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OVER-DISCIPLINING STUDENTS, RACIAL BIAS, AND THE SCHOOL-TO-PRISON PIPELINE

Jason P. Nance *

INTRODUCTION

Over the last three decades, our nation has witnessed a dramatic change regarding how schools discipline children for disruptive behavior. Empirical evidence during this time period demonstrates that schools increasingly have relied on extreme forms of punishment such as suspensions, expulsions, referrals to law enforcement, and school-based arrests to discipline students for violations of school rules. For example, from the 1972–73 school year to the 2009–10 school year, the number of students expelled or suspended from secondary schools increased from one in thirteen to one in nine.¹ Between 1974 and 2012, the number of out-of-school suspensions increased nationally from 1.7 million to 3.45 million.² There is also substantial evidence that referrals to law enforcement and school-based arrests have significantly increased in recent years.³ The U.S. Department of Education's Of-

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1. JACOB KANG BROWN ET AL., VERA INST. OF JUSTICE, 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>.

2. See NAACP LEGAL DEF. & EDUC. FUND, INC., DISMANTLING THE SCHOOL-TO-PRISON PIPELINE 3 (2005), <http://www.naacpldf.org/publication/dismantling-school-prison-pipeline>; U.S. DEP'T OF EDUC., CIVIL RIGHTS DATA COLLECTION, DATA SNAPSHOT: SCHOOL DISCIPLINE 2 (2014), <http://ocrdata.ed.gov/Downloads/CRDC-School-Discipline-Snapshot.pdf> [hereinafter CRDC DATA SNAPSHOT].

3. See, e.g., ACTION FOR CHILDREN, FROM PUSH OUT TO LOCK UP: NORTH CAROLINA'S ACCELERATED SCHOOL-TO-PRISON PIPELINE 8–9 (2013), http://www.ncchild.org/wp-content/uploads/2014/05/2013_STPP-FINAL.pdf (reporting that the number of school-based referrals to law enforcement in North Carolina increased by 10% from 2008 to 2013); ADVANCEMENT PROJECT ET AL., EDUCATION ON LOCKDOWN: THE SCHOOLHOUSE TO JAILHOUSE TRACK 15 (2005), http://b3cdn.net/advancement/5351180e24cb166d02_mlbrq

fice for Civil Rights estimates that during the 2011–12 school year alone, schools referred approximately 260,000 students to law enforcement, and there were approximately 92,000 school-based arrests.⁴ While it may be justifiable to suspend, expel, or refer a student to law enforcement under some circumstances (for example, when a student harms another student with a dangerous weapon or sexually assaults another member of the school community), schools routinely invoke such extreme disciplinary measures for much less serious offenses.⁵ Many have referred to this disturbing trend of schools directly referring students to law enforcement or creating conditions under which students are more likely to become involved in the justice system—such as suspending or expelling them—as the “school-to-prison pipeline.”⁶

gxlh.pdf (reporting that the number of school-based arrests increased in the Philadelphia Public School District and the Houston Public School District over the past years); Michael P. Krezmien et al., *Juvenile Court Referrals and the Public Schools: Nature and Extent of the Practice in Five States*, 26 J. CONTEMP. CRIM. JUST. 273, 286 (2010) (finding that school-based referrals to the juvenile justice system increased from 1995 to 2004 in Arizona, Hawaii, Missouri, and West Virginia).

4. See CRDC DATA SNAPSHOT, *supra* note 2, at 6.

5. See, e.g., ACTION FOR CHILDREN, *supra* note 3, at 9 (“Students were most commonly referred to the juvenile justice system for low-level offenses.”); TONY FABELO ET AL., JUSTICE CTR. & PUB. POLICY RESEARCH INST., 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 (showing that 97.3% of suspensions and expulsions in Texas resulted from offenses that did not require suspension or expulsion under law); FED. ADVISORY COMM. ON JUVENILE JUSTICE, ANNUAL REPORT 10 (2010), <http://www.facjj.org/annualreports/00-FACJJ%20Annual%20Report-FINAL%20508.pdf>; FLA. STATE CONFERENCE NAACP, ADVANCEMENT PROJECT & NAACP LEGAL DEF. & EDUC. FUND, INC., ARRESTING DEVELOPMENT: ADDRESSING THE SCHOOL DISCIPLINE CRISIS IN FLORIDA 6 (2006) (reporting that during the 2004–05 school year in Florida, 76% of student referrals to the Florida Department of Juvenile Justice were for offenses such as disorderly conduct, trespassing, and fighting without a weapon); 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 (Sofía Bahema et al. eds., 2012) [hereinafter Losen, *Sound Discipline*] (maintaining that the vast majority of suspensions and expulsions are for minor offenses).

