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Dismantling the School-to-Prison Pipeline: Tools for Change

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ABSTRACT

The school-to-prison pipeline is one of our nation's most formidable challenges. It refers to the trend of directly referring students to law enforcement for committing certain offenses at school or creating conditions under which students are more likely to become involved in the criminal justice system, such as excluding them from school. This article analyzes the school-to-prison pipeline's devastating consequences on students, its causes, and its disproportionate impact on students of color. But most importantly, this article comprehensively identifies and describes specific, evidence-based tools to dismantle the school-to-prison pipeline that lawmakers, school administrators, and teachers in all areas can immediately support and implement. Further, it suggests initial strategies aimed at addressing implicit racial bias, which appears to be one of the primary causes of the racial disparities relating to the school-to-prison pipeline. The implementation of these tools will create more equitable and safe learning environments that will help more students become productive citizens and avoid becoming involved in the justice system.

INTRODUCTION[1]

Our society has witnessed a distinct shift over the last three decades regarding how school administrators and teachers discipline students.[2] Years ago, school administrators and teachers handled minor offenses internally. In too many schools today, however, it is becoming more common for schools to refer students to law enforcement for routine disciplinary matters.[3] In 2005, five-year-old Ja'eisha Scott threw a temper tantrum after her teacher ended a classroom math exercise counting jelly beans.[4] Although Ja'eisha eventually settled down in the school administrator's office, the school called the police.[5] Upon arrival, three police officers handcuffed, arrested, and placed Ja'eisha in the back of a police car for three hours even though Ja'eisha's mother arrived shortly after the arrest.[6] In 2007, six-year-old Desre'e Watson was arrested for throwing a temper tantrum in an elementary school.[7] The police had to put the handcuffs around Desre'e's biceps because her wrists were too small.[8] The police took Desre'e to the county jail where she was fingerprinted, photographed, and charged with a felony and two misdemeanors.[9] Schools have involved law enforcement in many routine

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1.   This Article is a companion piece to my article entitled *Students, Police, and the School-to-Prison Pipeline*, 93 WASH. U. L. REV. (forthcoming), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2577333. Accordingly, in this Article I draw upon material I discuss in *Students, Police, and the School-to-Prison Pipeline* to establish the appropriate backdrop for presenting evidence-based tools that educators can implement to dismantle the school-to-prison pipeline.

2.   *Id.*

3.   *Id.*

4.   FLA. STATE CONFERENCE NAACP, ADVANCEMENT PROJECT & NAACP LEGAL DEF. & EDUC. FUND, ARRESTING DEVELOPMENT: ADDRESSING THE SCHOOL DISCIPLINE CRISIS IN FLORIDA 14 (2006) [hereinafter ARRESTING DEVELOPMENT]; *see also* Thomas C. Tobin, *Video Shows Police Handcuffing Five-Year-Old*, TAMPA BAY TIMES (Apr. 22, 2005), http://www.sptimes.com/2005/04/22/Southpinellas/Video_shows_police_ha.shtml.

5.   *See* ARRESTING DEVELOPMENT, *supra* note 4.

6.   *Id.*

7.   *See* Bob Herbert, *Six-Year-Olds Under Arrest*, N.Y. TIMES (Apr. 9, 2007), http://www.nytimes.com/2007/04/09/opinion/09herbert.html?_r=2.

8.   *Id.*

9.   *See* ACLU OF FLA., ADVANCEMENT PROJECT & FLA. STATE CONFERENCE OF THE NAACP, STILL HAVEN'T SHUT OFF THE SCHOOL-TO-PRISON PIPELINE: EVALUATING THE IMPACT

offenses such as dress code violations, arriving late to school, bringing cell phones to class, passing gas, texting, and stealing two dollars from a classmate.[10] Several scholars refer to this dramatic shift in school disciplinary practices as the "criminalization of school discipline."[11]

While precise national data are unavailable, data from the U.S. Department of Education's Civil Rights Data Collection (CRD Collection) suggest disturbing trends. According to those estimates, during the 2011–2012 school year, schools referred approximately 260,000 students to law enforcement, and approximately 92,000 students were arrested on school property during the school day or at school-sponsored events.[12] Local data provide additional sobering evidence of this growing problem,[13] especially in light of the substantial evidence that many of these referrals to law enforcement were for minor offenses.[14] Furthermore, the number of student

OF FLORIDA'S NEW ZERO-TOLERANCE LAW 4 (2010), https://www.aclufl.org/pdfs/ACLU-AP-NAACP-School-to-Prison-Pipeline-Report-2011.pdf.

10.   *See* Nancy A. Heitzeg, *Criminalizing Education: Zero Tolerance Policies, Police in the Hallways, and the School to Prison Pipeline*, *in* FROM EDUCATION TO INCARCERATION: DISMANTLING THE SCHOOL-TO-PRISON PIPELINE 11, 22 (Anthony J. Nocella II et al. eds., 2014), http://www.hamline.edu/uploadedFiles/Hamline_WWW/HSE/Documents/criminalizing-education-zero-tolerance-police.pdf (describing other incidents where students were arrested for minor problems); N.Y. CIVIL LIBERTIES UNION, ACLU, CRIMINALIZING THE CLASSROOM: THE OVER-POLICING OF NEW YORK CITY SCHOOLS 6, 14 (2007), http://www.nyclu.org/pdfs/criminalizing_the_classroom_report.pdf (discussing student arrests for bringing cell phones to school and being late to class); Matthew T. Theriot, *School Resource Officers and the Criminalization of Student Behavior*, 37 J. CRIM. JUST. 280, 281 (2009) (discussing arrests for minor offenses); Sharif Durhams, *Tosa East Student Arrested, Fined After Repeated Texting*, MILWAUKEE J. SENTINEL (Feb. 18, 2009), http://www.jsonline.com/news/milwaukee/39711222.html; *Student Arrested for 'Passing Gas' at Florida School*, NBC NEWS (Nov. 24, 2008, 9:47 PM), http://www.nbcnews.com/id/27898395/ns/us_news-weird_news/t/student-arrested-passing-gas-fla-school/#.VFlEEPnF98E; *see also* Nance, *supra* note 1.

11.   *See, e.g.*, Henry Giroux, *Racial Injustice and Disposable Youth in the Age of Zero Tolerance*, 16 INT'L J. QUALITATIVE STUD. 553, 557–58 (2010); Paul J. Hirschfield, *Preparing for Prison? The Criminalization of School Discipline in the USA*, 12 THEORETICAL CRIMINOLOGY 79, 88 (2008); Kathleen Nolan & Jean Anyon, *Learning to Do Time: Willis's Model of Cultural Reproduction in an Era of Postindustrialism, Globalization, and Mass Incarceration*, *in* LEARNING TO LABOR IN NEW TIMES 133, 133 (Nadine Dolby et al. eds., 2004); Kerrin C. Wolf, *Arrest Decision Making by School Resource Officers*, 12 YOUTH VIOLENCE & JUV. JUST. 137, 139 (2013).

12.   *See* U.S. DEP'T OF EDUC., CIVIL RIGHTS DATA COLLECTION DATA SNAPSHOT: SCHOOL DISCIPLINE (2014), http://ocrdata.ed.gov/Downloads/CRDC-School-Discipline-Snapshot.pdf.

13.   Nance, *supra* note 1 (documenting data that school-based arrests have increased in several states and in several school districts throughout the country).

14.   *See, e.g.*, ACTION FOR CHILDREN, FROM PUSH OUT TO LOCK UP: NORTH CAROLINA'S ACCELERATED SCHOOL-TO-PRISON PIPELINE 9–10 (2013), http://www.ncchild.org/wp-content/uploads/2014/05/2013_STPP-FINAL.pdf ("Students were most commonly referred to the juvenile justice system for low-level offenses."); ARRESTING DEVELOPMENT, *supra* note 4, at

suspensions and expulsions have dramatically increased in recent years.[15] According to the CRD Collection, approximately 3.45 million students were suspended at least one time during the 2011–2012 school year, and approximately 130,000 were expelled from school during that same time period.[16] This recent movement is troubling not only because of the lost instruction time, but empirical studies demonstrate that a suspended or expelled student is more likely to drop out of school, commit a crime, get arrested, and become incarcerated.[17]

Another layer to this complex problem is academic underachievement. Too often educators teach students who have acute needs, but current federal and state education funding laws do not provide adequate resources for schools to address those needs.[18] The result is that many of those students fall behind their peers, become disengaged and disillusioned with the educational process, misbehave, and drop out or are pushed out of school, which, again, significantly increases the probability of becoming involved in the juvenile justice system.[19]

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6 (stating that during the 2004–2005 school year, there were 26,990 school-based referrals to the Florida Department of Juvenile Justice and 76% of those referrals were for disorderly conduct, trespassing, and fighting without a weapon); JUSTICE POLICY INST., EDUCATION UNDER ARREST: THE CASE AGAINST POLICE IN SCHOOLS 15 (2011), http://www.justicepolicy.org/uploads/justicepolicy/documents/educationunderarrest_fullreport.pdf [hereinafter EDUCATION UNDER ARREST] (observing that during the 2007–2008 school year in Jefferson County, Alabama, 96% of students referred to juvenile court were for misdemeanors that included disorderly conduct and fighting without a weapon); *see also* Kristin Henning, *Criminalizing Normal Adolescent Behavior in Communities of Color: The Role of Prosecutors in Juvenile Justice Reform*, 98 CORNELL L. REV. 383, 410 (2013) ("Whereas schoolteachers, principals, and school counselors once handled school-based incidents such as fighting, disorderly conduct, and destruction of property in school, school officials now rely on local police or in-house SROs to handle even the most minor of school infractions.").

15.   For example, the number of students in secondary schools suspended or expelled increased from one in thirteen in 1972–73 to one in nine in 2009–10. *See* JACOB KANG-BROWN ET AL., 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.

16.   *See* U.S. DEP'T OF EDUC., *supra* note 12.

17.   *See* DANIEL J. LOSEN & JONATHAN GILLESPIE, THE CIVIL RIGHTS PROJECT, OPPORTUNITIES SUSPENDED: THE DISPARATE IMPACT OF DISCIPLINARY EXCLUSION FROM SCHOOL 13 (2012), http://civilrightsproject.ucla.edu/resources/projects/center-for-civil-rights-remedies/school-to-prison-folder/federal-reports/upcoming-ccrr-research/losen-gillespie-opportunity-suspended-2012.pdf (detailing the negative consequences to children who are arrested); *see also infra* Part I.

18.   *See* CATHERINE Y. KIM ET AL., THE SCHOOL-TO-PRISON PIPELINE: STRUCTURING LEGAL REFORM 1 (2010); Pedro A. Noguera, *Schools, Prisons, and Social Implications of Punishment: Rethinking Disciplinary Practices*, 42 THEORY INTO PRAC. 341, 344 (2003).

19.   *See* Noguera, *supra* note 18, at 342; Matthew P. Steinberg, Elaine Allensworth & David W. Johnson, *What Conditions Support Safety in Urban Schools?: The Influence of School*

Yet, the most alarming aspect of these recent negative disciplinary and achievement trends is that some student racial groups are disproportionately affected. National, state, and local data across all settings and at all school levels clearly demonstrate that school administrators and teachers discipline minority students, particularly African-American students, more harshly and more frequently than similarly-situated white students.[20] Further, empirical data manifest the substantial achievement gaps that exist between minority students and white students at every grade level.[21] Moreover, schools that serve primarily disadvantaged and underachieving minority students typically have access to fewer resources to educate students.[22] Those same schools more often rely on extreme forms of discipline, punishment, and control, pushing disproportionately high numbers of minority students out of school and into the juvenile justice system.[23]

Many have dubbed this pathway from school to prison for too many of our nation's students, but especially for students of color, as the "school-to-prison pipeline."[24] This article analyzes the problems and causes of the school-to-prison pipeline, as well as its disproportionate effect on minorities, and proposes comprehensive school-based solutions to reverse these appalling trends. It will proceed in three parts. Part I discusses the negative effects associated with incarcerating, arresting, or excluding a student from school by means of a suspension or expulsion. It also includes a brief analysis of the causes of the school-to-prison pipeline. Furthermore, it highlights the disproportionate impact of the school-to-prison pipeline on students of color. Part II outlines school-based solutions that lawmakers can support and

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Organizational Practices on Student and Teacher Reports of Safety in Chicago, *in* CLOSING THE SCHOOL DISCIPLINE GAP: EQUITABLE REMEDIES FOR EXCESSIVE EXCLUSION 118, 125 (Daniel J. Losen ed., 2015).

20. *See* U.S. DEP'T OF JUSTICE & U.S. DEP'T OF EDUC., DEAR COLLEAGUE LETTER ON NONDISCRIMINATORY ADMINISTRATION OF SCHOOL DISCIPLINE OF SCHOOL DISCIPLINE 3 (2014), http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201401-title-vi.pdf.

21. *See infra* Part I.C.

22. *See infra* Part I.C.

23. *See* Jason P. Nance, *School Surveillance and the Fourth Amendment*, 2014 WIS. L. REV. 79, 102 (2014).

24. *See, e.g.*, *id.*; Nance, *supra* note 1; Christi Parsons, *Obama Wants to Stop 'School-to-Prison Pipeline' for Minorities*, L.A. TIMES (Feb. 11, 2014, 3:00 AM), http://www.latimes.com/nation/politics/politicsnow/la-pn-obama-stop-school-prison-pipeline-20140210-story.html (discussing President Obama's "plans to launch an initiative aimed at improving the lives of young black and Latino men" by stopping the school-to-prison pipeline); *School-to-Prison Pipeline Must Be Dismantled, Stakeholders Tell ABA*, ABA (Feb. 7, 2015, 9:59 AM), http://www.americanbar.org/news/abanews/aba-news-archives/2015/02/school-to-prisonpip.html (discussing a town hall meeting to dismantle the school-to-prison pipeline attended by scholars, judges, lawyers, students, youth advocates, and government officials).

educators can apply to improve safety, student behavior, and student achievement in their schools in place of overly-punitive measures that push students into the justice system. Part III focuses specifically on school-based solutions aimed at eliminating or substantially reducing implicit bias that generates racial disparities in school discipline.[25]

I.   PROBLEMS AND CAUSES OF THE SCHOOL-TO-PRISON PIPELINE

A.   *Individual and Societal Consequences of Incarcerating, Arresting, and Excluding Youth from School*

No one should underestimate the negative consequences associated with incarcerating a juvenile, both to our society as a whole and to the youth themselves, which is the end result of the school-to-prison pipeline.[26] Empirical research demonstrates that incarceration produces long-term detrimental effects on youth, including reinforcement of violent attitudes and behaviors;[27] more limited educational, employment, military, and housing opportunities;[28] an increased likelihood of not graduating from high school;[29] mental health concerns;[30] and increased future involvement in the criminal

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25.   These strategies may also contribute to a broader strategy for reducing racial disparities in academic achievement.

26.   *See* Nance, *supra* note 1. Notably, there are clarion calls to overhaul the entire the juvenile justice system to be better responsive to the needs of youth, help them become productive citizens, and prepare them to avoid future involvement in the justice system. *See generally* A NEW JUVENILE JUSTICE SYSTEM: TOTAL REFORM FOR A BROKEN SYSTEM (Nancy E. Dowd ed., 2015).

27.   *See* Anne M. Hobbs et al., *Assessing Youth Early in the Juvenile Justice System*, 3 J. JUV. JUST. 80, 81 (2013); Mark J. Van Ryzin & Thomas J. Dishion, *From Antisocial Behavior to Violence: A Model for the Amplifying Role of Coercive Joining in Adolescent Friendships*, 54 J. CHILD PSYCHOL. 661, 661 (2013) (finding that coercive friendships at age 16–17 predicted early adulthood violent behavior).

28.   *See* FED. ADVISORY COMM. ON JUVENILE JUSTICE, ANNUAL REPORT 10 (2010), http://www.justicepolicy.org/images/upload/06-11_rep_dangersofdetention_jj.pdf; ARRESTING DEVELOPMENT, *supra* note 4, at 12, 17; BARRY HOLMAN & JASON ZIEDENBERG, THE DANGERS OF DETENTION: THE IMPACT OF INCARCERATING YOUTH IN DETENTION AND OTHER SECURE FACILITIES 2 (2006) (explaining that formerly detained youth have less success finding employment); Hobbs et al., *supra* note 27.

29.   HOLMAN & ZIEDENBERG, *supra* note 28, at 9. It is also important to recognize that once incarcerated, juveniles often do not have access to adequate education services or, worse, cannot complete their education and develop career skills to obtain employment once released. *See* Peter E. Leone, *Doing Things Differently: Education as a Vehicle for Youth Transformation and Finland as a Model for Juvenile Justice Reform*, *in* A NEW JUVENILE JUSTICE SYSTEM: TOTAL REFORM FOR A BROKEN SYSTEM 86, 91 (Nancy E. Dowd ed., 2015).

30.   HOLMAN & ZIEDENBERG, *supra* note 28, at 8; Christopher B. Forrest et al., *The Health Profile of Incarcerated Male Youths*, 105 PEDIATRICS 286, 288–89 (2000) (finding that

justice system.[31] Scholars Brent Brenda and Connie Tollett's empirical study of detained youth found that prior incarceration was by far the strongest predictor of recidivism, outweighing other factors such as parent abuse or negligence; having peers present at the time of the offense; carrying a weapon; gang membership; gender; race; poor relationships with parents; and residing in a single-parent household.[32]

In addition, juvenile detention costs are extremely high, averaging $148,767 per juvenile per year and ranging as high as $352,663 in the state of New York.[33] This extraordinary expense dwarfs the amount that on average our nation spends to educate one youth per year in our public schools ($10,700 in 2013).[34] Beyond the extraordinary amount of money that states and localities actually spend to incarcerate youth, researchers estimate that the long term costs to our society of confining youth may be between $7.9 billion a year to $21.47 billion a year, which includes costs associated with recidivism, lost future earnings, lost future tax revenue, additional Medicare and Medicaid spending, and the impact of sexual assault on confined youth.[35]

Moreover, incarceration does not accomplish one of its primary objectives, which is to deter criminal behavior. In a comprehensive meta-analysis examining 7,304 juveniles across twenty-nine studies over a thirty-five year period, scholars Anthony Petrosino, Carolyn Turpin-Petrosino, and Sarah Guckenburg found that juvenile justice processing did not effectively deter delinquency; instead, it actually increased delinquency and future involvement in the justice system.[36] In short, the research overwhelmingly

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incarcerated males suffered from significant mental health concerns); Javid H. Kashani et al., *Depression Among Incarcerated Delinquents*, 3 PSYCHOL. RES. 185, 190–91 (1980) (demonstrating that mental health issues such as depression increased among incarcerated youth).

31. DON BEZRUKI ET AL., AN EVALUATION: SECURE JUVENILE DETENTION 4 (1999) (finding that detaining youth does not deter most juveniles and does not reduce the likelihood of recidivism); HOLMAN & ZIEDENBERG, *supra* note 28, at 4; Brent B. Benda & Connie L. Tollett, *A Study of Recidivism of Serious and Persistent Offenders Among Adolescents*, 27 J. CRIM. JUST. 111, 119 (1999) (demonstrating that prior incarceration was a stronger predictor of recidivism than being neglected or abused by parents, gang membership, being with peers at the time the offense was committed, or carrying a weapon).

