Shade of Gray: A Year-End Analysis of Discipline and Suspension Data*, 32 EQUITY EXCELLENCE EDUC. 43, 43-55 (1999).

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n59 *Id.* at 54.

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n74 *Id.* at 12.

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n81 *Id.*

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n84 *Id.* at 2.

n85 *Id.* at 6.

n86 *Id.* at 6.

n87 "At least 10 percentage points higher than their proportion in the general student population" estimate is based on the difference between the proportion of African American students enrolled in public schools nationally and the proportion of African American public school students in the following disciplinary categories: corporal punishment, in-school suspension, out-of-school suspension, expulsions, law enforcement referrals, and school-related arrests, nationally. Overall enrollment percentages obtained from *Overall Enrollment*, U.S. DEPT OF EDUC. OFFICE FOR CIVIL RIGHTS (2014), <http://ocrdata.ed.gov/downloads/projections/2011-12/enrollment/SCH-0005%20Overall%20Enrollment.xlsx>. Proportion of African American students involved in disciplinary proceedings obtained from *Number and percentage of public school students with and without disabilities receiving corporal punishment by race/ethnicity, by state: School Year 2011-12*, U.S. DEPT OF EDUC. OFFICE FOR CIVIL RIGHTS (2014), <http://ocrdata.ed.gov/downloads/projections/2011-12/disability/Students%20with%20and%20without%20Disabilities.xlsx>. [hereinafter OVERALL ENROLLMENT AND DISABILITY STATUS].

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n90 *See id.*

n91 *See id.* (Estimates derived from calculating differences between state-level proportions of African American student enrollment and state-level proportions of punishment involving African American and White students).

n92 *See id.* (Estimates derived from calculating differences between national-level proportion of African American student enrollment and national-level proportions of punishment involving African American and White students).

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n97 *Id.*

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n100 *Id.*

n101 *Id.*

n102 *Id.*

n103 *Id.*

n104 *Id.*

n105 *Id.*

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n154 *GONE WITH THE WIND* (Warner Bros. 1939).

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n156 BIRTH OF A NATION (Epoch Producing Co.1915).

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n215 The Civil Rights Act of 1991, *supra* note 214.

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