6. *Hawker v. Sandy City Corp.*, 774 F.3d 1243, 1245–46 (10th Cir. 2014) (Lucero, J., concurring); Jason P. Nance, *School Surveillance and the Fourth Amendment*, 2014 WIS. L. REV. 79, 102–03 (2014); *School-to-Prison Pipeline Must Be Dismantled, Stakeholders Tell ABA*, A.B.A. (Feb. 7, 2015, 9:59 AM), <http://www.americanbar.org/news/abanews/aba-news-archives/2015/02/school-to-prisonpip.html>; Press Release, Senator Dick Durbin, Ill., Durbin Holds Hearing on Ending the School-to-Prison Pipeline (Dec. 12, 2012), <http://www.durbin.senate.gov/newsroom/press-releases/durbin-holds-hearing-on-ending-the-school-to-prison-pipeline>; see Jason P. Nance, *Dismantling the School-to-Prison Pipeline: Tools for Change*, 48 ARIZ. ST. L.J. (forthcoming) (manuscript at 10), http://papers.ssrn.com/sol3/papers.cfm?Abstract_id=2671447 [hereinafter Nance, *Dismantling*] (explaining the causes of the trend of over-disciplining students); Jason P. Nance, *Students, Police, and the School-to-Prison Pipeline*, 93 WASH. U. L. REV. (forthcoming) (manuscript at 18–19),

As I have explained at length elsewhere,⁷ there are detrimental, long-term consequences associated with incarcerating, arresting, suspending, or expelling students—to the youth themselves, their families, their communities, and our society as a whole. Yet perhaps the most alarming aspect of over-disciplining students and of the school-to-prison pipeline generally is that not all racial groups are affected equally by these negative trends.⁸ Part I of this essay briefly describes the observed racial disparities associated with disciplining students. In Part II, this essay discusses the concept of implicit bias, which appears to be one of the causes of those racial disparities. Finally, Part III describes the role that national and state government entities, including the U.S. Department of Education (“DOE”) and state departments of education, can play in forming a comprehensive strategy to address the implicit biases of educators and to create more equitable and inclusive schools.

I. RACIAL DISPROPORTIONALITIES ASSOCIATED WITH DISCIPLINING STUDENTS

Researchers repeatedly have documented racial disparities with respect to disciplining students at every school level in every setting.⁹ But perhaps the most telling data comes from the DOE’s Civil Rights Data Collection (“CRD Collection”). According to that extensive national database, African American students represented 16% of the total student population during the 2011–12 school year, but represented 32% of students who received an in-school suspension, 33% of students who received an out-of-school suspension, 42% of students who received more than one out-of-

http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2577333 [hereinafter Nance, *Students*] (discussing the shift to the “criminalization of school discipline” and the reasons behind it).

7. See Nance, *Dismantling*, *supra* note 6 (manuscript at 6–7); Nance, *Students*, *supra* note 6 (manuscript at 62, 65).

8. Although not the primary focus of this essay, it is important to recognize that disparities also arise by disability status, gender, sexual orientation, and English language learners, among other groups. See Daniel J. Losen, *Introduction*, in *CLOSING THE SCHOOL DISCIPLINE GAP: EQUITABLE REMEDIES FOR EXCESSIVE EXCLUSION* 1, 3 (Daniel J. Losen ed., 2015); Losen, *Sound Discipline*, *supra* note 5, at 50–51; see also *ADVANCEMENT PROJECT, POWER IN PARTNERSHIPS: BUILDING CONNECTIONS AT THE INTERSECTION OF RACIAL JUSTICE AND LGBTQ MOVEMENTS TO END THE SCHOOL-TO-PRISON PIPELINE* (2015), http://b.3cdn.net/advancement/85066c4a18d249e72b_r23m68j37.pdf [hereinafter *ADVANCEMENT PROJECT, POWER IN PARTNERSHIPS*].