32. *See* Benda & Tollett, *supra* note 31, at 120 tbl.4.

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

34. *See* EDUC. FIN. BRANCH, U.S. CENSUS BUREAU, PUBLIC EDUCATION FINANCES: 2013, at 8 tbl. 8 (2015), http://www2.census.gov/govs/school/13f33pub.pdf.

35. JUSTICE POLICY INST., *supra* note 33, at 36.

36. ANTHONY PETROSINO ET AL., FORMAL SYSTEM PROCESSING OF JUVENILES: EFFECTS ON DELINQUENCY 6 (2010), http://www.campbellcollaboration.org/lib/project/81/; *see also* Anna Aizer & Joseph J. Doyle, Jr., *Juvenile Incarceration, Human Capital, and Future Crime: Evidence from Randomly Assigned Judges*, 130 Q.J. ECON. 759 (2015) (demonstrating

demonstrates that "official processing of a juvenile law violation may be the *least* effective means of rehabilitating juvenile offenders."[37]

One also should not underestimate the negative effects of arresting a student, even when that arrest does not lead to conviction and incarceration.[38] After the police arrest a student, sometimes the school will refuse to readmit that student.[39] If an arrested student is readmitted to school, that student often suffers from emotional trauma, stigma, and embarrassment and may be monitored more closely by school resource officers, school officials, and teachers.[40] Several empirical studies conclude that arresting a student leads to lower standardized test scores, a higher probability that the student will not graduate from high school, and a higher likelihood of future involvement in the justice system.[41]

Finally, one should not underestimate the consequences of excluding students from school by means of suspension or expulsion.[42] Not only do students lose valuable instructional time, but empirical studies demonstrate that exclusion is associated with lower academic achievement levels, lower graduation rates, and lower enrollments in higher education institutions.[43] Analyzing longitudinal data from Florida, scholars Robert Balfanz, Vaughan Byrnes, and Joanna Hornig Fox found that the odds of a student dropping out of school increased from 16% to 32% the first time that a student was suspended in the ninth grade and increased each additional time that student was suspended.[44] Further, while controlling for other factors such as student

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empirically that juvenile incarceration lowers the probability that a juvenile will complete high school and increases the probability of adult incarceration).

37.   Hobbs et al., *supra* note 27 (emphasis added).

38.   *See* Nance, *supra* note 1.

39.   *See* THE ADVANCEMENT PROJECT, EDUCATION ON LOCKDOWN: THE SCHOOLHOUSE TO JAILHOUSE TRACK 12 (2005), http://b.3cdn.net/advancement/5351180e24cb166d02_mlbrqgxlh.pdf.

40.   *Id.*; Theriot, *supra* note 10, at 280–81.

41.   *See* KIM ET AL., *supra* note 18, at 113, 128.

42.   *See* Nance, *supra* note 1.

43.   *See, e.g.*, TONY FABELO ET AL., BREAKING SCHOOLS' RULES: A STATEWIDE STUDY OF HOW SCHOOL DISCIPLINE RELATES TO STUDENTS' SUCCESS AND JUVENILE JUSTICE INVOLVEMENT 55–57 (2011) (finding that 10% of students with at least one disciplinary action dropped out of school compared to only 2% of students with no disciplinary actions); Robert Balfanz et al., *Sent Home and Put Off Track*, *in* CLOSING THE SCHOOL DISCIPLINE GAP: EQUITABLE REMEDIES FOR EXCESSIVE EXCLUSION, *supra* note 19, at 22–29 (finding that in a longitudinal study of 181,897 Florida students, after controlling for student demographics and other indicators that a student is not on track to graduating, that each suspension decreases the odds that a student will graduate by 20%); Edward W. Morris & Brea L. Perry, *The Punishment Gap: School Suspension and Racial Disparities in Achievement*, 63 SOC. PROBS. 68, 82 (2016); JUSTICE POLICY INST., *supra* note 14, at 17.

44.   Balfanz et al., *supra* note 43, at 22.

demographics, attendance, and course performance, they found that each suspension deceased the odds that a student would graduate from high school by 20% and decreased the odds of a student attending a postsecondary institution by 12%.[45] Analyzing longitudinal data from Texas, scholar Miner P. Marchbanks III and his colleagues discovered that when a student received some type of exclusionary discipline, including an in-school suspension, out-of-school suspension, expulsion, a disciplinary alternative placement, or a juvenile justice placement, that student was 23.5% more likely to drop out of school after accounting for other salient factors, which they claimed was a conservative measure.[46] In another longitudinal study from a national dataset, scholar Tracey Shollenberger also discovered that exclusionary discipline negatively affected graduation rates, but that its effect had a magnified impact on minority male students.[47] For example, 46% of African-American male students, 42% of Hispanic male students, and 36% of white male students who had been suspended did not obtain a high school diploma by their late twenties.[48]

Not graduating from high school, of course, leads to a multitude of other social ills, such as unemployment, poverty, bad health, and future involvement in the criminal justice system.[49] Empirical data highlight the strong relationship between dropping out of school and eventual incarceration. For instance, in 2009, 40% of all institutionalized individuals had dropped out of high school, whereas only 8% of noninstitutionalized individuals had dropped out of school, and nearly one in ten male high school dropouts was institutionalized on any day during in 2006 compared to less

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45. *Id.*

46. *See* Miner P. Marchbanks III et al., *The Economic Effects of Exclusionary Discipline on Grade Retention and High School Dropout*, *in* CLOSING THE SCHOOL DISCIPLINE GAP: EQUITABLE REMEDIES FOR EXCESSIVE EXCLUSION, *supra* note 19, at 59, 64.

47. *See* Tracey L. Shollenberger, *Racial Disparities in School Suspension and Subsequent Outcomes: Evidence from the National Longitudinal Survey of Youth*, *in* CLOSING THE SCHOOL DISCIPLINE GAP: EQUITABLE REMEDIES FOR EXCESSIVE EXCLUSION, *supra* note 19, at 31, 36–37.

48. *Id.* Strikingly, in an empirical study examining data from 16,248 students in seventeen schools in Kentucky, scholars Edward Morris and Brea Perry found that school suspensions explained approximately one-fifth of the variation associated with math and reading performance, even after accounting for other salient factors associated with academic achievement. Morris & Perry, *supra* note 43, at 75–81.

49. *See* JOHN M. BRIDGELAND ET AL., CIVIC ENTERS., THE SILENT EPIDEMIC: PERSPECTIVES OF HIGH SCHOOL DROPOUTS i (2006), https://docs.gatesfoundation.org/documents/thesilentepidemic3-06final.pdf. Economists predict that the total lifetime cost-savings for each high school graduate is approximately $26,600, and that cost-savings is significantly higher for African-American and Hispanic males. *See* HENRY LEVIN ET AL., THE COSTS AND BENEFITS OF AN EXCELLENT EDUCATION FOR ALL OF AMERICA'S CHILDREN 14 tbl.9 (2006).

than one in thirty-three male high school graduates.[50] Further, in 2006, the probability of becoming institutionalized was sixty-three times greater for a high school dropout than for a four-year college graduate.[51]

Recent empirical works also document the strong relationship between exclusionary discipline and involvement in the justice system as an adult. Tracey Shollenberger's national longitudinal survey of youth confirms that suspended students are more likely to be arrested and incarcerated as adults, and those odds increase as students receive more suspensions.[52] In an empirical study of four waves of data from the National Longitudinal Survey of Youth, scholars Thomas Mowen and John Brent show that students who are suspended are more likely to be arrested over time than students who are not suspended.[53] Further, their results show "clear increases in the odds of arrest across time that increase with each year a youth in suspended, even when they remain in school" (i.e., the odds of arrest increase further when a student is suspended as a freshman *and* as a sophomore).[54] In another empirical study, scholars Kerrin Wolf and Aaron Kupchik analyzed data from the National Longitudinal Survey of Adolescent to Adult Health and found that being suspended in school was associated with greater odds of involvement in criminal activity and being incarcerated in adulthood, even after controlling for other factors that might explain involvement in the criminal justice system.[55]

It is also important to emphasize that excluding a student from school increases the likelihood that a student very soon will become involved in the

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50. NAT'L CTR. JUVENILE JUSTICE, JUVENILE OFFENDERS AND VICTIMS: 2014 NATIONAL REPORT 15 (Melissa Sickmund & Charles Puzzanchera eds., 2014), http://www.ojjdp.gov/ojstatbb/nr2014/downloads/NR2014.pdf; *see also* CLIVE R. BELFIELD ET AL., THE ECONOMIC VALUE OF OPPORTUNITY YOUTH 20 (2012), http://www.serve.gov/new-images/council/pdf/econ_value_opportunity_youth.pdf; ANDREW SUM ET AL., THE CONSEQUENCES OF DROPPING OUT OF HIGH SCHOOL: JOBLESSNESS AND JAILING FOR HIGH SCHOOL DROPOUTS AND THE HIGH COST FOR TAXPAYERS 7–11 (2009); BRUCE WESTERN, PUNISHMENT AND INEQUALITY IN AMERICA 17 tbl.1.1 (2006) (reporting that 32.4% of Black men who dropped out of high school were in prison on a typical day in 2000). I emphasize here that these studies show only a strong association between dropping out of high school and incarceration, but they do not demonstrate a causal relationship.

51. NAT'L CTR. JUVENILE JUSTICE, *supra* note 50; *see also* WESTERN, *supra* note 50, at 16 (reporting that in 2000, Black men who dropped out of high school were more than eight times as likely to be incarcerated than Black men who were college educated).

52. Shollenberger*, supra* note 47, at 36–40.

53. *See* Thomas Mowen & John Brent, *School Discipline as a Turning Point: The Cumulative Effect of Suspension on Arrest*, J. OF RES. IN CRIME AND DELINQUENCY (forthcoming 2016).

54. *Id.*

55. Kerrin C. Wolf & Aaron Kupchik, *School Suspension and Adverse Experiences in Adulthood*, JUST. Q. (forthcoming 2016).

juvenile justice system. The American Academy of Pediatrics Committee on School Health observed that when students are not monitored by trained professionals and are at home without parent supervision, they are far more likely to commit crimes, such as becoming involved in a physical altercation or carrying a weapon.[56] In their longitudinal study of Texas students, scholar Tony Fabelo and his colleagues found that when a school suspended or expelled a student for a discretionary offense, that student was approximately 2.85 times more likely to have contact with the juvenile justice system during the next academic year.[57] In addition, they found that with each subsequent exclusionary punishment the student received, the odds of involvement with the juvenile justice system further increased.[58]

B.   *The Causes of the School-to-Prison Pipeline*

The pathway from school to prison for many of our nation's youth, but particularly for minority students, results in large part from two intricately-related nationwide trends in our public education system: academic underachievement and over-disciplining students.[59]

Academic underachievement contributes to the school-to-prison pipeline in at least two ways. First, underachievement standing alone makes it more likely that students will be incarcerated at some point in their lives.[60] Second, and directly relevant to the disciplinary focus of this article, underachievement leads to misbehavior, which, because of the current trend of over-disciplining students, frequently results in a suspension, expulsion, or a referral to law enforcement. Empirical studies reveal that students often act out and engage in delinquent behavior because they are frustrated or embarrassed by their inability to complete assignments and learn the concepts taught in class.[61] When students begin to sense that the educational process

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56. Am. Acad. of Pediatrics, *Out-of-School Suspension and Expulsion*, 112 PEDIATRICS 1206, 1207 (2003).

57. *See* TONY FABELO ET AL., *supra* note 43, at 70.

58. *Id.*; *see also* Alison Evans Cuellar & Sara Markowitz, *School Suspension and the School-to-Prison Pipeline*, 43 INT'L REV. L. & ECON. 98, 99 (2015) (finding empirically that students who receive an out of school suspension are more likely to commit criminal offenses on suspension days than on non-suspension days).

59. In forthcoming works, I intend to explore this subject in greater depth.

60. *See supra* Part I.A. I will not fully explore the connection between underachievement and justice system involvement in this article, but it is important to note.

61. MATTHEW P. STEINBERG ET AL., UNIV. CHI. URBAN EDUC. INST., STUDENT AND TEACHER SAFETY IN CHICAGO PUBLIC SCHOOLS: THE ROLES OF COMMUNITY CONTEXT AND SCHOOL SOCIAL ORGANIZATION 46 (2011) (maintaining that low-performing students are less likely to be engaged in school and more likely to be frustrated and misbehave); *see also* Steinberg,

will not help them—that it is unlikely that they will meet grade level expectations, graduate, attend college, or obtain a well-paying job—they have fewer reasons to behave, take school seriously, master the classroom material, and stay in school.[62] Instead, they disrupt classroom activities, push back against mandatory attendance policies, look for alternative (often illegitimate) ways to establish their self-worth, identity, and status among peers, or drop out of school altogether.[63] Thus, student academic underachievement frequently creates complex behavioral dynamics whereby school administrators and teachers must appropriately respond to help troubled students while still maintaining order in the classroom and school.

It is imperative that schools maintain safe, orderly environments conducive to learning so that educators can carry out their important responsibilities. However, when students misbehave because they are frustrated with the educational process, instead of focusing on meeting students' needs, improving curriculum and instruction, or employing some of the other school-based solutions described in Part II, schools often resort to over-disciplining misbehaving students by suspending, expelling, or referring them to law enforcement for offenses that could be handled in alternative ways aimed at keeping them in school.[64] This negative response is exacerbated in schools serving large numbers of academically-unsuccessful students, many of whom are minority students living in impoverished neighborhoods.[65] Scholar Pedro Noguera explains:

Allensworth & Johnson, *supra* note 19 (explaining that low-achieving students are less likely to be engaged and more likely to act out); *see also* Nance, *supra* note 1. As Patrick Finley, who is a leader of the Metropolitan Expeditionary Learning School that serves primarily low-income students, recently observed, "When kids are struggling, it's not that they don't want to learn; it's that they are missing some set of skills that are preventing them from learning. . . . Removing them from the classroom is not building those skills." Carly Berwick, *Zeroing Out Zero Tolerance*, THE ATLANTIC (Mar. 17, 2015), http://www.theatlantic.com/education/archive/2015/03/zeroing-out-zero-tolerance/388003/.

62. *See* STEINBERG ET. AL, *supra* note 61, at 27–31 (documenting that students' academic skills are highly correlated with overall safety at the school); PAUL E. WILLIS, LEARNING TO LABOR: HOW WORKING CLASS KIDS GET WORKING CLASS JOBS 72 (1977) (observing that "teachers' authority becomes increasingly the random one of the prison guard, not the necessary one of the pedagogue" when students believe that the knowledge, skills, and credentials acquired in school will not benefit them); Noguera, *supra* note 18, at 343; *see also* Nance, *supra* note 1; Nance, *supra* note 23, at 100.

63. *See* Jason P. Nance, *Students, Security, and Race*, 63 EMORY L.J. 1, 46 (2013); *see also* Nance, *supra* note 23, at 101–01; Steinberg, Allensworth & Johnson, *supra* note 19, at 46 (observing that low-performing students are less engaged, more likely to become frustrated and act out, and less likely to respond to punishment).

64. *See* Nance, *supra* note 63; Nance, *supra* note 23, at 100–02; Noguera, *supra* note 18, at 343.

65. *See* Nance, *supra* note 23, at 101–102; Nance, *supra* note 1.

> Such schools often operate more like prisons than schools. They are more likely to rely on guards, metal detectors, and surveillance cameras to monitor and control students, restrict access to bathrooms, and attempt to regiment behavior by adopting an assortment of rules and restrictions. . . . In any educational setting where children are regarded as academically deficient, and where the adults view large numbers of them as potentially bad or even dangerous, the fixation on control tends to override all other educational objectives and concerns.[66]

It is also important to emphasize that over-disciplining students often does not create a more orderly environment conducive to learning.[67] While removing a disruptive student from the classroom or school may temporarily improve the learning climate, empirical evidence demonstrates that over-disciplining students and creating a punitive environment often alienates students, generates mistrust, and impedes the learning environment even more.[68] In fact, punitive environments often lead to additional violence and disorder and lower academic achievement for all students.[69]

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66. Noguera, *supra* note 18, at 345.

67. *See* 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, 56–57 (Sofía Bahema et al. eds., 2012) (arguing that excluding troublesome students on a large scale does not improve the learning environment in schools).

68. *See* Steinberg, Allensworth & Johnson, *supra* note 19, at 127–29 (finding that teachers and students reported lower levels of perceived safety in schools with higher suspension rates, even after controlling for other important community and school contextual variables); *see also Ending the School-to-Prison Pipeline: Hearing Before the Subcomm. on the Constitution, Civil Rights, and Human Rights of the S. Comm. on the Judiciary*, 112th Cong. 1–4 (2012) (testimony of Edward Ward, Blocks Together, Dignity in Schools Campaign), http://www.judiciary.senate.gov/imo/media/doc/12-12-12WardTestimony.pdf (describing his school environment as "very tense," "antagonizing," and "dishearten[ing]," where "the halls were full with school security officers whose only purpose seemed to be to serve students with detentions or suspensions"); Randall R. Beger, *The "Worst of Both Worlds": School Security and the Disappearing Fourth Amendment Rights of Students*, 28 CRIM. JUST. REV. 336, 340 (2003) (maintaining that aggressive measures designed to instill order and control often produce alienation and mistrust among students"); Paul Hirschfield, *School Surveillance in America*, *in* SCHOOLS UNDER SURVEILLANCE: CULTURES OF CONTROL IN PUBLIC EDUCATION 38, 46 (Torin Manahan & Rodolfo D. Torres eds., 2010) (observing that coercive measures employed to create order often are "a frequent cause of disunity or discord within the school community").

69. *See* Clifford H. Edwards, *Student Violence and the Moral Dimensions of Education*, 38 PSYCHOL. SCHS. 249, 250 (2001) (observing that "intrusive strategies are likely to undermine the trust needed to build cooperative school communities capable of really preventing violence"); Losen, *supra* note 67, at 56–57; Matthew J. Mayer & Peter E. Leone, *A Structural Analysis of School Violence and Disruption: Implications for Creating Safer Schools*, 22 EDUC. & TREATMENT CHILD. 333, 350, 352 (1999) (reporting empirical evidence that student disorder and student victimization were higher in schools using intense, coercive measures); Pedro A. Noguera, *Preventing and Producing Violence: A Critical Analysis of Responses to School*

Why have many schools, especially those serving large percentages of low-income minority students, adopted a harsh, punitive mindset towards disciplining students, even for relatively minor infractions? The reasons are complex and multilayered.[70] There is evidence suggesting that some school administrators and teachers believe that some students, particularly African-American male students, simply cannot be taught, are "unsalvageable," and are prison-bound.[71] School administrators and teachers also are influenced by unconscious bias towards minority students.[72] In addition, there are many educators who believe that they lack the resources to help all of the troubled students and have adopted an exclusionary ethos to preserve their limited resources to help students who they believe have a better chance of succeeding.[73] And there are many educators who are simply frustrated from

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Violence, 65 HARV. EDUC. REV. 189, 190–91 (1995) (maintaining that the "get tough" approach undermines school safety because coercive measures create mistrust and resistance among students); Brea L. Perry & Edward W. Morris, *Suspending Progress: Collateral Consequences of Exclusionary Punishment in Public Schools*, 79 AM. SOC. REV. 1067, 1076–1082 (finding empirically that higher levels of exclusionary discipline was associated with lower levels of academic achievement among students who were not suspended); Russell J. Skiba & M. Karega Rausch, *Zero Tolerance, Suspension, and Expulsion: Questions of Equity and Effectiveness*, *in* HANDBOOK OF CLASSROOM MANAGEMENT: RESEARCH, PRACTICE, AND CONTEMPORARY ISSUES 1063, 1072 (Carolyn M. Evertson & Carol S. Weinstein eds., 2006) (finding that after controlling for other important variables such as student poverty, student demographics, higher rates of out of school suspensions were associated with lower scores on the state academic achievement exam).