9. See Russell J. Skiba et al., *More than a Metaphor: The Contribution of Exclusionary Discipline to a School-to-Prison Pipeline*, 47 *EQUITY & EXCELLENCE EDUC.* 546, 550 (2014) (listing empirical sources).

school suspension, and 34% of students who were expelled.¹⁰ In another snapshot, during the 2009–10 school year, one out of every six black students enrolled in K–12 public school was suspended at least once, but only one out of every twenty white students was suspended.¹¹ Even worse, during the 2009–10 school year, one out of every four African American students with a disability was suspended during that same time period.¹² And perhaps even worse than that, during the 2011–12 school year, while African American children represented 18% of preschool enrollment, they represented 48% of preschool children who received more than one out-of-school suspension.¹³

Significant racial disparities also exist with respect to law enforcement referrals and school-based arrests. According to the 2011–12 CRD Collection, although African American students represented 16% of the total student population, they represented 27% of students that schools referred to law enforcement and 31% of students subject to a school-based arrest.¹⁴

While one might suggest that the reason behind these disparities is that minority children tend to misbehave more than other children, several empirical studies debunk this misconception.¹⁵

10. See CRDC DATA SNAPSHOT, *supra* note 2, at 2.

11. DANIEL J. LOSEN & JONATHAN GILLESPIE, THE CIVIL RIGHTS PROJECT, OPPORTUNITIES SUSPENDED: THE DISPARATE IMPACT OF DISCIPLINARY EXCLUSION FROM SCHOOL 6 (2012).

12. *Id.* at 7.

13. CRDC DATA SNAPSHOT, *supra* note 2, at 1.

14. *Id.* at 6.

15. Russell J. Skiba et al., *The Color of Discipline: Sources of Racial and Gender Disproportionality in School Punishment*, 34 URB. REV. 317, 335 (2002) (finding empirically that although African American students were no more likely to engage in disruptive behavior than white students, African American students were more likely to be referred to the office for discipline for discretionary offenses); see also TONY FABELLO ET AL., *supra* note 5, at 45–46 (empirically finding that Texas ninth grade African American students were 31% more likely to receive a discretionary school disciplinary action than a white student, even after controlling for other salient factors such as student poverty); Michael Rocque, *Office Discipline and Student Behavior: Does Race Matter?* 116 AM. J. EDUC. 557, 572 (2010) (finding that African American students were more likely to be referred to the office for punishment than other students, even after controlling for school-level factors and student behavior); 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, 663 (2011) (finding empirically that African American elementary students were more likely to be disciplined than other students even after controlling for classroom and school factors and student behavior); Russell J. Skiba et al., *Race Is Not Neutral: A National Investigation of African American and Latino Disproportionality in School Discipline*, 40 SCH. PSYCHOL. REV. 85, 101 (2011) (finding empirically that African American middle and elementary school students were more likely to be referred to the office for poor behavior than white students and were more likely to be sus-

Further, that supposition is inconsistent with the Department of Education Office for Civil Rights's own investigations. The Office for Civil Rights recently confirmed that it repeatedly finds schools in which "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."¹⁶

II. THE ROLE OF IMPLICIT RACIAL BIAS

Observing such gross racial disparities in the administration of school discipline causes one to wonder why these disparities exist, and why our nation tolerates their existence.¹⁷ These disparities are especially troublesome because most teachers and school officials are probably acting in good faith most of the time when dealing with students.¹⁸ Although several factors contribute to these racial disparities,¹⁹ most researchers agree that one of the causes

pended or expelled than white students for similar behavior).

16. U.S. Dep't. of Educ., Office for Civil Rights & U.S. Dep't. of Justice, Civil Rights Div., "Dear Colleague" Letter 4 (Jan. 8, 2014), <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201401-title-vi.pdf> [hereinafter "Dear Colleague" Letter] (issuing guidance on the nondiscriminatory administration of school discipline). Though not the primary focus of this article, it is important to note that racial disparities exist in almost every facet of public education, including academic achievement, advancing to the next grade level, graduating from high school, and per-pupil funding. See ROBERT D. PUTNAM, *OUR KIDS: THE AMERICAN DREAM IN CRISIS* 161 (2015). In addition, it is well documented that minorities have less access to high-level courses, high levels of peer group competition, instructional resources, extracurricular activities, counselors, and mental health specialists. See Gary Orfield, *The Growth of Segregation: African-Americans, Latinos, and Unequal Education*, in *DISMANTLING DESEGREGATION: THE QUIET REVERSAL OF BROWN V. BOARD OF EDUCATION* 53, 67–68 (Gary Orfield & Susan E. Eaton eds., 1996). They also tend to learn in overcrowded classrooms, attend school in segregated environments, and have less experienced and lower-paid teachers. See LINDA DARLING-HAMMOND, *THE FLAT WORLD AND EDUCATION* 36, 43, 63 (2010); GARY ORFIELD & CHUNGMEI LEE, *CIVIL RIGHTS PROJ. AT HARV. UNIV., RACIAL TRANSFORMATION AND THE CHANGING NATURE OF SEGREGATION* 29–30 (2006); Roslyn Arlin Mickelson, *The Academic Consequences of Desegregation and Segregation: Evidence from the Charlotte-Mecklenburg Schools*, 81 N.C. L. REV. 1513, 1547 (2003); Nance, *Dismantling*, *supra* note 6 (manuscript at 5); Press Release, U.S. Dep't of Educ., *New Data from U.S. Department of Education Highlights Educational Inequalities Around Teacher Experience, Discipline, and High School Rigor* (Mar. 6, 2012), <http://www.ed.gov/news/press-releases/new-data-us-department-education-highlights-educational-inequities-around-teacher-experience-discipline-and-high-school-rigor>.

17. See Sarah E. Redfield, *Can New Thinking Help Reverse the School-to-Prison Pipeline?* 5 A.B.A. DIVERSITY VOICE, Summer 2014, at 4, <http://www.americanbar.org/content/dam/aba/administrative/diversity/DVsummer2014.authcheckdam.pdf>.

18. *Id.*

19. See, e.g., Daniel J. Losen et al., *Disturbing Inequities: Exploring the Relationship Between Racial Disparities in Special Education Identification and Discipline*, in *CLOSING THE SCHOOL DISCIPLINE GAP: EQUITABLE REMEDIES FOR EXCESSIVE EXCLUSION* 89, 91–92

is the racial biases of teachers and school administrators, which manifest themselves principally in unconscious forms.²⁰

Though a full discussion of the concept of implicit bias is beyond the scope of this essay,²¹ in short, an implicit bias is a “behavioral propensity that results from implicit attitudes and stereotypes.”²² Attitudes are associations between a concept (such as a

(Daniel J. Losen ed., 2015) (explaining that minority students are more likely to have inexperienced teachers).