70.   See Nance, *supra* note 1, for a more extended discussion.

71.   *See* Michelle Fine et al., *Civics Lessons: The Color and Class of Betrayal*, 106 TEACHERS C. REC. 2193, 2201–05 (2004) (reporting that some minority students believed that their teachers considered them to be "animals," "inmates," or "killers"); Hirschfield, *supra* note 11, at 92 ("Owing to a dominant image of black males as criminals and prisoners, many school authorities view chronically disobedient black boys as 'bound for jail' and 'unsalvageable.'"); Pedro A. Noguera, *The Trouble with Black Boys: The Role and Influence of Environmental and Cultural Factors on the Academic Performance of African American Males*, 38 URB. EDUC. 431, 448 (2003) (maintaining that black students are less likely than white students to believe that their teachers were concerned about and supported them); David M. Ramey, *The Social Structure of Criminalized and Medicalized School Discipline*, 88 SOC. EDUC. 181, 185 (2015) (explaining that "school officials have lower expectations of minority children and often view their misbehavior as stable and unchanging, openly opining that these children are destined for criminal activity").

72.   *See infra* Parts I.C, III.

73.   ARRESTING DEVELOPMENT, *supra* note 4, at 7 ("[L]ong-standing resource inadequacies that lead to negative educational and behavioral outcomes, and perverse incentives created by testing and accountability movement to remove children from school who may drag down a school's test scores."); Hirschfield, *supra* note 11, at 92 (maintain that some educators rely on extreme punitive measures because they believe that they "lack the resources to reverse the downward trajectories of the most troublesome students without compromising the quality of teaching and services aimed at more deserving or promising students"); Noguera, *supra* note 18, at 346.

dealing with misbehaving students, feel as if they are losing control of their classrooms, and do not know how to otherwise handle these students.[74]

In addition, there are several external forces encouraging schools to adopt overly-punitive disciplinary models. Many scholars have observed that over-disciplining students has emerged parallel to and in connection with a general "tough on crime" movement that has occurred over the prior decades.[75] When juvenile crime rates increased in the mid-1980s to the mid-1990s and our nation witnessed several high-profile school shootings, lawmakers and school officials, under growing pressure to create safe schools, passed and implemented a series of laws and policies designed to intensify student surveillance and mandate removal of students from schools for committing certain offenses.[76] Furthermore, U.S. Congress and several state legislatures passed a series of laws that provided schools with funding to buy surveillance equipment and hire law enforcement officers to patrol school grounds.[77]

Two other movements, which are less related to the "tough on crime" mindset, have also contributed to schools' adoption of overly-punitive disciplinary models. First, over the last few decades the United States Supreme Court and many lower courts have weakened students' constitutional rights in schools to assist school officials in their efforts to maintain safe and orderly environments.[78] As a result, school officials can

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74. *See* PEDRO A. NOGUERA, THE TROUBLE WITH BLACK BOYS . . . AND OTHER REFLECTIONS ON RACE, EQUITY, AND THE FUTURE OF PUBLIC EDUCATION 120–24 (2008).

75. *See, e.g.*, KATHLEEN NOLAN, POLICE IN THE HALLWAYS: DISCIPLINE IN AN URBAN HIGH SCHOOL 22–26 (2011); Donna M. Bishop & Barry C. Feld, *Juvenile Justice in the Get Tough Era*, *in* ENCYCLOPEDIA OF CRIMINOLOGY AND CRIMINAL JUSTICE 2766, 2770 (Gerben Bruinsma & Davis Weisburd eds., 2014); Giroux, *supra* note 11; Hirschfield, *supra* note 11; Nolan & Anyon, *supra* note 11, at 136; *see also* Nance, *supra* note 1.

76. *See infra* Part II; *see also* Nance, *supra* note 1 (discussing zero-tolerance policies and statutes mandating that schools refer students to law enforcement for committing certain offenses).

77. *See* Nance, *supra* note 23, at 96–99; Nance, *supra* note 63, at 13–14.

78. *See, e.g.*, Bd. of Educ. v. Earls, 536 U.S. 822, 838 (2002) (upholding a school's random drug testing program on students involved in extracurricular activities); Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 653–54 (1995) (upholding a school's random drug testing program on student athletes); New Jersey v. T.L.O., 469 U.S. 325, 340–41 (1985) (holding that school officials need not obtain a search warrant or meet the probable cause standard to search a student); Commonwealth v. Snyder, 597 N.E.2d 1363, 1369 (Mass. 1992) (concluding that a school official that is not acting on behalf of the police is not required to give *Miranda* warnings); State v. Tinkham, 719 A.2d 580, 583 (N.H. 1998) (holding that a school official was not required to advise the student of his right to remain silent and his right to counsel prior to questioning); *see also* Barry C. Feld, T.L.O. *and* Redding*'s Unanswered (Misanswered) Fourth Amendment Questions: Few Rights and Fewer Remedies*, 80 MISS. L.J. 847, 851 (2011); Paul Holland, *Schooling* Miranda*: Policing Interrogation in the Twenty-First Century Schoolhouse*, 52 LOY. L. REV. 39, 59 n.90 (2006); Catherine Y. Kim, *Policing School Discipline*, 77 BROOK. L. REV. 861, 861 (2012); Jason P. Nance, *Random, Suspicionless Searches of Students' Belongings: A Legal,*

provide evidence of wrongdoing to prosecutors under circumstances that would render such evidence inadmissible under other circumstances.[79] Moreover, students are entitled only to minimal procedural protection for suspensions of ten days or less.[80] And while students theoretically are entitled to greater procedural protections for suspensions longer than ten days or for expulsions,[81] scholars agree and school officials concede that those disciplinary proceedings too often are formulaic rather than substantive and are not aimed towards justice or accuracy.[82] Rather, those proceedings often amount to only a routinized process intended to produce a favored result, which, if the procedures are followed, normally will be upheld by the courts.[83] These reduced constitutional protections, especially when coupled with zero-tolerance policies, increased police presence in schools,[84] and an overall punitive mentality towards disciplining students,[85] have pushed more students out of school and into the juvenile justice system.[86]

Second, the passage of federal and state school accountability laws has had the unintended consequence of encouraging schools to push out

Empirical, and Normative Analysis, 84 U. COLO. L. REV. 367, 367 (2013); Nance, *supra* note 1; Nance, *supra* note 63, at 7–13. *But see* J.D.B. v. North Carolina, 564 U.S. 261, 261 (2011) (holding that the court is required to consider the student's age when determining whether a student was in custody for *Miranda* purposes when being questioned by a police officer at school). For a thorough and fascinating discussion of the rights of juveniles under the Fifth Amendment, see generally BARRY C. FELD, KIDS, COPS, AND CONFESSIONS: INSIDE THE INTERROGATION ROOM (2013).

79. *See* Kim, *supra* note 78, at 861, 866; KIM ET AL., *supra* note 18, at 118–120; Nance, *supra* note 1.

80. *See* Goss v. Lopez, 419 U.S. 565, 584 (1975); Nance, *supra* note 1.

81. *Id.* ("Longer suspensions or expulsions for the remainder of the school term, or permanently, may require more formal procedures.").

82. *See* Derek W. Black, *The Constitutional Limit of Zero Tolerance in Schools*, 99 MINN. L. REV. 823, 846 (2015); *see also* RICHARD ARUM, JUDGING SCHOOL DISCIPLINE: THE CRISIS OF MORAL AUTHORITY 6, 14–15 (2003); JUDITH KAFKA, THE HISTORY OF "ZERO TOLERANCE" IN AMERICAN PUBLIC SCHOOLS 5–6 (2011); Nance, *supra* note 1.

83. Black, *supra* note 82, at 859; Nance, *supra* note 1.

84. The presence of police in schools has significantly complicated the analysis of students' constitutional rights in schools. *See, e.g.*, Kim, *supra* note 78, at 892–902 (arguing for heightened procedural protections for students accused of misconduct at school); Michael Pinard, *From the Classroom to the Courtroom: Reassessing Fourth Amendment Standards in Public School Searches Involving Law Enforcement Authorities*, 45 ARIZ. L. REV. 1067, 1070 (2003) (arguing that courts should apply the probable cause standard when school searches involve law enforcement officers or when school officials are required to turn evidence of criminal violations over to the police).

85. *See* Nance, *supra* note 1.

86. *See* Feld, *supra* note 78, at 884–95 (explaining how the combination of SROs, students' diminished constitutional rights, school accountability laws, and zero tolerance policies contribute to the Pipeline). Part II.A contains a more detailed discussion of zero-tolerance policies and increased surveillance and police presence in schools.

"problem" or low-performing students to improve schools' overall performance on high-stakes achievement tests.[87] Accountability laws require schools to regularly test students' reading, mathematics, and other skills at different stages and impose certain consequences on schools for failing to meet articulated criteria.[88] To avoid sanctions, a negative label, or losing their jobs, many scholars fear that school officials or teachers may sometimes push low-performing students out of school to avoid having low scores count against them.[89]

The confluence of these laws, policies, practices, and conditions have led schools to over-discipline many students, sending them on a path that eventually ends with too many of them becoming incarcerated and disenfranchised. While it may be justifiable to suspend, expel, or refer a student to law enforcement under certain such as when a student sexually assaults another student or harms another student with a dangerous weapon—under many schools' current policies and practices, the majority of students

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87. *See* Nance, *supra* note 1; Nance, *supra* note 23, at 94–95.

88. *See* Nance, *supra* note 63, at 15; Nance, *supra* note 1. For example, under the No Child Left Behind Act (NCLBA), which is no longer a controlling statute, schools were required to test students in core subjects at certain grade levels. *See Testing: Frequently Asked Questions*, U.S. DEP'T OF EDUC., http://www2.ed.gov/nclb/accountability/ayp/testing-faq.html (last visited May 19, 2016). If schools failed to meet certain criteria, schools could receive various sanctions. *See* Nance, *supra* note 23, at 94–95. The statute that recently replaced the NCLBA, called the Every Student Succeeds Act (ESSA), Pub. L. No. 114-95, 129 Stat. 1801 (2015), also mandates states that receive federal funds to conduct academic assessments. *See id.* at § 1111(b)(2). However, the ESSA precludes the federal government from assigning a weight for accountability purposes to those academic assessments. *See id.* at § 1111(e)(1)(B)(iii); Nance, *supra* note 1.

89. *See* Nance, *supra* note 63, at 15; Nance, *supra* note 1; ADVANCEMENT PROJECT, TEST, PUNISH, AND PUSH OUT: HOW "ZERO TOLERANCE" AND HIGH-STAKES TESTING FUNNEL YOUTH INTO THE SCHOOL-TO-PRISON PIPELINE 28–33 (2010); ARRESTING DEVELOPMENT, *supra* note 4, at 7; FED. ADVISORY COMM. ON JUVENILE JUSTICE., *supra* note 28; NAACP LEGAL DEF. & EDUC. FUND, DISMANTLING THE SCHOOL-TO-PRISON PIPELINE 5 (2005); Linda Darling-Hammond, *Race, Inequality and Educational Accountability: the Irony of 'No Child Left Behind'*, 10 RACE, ETHNICITY, & EDUC. 245, 252–55 (2007); Deborah Gordon Klehr, *Addressing the Unintended Consequences of No Child Left Behind and Zero Tolerance: Better Strategies for Safe Schools and Successful Students*, 16 GEO. J. ON POVERTY L. & POL'Y 585, 602–03 (2009); 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, 274 (2010); Thomas J. Mowen et al., *School Crime and Security*, *in* HANDBOOK OF MEASUREMENT ISSUES IN CRIMINOLOGY AND CRIMINAL JUSTICE 28 (Timothy S. Bynum & Beth M. Huebner eds., forthcoming); James E. Ryan, *The Perverse Incentives of The No Child Left Behind Act*, 79 N.Y.U. L. REV. 932, 969–70 (2004); *cf.* Rachel F. Moran, *Sorting and Reforming: High-Stakes Testing in the Public Schools*, 34 AKRON L. REV. 107, 115 (2000) (maintaining that in a high stakes testing context, low-performing students are in danger of being pushed out of schools).

are excluded from school or referred to law enforcement for offenses that are not dangerous or serious.[90]

C.   *Racial Disparities Relating to the School-to-Prison Pipeline*

While the school-to-prison pipeline is disturbing in and of itself, the most alarming feature of this troubling trend is that not all racial groups are equally affected.[91] Racial disparities relating to different aspects of the school-to prison pipeline, such as suspensions, expulsions, referrals to law enforcement, school-based arrests, and graduation rates, have been documented using national, state, and local data at all school levels across all settings.[92] For example, the most recent national data from the CRD Collection reveals that although African-American students comprised only 16% of the student population during the 2011–2012 school year, they represented 32% of students who received an in-school suspension; 33% of students who received one out-of-school suspension; 42% of students who received more than one out-of-school suspension; and 34% of students who were expelled.[93] Further, during that same time frame, African-American students represented 27% of the students who were referred to law enforcement, and 31% of students who were subject to a school-based

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90.   *See, e.g.*, ARRESTING DEVELOPMENT, *supra* note 4, at 6 (reporting that during the 2004–2005 school year in Florida, 76% of referrals to the Florida Department of Juvenile Justice were for misdemeanor offenses such as disorderly conduct, trespassing, and fighting without a weapon); EDUCATION UNDER ARREST, *supra* note 14 (reporting that during the 2007–08 school year in Jefferson County, Alabama, 96% of students referred to the juvenile justice system were for misdemeanors that included disorderly conduct and fighting without a weapon); FED. ADVISORY COMM. ON JUVENILE JUSTICE, *supra* note 28, at 13; Kristin Henning, *Criminalizing Normal Adolescent Behavior in Communities of Color: The Role of Prosecutors in Juvenile Justice Reform*, 98 CORNELL L. REV. 383, 410 (2013) ("Whereas schoolteachers, principals, and school counselors once handled school-based incidents such as fighting, disorderly conduct, and destruction of property in school, school officials now rely on local police or in-house SROs to handle even the most minor of school infractions."); Losen, *supra* note 67, at 54–55 (explaining that the vast majority of suspensions are for nonviolent and minor offenses).

91.   While not the primary focus of this paper, it is important to recognize that disparities also arise by gender, disability status, sexual orientation, and English language learner status, among other groups. *See* Daniel J. Losen, *Introduction*, *in* CLOSING THE SCHOOL DISCIPLINE GAP: EQUITABLE REMEDIES FOR EXCESSIVE EXCLUSION, *supra* note 19, at 1, 1–3; Losen, *supra* note 67, at 50–51.

92.   *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, 550–51 (2014).

93.   *See* U.S. DEP'T OF EDUC., *supra* note 12, at 2; *see also* LOSEN & GILLESPIE, *supra* note 17, at 6 (finding that one out of every six African-American students enrolled in K–12 public schools had been suspended at least once, but only one out of twenty white students had been suspended).

arrest.[94] In addition, although African-American children represented 18% of preschool enrollment, they represented 48% of the preschool children who received more than one out-of-school suspension.[95]

According to the U.S. Department of Education's Office for Civil Rights, these disparities cannot be explained by more frequent or serious misbehavior by minority students.[96] It recently stated, quite emphatically and unambiguously, that "in our investigations we have found cases where African-American students were disciplined more harshly and more frequently because of their race than similarly situated white students. In short, racial discrimination in school discipline is a real problem."[97] Indeed, substantial empirical research corroborates the U.S. Department of Education's conclusion,[98] indicating that to reduce these deplorable inequalities, racial bias in schools must be addressed.[99]

Equally problematic, academic underachievement also is inconsistent across all student racial groups. Academic achievement inequalities contribute to the overall racial inequalities associated with the school-to-prison pipeline by fostering conditions whereby (a) fewer minority students

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94. U.S. DEP'T OF EDUC., *supra* note 12, at 6.

95. *Id.* at 7.

96. U.S. DEP'T OF JUSTICE & U.S. DEP'T OF EDUC., *supra* note 20, at 4.

97. *Id.*; *see also* Michael Rocque & Raymond Paternoster, *Understanding the Antecedents of the "School-to-Jail" Link: The Relationship Between Race and School Discipline*, 101 J. CRIM. L. & CRIMINOLOGY 633, 653–54 (2011) (finding that African-American students are significantly more likely than whites to be disciplined even after taking into account other salient factors such as grades, attitudes, gender, special education or language programs, and their conduct in school as perceived by teachers); Russell J. Skiba et al., *Race Is Not Neutral: A National Investigation of African American and Latino Disproportionality in School Discipline*, 40 SCH. PSYCHOL. REV. 85, 95–101 (2011) (finding significant disparities for minorities with respect to school discipline after examining an extensive national sample).

98. *See, e.g.*, DANIEL J. LOSEN, THE CIVIL RIGHTS PROJECT, DISCIPLINE POLICIES, SUCCESSFUL SCHOOLS, AND RACIAL JUSTICE 6–7 (2011); Catherine P. Bradshaw et al., *Multilevel Exploration of Factors Contributing to the Overrepresentation of Black Students in Office Disciplinary Referrals*, 102 J. EDUC. PSYCHOL. 508, 508 (2010) (finding that, after controlling for teacher ratings of students' behavior problems, African-American students were more likely than white students to be referred to the office for disciplinary reasons); Sean P. Kelly, *A Crisis of Authority in Predominantly Black Schools?*, 112 TEACHERS C. REC. 1247, 1261–62 (2010) (examining data from teacher surveys and finding that, when controlling for factors such as low achievement and poverty, African-American students were no more disruptive than other students); Anna C. McFadden et al., *A Study of Race and Gender Bias in the Punishment of Handicapped School Children*, 24 URB. REV. 239, 246–47 (1992) (finding that African-American male disabled students were punished more severely than other students for the same offenses); Russell J. Skiba et al., *Where Should We Intervene? Contributions of Behavior, Student, and School Characteristics to Out-of-School Suspension*, *in* CLOSING THE SCHOOL DISCIPLINE GAP: EQUITABLE REMEDIES FOR EXCESSIVE EXCLUSION, *supra* note 19, at 132, 132–34 (finding that race was a strong predictor of out-of-school suspensions).