20. See ADVANCEMENT PROJECT, POWER IN PARTNERSHIPS, *supra* note 8, at 5 (“Implicit bias also plays a role in funneling Black, Brown, and LGBTQ students into the school-to-prison pipeline.”); DEREK BLACK, EDUCATION LAW: EQUALITY, FAIRNESS, AND REFORM 147 (2013) (“[T]oday racial discrimination is more likely to be the result of subtle or unconscious biases, on which a state actor may not even realize it is acting.”); JOHANNA WALD, HARVARD LAW SCH. INST. FOR RACE & JUSTICE, CAN “DE-BIASING” STRATEGIES HELP TO REDUCE RACIAL DISPARITIES IN SCHOOL DISCIPLINE? 1, 2 (2014), http://www.indiana.edu/~atlantic/wp-content/uploads/2014/03/Implicit-Bias_031214.pdf (arguing that the empirical evidence suggests that implicit racial bias contributes to differential treatment of racial minorities in schools); 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: EQUITABLE REMEDIES FOR EXCESSIVE EXCLUSION 75, 76 (Daniel J. Losen ed., 2015); (“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 (2010) (finding that students of color are targeted by teachers out of fear and anxiety of losing control of the classroom, not fear of dangerousness); Kent McIntosh et al., *Education Not Incarceration: A Conceptual Model for Reducing Racial and Ethnic Disproportionality in School Discipline*, J. APPLIED RES. ON CHILD., 1, 6 (2014) <http://digitalcommons.library.tmc.edu/cgi/viewcontent.cgi?article=1215&context=childrenatrisk> (explaining that conscious or unconscious bias is an important factor in the discipline gap); cf., Gary Blasi, *Advocacy Against the Stereotype: Lessons from Cognitive Social Psychology*, 49 UCLA L. REV. 1241, 1276 (2002) (maintaining that Americans’ behavior is determined to some degree by unconscious racial biases); Jerry Kang, *Trojan Horses of Race*, 118 HARV. L. REV. 1489, 1506–14 (2005) (discussing social cognition research that shows that most people hold implicit biases against racial minorities); 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.”).

21. For a more extended discussion of the concept of implicit bias, see, e.g., DANIEL KAHNEMAN, THINKING, FAST AND SLOW (2011); Anthony G. Greenwald & Linda Hamilton Krieger, *Implicit Bias: Scientific Foundations*, 94 CAL. L. REV. 945, 947 (2006); Darren Leonard Hutchinson, “Continually Reminded of Their Inferior Position”: *Social Dominance, Implicit Bias, Criminality, and Race*, 46 WASH. U. J.L. & POL’Y 23 (2014); Kang, *supra* note 20, at 1506–13; Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161 (1995); Charles R. Lawrence III, *The Id., the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317 (1987); Lee, *supra* note 20, at 1570; McIntosh et al., *supra* note 20, at 6; Nance, *Dismantling*, *supra* note 6 (manuscript at 49); L. Song Richardson, *Police Efficiency and the Fourth Amendment*, 87 IND. L.J. 1143, 1146–47 (2012).

22. Hutchinson, *supra* note 21, at 37; see also Greenwald & Krieger, *supra* note 21, at 950–51.

racial group) and a way of thinking or feeling, which can be positive or negative.²³ They are formed from past experiences but shape and inform prospective actions and preferences.²⁴ Stereotypes, on the other hand, are associations between a concept (such as a racial group) and a trait.²⁵

Implicit biases originate “from ‘the deep influence of the immediate environment and the broader culture on internalized preferences and beliefs.’”²⁶ They do not function in connection with a person’s awareness of having attitudes and stereotypes.²⁷ Rather, they function automatically and often in ways that a person would not explicitly endorse if the person was consciously aware of the biases.²⁸ In other words, stereotypes and attitudes are types of schemas, which essentially are shortcuts created in our minds to help us navigate efficiently in a complex world.²⁹ But as we unconsciously rely on racial stereotypes and attitudes to help us make quick decisions, those stereotypes and attitudes bias our perceptions, judgments, and ultimately our decisions without our awareness or intent.³⁰

With this understanding in mind, it may be easier to grasp why we observe such stark racial disparities relating to discipline even though minority students are not misbehaving at higher rates than similarly situated white students when most teachers and

23. Kang, *supra* note 20, at 1500, 1510.

24. Hutchinson, *supra* note 21, at 35.

25. Kang, *supra* note 20, at 1500, 1512; *see also* Hutchinson, *supra* note 21, at 36; Richardson, *supra* note 21, at 1147.

26. Richardson, *supra* note 21, at 1147 (quoting Brian A. Nosek et al., *Harvesting Implicit Group Attitudes and Beliefs from a Demonstration Web Site*, 6 GROUP DYNAMICS 101, 112 (2002)).

27. Kang, *supra* note 20, at 1505.

28. *Id.* at 1506, 1508; *see also* Hutchinson, *supra* note 21, at 37 (“The individual’s conscious attitudes do not control the choice . . . to evaluate members of different social groups in a disparate manner.”); Lee, *supra* note 20, at 1569 (“Our implicit biases can be and often are completely the opposite of our consciously held beliefs.”); Richardson, *supra* note 21, at 1147 (“What is surprising about implicit stereotypes and attitudes is that they can and often do conflict with an individual’s genuine and consciously held thoughts and feelings.”).