99. *See infra* Part III.

graduate from high school—thereby increasing the probability that more minority students eventually will become incarcerated,[100] and (b) more minorities are suspended, expelled, and referred to law enforcement for misbehaving when they become frustrated with their inability to learn the material.[101]

The racial gaps for graduation rates are stark. In 2011, nearly 80% of white students graduated from high school nationally, whereas only 61.7% of African-Americans students and 68.1% of Hispanic students graduated from high school.[102] The overall racial achievement gaps are even more dramatic. Scholar Margaret Burchinal and her colleagues have called the "substantial gap in educational achievement between Black and White children [a]s one of the most pernicious problems facing American society."[103] Disparities are evident at an early age and can be seen at every stage of minorities' lives.[104] Empirical studies demonstrate that substantial gaps exist between minority and white kindergarten students' level of vocabulary and ability to recognize letters of the alphabet.[105] Then, as students continue to advance through school, these disparities widen.[106] For example, an average African-American or Hispanic seventh-grade student reads at approximately the same level as an average white third grade students, and an average seventeen-year-old Hispanic or African-American student reads at approximately the same level as the average thirteen-year-old white student.[107]

Although this article does not fully discuss all of the reasons behind racial disparities in student achievement, it is important to highlight two factors that

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100. *See supra* Parts I.A-B.

101. *See supra* Part I.B.

102. Marchbanks III et al., *supra* note 46, at 59.

103. Margaret Burchinal et al., *Examining the Black-White Achievement Gap Among Low-Income Children Using the NICHD Study of Early Child Care and Youth Development*, 82 CHILD DEV. 1404, 1404 (2011).

104. *See id.* ("Black children in the U.S. start school about one half of a standard deviation behind their White peers on standardized reading and mathematics tests . . . .").

105. *See* SARAH E. REDFIELD, DIVERSITY REALIZED: PUTTING THE WALK WITH THE TALK FOR DIVERSITY IN THE LEGAL PROFESSION 40–41 (2009); Jason P. Nance & Paul E. Madsen, *An Empirical Analysis of Diversity in the Legal Profession*, 47 CONN. L. REV. 271, 293 (2014). Worse, African-Americans are also more likely to live in concentrated poverty for multiple generations, which multiplies the detrimental effects of poverty on children. *See* PATRICK SHARKEY, STUCK IN PLACE: URBAN NEIGHBORHOODS AND THE END OF PROGRESS TOWARD RACIAL EQUALITY 40, 46, 129 (2013).

106. *See* REDFIELD, *supra* note 105, at 41–48; *see also* Burchinal et al., *supra* note 103 (stating that "racial disparities in school achievement increase by about one tenth of a standard deviation during each year of school"); Nancy E. Dowd, *What Men?: The Essentialist Error of the "End of Men*," 93 B.U. L. REV. 1205, 1217 (2013) (observing that the racial achievement gap widens as children grow because minority schools have fewer resources).

107. REDFIELD, *supra* note 105.

relate to the school-to-prison pipeline and its accompanying racial disparities. First, racial bias appears to be a primary cause for disparities both in school discipline[108] and in academic achievement.[109] While the school-based solutions described in Part III are aimed at addressing implicit racial biases relating to discipline, they may also contribute to a broader strategy for addressing implicit biases relating to academic underachievement for minority students.

Second, poverty is a critical contributor to racial disparities in underachievement.[110] One in three African-American children are living in poverty (which is more than twice the rate for white children),[111] and the level of poverty young children confront is closely tied to their health, housing opportunities, level of nutrition, and early learning opportunities, all of which affect children's cognitive development.[112] Not surprisingly, then, several

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108. *See supra* notes 97–98 and accompanying text.

109. *See* Linda van den Bergh et al., *The Implicit Prejudiced Attitudes of Teachers: Relations to Teacher Expectations and the Ethnic Achievement Gap*, 47 AM. EDUC. RES. J. 497, 518 (2010) (finding empirically that teachers with negative prejudiced attitudes toward ethnic minorities saw those students as less intelligent and less capable of having promising post-career prospects, and student achievement differences between ethnic minority students and other students were larger in classrooms with prejudiced teachers than with teachers who held less prejudicial attitudes); 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 affects teacher expectancy effects that 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) (empirically demonstrating that teachers with high biases towards minority students experienced higher gaps in student achievement along racial lines than teachers with lower biases); Harriet R. Tenenbaum & Martin D. Ruck, *Are Teachers' Expectations Different for Racial Minority than for European American Students? A Meta-Analysis*, 99 J. EDUC. PSYCHOL. 253, 271 (2007) (finding that teachers have higher expectations for white students than for minority students, and that teacher expectancies may lead to differences in academic performances); *see also* CHERYL STAATS, KIRWAN INST. FOR THE STUDY OF RACE & ETHNICITY, STATE OF THE SCIENCE: IMPLICIT BIAS REVIEW 30–34 (2013).

110. *See* Christopher A. Mallett, *The School-to-Prison Pipeline: Disproportionate Impact on Vulnerable Children and Adolescents*, EDUC. & URBAN SOC. (forthcoming 2016) (describing the detrimental impact of poverty on academic achievement).

111. *See* NOGUERA, *supra* note 74, at 21; Dowd, *supra* note 106, at 1210–11; *see also* DOROTHY H. EVENSEN & CARLA D. PRATT, THE END OF THE PIPELINE: A JOURNEY OF RECOGNITION FOR AFRICAN-AMERICANS ENTERING THE LEGAL PROFESSION 114 (2012) (observing that 44% of African-American families live in poverty); Tamar R. Birckhead, *Delinquent by Reason of Poverty*, 38 WASH. U. J.L. & POL'Y 53, 59 (2012) (explaining that "children of color are more than twice as likely to be impoverished than their white counterparts").

112. *See* LINDA DARLING-HAMMOND, THE FLAT WORLD AND EDUCATION 31–33 (James A. Banks ed. 2010); DIANE RAVITCH, REIGN OF ERROR: THE HOAX OF THE PRIVATIZATION MOVEMENT AND THE DANGER TO AMERICA'S PUBLIC SCHOOLS 90–98 (2013); Dowd, *supra* note 106, at 1211.

empirical studies demonstrate that childhood poverty is highly correlated with diminished cognitive capacities and academic achievement.[113] Yet, despite the debilitating effects of poverty on children, federal and state education funding laws often do not provide adequate resources for many schools who serve students with the greatest needs.[114] It is well documented that minority students from low-income households more often have teachers who are less experienced and lower paid; learn in over-crowded classrooms; have fewer instructional resources; have less access to higher level curriculum; lack counselors, mental health specialists, and extracurricular programs; learn in segregated environments with low-achieving students; and have lower levels of peer group competition and support.[115] This is not to say that schools alone can address the detrimental effects of poverty on

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113. *See, e.g.*, Dowd, *supra* note 106, at 1211; Martha J. Farah et al., *Childhood Poverty: Specific Associations with Neurocognitive Development*, 1110 BRAIN RES. 166, 166, 169 (2006) (observing that childhood poverty affects "disparities in working memory, cognitive control and especially in language and memory"); James E. Ryan, *Poverty as Disability and the Future of Special Education Law*, 101 GEO. L.J. 1455, 1478–90 (2013) (explaining that many cognitive development tests show significant cognitive disparities that correlate with socioeconomic status).

114. *See, e.g.*, Bruce J. Biddle & David C. Berliner, *A Research Synthesis/Unequal School Funding in the United States*, 59 EDUC. LEADERSHIP 48, 48–49 (2002) (describing the vast differences in school funding); Derek W. Black, *Middle-Income Peers as Educational Resources and the Constitutional Right to Equal Access*, 53 B.C. L. REV. 373, 404–09 (2012) (explaining the inferior resources that low-income minority students receive); Erwin Chemerinsky, *Separate and Unequal: American Public Education Today*, 52 AM. U. L. REV. 1461, 1470–72 (2003) (describing the disparities in school funding); Michael Heise, *Litigated Learning and the Limits of Law*, 57 VAND. L. REV. 2417, 2436–42 (2004) (discussing school finance reforms); James E. Ryan, *Schools, Race, and Money*, 109 YALE L.J. 249, 252–56 (1999) (discussing funding disparities for low-income minority students).

115. *See* DARLING-HAMMOND, *supra* note 112, at 27–65 (explaining the disadvantaged learning opportunities for minority students); KIM ET AL., *supra* note 18; GARY ORFIELD & CHUNGMEI LEE, RACIAL TRANSFORMATION AND THE CHANGING NATURE OF SEGREGATION 29–31 (2006) (describing inequalities of schools attended by minority students living in concentrated poverty); ROBERT D. PUTMAN, OUR KIDS: THE AMERICAN DREAM IN CRISIS 135–90 (2015) (describing the inequalities and disparate opportunities that exist in our educational system); Roslyn Arlin Mickelson, *The Academic Consequences of Desegregation and Segregation: Evidence from the Charlotte-Mecklenburg Schools*, 81 N.C. L. Rev. 1513, 1547 (2003) (explaining that segregated black learning environments have access to fewer resources to educate students); 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, 67–69 (Gary Orfield & Susan E. Eaton eds., 1996) (explaining that "disadvantaged students face more barriers and receive less reinforcement to succeed in school"); 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-teache (describing the inequalities for minorities in the public education system).

children,[116] but a comprehensive strategy to reduce these disparities and fully dismantle the school-to-prison pipeline must include providing more resources to schools that serve students living in poverty.[117]

II.   SCHOOL-BASED SOLUTIONS TO REVERSE THE SCHOOL-TO-PRISON PIPELINE

The school-to-prison pipeline is a complex, societal problem with no easy or simple solutions. At their core, solutions should focus on ways to (a) improve academic achievement and increase the likelihood that students will remain in school, graduate, and prepare to become positive, contributing members of our society, and (b) decrease the number of suspensions, expulsions, and referrals to law enforcement. While this article discusses only school-based solutions, it is important to recognize that solutions aimed at reversing the school-to-prison pipeline should go well beyond schools and involve providing more resources to parents, neighborhoods, and communities to achieve these ends.[118]

It is also important to recognize that reversing the school-to-prison pipeline encompasses many decisions largely outside of the control of school officials and teachers themselves. As described above, federal and state education funding laws do not provide schools serving students with acute needs with adequate resources, which too often results in dysfunctional learning environments, safety problems, and disparities in student achievement and student discipline.[119] Our schools need more counselors, mental health services, mentoring programs, after-school services, and programs that build student character, school community, collective responsibility, and trust.[120] We need more social support for children who are

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116. *See* RAVITCH, *supra* note 112, at 91–98.

117. *See* Mallett, *supra* note 110.

118. *See* JOHANNA WALD, CAN "DE-BIASING" STRATEGIES HELP TO REDUCE RACIAL DISPARITIES IN SCHOOL DISCIPLINE? 7 (2014) (arguing that dismantling the school-to-prison pipeline "is a large social issue that demands a comprehensive response crossing over a myriad of systems (education, juvenile justice, foster case, housing, health care, job creation) and that requires legal, legislative, practice, and policy reforms aimed at structures, institutions, and individuals").

119. *See* Noguera, *supra* note 18, at 342 (maintaining that it is the acute needs of students and the inability of educators to meet those needs that often cause students to be disruptive and dangerous at school).

120. *See* Nance, *supra* note 78, at 400–01; Nance, *supra* note 63, at 48–55.

born and grow up in poverty,[121] universal early childhood education,[122] and more, better trained teachers and school administrators.[123] Further, too many low-income minority students learn in segregated environments with lower levels of peer group competition and support.[124] We need more racially and economically-integrated environments that are organized in such a way so that all students can receive the benefits of a middle-class school, which includes, as scholar James Ryan explains, "good teachers, strong principals, reasonable class sizes, parental involvement, decent facilities, high expectations, and real accountability."[125]

Nevertheless, while the above recommendations are needed to completely address the school-to-prison pipeline, there are several specific school-based initiatives that lawmakers can support and educators can immediately implement in a feasible manner, most of which do not require large sums of

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121. *See* DARLING-HAMMOND, *supra* note 112, at 31–33; RAVITCH, *supra* note 112, at 91–98, 227–29.

122. DARLING-HAMMOND, *supra* note 112, at 33–35; RAVITCH, *supra* note 112, at 230–33; *see also* James E. Ryan, *A Constitutional Right to Preschool?*, 94 CALIF. L. REV. 49, 56–58 (2006); James J. Heckman, *Schools, Skills, and Synapses* 19–25 (Nat'l Bureau of Econ. Research, Working Paper No. 14064, 2008), http://www.nber.org/papers/w14064.pdf.

123. DARLING-HAMMOND, *supra* note 112, at 234–57; RAVITCH, *supra* note 112, at 274–77.

124. *See* Jason P. Nance, *Persisting Inequalities in Educational Resources and Results: A Call for Reform*, *in* THE ROAD TO PROGRESS: THE CASE FOR A U.S. EDUCATION AMENDMENT (Charles J. Ogletree, Jr. & Kimberly J. Robinson eds., forthcoming).

125. JAMES E. RYAN, FIVE MILES AWAY, A WORLD APART: ONE CITY, TWO SCHOOLS, AND THE STORY OF EDUCATIONAL OPPORTUNITY IN MODERN AMERICA 15 (2010); *see also* HEATHER SCHWARTZ, CENTURY FOUND., HOUSING POLICY IS SCHOOL POLICY: ECONOMICALLY INTEGRATIVE HOUSING PROMOTES ACADEMIC SUCCESS IN MONTGOMERY COUNTY, MARYLAND 6 (2010) ("After five to seven years, students in public housing who were randomly assigned to low-poverty elementary schools significantly outperformed their peers in public housing who attended moderate-poverty schools in both math and reading."); Black, *supra* note 114, at 409–10; Wendy Parker, *The Failings of Education Reform and the Promise of Integration*, 90 TEX. L. REV. 395, 407–11 (2011). This is not to say that integration is the panacea for education reform. *See* Wendy Parker, *Valuing Integration: Lessons from Teachers*, 47–50 (Wake Forest Univ. Legal Studies Research Paper Series, Paper No. 1014366, 2007), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1014366. Or that many majority-minority schools have not achieved significant educational success. *Id.* at 48; *see also* DERRICK BELL, SILENT COVENANTS: *BROWN V. BOARD OF EDUCATION* AND THE UNFULFILLED HOPES FOR RACIAL REFORM 165–77 (2004). But racial and economic integration has been linked to improved academic success for students living in high-poverty neighborhoods. *See, e.g.*, PUTMAN, *supra* note 115, at 164–65; SCHWARTZ, *supra*, at 6. And such schools can potentially prepare all students to be better citizens who appreciate and can work with students of all races and economic-backgrounds. *See* RYAN, *supra*, at 279 ("Even if they present challenges, attending diverse schools can better prepare students for their future lives as citizens and workers than can racially and economically homogenous schools.").

money.[126] These recommendations will substantially improve the learning climate and promote school safety without resorting to extreme disciplinary measures that funnel more students into the juvenile justice system.

A. Scale Back or Eliminate Harsh Disciplinary Measures

First, lawmakers and school officials must support policies that scale back or eliminate harsh disciplinary measures that contribute to the school-to-prison pipeline, such as hiring school resource officers, instituting zero tolerance policies, relying on intrusive surveillance methods, and excluding children from school for minor offenses. None of these practices are evidence-based, and all of these harsh disciplinary practices are inconsistent with the well-being of children, harm the learning climate, and contribute to the school-to-prison pipeline.

1. School Resource Officers

Police officers have provided services to schools for years, but the practice of hiring police officers, or school resource officers (SROs),[127] to regularly patrol school grounds is a relatively new phenomenon and is consistent with the overall national trend of criminalizing student discipline.[128] While there were fewer than one hundred police officers stationed in public schools in the late 1970s,[129] in 2007, there were approximately 19,000 SROs employed by

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126. Nevertheless, as Dan Losen recently observed, the perceived lack of resources to dismantle the school-to-prison pipeline "is a reflection of a policy disconnect rather than a true shortage of resources. If states and localities could take projected savings from having lower delinquency and transfer them to their education budget, the remedies could likely pay for themselves." Daniel J. Losen, *Conclusion*, *in* CLOSING THE SCHOOL DISCIPLINE GAP: EQUITABLE REMEDIES FOR EXCESSIVE EXCLUSION, *supra* note 19, at 241, 241.

127. An SRO is a "career law enforcement officer, with sworn authority, deployed in community-oriented policing, and assigned by the employing police department or agency to work in collaboration with schools and community-based organizations." 42 U.S.C. § 3796dd-8 (2015); *see also* 20 U.S.C. § 7161 (2012).

128. *See* NATHAN JAMES & GAIL MCCALLION, CONG. RESEARCH SERV., R43126, SCHOOL RESOURCE OFFICERS: LAW ENFORCEMENT OFFICERS IN SCHOOLS 10–11 (2013); BARBARA RAYMOND, U.S. DEP'T OF JUSTICE, ASSIGNING POLICE OFFICERS TO SCHOOLS 1 (2010), http://www.popcenter.org/Responses/pdfs/school_police.pdf; Krezmien et al., *supra* note 89; Theriot, *supra* note 10 (describing arrests for trivial offenses); *see also* Nance, *supra* note 1.

129. *See* Kevin P. Brady et al., *School-Police Partnership Effectiveness in Urban Schools*, 39 EDUC. & URB. SOC. 455, 457 (2007); Paul J. Hirschfield & Katarzyna Celinska, *Beyond Fear: Sociological Perspectives on the Criminalization of School Discipline*, 5 SOC. COMPASS 1, 1 (2011).

local law enforcement agencies nationwide.[130] Lawmakers, police departments, and school districts expanded the police presence in schools in response to high-profile incidents of school violence and rising juvenile crime rates.[131] Nevertheless, they made those decisions without thoroughly evaluating whether having an increased police presence in schools improves school safety.[132] A recent Congressional Research Service report concluded the following:

> The body of research on the effectiveness of SRO programs is noticeably limited, both in terms of the number of studies published and the methodological rigor of the studies conducted. The research that is available draws conflicting conclusions about whether SRO programs are effective at reducing school violence. In addition, the research does not address whether SRO programs deter school shootings, one of the key reasons for renewed congressional interest in these programs.[133]

Not only do SRO programs take away needed resources that could otherwise be used to hire more counselors, mental resource specialists, and implement the alternative programs described above,[134] but hiring SROs to patrol school grounds also appears to involve more students in the juvenile justice system, even for less serious offenses.[135] Examining restricted data

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130. JAMES & MCCALLION, *supra* note 128, at 20; *see also* Theriot, *supra* note 10 ("While it is difficult to know the exact number of school resource officers, it is estimated that there might be more than 20,000 law enforcement officers patrolling schools in the United States.").

131. *See* JAMES & MCCALLION, *supra* note 128, at 4–5; Ben Brown, *Understanding and Assessing School Police Officers: A Conceptual and Methodological Comment*, 34 J. CRIM. JUST. 591, 591 (2006); *see also* Nance, *supra* note 1.

132. *See* JAMES & MCCALLION, *supra* note 128, at 9; Brown, *supra* note 131, at 592; Theriot, *supra* note 10, at 280.