29. McIntosh et al., *supra* note 20, at 6; *see also* L. Song Richardson & Phillip Atiba Goff, *Implicit Racial Bias in Public Defender Triage*, 122 YALE L.J. 2626, 2629 (2013) (quoting Sandra Graham & Brian S. Lowery, *Priming Unconscious Racial Stereotypes About Adolescent Offenders*, 28 LAW & HUM. BEHAV. 483, 485 (2004)) (“Implicit racial biases facilitate our ability to ‘manage information overload and make decisions more efficiently and easily’ by ‘filtering information, filling in missing data, and automatically categorizing people according to cultural stereotypes.’”).

30. McIntosh et al., *supra* note 20, at 6.

school officials appear to be acting in good faith most of the time.³¹ If each disciplinary action is a decision point, and if each decision is influenced by the unconscious negative attitudes and stereotypes of teachers and school administrators towards students of color, then a logical outcome is what we currently observe: significant disparities relating to discipline along racial lines.

III. HOW TO ADDRESS RACIAL DISPARITIES IN DISCIPLINE AND THE SCHOOL-TO-PRISON PIPELINE

Elsewhere I have detailed how schools can dismantle the school-to-prison pipeline.³² Schools must eliminate zero-tolerance policies; scale back their use of strict security measures such as metal detectors and random, suspicionless searches; stop relying on police officers to discipline students; and reserve their use of suspensions, expulsions, and referrals to law enforcement for only extreme offenses such as physical endangerment of other students.³³ Schools must also replace these harsh disciplinary measures with evidence-based practices that create safe, positive learning climates.³⁴ For example, school officials at the state, district, and local levels must help teachers improve the quality of their classroom activities and develop better classroom management skills.³⁵ Schools should help students develop better intrapersonal skills, attributes, and character; emotional and social stability; and “racial literacy” or “race-relations intelligence.”³⁶

31. See Redfield, *supra* note 17.

32. Nance, *Dismantling*, *supra* note 6.

33. *Id.* (manuscript at 27–29).

34. *Id.* (manuscript at 30).

35. *Id.*

36. *Id.* (manuscript at 34–35); see also David M. Osher et al., *Avoid Quick Fixes: Lessons Learned from a Comprehensive Districtwide Approach to Improve Conditions for Learning*, in CLOSING THE SCHOOL DISCIPLINE GAP: EQUITABLE REMEDIES FOR EXCESSIVE EXCLUSION 192, 192 (Daniel J. Losen ed. 2015) (noting that emotional connectedness as well as social and emotional connectedness are included in positive conditions for learning); SHARON E. RUSH, HUCK FINN’S “HIDDEN” LESSONS: TEACHING AND LEARNING ACROSS THE COLOR LINE 123–24 (2006) (explaining how most people of color use “*high race-relations intelligence*” to adapt to a predominately white society); Joseph A. Durlak et al., *The Impact of Enhancing Students’ Social and Emotional Learning: A Meta-Analysis of School-Based Universal Interventions*, 82 CHILD DEV. 405, 405–06 (2011) (describing how using a social and emotional learning approach, which promotes competencies that many students lack, including self-awareness, self-management, and social awareness, positively impacts students’ academic performance and social behaviors); Lani Guinier, *From Racial Liberalism to Racial Literacy: Brown v. Board of Education and the Interest-Divergence Dilemma*, 91 J. AM. HIST. 92, 113–18 (2004) (describing a proposed shift in “racial literacy”).

They must also improve their school climates by implementing initiatives such as restorative justice practices or School-Wide Positive Behavioral Interventions and Supports.³⁷ In addition, school officials at the state and district levels must provide training to school officials to help them understand and implement these evidence-based strategies.³⁸ Further, lawmakers and high-level school officials should improve the collection and reporting of data relating to discipline at each school and consider ways to hold schools accountable for relying too heavily on harsh, punitive measures that unnecessarily put more students on a pathway to prison.³⁹ Lawmakers and high-level school officials should also make this data publicly available so that lawyers, civil rights activists, lawmakers, and parents can hold individual schools accountable.⁴⁰

Yet, while all of these measures will significantly reduce the overall number of students who drop out or are suspended, expelled, or referred to law enforcement, and may even help narrow the racial disparities relating to discipline to some degree,⁴¹ much more must be done to further narrow or eliminate these disparities. For example, school administrators, teachers, parents, students, and other stakeholders should reduce ambiguities in their school codes, which often lead to racial disparities.⁴² Further, schools should be required to report disciplinary data disaggregated by race.⁴³ In addition, as part of a national strategy to reduce disparities in discipline, it is critical that national and state lawmakers, the DOE, and state departments of education implement the following three recommendations.

37. Nance, *Dismantling*, *supra* note 6 (manuscript at 41).

38. *Id.* (manuscript at 33).

39. *Id.* (manuscript at 23, 43).

40. *Id.* (manuscript at 44).

41. *Id.* (manuscript at 45 n.263 and accompanying text).

42. *See id.*; *see also* FABELO ET AL., *supra* note 5, at 45–46 (finding that race was predictive for whether a student would be disciplined, especially for discretionary offenses); Losen, *Sound Discipline*, *supra* note 5, at 52 (identifying discretionary offenses as a major avenue for racially disparate disciplining); McIntosh et al., *supra* note 20, at 3 (noting that African American students are more likely to be disciplined for “ambiguous or subjective problem behaviors . . . which require a judgment call,” compared to white students who are more often reported for objective, easily classified behaviors).

43. Nance, *Dismantling*, *supra* note 6 (manuscript at 52–53); *see also* Daniel J. Losen, *Conclusion*, in *CLOSING THE SCHOOL DISCIPLINE GAP: EQUITABLE REMEDIES FOR EXCESSIVE EXCLUSION* 241, 248 (Daniel J. Losen ed., 2015); McIntosh et al., *supra* note 20, at 14–15.

First, school officials and teachers must receive training to understand the concept of implicit bias and learn neutralizing techniques.⁴⁴ Empirical research demonstrates that such training helps ameliorate the negative effects of implicit bias.⁴⁵ As a condition for receiving federal funds under the Elementary and Secondary Education Act, the U.S. Congress should require states to develop programs to provide implicit bias training to teachers and school administrators on an annual basis. Alternatively, state legislatures should pass legislation requiring such annual training.

Second, although the concept of implicit bias is reasonably understood, less understood are its causes and effects and ways to neutralize its negative effects.⁴⁶ Our national and state governments must invest more money to fund more research to better understand how to address the implicit biases of school officials and teachers.⁴⁷ Notably, such investment not only will address implicit biases relating to discipline, but also will address biases that affect disparities relating to a multitude of other areas of education, including academic achievement and placement in gifted and special education programs.⁴⁸

44. See Nance, *Dismantling*, *supra* note 6 (manuscript at 33–34).

45. See CHERYL STAATS, OHIO STATE UNIV. KIRWAN INST. FOR THE STUDY OF RACE & ETHNICITY, *STATE OF THE SCIENCE: IMPLICIT BIAS REVIEW* 53 (2013); see also Irene V. Blair, *The Malleability of Automatic Stereotypes and Prejudice*, 6 PERSONALITY & SOC. PSYCHOL. REV. 242, 247–48 (2002); Nilanjana Dasgupta & Anthony G. Greenwald, *On the Malleability of Automatic Attitudes: Combating Automatic Prejudice with Images of Admired and Disliked Individuals*, 81 J. PERSONALITY & SOC. PSYCHOL. 800, 808 (2001); Patricia G. Devine, *Stereotypes and Prejudice: Their Automatic and Controlled Components*, 56 J. PERSONALITY & SOC. PSYCHOL. 5, 15–16 (1989); Erik J. Girvan, *On Using the Psychological Science of Implicit Bias to Advance Anti-Discrimination Law*, 26 GEO. MASON U. C.R. L.J. (forthcoming) (manuscript at 86–88), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2592178&download=yes.