133. JAMES & MCCALLION, *supra* note 128; *see also* Theriot, *supra* note 10, at 280 ("Empirical evaluations of these various security strategies are limited, have varying levels of methodological rigor, and often report conflicting findings." (internal citations omitted)). Another research report states:

> Studies of SRO effectiveness that have measured actual safety outcomes have mixed results. Some show an improvement in safety and a reduction in crime; others show no change. Typically, studies that report positive results from SRO programs rely on participants' perceptions of the effectiveness of the program rather than on objective evidence. Other studies fail to isolate incidents of crime and violence, so it is impossible to know whether the positive results stem from the presence of SROs or are the results of other factors.

RAYMOND, *supra* note 128, at 8.

134. The cost of employing approximately 19,000 SROs is estimated to be at least $615 million per year. *See* JAMES & MCCALLION, *supra* note 128, at 20 (estimating that the average minimum salary for an entry-level SRO is $32,412).

135. *See* Brown, *supra* note 131, at 596.

from the U.S. Department of Education, I found that a police officer's regular presence at a school was predictive of greater odds that schools referred students to law enforcement for lower-level offenses such as fighting without a weapon and threats without a weapon.[136] These findings held true even after taking into account other variables that might influence whether schools refer students to law enforcement such as general levels of criminal activity, disorder in the schools, and neighborhood crime.[137] In many schools today, SROs have become the "new authoritative agents" of discipline.[138]

There are numerous problems associated with SROs handling routine discipline matters.[139] Unlike school administrators and educators, SROs do not have advanced training in child psychology, pedagogy, discipline, educational theory, and they generally are not accountable to the local school board.[140] Accordingly, a decision to arrest a student might be based on criteria that are wholly inconsistent with the best interests of the student or the school.[141] Indeed, as stated above, there are many anecdotal accounts of SROs mishandling student disciplinary issues.[142]

If schools do decide to rely on SROs, school administrators should urge SROs to enter into memorandums of understanding (MOUs), preferably before SROs begin regularly patrolling school grounds, to clearly establish

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136. *See* Nance, *supra* note 1.

137. See Nance, *supra* note 1, for a complete description and analysis of this empirical study.

138. *See* Brown, *supra* note 131.

139. *See* Nance, *supra* note 1.

140. Brown, *supra* note 131, at 591–92.

141. Nance, *supra* note 1. The United States Department of Justice recently investigated the Ferguson Missouri Police Department and concluded the following:

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

U.S. DEP'T OF JUSTICE CIVIL RIGHTS DIV., INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT 38 (2015).

142. *See supra* notes 1–12; *see also* SHAKTI BELWAY, S. POVERTY LAW CTR., ACCESS DENIED: NEW ORLEANS STUDENTS AND PARENTS IDENTIFY BARRIERS TO PUBLIC EDUCATION 4, 6 (2010), https://www.splcenter.org/sites/default/files/d6_legacy_files/downloads/publication/SPLC_repo rt_Access_Denied.pdf; Kaitlin Banner, *Breaking the School-to-Prison Pipeline: New Models for School Discipline and Community Accountable Schools*, *in* A NEW JUVENILE JUSTICE SYSTEM: TOTAL REFORM FOR A BROKEN SYSTEM, *supra* note 29, at 301, 302–03 (describing other events of SROs mishandling student disciplinary issues).

that SROs should not become involved in routine disciplinary matters.[143] The U.S. Department of Education, the U.S. Department of Justice, the Congressional Research Service, the National Association for School Resource Officers, the American Civil Liberties Union, and several states all support the use of MOUs if schools rely on SROs.[144] Importantly, a report evaluating several SRO programs observed that "[w]hen SRO programs fail to define the SROs' roles and responsibilities in detail before—or even after—the officers take up the posts in the schools, problems are often rampant—and may last for months and even years."[145]

Further, school officials must insist that SROs working in their schools receive specialized training on adolescent behavior and how to work effectively with children, especially children with disabilities.[146] SROs must learn to employ effective de-escalation techniques, learn a range of non-punitive methods to curb student misbehavior, and comprehend how to choose the least coercive measure when students violate school rules.[147] SROs must be taught to leave routine disciplinary matters to educators and to invoke their law enforcement authority only as a last resort to protect others from harm.[148]

2. Zero Tolerance Policies

States and local school districts should also eliminate zero-tolerance policies. Zero-tolerance policies refer to policies that require school officials

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143. *See* Statement of Interest of the United States at 13–14, S.R. v. Kenton Cty., No. 2:15-CV-143 (E.D. Ky. Oct. 2, 2015); CATHERINE Y. KIM & I. INDIA GERONIMO, ACLU, POLICING IN SCHOOLS: DEVELOPING A GOVERNANCE DOCUMENT FOR SCHOOL RESOURCE OFFICERS IN K–12 SCHOOLS 5 (2009); U.S. DEP'T OF EDUC., GUIDING PRINCIPLES: A RESOURCE GUIDE FOR IMPROVING SCHOOL CLIMATE AND DISCIPLINE 9–10 (2014) [hereinafter GUIDING PRINCIPLES]; Nance, *supra* note 1.

144. *See* IND. CODE § 20-26-18.2-2 (2013); MD. CODE ANN., EDUC. § 26-102 (West 2003); 22 PA. CODE § 10.11 (2012); TEX. EDUC. CODE ANN. § 37.0021 (West 2011); JAMES & MCCALLION, *supra* note 128, at 11; KIM & GERONIMO, *supra* note 143, at 12–13; RAYMOND, *supra* note 128, at 30 ("An operating protocol or memorandum of understanding is a critical element of an effective school-police partnership."). Lisa H. Thurau & Johanna Wald, *Controlling Partners: When Law Enforcement Meets Discipline in Public Schools*, 54 N.Y.L. SCH. L. REV. 977, 991 (2010) ("[T]he National Association of School Resource Officers ("NASRO") strongly recommends the use of MOUs.").

145. PETER FINN ET AL., COMPARISON OF PROGRAM ACTIVITIES AND LESSONS LEARNED AMONG 19 SCHOOL RESOURCE OFFICER (SRO) PROGRAMS 2 (2005).

146. *See* Statement of Interest of the United States at 13–15, S.R. v. Kenton Cty., No. 2:15-CV-143 (E.D. Ky. Oct. 2, 2015); Nance, *supra* note 1.

147. *Id.* at 13–14.

148. *See id.*; *see also* GUIDING PRINCIPLES, *supra* note 143, at 7–8; U.S. DEP'T OF JUSTICE CIVIL RIGHTS DIV., *supra* note 141, at 37–38.

to apply predetermined consequences, such as suspension or expulsion, regardless of the situational context, mitigating circumstances, or the seriousness of the offense.[149] Many states and school districts modeled their zero-tolerance policies after the Federal Gun-Free Schools Act of 1994, which, as a condition for receiving federal education funds, requires states to pass a law compelling schools to expel students for at least one year for bringing a firearm on school grounds.[150] States and school districts have applied the concept of zero tolerance to many types of offenses, including possession of drugs, tobacco, or alcohol; fighting; tardiness; truancy; and dress-code violations.[151]

Scholars, youth advocacy groups, the American Bar Association, and many other agencies and organizations have strongly criticized zero-tolerance policies, concluding that they are counterproductive and inconsistent with a healthy school climate.[152] Yet, despite the fact that there is no evidence that zero-tolerance policies help create safer learning climates,[153] too many schools still rely on them, creating conditions whereby more students become involved in the criminal justice system.[154] Notably, the U.S. Department of Education recently stated that the Gun-Free Schools Act "does not require that states or schools implement wide-ranging zero-tolerance policies or rely on exclusionary discipline for any other types of student misconduct [outside of bringing a firearm to school.]"[155]

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149. *See* Am. Psychol. Ass'n Zero Tolerance Task Force, *Are Zero Tolerance Policies Effective in the Schools? An Evidentiary Review and Recommendations*, 63 AM. PSYCHOLOGIST 852, 852 (2008) [hereinafter *Are Zero Tolerance Policies Effective in Schools?*].

150. *See* 20 U.S.C.A. § 7961(b)(1) (2015). However, the law also permits superintendents to modify the expulsion requirement on a case-by-case basis. *See id.*

151. *See* KIM ET AL., *supra* note 18, at 80.

152. *See, e.g.*, *Are Zero Tolerance Policies Effective in Schools?*, *supra* note 149, at 853–54 (explaining that the research available on zero tolerance overwhelmingly contradicts the assumptions on which those policies are based); Black, *supra* note 82, at 837–41 (explaining that zero tolerance policies have not achieved their intended purpose); Am. Bar Ass'n, *School Discipline "Zero Tolerance" Policies*, (Feb. 2001), http://www.americanbar.org/groups/child_law/tools_to_use/attorneys/school_disciplinezerotole rancepolicies.html (opposing zero tolerance policies).

153. *See* ARRESTING DEVELOPMENT, *supra* note 4, at 10; LOSEN & GILLESPIE, *supra* note 17, at 14 (arguing that after four years of relying on zero tolerance policies, schools that had zero tolerance policies were less safe than others that did not have them); *Are Zero Tolerance Policies Effective in the Schools?*, *supra* note 149, at 857 (stating that "zero tolerance policies have not provided evidence that such approaches can guarantee safe and productive school climates"); Krezmien et al., *supra* note 89, at 274.

154. *See* KIM ET AL., *supra* note 18, at 78.

155. GUIDING PRINCIPLES, *supra* note 143, at 15.

3. Other Strict Security Measures

Schools should also scale back or eliminate altogether their use of metal detectors, drug-sniffing dogs, drug testing, and random searches of students' lockers, personal belongings, and persons. Not only is there considerable doubt regarding the effectiveness of such methods,[156] but such methods undermine the climate of trust necessary for a healthy school environments,[157] which may lead to additional violence and disorder.[158] Scholars Matthew Mayer and Peter Leone conducted an empirical study on data from almost 7,000 students and observed that schools' use of metal detectors, locked doors, locker searches, and security guards was associated with higher levels of school disorder, crime, and violence.[159] These scholars concluded that "less attention should be paid to running schools in an overly restrictive manner and rather, schools should concentrate more on communicating individual responsibility to students . . . [because] . . . the data may suggest that disorder and restrictive management of the school premises may go hand in hand and may feed off each other."[160]

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156. *See* THE ADVANCEMENT PROJECT, *supra* note 39, at 8 (explaining that strict security measures "produce a perception of safety, [but] there is little or no evidence that they create safer learning environments or change disruptive behaviors"); John Blosnich & Robert Bossarte, *Low-Level Violence in Schools: Is There an Association Between School Safety Measures and Peer Victimization?*, 81 J. SCH. HEALTH 107, 107 (2011) (finding that school security measures did not reduce violent behaviors related to bullying); Abigail Hankin et al., *Impacts of Metal Detector Use in Schools: Insights from 15 Years of Research*, 81 J. SCH. HEALTH 100, 105 (2011) (concluding that, after reviewing several empirical studies examining the effectiveness of metal detectors, that there is insufficient evidence to demonstrate whether metal detectors reduces school violence); Mayer & Leone, *supra* note 69, at 350, 352 (concluding that student disorder and victimization were higher in schools using strict security measures than in schools that did not rely on these measures); Richard E. Redding & Sarah M. Shalf, *The Legal Context of School Violence: The Effectiveness of Federal, State, and Local Law Enforcement Efforts to Reduce Gun Violence in Schools*, 23 L. & POL'Y 297, 319 (2001) ("It is hard to find anything better than anecdotal evidence" to demonstrate that strict security measures such as metal detectors and guards reduce violence in schools). *But see* Ctrs. for Disease Control and Prevention, *Violence-Related Attitudes and Behaviors of High School Students—New York City, 1992*, 42 MORBIDITY & MORTALITY WKLY. REP. 773, 774 (1993) (reporting that students attending schools using metal detectors were less likely to carry a weapon inside a school (7.8% versus 13.6%), but the use of metal detectors did not reduce school violence); Renee Wilson-Brewer & Howard Spivak, *Violence Prevention in Schools and Other Community Settings: The Pediatrician as Initiator, Educator, Collaborator, and Advocate*, 94 PEDIATRICS 623, 626–27 (1994) (maintaining that one school system in New York City reported that after the school security staff began using hand-held metal detectors to conduct unannounced lobby searches of students at the beginning of the school day, weapon-related incidents decreased in thirteen of fifteen schools).

157. *See supra* note 68.

158. *See supra* note 69.

159. *See* Mayer & Leone, *supra* note 69, at 333, 349.

160. *Id.* at 351.

4. Suspending, Expelling, or Referring Students to Law Enforcement

Finally, schools should dramatically scale back the number of students they suspend, expel, or refer to law enforcement. While there may be limited circumstances when it is appropriate to exclude a student from school, under many schools' current policies, students are suspended, expelled, or referred to law enforcement for offenses that are not considered dangerous.[161] As explained more fully above, excluding students from school has serious repercussions. Students fall behind in school, are more likely to engage in further delinquent behavior, are less likely to graduate, commit a crime, get arrested, and become incarcerated.[162] The U.S. Department of Education recently urged school districts to "reserve the use of out-of-school suspensions, expulsions, and alternative placements for the most egregious disciplinary infractions that threaten school safety and when mandated by federal or state law."[163]

Moreover, while excluding disruptive students from school may temporarily quiet the environment, empirical studies demonstrate that schools that overly rely on such punitive measures often impede the learning climate in the long run by alienating students and creating mistrust, which may lead to more disorder and reduced academic achievement.[164] In an empirical study of the Chicago Public Schools, scholars Matthew Steinberg, Elaine Allensworth, and David Johnson found that after controlling for the community and school contextual variables, teachers and students reported lower levels of perceived safety in schools with higher suspension rates.[165] They conclude:

> Although we are not claiming a causal connection, this finding
> suggests that high suspension rates do not sufficiently address the

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161. ARRESTING DEVELOPMENT, *supra* note 4, at 6, 10 (reporting that during the 2004–2005 school year in Florida, 76% of school-based referrals to law enforcement were for misdemeanor offenses such as disorderly conduct*)*; EDUCATION UNDER ARREST, *supra* note 14, at 14–15 (explaining that in 2007–2008, 96% of school-based referrals in Birmingham, Alabama were for misdemeanors); FABELO ET AL., *supra* note 43, at 37 fig.6 (reporting that 97% of suspensions and expulsions in Texas resulted from offenses that did not require suspension or expulsion under law, such as offenses involving weapons, drugs, aggravated assault, or sexual assault); Losen, *supra* note 67, at 54–55 (arguing that the vast majority of suspensions and expulsions are for relatively minor offenses).

162. *See supra* Part I.A. *See also* Losen, *supra* note 67, at 55–56.

163. GUIDING PRINCIPLES, *supra* note 143, at 15.

164. *See supra* Part I.A; *see also* Jonathan Cohen et al., *School Climate: Research, Policy, Practice, and Teacher Education*, 111 TEACHER C. REC. 180, 181 (2009) (finding that positive school climates are related to student academic achievement, safe learning environments, healthy student development, and teacher retention).

165. Steinberg, Allensworth & Johnson, *supra* note 19, at 127–29.

problems that schools face—schools with high suspension rates are still less safe than others that serve students with similar backgrounds in similar neighborhoods. At worst this suggests that suspensions themselves can aggravate the problems with safety. . . . Through their disciplinary practices, schools serving schools from high-crime/high-poverty neighborhoods might unwittingly be exacerbating their low levels of safety.[166]

Scholars Brea Perry and Edward Morris examined the relationship between exclusionary discipline practices and student achievement by analyzing data from approximately 17,000 middle school and high school students attending seventeen schools in Kentucky.[167] Strikingly, they found that high levels of exclusionary discipline were associated with lower levels of reading and math achievement among *non-suspended students*, even after accounting for other factors that might explain lower academic achievement such as the overall levels of school violence, school disorganization, and school demographics.[168] Perhaps even more strikingly, this negative relationship is strongest in schools that report low levels of violence, even though this negative relationship is also present in disorganized schools and in schools that report high levels of violence.[169] Perry and Morris conclude that their findings support the theory that an overly punitive school environment "jeopardizes student success," even among well-behaved students, "destabilizes school communities," and "fosters anxiety and distrust" among its members.[170]

B.   *Replace Harsh Disciplinary Measures with Evidence-Based Practices that Improve the Learning Climate and Enhance Safety*

When schools scale back or eliminate harsh disciplinary methods, it is absolutely critical to replace those measures with evidence-based practices that will improve the learning climate and enhance school safety. Indeed, school administrators and teachers must be well equipped to handle disruptive students and maintain an appropriate learning environment for their own well-being as well as for all benefit of all members of the school community. The initiatives described below will not work for every student

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166. *Id.* at 128–29.
167. Perry & Morris, *supra* note 69, at 1072.
168. *Id.* at 1076–84.
169. *Id.* at 1081.
170. *Id.* at 1084.

and may not be successful at every school. Nevertheless, empirical studies have demonstrated their effectiveness in a variety of school settings.[171]

It is also important to emphasize that administrators and teachers in a school district will achieve greater success when using these practices if they apply them at all grade levels and in all settings in a consistent manner for an extended period of time. Schools can apply all of these initiatives at the same time, introduce them one at a time, or apply them selectively as needed. Further, schools can apply these methods without drastically increasing their expenditures. Indeed, by shifting and prioritizing their resources, most schools should be in a position to implement many of these practices immediately.

1.   Improve Classroom Instruction and Management Skills of Teachers

Perhaps the most important initiative that lawmakers can support and educators can implement to enhance the learning environment and school safety without resorting to extreme disciplinary measures is to improve the strength and quality of classroom activities and the classroom management skills of teachers.[172] Although educators frequently blame only the students themselves for student misbehavior, researchers consistently observe that students who misbehave in one classroom behave very well in another classroom.[173] In fact, it is well documented that behavioral problems often correlate to teachers' ability to manage a classroom and engage the students in productive activities.[174]

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171. *See infra* Part II.B.1–5.

172. *See* David Osher et al., *How Can We Improve School Discipline?*, 39 EDUC. RESEARCHER 48, 48–49 (2010).

173. *See* LOSEN & GILLESPIE, *supra* note 17, at 32.