46. Girvan, *supra* note 45 (manuscript at 53–54).

47. See Kimberly Jenkins Robinson, *Disrupting Education Federalism*, 92 WASH. U. L. REV. 959, 994–97 (2015) (arguing that for the federal government to enable educational equality, it must provide generous support for rigorous, objective research regarding how state and local governments and local school boards can implement effective reforms).

48. See, e.g., Nancy E. Dowd, *What Men?: The Essentialist Error of the “End of Men”*, 93 B.U. L. REV. 1205, 1216–22 (2013) (describing the disparities experienced by minorities, especially black males, in schools); Clark McKown & Rhona S. Weinstein, *Modeling the Role of Child Ethnicity and Gender in Children’s Differential Response to Teacher Expectations*, 32 J. APPLIED SOC. PSYCHOL. 159, 174–80 (2002) (finding that race may affect teacher expectations towards their students, which may exacerbate racial achievement gaps); 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 biases towards minority students experienced higher gaps in student achievement along ethnic lines than teachers with lower biases); Linda van den Bergh et al., *The Implicit Prejudiced Attitudes of Teachers: Relations to Teacher Expecta-*

Third, the DOE and state departments of education should play more assertive and active roles in reducing implicit bias.⁴⁹ For example, the DOE and state departments of education can analyze, support, and disseminate research to school districts about effective programs to reduce implicit bias. Because implicit bias imbues so many daily (even hourly) decisions that hundreds of thousands of school officials and teachers make, it is imperative that the DOE and state departments of education harness their influence, resources, and skills to address this problem that negatively affects millions of students of color everywhere.⁵⁰

CONCLUSION

The racial disparities we observe in the disciplinary data (and in other areas of public education) are appalling and cannot be tolerated. Because most teachers and school administrators seem to be acting in good faith and there is substantial evidence that minority students are not misbehaving at higher rates than similarly situated white students,⁵¹ logically we can attribute at least some of these disparities to the unconscious biases of educators.⁵²

As part of a comprehensive national strategy to reduce racial disparities relating to discipline,⁵³ government entities overseeing

tions and the Ethnic Achievement Gap, 47 AM. EDUC. RES. J. 497, 518 (2010) (demonstrating empirically that teachers with negative prejudiced attitudes towards minority students saw those students as less intelligent, and student achievement differences between minority students and other students were larger in classrooms with prejudiced teachers than with teachers who held less prejudicial attitudes); see also STAATS, *supra* note 45, at 30–34.

49. I note that the DOE already publicly supports the idea that all school personnel receive training to develop awareness of implicit bias and understand how to neutralize it. See U.S. DEPT OF EDUC., GUIDING PRINCIPLES: A RESOURCE GUIDE FOR IMPROVING SCHOOL CLIMATE AND DISCIPLINE 16–17 (2014), <http://www2.ed.gov/policy/gen/guid/school-discipline/guiding-principles.pdf>; cf., “Dear Colleague” Letter, *supra* note 16, Appendix (advocating that school resource officers and other law enforcement officers that work in schools receive training on implicit bias and cultural competence).

50. See Robinson, *supra* note 47, at 995–96 (arguing that the federal government should identify and disseminate research to states and local governments as part of a comprehensive plan to achieve educational equality).

51. See *supra* note 15 and accompanying text.

52. See Redfield, *supra* note 17; see also *supra* note 20 and accompanying text.

53. As explained above, strategies to address implicit bias should be only one component of a larger effort to reduce racial disparities in discipline. Further, while this article briefly discusses how schools can help dismantle the school-to-prison pipeline, see *supra* Part III, it is important to recognize that fully dismantling the school-to-prison pipeline and its associated racial disparities requires a comprehensive response from many systems such as schools, juvenile justice, foster care, housing, health care, and the employ-

public education should require annual implicit bias training for all school administrators and teachers. In addition, these entities should support further research to better understand how to counteract implicit biases and regularly disseminate information to schools on effective strategies to do so. Following these recommendations will create more just, equitable, and inclusive schools for students of all races and will prevent more students of color from becoming involved in the juvenile justice system.