174. LOSEN, *supra* note 98, at 1; (explaining that good teachers "are able to diffuse disruptive and disobedient behavior quickly, without relying on an office discipline referral that excludes a student from the classroom"); STEINBERG ET AL., *supra* note 61, at 46; Anne Gregory et al., *The Promise of a Teacher Professional Development Program in Reducing Racial Disparity in Classroom Exclusionary Discipline*, *in* CLOSING THE SCHOOL DISCIPLINE GAP: EQUITABLE REMEDIES FOR EXCESSIVE EXCLUSION, *supra* note 19, at 166, 166–67 ("Research has shown that engaging and motivating students can prevent students from disrupting class in the first place."); Osher et al., *supra* note 172, at 49; (empirically demonstrating that disengaged students were more likely to receive disciplinary referrals); Ivory A. Toldson et al., *Reducing Suspensions by Improving Academic Engagement Among School-Age Black Males*, *in* CLOSING THE SCHOOL DISCIPLINE GAP: EQUITABLE REMEDIES FOR EXCESSIVE EXCLUSION, *supra* note 19, at 107, 110–11. Relatedly, as explained in Part I.B, *supra*, there is also a correlation between academic achievement and delinquent behavior, whereby low-performing students are more likely to be frustrated in the classroom and misbehave. *See* STEINBERG ET AL., *supra* note 61, at 46; Kent

When teachers employ a varied-instructional approach that incorporates activities that target different learning styles and students' needs; capture the students' interests by making the material relevant to their lives; help students understand what is possible through cooperation and coordinated action with others; and have supportive, caring environments with clear behavioral expectations, teachers experience far fewer behavioral problems.[175] This is the type of learning environment that gives students a sense of purpose and commitment and helps them understand that the educational process is a pathway to a better, happier, and more productive life. As Jason Fink, a spokesman for the New York City Department of Education, recently observed, "[s]tudents learn best when they are being actively engaged in a supportive environment, not when they are worried about getting suspended for any minor incident."[176]

Importantly, educators want more training in these areas. In 2006, 2,334 teachers from forty-nine states and the District of Columbia responded to a survey administered by the American Psychological Association to gather information for designing teacher professional development activities.[177] Those teachers indicated that their greatest professional development needs included ways to strengthen their instructional and classroom management skills.[178] Encouragingly, there is ample research suggesting that teachers benefit from classroom management and curriculum instruction and display more confidence in the classroom when they receive such support.[179]

McIntosh et al., *Kindergarten Reading Skill Level and Change as Risk Factors for Chronic Problem Behavior*, 14 J. POSITIVE BEHAV. INTERVENTIONS 17, 17–18 (2012).

175. MICHAEL ESKENAZI ET AL., EQUITY OR EXCLUSION: THE DYNAMICS OF RESOURCES, DEMOGRAPHICS, AND BEHAVIOR IN THE NEW YORK CITY PUBLIC SCHOOLS 2 (2003) (maintaining that teacher qualifications have a strong positive effect on student behavior); BARBARA FEDDERS ET AL., SCHOOL SAFETY IN NORTH CAROLINA: REALITIES, RECOMMENDATIONS & RESOURCES 8–14 (May 2013); LOSEN & GILLESPIE, *supra* note 17, at 35–37 (2012); Osher et al., *supra* note 172, at 49.

176. Berwick, *supra* note 61.

177. *See* COAL. FOR PSYCHOLOGY IN SCH. AND EDUC., AM. PSYCHOLOGICAL ASS'N, REPORT ON TEACHER NEEDS SURVEY 7 (2006).

178. *Id.* at 35.

179. *See* Jamilia J. Blake et al., *Challenging Middle-Class Notions of Femininity: The Cause of Black Females' Disproportionate Suspension Rates*, *in* CLOSING THE SCHOOL DISCIPLINE GAP: EQUITABLE REMEDIES FOR EXCESSIVE EXCLUSION, *supra* note 19, at 75, 85; Gregory et al., *supra* note 174, at 169, 177 (reporting that when teachers participated in a professional development program to improve classroom organization, instruction, and emotional support, exclusionary student referrals decreased); Elizabeth Green, *Building a Better Teacher*, N.Y. TIMES (Mar. 2, 2010), http://www.nytimes.com/2010/03/07/magazine/07Teachers-t.html?_r=0 (discussing classroom management techniques that can applied by almost any teacher at almost any teaching level to improve student discipline).

Very recently, the Century Foundation released a report detailing how low-performing schools serving high concentrations of students from low-income households created safer, stronger learning environments to increase academic achievement.[180] Schools that created stronger learning climates and improved academic achievement had "an intensive focus on improving classroom instruction through ongoing, data-driven collaboration, led largely by teachers with oversight from the principal."[181] According to this report, successful schools had school administrators that articulated a clearly-defined vision for improving instruction and could communicate priorities to teachers, students, and other members of the school community.[182] Then, in a collaborative fashion, teachers developed plans that detailed how they would improve academic instruction and what type of professional development they would receive.[183] They also effectively leveraged data using formal and informal assessment to identify the instructional needs of the students and determined areas where teachers needed professional development.[184] Further, successful schools restructured the school day to allocate time to provide individualized tutoring to struggling students and permit teachers to share and review their instructional strategies with an eye towards improvement.[185] Successful schools also shifted the behavioral management of delinquent students from administrators to behavior specialists, counselors, and mentors to allow school administrators to focus on improving instruction in the school.[186]

To provide a concrete example, principal Ken Parshall worked with his teachers and staff to turnaround McKay High School, a low-performing school in Salem, Oregon, that was located in a neighborhood infested with active gangs.[187] Students at McKay were mostly Hispanic, came from low-income households, and were frequent perpetrators and victims of crime.[188] The percentage of McKay students who had parents who were incarcerated was higher than for students at any other school in Oregon.[189] In addition, McKay's expulsion rate was high, its graduation rate was low, and student

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180. *See* GREG ANRIG, CENTURY FOUND., LESSONS FROM SCHOOL IMPROVEMENT GRANTS THAT WORKED 1–3 (2015), http://www.tcf.org/assets/downloads/Anrig_LessonsFromSchoolImprovementGrants.pdf.

181. *Id.* at 2.

182. *Id.* at 9.

183. *Id.* at 8.

184. *Id.* at 9.

185. *Id.* at 8.

186. *Id.* at 11.

187. *Id.*

188. *Id.*

189. *Id.*

test scores were consistently poor.[190] Yet, in just four short years, students who met or exceeded standards on the state assessment test increased from 50% to 87% in reading and from 48% to 85% in math, and their dropout rate was lower than any other large high school in Oregon.[191]

How did the educators at McKay High accomplish this? First, they consistently employed a "medical-rounds" classroom observational strategy to evaluate teachers' instructional skills, identify weaknesses, and provide support for strengthening their teaching skills.[192] Second, they formed professional learning community teams that met each morning for fifty minutes before classes to discuss student academic weaknesses using data and to share strategies to address those weaknesses.[193] Third, they developed a system to assist students who were struggling academically (and behaviorally) that included extra tutoring and summer school classes.[194] Finally, the school administrators shifted the behavioral management of troublesome students to behavioral specialists, counselors, and mentors so that administrators could focus on improving teacher instruction.[195]

2.   Provide Training to School Officials

Lawmakers and other high-level public education administrators also should not overlook the importance of providing more training to school administrators in their efforts to dismantle the school-to-prison pipeline. Training is critical so that school officials (1) become aware of and support the use of alternative methods to improve student behavior, and (2) understand the causes and consequences of involving more students in the justice system.[196] Substantial empirical research supports the expected conclusion that school leaders' mindset towards student discipline heavily influences how schools respond to student misbehavior.[197] Russell J. Skiba and his colleagues recently conducted an empirical analysis on a set of records from the State of Indiana Suspension and Expulsion database for the 2007–2008 school year.[198] Unsurprisingly, they report that students were more likely to receive an out-of-school suspension in schools led by a

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190. *Id.*
191. *Id.* at 12–3.
192. *Id.* at 11.
193. *Id.* at 11–12.
194. *Id.*
195. *Id.*
196. *See* Skiba et al., *supra* note 97, at 139, 141.
197. *See id.* at 132–34.
198. *See id.* at 135.

principal who believed that suspensions and expulsions were an important and inevitable part of disciplining students.[199] Along these same lines, Russell J. Skiba and his colleagues also report that in schools led by principals who had a mindset towards preventing student misbehavior using alternative methods, out-of-school suspensions were less common.[200]

In another recent study, Anna Heilbrun, Dewey Cornell, and Peter Lovegrove analyzed survey data from the 2012 Virginia School Safety Audit to measure whether principal attitudes towards zero-tolerance policies were associated with higher suspension rates.[201] Again, school suspensions were higher in schools led by principals who believed that zero-tolerance policies helped maintain an orderly environment.[202] These studies highlight an important component for reversing the school-to-prison pipeline that too often overlooked: it is critical to help school officials understand that there are better, more effective ways to create a strong learning environment than using exclusionary, punitive measures that end up funneling more students into the justice system.[203]

3.   Social and Emotional Learning

Another initiative that lawmakers can support and educators can implement are efforts targeted to help students (and teachers) develop emotional and social stability through social and emotional learning. Social and emotional learning helps students identify and manage emotions, empathize with others, develop positive relationships, develop respect towards members of different racial groups, make good decisions, and appropriately handle challenging interpersonal situations effectively.[204] When implemented effectively, such initiatives enable students to make responsible decisions grounded in moral reasoning and develop strong, positive attributes such as respect, resilience, self-understanding, and empathy, all of which are important to resolve personal conflicts

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199. *Id.* at 139.

200. *Id. See also* Russell J. Skiba et al., *Parsing Disciplinary Disproportionality: Contributions of Infraction, Student, and School Characteristics to Out-of-School Suspension and Expulsion*, 51 AM. EDUC. RES. J. 640, 657, 659–60 (2014).

201. Anna Heilbrun et al., *Principal Attitudes Regarding Zero Tolerance and Racial Disparities in School Suspensions*, 52 PSYCHOL. SCH. 489, 491 (2015).

202. *Id.* at 495.

203. *See* Skiba et al., *supra* note 97, at 141.

204. *See* 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, 406 (2011); David M. Osher et al., *Avoid Quick Fixes*, *in* CLOSING THE SCHOOL DISCIPLINE GAP: EQUITABLE REMEDIES FOR EXCESSIVE EXCLUSION, *supra* note 19, at 192.

appropriately and to bond with others, including those of other races.[205] As scholar Sharon Rush cogently explained, "we must begin to teach our children how to become authentic people—that is, people who respect the inherent dignity in others and strive to create a just society."[206]

While there are several different programs available to teach students social and emotional learning,[207] nearly all the initiatives share common features. These features include teaching students social and emotional learning lessons as a separate program or integrating those lessons into the existing curriculum; regular communication with the families of students so caregivers can reinforce the principles learned at school; and planning opportunities for students to apply and practice the moral competencies.[208] Importantly, social and emotional learning strategies are more successful when used in conjunction with the other strategies described elsewhere in this article, such as School-Wide Positive Behavior Interventions and Supports and strengthening classroom instruction and teachers' classroom management skills.[209]

A vital component to social and emotional learning includes "racial literacy"[210] or "race-relations intelligence."[211] Because race and racism hold a unique space in our nation and globally, it is crucial to understand racial dynamics in order to foster authentic inter-racial relationships.[212] As Sharon Rush points out, teachers can teach race-relations intelligence by using culturally-relevant curriculum, modeling antiracism in the classroom, teaching students of different races how to interact and relate to one another,

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205. *See* Osher et al., *supra* note 172, at 51.

206. SHARON E. RUSH, HUCK FINN'S "HIDDEN LESSONS": TEACHING AND LEARNING ACROSS THE COLOR LINE 121 (2006).

207. *See, e.g.*, Blake et al., *supra* note 179, at 85 (describing how mental health counselors can teach social and emotional learning to students); Osher et al., *supra* note 204, at 196–98 (describing an initiative to teach social and emotional learning called Promoting Alternative Thinking Strategies (PATH)).

208. Osher et al., *supra* note 172, at 51.

209. Osher et al., *supra* note 172, at 53. See *infra* Part II.B.4.b for a discussion on School-Wide Positive Behavior Interventions and Supports.

210. *See* 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) (arguing that legal equality granted through the courts is insufficient; rather, our nation must become more literate of how racism structures and narrates political, educational, and economic opportunities to mobilize people across all racial lines to work together collectively to extirpate racial inequalities).

211. RUSH, *supra* note 206, at 123–24 (emphasis omitted).

212. *Id.* at 124. But in order to teach race-relations intelligence, teachers need develop their own emotional intelligence towards race relations. *Id.* To do this effectively, it will require changes to our teacher certification programs, but school administrators can also provide professional development on this important topic.

and, most importantly, effectively conveying to students that respect and equality are fundamental attributes and that every student in the classroom is entitled to equal respect and dignity.[213]

Schools implementing social and emotional learning strategies have witnessed substantial improvements in student behavior.[214] Notable examples include schools residing in Cleveland Metropolis School District, in Cleveland, Ohio, a district that serves many students who confront high levels of long-term poverty, engage in risky and aggressive behavior, and have acute mental health needs.[215] After schools in Cleveland Metropolis School District administered a social and emotional learning program called Promoting Alternative Thinking Strategies (PATH), student attendance rates increased, suspensions declined, the number of violent incidents decreased, and the overall number of disciplinary incidents decreased.[216] In addition, schools demonstrated an improvement in a number of other important areas, including increases in student test scores, student social-emotional competencies, and student perceptions of safety, support, and respect at school.[217]

4. Improve the School Climate

It is also imperative for educators to improve their school climate. "School climate" refers to the degree to which a school community creates an environment that supports respectful, trusting, and caring relationships among school community members and that is conducive to academic achievement.[218] Not only are positive school climates associated with high levels of academic achievement, healthy student development, and teacher retention, but they are also associated with safe learning environments.[219] In 2001, the Office of Surgeon General released a report on youth violence in the United States which summarized an extensive body of research.[220] The Surgeon General concluded that to more effectively prevent violence in

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213. *Id.*; *see generally* HOWARD C. STEVENSON, PROMOTING RACIAL LITERACY IN SCHOOLS: DIFFERENCES THAT MAKE A DIFFERENCE (2014) (outlining ways to teach racial literacy in schools).

214. STEVENSON, *supra* note 213, at 50–53; Osher et al., *supra* note 172, at 52.

215. Osher et al., *supra* note 204, at 194–96.

216. *Id.* at 198–202.

217. *Id.*

218. *See* GUIDING PRINCIPLES, *supra* note 143, at 5.

219. *See* Cohen et al., *supra* note 164; *see also* AMRIT THAPA ET AL., SCHOOL CLIMATE RESEARCH SUMMARY 3–4 (2012).

220. *See* U.S. DEP'T OF HEALTH & HUMAN SERVICES, YOUTH VIOLENCE: A REPORT OF THE SURGEON GENERAL 9 (2001).

schools, it is better to focus on improving the social context of the schools rather than attempting to change the individual students' attitudes and risk behaviors.[221] After the tragic school shootings at Columbine High School in Littleton, Colorado, the U.S. Secret Service and the U.S. Department of Education embarked on a joint study to better understand and attempt to prevent school violence.[222] They concluded that a central component for creating a safe school environment is to strengthen the school's climate by creating positive connections among students and between adults and students.[223] They found that in safe schools, students and adults respect diversity, differences, and each another; there are places for open discussions; and when conflict arises, educators constructively manage it and mediate it.[224] Likewise, in a comprehensive study of school safety in the Chicago Public School System, scholars Matthew Steinberg, Elaine Allensworth, and David Johnson discovered that what defines a safe school most strongly, even in areas of high crime and poverty, is "the quality of relationships between staff and students and between staff and parents."[225]

All of these comprehensive studies highlight the same underlying principles: schools can maintain orderly, safe environments conducive to learning by strengthening relationships among members of the school community, improving positive communication, and teaching students and educators how to resolve conflict constructively. Below are two specific initiatives that schools can adopt to achieve these ends.

a. *Restorative Justice*

Restorative justice is a philosophy that puts the relationships of the members of the school community at the center of students' educational experience.[226] It focuses on the harms that result from student misbehavior,

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221. *Id.* at 13.

222. *See* ROBERT A. FEIN ET AL., U.S. DEP'T OF EDUC., THREAT ASSESSMENT IN SCHOOLS: A GUIDE TO MANAGING THREATENING SITUATIONS AND TO CREATING SAFE SCHOOL CLIMATES ii, 3 (2004).

223. *Id.* at 11–12.

224. *Id.*

225. STEINBERG ET AL., *supra* note 61, at 1; *see also* Mark T. Greenberg et al., *Enhancing School-Based Prevention and Youth Development Through Coordinated Social, Emotional, and Academic Learning*, 58 AM. PSYCHOLOGIST 466, 468, 470 (2003) (finding that schools can successfully improve student behavior by creating caring communities, enhancing the school climate, and by building trust among school staff, families and students); Steinberg, Allensworth & Johnson, *supra* note 19, at 126 (reporting that school leadership, teacher collaboration, school-family interactions, and student-teacher relationships explained 80% of the variance associated with school safety as reported by students and teachers).

226. *Restorative Discipline in Schools*, INST. FOR RESTORATIVE JUST. & RESTORATIVE DIALOGUE, http://irjrd.org/restorative-discipline-in-schools/ (last visited June 25, 2016); *see also*

the causes of student misbehavior, and the needs of all of the students involved.[227] It seeks to repair harms, engage victims, establish accountability, strengthen the school community, and prevent future harm.[228] At the same time, this approach aims to change behavior, enhance school safety, and improve graduation rates.[229] Thus, rather than excluding the student from the school community for misbehaving, which potentially can cause resentment, disrupt that student's educational progress, and lead to recidivism and dropping out of school, one of the primary goals of restorative justice is to integrate the offender back into the school community as a productive member.[230] Marilyn Armour, Director of the Institute for Restorative Justice and Restorative Dialogue at the University of Texas at Austin, has described restorative practices as "a relational approach to building school climate and addressing student behavior that fosters belonging over exclusion, social engagement over control, and meaningful accountability over punishment."[231]

In essence, restorative justice practices are conflict resolution tools that involve victims, offenders, and other members of the school community.[232] While the traditional punitive model focuses on the rules that were broken, who broke the rules, and the appropriate punishment, restorative practices focus on the harm that was caused and to whom, the current needs that have resulted from the harm, and who should address those needs, repair the harms, and restore relationships.[233] Using formal and informal conferences, or "restorative circle" groups, victims share with offenders how they have been harmed by the offender's behavior, offenders have opportunities to apologize to the victims, and, with the help of the victims and the other members of the school community, conference participants devise remedies

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Thalia González, *Socializing Schools: Addressing Racial Disparities in Discipline Through Restorative Justice*, *in* CLOSING THE SCHOOL DISCIPLINE GAP: EQUITABLE REMEDIES FOR EXCESSIVE EXCLUSION, *supra* note 19, at 151, 151–53.

227. *See supra* note 226.

228. *See* Thalia N. C. González & Benjamin Cairns, *Moving Beyond Exclusion: Integrating Restorative Practices and Impacting School Culture in Denver Public Schools*, *in* JUSTICE FOR KIDS: KEEPING KIDS OUT OF THE JUVENILE JUSTICE SYSTEM 241, 241–42 (Nancy E. Dowd ed., 2011); *see also* González, *supra* note 226, at 151–53.

229. González & Cairns, *supra* note 228, at 241.

230. *Id.* at 243–44, 246.

231 Marilyn Armour, *Restorative Practices: Righting the Wrongs of Exclusionary School Discipline*, 50 U. RICH. L. REV. 999, 1019 (2016).

232. ODI OFER ET AL., N.Y. CIVIL LIBERTIES UNION, SAFETY WITH DIGNITY: ALTERNATIVES TO THE OVER-POLICING OF SCHOOLS 18 (Jennifer Carnig et al. eds., 2009).

233. Armour, *supra* note 231, at 1018.

for the harmful behavior.[234] For example, after a physical altercation between students, instead of suspending, expelling, or referring the students involved to law enforcement, those students would receive the opportunity to sit down together with their parents or guardians, their teachers, and school administrators to explore the reasons for fighting, the harm it caused, and how to repair the harm.[235] Participation in such an activity teaches students to share their feelings in response to other students' misbehavior, which can humanize victims, teach offenders how their actions affect other members of the school community, and give students a voice.[236] This multifaceted dialogue facilitates understanding, fosters social engagement, and supports relationship-building, all of which enhance school culture.[237]

While restorative justice has been used successfully by schools around the globe, including in Australia, New Zealand, Canada, England, Wales, and the United States, implementing restorative justice requires a consistent effort and commitment from school board members, school district administrators, principals, teachers, and other key members of the school community over an extended period of time before students begin to see its value and school climate begins to improve.[238] To be sure, cultural change does not happen quickly and, thus, educators must adopt a long-term mindset and be prepared to exert sustained efforts for perhaps three to five years before they witness a visible cultural shift.[239] Further, unless educators are properly trained and committed, restorative justice initiatives most likely will fail.[240]

Schools around the world have enjoyed success using restorative justice. For example, in a study evaluating the effects of implementing restorative

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234. Laura Mirsky, *Building Safer, Saner Schools*, 69 EDUC. LEADERSHIP 45, 45–49 (2011); *see also* JESSICA ASHLEY & KIMBERLY BURKE, IMPLEMENTING RESTORATIVE JUSTICE: A GUIDE FOR SCHOOLS 11–12 (2009); *cf.* Jonathan R. Cohen, *Advising Clients to Apologize*, 72 S. CAL. L. REV. 1009, 1015–23 (1999) (explaining that apology and forgiveness can be value-creating by preventing antagonistic behavior, repairing damaged relationships, and fostering paths for spiritual and psychological growth).

235. González & Cairns*, supra* note 228, at 242.

236. *Id.* at 241.

237. *Id.* at 243.

238. *See* Gillean McCluskey et al., *'I Was Dead Restorative Today': From Restorative Justice to Restorative Approaches in School*, 38 CAMBRIDGE J. EDUC. 199, 199 (2008); *see also* González & Cairns, *supra* note 228, at 245; *Restorative Discipline in Schools*, *supra* note 226.

239. *See* González & Cairns, *supra* note 228, at 245 ("Schools should envision a three-to-five-year implementation plan.").

240. *See, e.g.*, Eric Westervelt, *An Alternative to Suspension and Expulsion: 'Circle Up!'*, NPRED (Dec. 17, 2014, 3:42 AM), http://www.npr.org/sections/ed/2014/12/17/347383068/an-alternative-to-suspension-and-expulsion-circle-up (describing a school attempting to implement restorative justice failed without teacher buy-in and proper training); *see also Restorative Discipline in Schools*, *supra* note 226.

justice in multiple schools in England, researchers found that restorative justice improved student behavior, student relationships, overall school climate, and reduced the number of student exclusions.[241] In a study of eighteen schools located in Scotland, researchers found that fourteen out of eighteen schools made significant progress towards helping members of the school community develop an increased sense of safety and belonging, a greater respect for others and themselves, and more meaningful, positive relationships with others.[242]

In the United States, the school climate at West Philadelphia High School, one of Pennsylvania's most dangerous schools, improved significantly after implementing restorative justice initiatives. One year after implementing restorative justice, violent acts and other serious incidents declined by 52%.[243] After the second year of implementation, violent acts and other serious incidents declined by another 40%.[244] At Cole Middle School in Oakland, California, within three years of implementing restorative justice, suspensions declined by 87%, and Cole Middle School did not have a single expulsion.[245] After implementing restorative justice, Ed White Middle School in San Antonio, Texas experienced an 84% drop in off-campus suspension; a 30% drop in the use of in-school suspensions lasting one-to-three days; reductions in all suspension rates and placements in alternative education programs; and higher test scores.[246] In Denver, Colorado, after introducing restorative justice, several schools significantly reduced the number of office referrals and out-of-school suspensions, decreased the number of student absences and tardies, and many students perceived an improvement in their ability to resolve interpersonal conflicts.[247] Also in Denver, after implementing restorative justice, North High School's out-of-school suspensions declined by 39%, referrals to law enforcement declined by 15%,

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241. *See* YOUTH JUSTICE BD. FOR ENG. & WALES, NATIONAL EVALUATION OF THE RESTORATIVE JUSTICE IN SCHOOLS PROGRAMME 37–59 (2004); *see also* McCluskey et al., *supra* note 238, at 200 (observing that many schools report the positive effects of restorative justice on school climate).

242. McCluskey et al., *supra* note 238, at 207–12.

243. *See* INT'L INST. FOR RESTORATIVE PRACTICES, IMPROVING SCHOOL CLIMATE: FINDINGS FROM SCHOOLS IMPLEMENTING RESTORATIVE PRACTICES 7 (2009), http://www.iirp.edu/pdf/IIRP-Improving-School-Climate-2009.pdf.

244. *Id.*

245. *See Bye, Bye Suspensions: Oakland Schools Change the Way They Punish Students*, YAHOO! NEWS (Sept. 18, 2012, 5:44 PM), http://news.yahoo.com/bye-bye-suspensions-oakland-schools-change-way-punish-214400446.html.

246. MARILYN ARMOUR, ED WHITE MIDDLE SCHOOL RESTORATIVE DISCIPLINE EVALUATION: IMPLEMENTATION AND IMPACT 23–30 (2013).

247. *See* MYRIAM L. BAKER, DPS RESTORATIVE JUSTICE PROJECT: YEAR THREE 9–17 (2009).

and expulsions declined by 82%.[248] Further, North High School experienced fewer fights and enjoyed a drop in overall violent and other antisocial forms of conflict.[249]

One seventeen-year-old female African-American student in New Orleans explains how restorative justice circles changed her life:

> I've been going to school for 11 years and . . . did I used to get suspended a lot! . . . Suspensions are so bad for students because you miss school, you miss your education and it's impossible to catch up . . . . I haven't given up because my school started doing [restorative justice] circles. Things changed for me. I haven't been suspended for a long time.
>
> Circles are like this: You sit around and talk about the root of the problems, the reasons why you do things that could get you suspended. You feel nervous, really nervous. One of the important rules is that you have to listen respectfully when the others are talking. You can't talk when someone is telling their side of the story. When you listen, you find out sometimes people aren't who you thought they were. So many times when you find out who people really are, you can avoid a fight or a conflict.
>
> I had a circle with all of my teachers. I was having a really hard time with my behavior, with following the rules. The way the teachers talked to me set me off. We had a circle and I talked to them. I told them about where I come from, why things bother me. I told them who I was. My teachers learned about me and about how they can help me. In the end we signed a contract. I agreed to follow the rules. They agreed to talk to me respectfully. Together we developed a plan and it really worked.
>
> People need to know these circles work. They help a lot of students, make us safer and make the school a better place. And fewer students get suspended. Circles can help a lot of problems in schools and I hope every school starts to use them.[250]

b. *School-Wide Positive Behavior Interventions and Supports*

Schools can also improve their school climates by embracing another program called School-Wide Positive Behavior Interventions and Supports (SWPBIS), which has been implemented in thousands of schools across the

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248. *See* González & Cairns, *supra* note 228, at 253.

249. *Id.* Notably, New York City's Department of Education recently allocated $1.2 million to expand restorative justice in their schools. *See* Berwick, *supra* note 61.

250. BELWAY, *supra* note 142, at 5.

nation.[251] This program involves strategies for fostering positive student behavior to help create a strong learning environment for an entire system.[252] In essence, it is a decision-making framework to help educators select and apply evidence-based practices aimed at improving student behavior and academic achievement.[253] Relying on this program, educators use data to develop a set of behavior interventions; create an environment to prevent problems from developing; teach, model, practice, and reward students for appropriate behavior; apply the behavioral practice consistently on a system-wide level; establish accountability; and monitor progress.[254] It is worth emphasizing that, to be successful, educators should apply this program district-wide—at all grade levels and all schools over an extended period of time—so positive behavior is taught, retaught, and reinforced repeatedly from the time the student first enters the school district until the student graduates.

SWPBIS consists of a multi-tiered approach to develop positive student behavior and a strong school climate.[255] In the first tier, educators provide a system-wide set of prevention strategies for all members of the school community.[256] To successfully promote positive student behavior, all members of the school community consistently define, encourage, teach, model, practice, monitor, acknowledge, reward, and reinforce positive behavior.[257] It is crucial for educators to devote a significant amount of time at the beginning of the school year to teach and model good behavior, then

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251. *See* Catherine P. Bradshaw et al., *Examining the Effects of Schoolwide Positive Behavioral Interventions and Supports on Student Outcomes*, 12 J. POSITIVE BEHAV. INTERVENTIONS 133, 134 (2013).

252. *What is School-Wide PBIS?*, POSITIVE BEHAVIORAL INTERVENTIONS & SUPPORTS, http://www.pbis.org/school/default.aspx (last visited Mar. 20, 2016); *see also* Matthew J. Mayer & Peter E. Leone, *School Violence and Disruption Revisited: Equity and Safety in the School House*, 40 FOCUS ON EXCEPTIONAL CHILD. 1, 13 (2007) (maintaining that SWPBIS can "transform[] the school environment to support overall student success, behaviorally, socially, and academically").

253. *See PBIS FAQs*, POSITIVE BEHAVIORAL INTERVENTIONS & SUPPORTS, https://www.pbis.org/school/swpbis-for-beginners/pbis-faqs (last visited Mar. 20, 2016); *see also* Nance, *supra* note 63, at 30.

254. *See also* Claudia G. Vincent et al., *Effectiveness of Schoolwide Positive Behavior Interventions and Supports in Reducing Racially Inequitable Disciplinary Exclusion*, *in* CLOSING THE SCHOOL DISCIPLINE GAP: EQUITABLE REMEDIES FOR EXCESSIVE EXCLUSION, *supra* note 19, at 207, 208–09.

255. *See* Nance, *supra* note 63, at 51.

256. Vincent et al., *supra* note 254; *see also* Rob H. Horner et al., *Is School-Wide Positive Behavior Support an Evidenced-Based Practice?*, POSITIVE BEHAVIORAL INTERVENTIONS & SUPPORTS (Apr. 2015), http://www.pbis.org/research/default.aspx.

257. *See PBIS FAQs*, *supra* note 253.

consistently reteach and reinforce those teachings throughout the year.[258] In most systems, approximately 80% of students will respond positively to tier one strategies.[259]

Tier two consists of more intensive prevention strategies directed at students who did not respond positively to the system-wide tier-one strategies.[260] These strategies are designed so that educators can easily administer them to small groups of students in an efficient manner.[261] Core components of tier-two strategies include screenings, monitoring progress, creating systems to increase structure and predictability, frequent adult feedback, and fostering more communication between home and school.[262] One example of a tier-two strategy is the "behavior education program,"[263] which might consist of creating a simple behavior plan for a student; asking that student to check in with an adult on a regular basis; and formalizing consequences for misbehavior at school and at home.[264] In most systems, 95% of students will respond either to tier-one or tier-two strategies.[265]

Tier-three strategies are designed to help the approximately 5% of students who do not respond positively to tier-one or tier-two strategies.[266] While students who receive tier three support still need the foundation provided by tier-one and tier-two strategies, tier-three strategies include developing a team-based, highly individualized plan targeted to address the needs of the student.[267] Individualized interventions might include identifying and preventing the problem contexts; instruction on the desired performance skills; strategies for rewarding positive behavior; and the use of negative or safety consequences, if necessary.[268]

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258. *See* ANRIG, *supra* note 180, at 15.

259. *See* GEORGE SUGAI, CTR. ON POSITIVE BEHAVIORAL INTERVEN. & SUPPORTS, SCHOOL-WIDE POSITIVE BEHAVIOR SUPPORT FOR ALL STUDENTS: GETTING STARTED OVERVIEW 8 (2014), https://www.pbis.org/Common/Cms/files/Forum14_Presentations/A1_Getting_Started_Sugai_29_Oct_2014.pdf.

260. *See PBIS FAQs*, *supra* note 253.

261. *See* SUGAI, *supra* note 259, at 9.

262. *See* Horner et al., *supra* note 256.

263. *See* DEANNE A. CRONE ET AL., RESPONDING TO PROBLEM BEHAVIOR IN SCHOOLS: THE BEHAVIOR EDUCATION PROGRAM 2–3 (2d ed. 2010).

264. *See* MICH. DEP'T OF EDUC., SCHOOL-WIDE POSITIVE BEHAVIORAL INTERVENTIONS & SUPPORTS: IMPLEMENTATION GUIDE 22–23 (2010), https://www.michigan.gov/documents/mde/SchoolwidePBS_264634_7.pdf; Vincent et al., *supra* note 254, at 209 (describing tier two's "check-in/check-out" program).

265. *See* SUGAI, *supra* note 259, at 9.

266. *Id.*

267. *See* Horner et al., *supra* note 256.

268. *Id.*

As with restorative justice, schools relying on SWPBIS have improved their climates and overall student behavior. For example, Catherine Bradshaw, Mary Mitchell, and Philip Leaf analyzed data from a five-year longitudinal study conducted in thirty-seven elementary schools to measure the impact of SWPBIS on suspensions and office referrals.[269] They found that schools implementing SWPBIS reported significant reductions in both office referrals and suspensions.[270] Similarly, Robert Horner and his colleagues conducted a randomized, wait-list controlled trial to assess the effects of SWPBIS in over sixty elementary schools in two states and found that schools implementing SWPBIS experienced higher perceptions of school safety and higher scores on state reading assessment tests.[271] At the middle school level, Claudia Vincent and her colleagues found that schools adopting SWPBIS experienced overall lower rates of in-school suspensions.[272] In another example, during the 2004–2005 school year, after employing SWPBIS, Pleasanton Independent School District in Texas witnessed an overall 56.4% decline in office referrals.[273] And in yet another example, Austin School District reduced office referrals and suspensions and increased attendance and achievement test scores after implementing SWPBIS.[274] Overall, SWPBIS has been successful in many types of settings, including in urban schools and in the juvenile justice system.[275]

5.   Require Schools to Report Disciplinary Data and Consider Ways to Incorporate that Data into Accountability Rubrics

Finally, lawmakers and school officials should improve the process of collecting and reporting data relating to school discipline. According to education scholars Kent McIntosh, Erik Girvan, Robert Horner, and Keith

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269. *See* Bradshaw et al., *supra* note 251, at 133.

270. *Id.* at 145.

271. *See* Robert H. Horner et al., *A Randomized, Wait-List Controlled Effectiveness Trial Assessing School-Wide Positive Behavior Support in Elementary Schools*, 11 J. POSITIVE BEHAV. INTERVENTIONS 133, 139–41 (2009).

272. Vincent et al., *supra* note 254, at 213.

273. Patrick S. Metze, *Plugging the School to Prison Pipeline by Addressing Cultural Racism in Public Education Discipline*, 16 U.C. DAVIS J. JUV. L. & POL'Y 203, 280–81 (2012).

274. *Id.* at 282.

275. *See* David Domenici & James Forman Jr., *What It Takes to Transform a School Inside a Juvenile Justice Facility: The Story of the Maya Angelou Academy*, *in* JUSTICE FOR KIDS: KEEPING KIDS OUT OF THE JUVENILE JUSTICE SYSTEM, *supra* note 228, at 283, 290 (successfully implementing a modified version of PBIS in a school inside of a juvenile justice facility); *Primary FAQs*, POSITIVE BEHAVIORAL INTERVENTIONS & SUPPORTS, http://www.pbis.org/school/primary_level/faqs.aspx (last visited May 3, 2016).

Smolkowksi, "the single most efficient process for achieving a valued outcome within a complex system is to define[,] measure[,] and report progress toward achieving that outcome on a regular cycle."[276] While the Civil Rights Data Collection has provided much needed data to shed important light on how schools discipline children and which racial groups are affected most, in their efforts to address the school-to-prison pipeline, lawmakers (and school officials) should require schools to collect and publicly report more detailed data describing the number of and the reasons for student suspensions, expulsions, referrals to law enforcement, and school-based arrests, disaggregated by student subgroups such as race, gender, and disability.[277] Schools also should report longitudinal data regarding students who become involved in the juvenile justice system, including how students became involved and their transition back to school or into the workforce.[278] In addition, schools should report data relating to the security measures they use, including their use of metal detectors, student searches, drug-sniffing dogs, surveillance cameras, and school resources officers, as well as their use of the alternative methods described above to improve school climate.[279]

Further, in connection with reporting, lawmakers and high-level school officials should also consider ways to hold schools accountable for relying too heavily on disciplinary measures that exacerbate the school-to-prison pipeline and for not relying on alternative measures described above.[280] As civil rights activist and scholar Dan Losen writes, "[u]ltimately, until discipline data are incorporated into the broader accountability rubrics used by states to evaluate schools and districts, it is unlikely we will witness comprehensive and lasting improvements in the area of school discipline."[281]

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276. Kent McIntosh et al., *Education Not Incarceration: A Conceptual Model for Reducing Racial and Ethnic Disproportionality in School Discipline*, 5 J. APPLIED RES. CHILD. 1, 14 (2014).

277. Losen, *supra* note 126, at 248. Federal law currently requires states, districts, and schools to publicly report disaggregated data on achievement scores on state assessment exams by subject, graduation rates, teacher quality data, and other data in their annual report cards. U.S. DEP'T OF EDUC., STATE AND LOCAL REPORT CARDS: NON-REGULATORY GUIDANCE 11–15 (2013), http://www2.ed.gov/programs/titleiparta/state_local_report_card_guidance_2-08-2013.pdf. Yet federal law does not require states, districts, and schools to publicly disclose their discipline data in those annual report cards. *Id.*; *see also* Losen, *supra* note 126, at 248. And while the U.S. Department of Education does require schools and districts to provide some disciplinary data by means of the Civil Rights Data Collection Survey, this information is reported only every other year, lacks necessary detail, and it is unknown whether future administrations will even continue this current practice without a stronger mandate in place. Losen, *supra* note 126, at 246–47.

278. Losen, *supra* note 126, at 246–47.

279. *Id.*

280. *Id.* at 248; *see also* Shollenberger, *supra* note 47, at 41–42.

281. Losen, *supra* note 126, at 248.

Finally, it is important to make all of this data accessible to parents, lawyers, lawmakers, civil rights activists, and others, which would serve as another means of accountability.[282] Parents must have access to this information to make informed choices regarding which schools their children will attend and whom they will elect to fill school board positions or other public offices. Parents also need this information to voice their concerns and demand changes in the school system. In addition, lawmakers, lawyers, and civil rights activists must have access to this information to instigate needed changes to discipline policies, including changes relating to reducing disparities along racial, gender, and other lines.[283]

III.   SCHOOL-BASED SOLUTIONS TO REDUCE RACIAL DISPARITIES RELATING TO SCHOOL DISCIPLINE

As described in Part I, a particularly alarming aspect of the school-to-prison pipeline is that minority students are disciplined more harshly and more frequently than similarly-situated white students, which is not explained by more frequent or serious misbehavior by minority students.[284] Implementing the school-based solutions described in Part II will significantly reduce the overall number of students who are suspended, expelled, arrested, convicted, and who drop out of school, which will benefit all students, including minority students. And some of the initiatives described above most likely will also reduce the racial disparities relating to discipline.[285] Nevertheless, more must be done to address this serious

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282. *See* Daniel J. Losen, *Directions for Broad Policy Change*, *in* CLOSING THE SCHOOL DISCIPLINE GAP: EQUITABLE REMEDIES FOR EXCESSIVE EXCLUSION, *supra* note 19, at 15, 15.

283. Daniel J. Losen, *Discipline Policies, Successful Schools, Racial Justice, and the Law*, 51 FAM. CT. REV. 388, 397 (2013) (reasoning that if data is not publicly available, "it is exceedingly difficult for parents, civil rights advocates and policymakers to determine whether discrimination in discipline may be occurring in a particular school or district and to press for relief in cases where it is").

284. *See supra* Part I.C.

285. *See, e.g.*, Blake et al., *supra* note 179 (arguing that schools should hire more mental health professionals to teach social and emotional learning skills to students, which will reduce disparities relating to disciplining African-American female students); González, *supra* note 226, at 154 (reporting that after adopting restorative justice practices, the racial discipline gap narrowed between African-American and white students); Gregory et al., *supra* note 174, at 173 (demonstrating empirically that when teachers participated in a professional development program to improve classroom organization, instruction, and emotional support, African-American students had a similar probability of receiving exclusionary discipline as other students in the classroom); Claudia G. Vincent et al., *Disciplinary Referrals for Culturally and Linguistically Diverse Students with and Without Disabilities: Patterns Resulting from School-Wide Positive Behavior Support*, 19 EXCEPTIONALITY 175, 185–86 (2011) (demonstrating

problem. This section will describe additional school-based initiatives that lawmakers can support and school officials can implement to further reduce these racial disparities relating to discipline. While several factors contribute to these disparities, such as minority students' differential exposure to inexperienced teachers,[286] the initiatives described below target what most researchers agree to be one of the primary causes: the racial biases of school administrators and teachers, which manifest themselves in today's world principally in subtle or unconscious forms.[287] Further, it is imperative to reemphasize that not only is racial bias a primary cause for disparities relating

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empirically that in schools employing SWPBIS the racial disparity relating to discipline was smaller than in schools not employing SWPBIS, although African-American students were still overrepresented in all schools with respect to adverse discipline). *But see* Vincent et al. *supra* note 254, at 211 (concluding that, after reviewing the empirical studies on the effect of SWPBIS in reducing racial disparities, "the extent to which SWPBIS is effective in reducing racial disparities . . . is currently unclear, particularly at the secondary level, where racial disparities are most pronounced"); *id.* at 213 (finding empirically that race remained a predictor in exclusionary discipline even in schools that implemented SWPBIS).

286. *See* 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, *supra* note 19, at 89, 91–92.

287. *See* ADVANCEMENT PROJECT, POWER IN PARTNERSHIPS: BUILDING CONNECTIONS AT THE INTERSECTIONS OF RACIAL JUSTICE AND LGBTQ MOVEMENTS TO END THE SCHOOL-TO-PRISON PIPELINE 5 (2015), http://b.3cdn.net/advancement/85066c4a18d249e72b_r23m68j37.pdf ("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, CAN "DE-BIASING" STRATEGIES HELP TO REDUCE RACIAL DISPARITIES IN SCHOOL DISCIPLINE? SUMMARY OF THE LITERATURE 2 (2014), http://www.indiana.edu/~atlantic/wp-content/uploads/2014/03/Implicit-Bias_031214.pdf (maintaining that implicit racial bias contributes to differential treatment of minorities in schools); Blake et al., *supra* note 179, at 76 ("Although a number of factors are believed to contribute to disproportionate disciplinary practices, racial/ethnic bias has been implicated [more] frequently . . . ."); Pamela Fenning & Jennifer Rose, *Overrepresentation of African American Students in Exclusionary Discipline: The Role of School Policy*, 42 URB. EDUC. 536, 537 (2007) (finding that students of color are targeted by teachers out of fear and anxiety of losing control of the classroom); McIntosh et al., *supra* note 276, at 6 (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) (explaining unconscious racial bias influences Americans' behavior to some degree); 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."); L. Song Richardson, *Police Efficiency and the Fourth Amendment*, 87 IND. L.J. 1143, 1146–47 (2012) (explaining that individuals have nonconscious reactions to others that negatively influence their decisions and behaviors to those individuals); *see also* Jason P. Nance, *Over-Disciplining Students, Racial Bias, and the School-to-Prison Pipeline*, 50 U. RICH. L. REV. 1063, 1067–68 (2016).

to school discipline, but also is a primary cause for racial disparities relating to academic achievement.[288] The school-based solutions described below are aimed at addressing implicit racial biases relating to discipline, but they also may contribute to a broader strategy for addressing implicit biases relating to academic underachievement for minority students.

A. Explicit and Implicit Biases

Although a full analysis is well beyond the scope of this article, it is important to briefly explain the concepts of explicit and implicit racial bias before describing the initiatives that schools should implement to reduce racial disproportionalities in school discipline.

"A bias is a departure from some point that has been marked as 'neutral.'"[289] Racial biases are driven by attitudes and stereotypes that we have toward individuals of a particular race.[290] An attitude is an association between a concept (such as a social group) and a way of thinking or feeling, which can be positive or negative.[291] Attitudes are fashioned by our past experiences, which "inform and shape actions and preferences prospectively."[292] A stereotype is an association between a concept (such as a social group) and a trait.[293] Although attitudes and stereotypes are related, they are distinct.[294] As Jerry Kang and his colleagues explain, one may have a positive attitude towards African-Americans, yet still associate this racial group with weapons.[295] Conversely, one may associate Asian-Americans with

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288. *See supra* note 109 and accompanying text.

289. *See* JERRY KANG, NAT'L CTR. FOR STATE COURTS, IMPLICIT BIAS: A PRIMER FOR COURTS 8 (2009), http://www.americanbar.org/content/dam/aba/migrated/sections/criminaljustice/PublicDocuments/unit_3_kang.authcheckdam.pdf [hereinafter KANG REPORT]. There are many empirically revealed biases that have nothing to do with race, ethnicity, and gender, such as bias towards numbers, judgments, and assessments to which we have been exposed previously; bias towards those who possess property, rights, or other entitlements, even when they have been granted arbitrarily; and hindsight bias. *See* Jerry Kang et al., *Implicit Bias in the Courtroom*, 59 UCLA L. REV. 1124, 1128 (2012) [hereinafter *Bias in the Courtroom*].

290. *Bias in the Courtroom*, *supra* note 289; Richardson, *supra* note 287, at 1147.

291. *Bias in the Courtroom*, *supra* note 289.

292. Darren Lenard Hutchinson, *"Continually Reminded of Their Inferior Position": Social Dominance, Implicit Bias, Criminality, and Race*, 46 WASH. U. J.L. & POL'Y 23, 35 (2014).

293. *Bias in the Courtroom*, *supra* note 289; *see also* Anthony G. Greenwald & Linda Hamilton Krieger, *Implicit Bias: Scientific Foundations*, 94 CAL. L. REV. 945, 949 (2006); Hutchinson, *supra* note 292, at 36; Richardson, *supra* note 287, at 1147.

294. *Bias in the Courtroom*, *supra* note 289.

295. *Id.* at 1129.

high achievement in mathematics, yet still have a negative attitude towards this racial group.[296]

Biases can be explicit or implicit. Explicit biases are "consciously accessible through introspection and endorsed as appropriate by the person who possesses them."[297] Explicit biases operate in a cognitive processing system, sometimes called "System Two," that requires substantial working memory and is slow, reflective, deliberative, controlled, rule-based, correlated with cognitive ability, and conscious.[298] Explicit racial biases are related to the commonly-held notion of "racism," which is a consciously held belief that members of certain racial groups are inherently inferior.[299]

Implicit biases, on the other hand, are "behavioral propensit[ies] that result[] from implicit attitudes and stereotypes."[300] They "originate from the deep influence of the immediate environment and the broader culture on internalized preferences and beliefs."[301] They function independently of an individual's awareness of having these attitudes and stereotypes.[302] Rather, implicit biases "function automatically," including in manners that might be inconsistent with a person's explicit set of personal values if that person were consciously aware of those biases.[303] This is because implicit biases operate in an alternative cognitive processing system, often termed "System One," that is quick, contextualized, automatic, associative, independent of cognitive

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296. *Id.*

297. *Id.*

298. *See* DANIEL KAHNEMAN, THINKING, FAST AND SLOW 21 (2011) ("*System 2* allocates attention to the effortful mental activities that demand it, including complex computations. The operations of System 2 are often associated with the subjective experience of agency, choice, and concentration."); Jonathan St. B. T. Evans & Keith E. Stanovich, *Dual-Process Theories of Higher Cognition: Advancing the Debate*, 8 PERSP. ON PSYCHOL. SCI. 223, 225 tbl.1 (2013).

299. McIntosh et al., *supra* note 276, at 5; Nance, *supra* note 287, at 1069.

300. Hutchinson, *supra* note 292, at 37; *see also* Greenwald & Krieger, *supra* note 293, at 950–51.

301. Richardson, *supra* note 287, at 1147 (quoting Brian A. Nosek, Mahzarin R. Banaji & Anthony G. Greenwald, *Harvesting Implicit Group Attitudes and Beliefs from a Demonstration Web Site*, 6 GROUP DYNAMICS 101, 112 (2002)) (internal quotation marks omitted).

302. *Bias in the Courtroom*, *supra* note 289, at 1129.

303. *Id.*; *see also* Hutchinson, *supra* note 292, at 37 (explaining that, with respect to implicit biases, the "individual's conscious attitudes do not control the choice; instead, nonconscious stereotypes or shortcuts embedded in the human mind cause the individual to evaluate members of different social groups in a disparate manner"); Lee, *supra* note 287, at 1569 ("Our implicit biases can be and often are completely the opposite of our consciously held beliefs."); Richardson, *supra* note 287, 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.").

ability, and operating mostly outside of our conscious awareness.[304] System One processing is critical because it helps us function more quickly and process information in a fast-paced, complex world without expending valuable mental resources.[305] System One processing relies on the creation of schemas, "which are templates of knowledge that help us organize specific examples into broader categories."[306]

Racial stereotypes and attitudes are types of schemas, acting as shortcuts to help us navigate the complexity of the world.[307] But as we unconsciously rely on racial stereotypes and attitudes to help us function more efficiently, they skew our perceptions, judgments, and decision-making without our intent or awareness.[308] Further, implicit bias manifests itself most acutely in an individual when that individual does not or cannot act carefully and deliberately, because, for example, the individual lacks sufficient time, motivation, or cogitative capability for deep consideration of another person.[309] Along these same lines, despite the fact that someone consciously attempts to be fair-minded and unbiased, implicit bias manifests itself in a person when the structural demands of a situation exceed the information available to that person (i.e., the person confronts a situation that is difficult, confusing, ambiguous, etc.) or when that person's cognitive resources are limited, depleted, or impaired (i.e., when a person is tired, hungry, rushed, upset, anxious, threatened, afraid, etc.).[310]

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304. Evans & Stanovich, *supra* note 298, at 223–25; McIntosh et al., *supra* note 276, at 6–7; *see also* KAHNEMAN, *supra* note 298, at 20 ("*System 1* operates automatically and quickly, with little or no effort and no sense of voluntary control.").

305. McIntosh et al., *supra* note 276, at 5; KANG REPORT, *supra* note 289, at 1.

306. KANG REPORT, *supra* note 289, at 1.

307. McIntosh et al., *supra* note 276, at 6–7; Nance, *supra* note 287, at 1069; *see also* L. Song Richardson & Philip 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.'").

308. McIntosh et al., *supra* note 276, at 6–7; Nance, *supra* note 287, at 1069.

309. *Id.*; *see also* C. Neil Macrae & Galen V. Bodenhausen, *Social Cognition: Thinking Categorically About Others*, 51 ANN. REV. PSYCHOL. 93, 105 (2000) (explaining that "category application is likely to occur when a perceiver lacks the motivation, time, or cognitive capacity to think deeply (and accurately) about others").

310. McIntosh et al., *supra* note 276, at 6–7.

B.   *School-Based Solutions Designed to Ameliorate the Effects of Educator Implicit Biases*

Like everyone else, school officials and teachers also have implicit racial biases, which affect their decision-making towards students, especially relating to discipline.[311] However, while the phenomenon of implicit bias is reasonably understood, its causes, effects, and particularly, methods to address it and reduce its effects are far less understood.[312] Nevertheless, this section will briefly describe three specific school-based initiatives that lawmakers can support and school officials can implement to counteract implicit biases aimed at reducing racial disparities relating to discipline and the school-to-prison pipeline.[313]

1.   Provide Debiasing Training to School Administrators and Teachers and Teach Them to Apply Neutralizing Routines when Faced with Vulnerable Decision Points

Because implicit bias operates outside of our conscious awareness, it can be difficult for educators to correct for it, even when they desire to do so.[314] Nevertheless, despite the fact that implicit racial biases are deeply embedded in our subconscious minds, researchers agree that implicit racial biases are malleable and can be addressed, even if field-tested strategies and interventions are still in their very early stages.[315] Providing debiasing training can be beneficial to those who are equity-minded and help school officials and teachers make better discipline decisions.[316] State education and school district officials can hire implicit bias experts to teach school

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311. *See* STAATS, *supra* note 109, at 32–33; *cf.* Kurt Hugenberg & Galen V. Bodenhausen, *Facing Prejudice: Implicit Prejudice and the Perception of Facial Threat*, 14 PSYCHOL. SCI. 640, 640, 643 (2003) (finding that higher implicit bias was correlated to a greater willingness to perceive anger in the faces of African-Americans).

312. *See* Eric J. Girvan, *On Using the Psychological Science of Implicit Bias to Advance Anti-Discrimination Law*, 26 GEO. MASON U. C.R. L.J. 1, 77 (2015).

313. This article only briefly describes strategies to address implicit bias in educators. This will be the topic of forthcoming research projects.

314. *Id.*; *see also* STAATS, *supra* note 109, at 53 ("Debiasing is far from a simple task, as it involves the construction of new mental associations.").

315. *See* STAATS, *supra* note 109, at 53; *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); Girvan, *supra* note 312; KANG REPORT, *supra* note 289, at 4–5.

316. McIntosh et al., *supra* note 276, at 8.

administrators and teachers what implicit bias is, how it affects us and our decision making, and introduce known strategies to counteract it.[317] State education and school district officials can also encourage school administrators and teachers to take the Implicit Association Test (IAT), which is a well-known and established instrument to measure implicit biases, so that administrators and teachers will better understand their individual unconscious biases towards minorities.[318]

With the help of an expert, it is critical that state education and school district officials require, or at least encourage, school officials and teachers to apply neutralizing routines when facing vulnerable decision points.[319] As explained above, implicit bias typically manifests itself most often when an individual lacks time or cognitive capability for deep consideration of another person, when structural demands exceed information available to a person, or when that person's cognitive resources are depleted.[320] Thus, even when there is no change in a person's attitude towards an individual of a particular race, that person can selectively show racial bias at different decision-making points.[321] For instance, although a teacher might be more equitable at the beginning of the day when that teacher is fresh, that same teacher unconsciously might make biased decisions when that teacher is hungry, fatigued, feels rushed, or is under stress.[322] Using a school's own individual data, it is important for school officials to identify school-specific

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317. STAATS, *supra* note 109, at 59–60 (explaining that efforts directed at raising awareness of implicit bias help debias individuals); CHERYL STAATS, KIRWAN INSTITUTE FOR THE STUDY OF RACE AND ETHNICITY, STATE OF THE SCIENCE: IMPLICIT BIAS REVIEW 20–21 (2014). Nevertheless, as Professor Eric J. Girvan explains, "field-tested interventions to change [implicit bias] or reduce its effects are still in their infancy." Girvan, *supra* note 312.

318. The Implicit Association Test is a computer-based, video game-like test, which measures time differences when participants sort categories of pictures and words. KANG REPORT, *supra* note 289, at 3. In essence, the test asks participants to press a particular computer key when the participant sees a black person or a negative word and a different key when the participant sees a white person or a positive word. Then, during the second round of testing, the test reverses the instructions, asking the participant to press a certain computer key when that participant sees a black person or a positive word and a different computer key when the participant sees a white person and a negative word. The test reveals implicit biases if there are time and accuracy differentiations between the two rounds of testing. *See* Hutchinson, *supra* note 292, at 39; Jerry Kang, *Trojan Horse of Race*, 118 HARV. L. REV. 1489, 1509–10 (2005). The IAT has become the dominant tool for measuring implicit bias. *See* Hutchinson, *supra* note 292, at 38–39; Kang, *supra*, at 1509. For a useful review of the literature that discusses the predictive value of the IAT, as well as the literature that questions the IAT, see Marianne Bertrand & Esther Duflo, *Field Experiments on Discrimination* 30–34 (Nat'l Bureau of Econ. Research, Working Paper No. 22014, 2016).

319. McIntosh et al., *supra* note 276, at 16.

320. *See supra* notes 306–09 and accompanying text.

321. McIntosh et al., *supra* note 276, at 4–5.

322. *Id.*

vulnerability decision points for when inequalities relating to discipline typically occur.[323] School officials might discover that these inequalities are most present right before lunch when teachers and school officials are hungry or at the end of the day or week when teachers and school officials feel more fatigued.[324] Or they might discover that inequalities are more pronounced when educators interact with students they do not know as well (i.e., students they observe misbehaving in the hallway) or with physically mature students, which might increase their stress levels because teachers and school officials perceive them as more threatening.[325]

Once the school-specific vulnerability points are identified, school officials and teachers should utilize a self-review routine before making a discipline decision.[326] More specifically, before sending a student to the office, suspending, expelling, or referring a student to law enforcement, school officials and teachers should ask themselves a brief set of questions to help them understand whether they are operating at a vulnerable decision point, remind them of the concept of implicit bias, and suggest specific courses of action if they do find themselves at a vulnerable decision point.[327] Such if-then routines have proven to be effective in other contexts and for other professions, such as for law enforcement and courtroom officials.[328]

2.   Reduce Ambiguities in School Discipline Codes

As explained above, social cognition psychology postulates that implicit bias tends to manifest itself when the structural demands of a situation exceed the information available to a person, such as when a situation is confusing or ambiguous.[329] Observational data on student discipline support this theory. For example, research studies demonstrate that white students typically are disciplined for objective problem behaviors such as smoking or vandalism, whereas black students more often are disciplined for ambiguous or

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323. *Id.* at 15.

324. *Id.* at 10.

325. *Id.*

326. *Id.* at 16.

327. *Id.*

328. *See* David M. Amodio & Patricia G. Devine, *Control in the Regulation of Intergroup Bias*, *in* SELF CONTROL IN SOCIETY, MIND, AND BRAIN 49, 62 (Ran R. Hassin et al. eds., 2010); Davis M. Amodio & Saaid A. Mandoza, *Implicit Intergroup Bias: Cognitive, Affective, and Motivational Underpinnings*, *in* HANDBOOK OF IMPLICIT SOCIAL COGNITION 353, 363 (Bertram Gawronski & B. Keith Payne eds., 2011); *Bias in the Courtroom*, *supra* note 289, at 1177 n.234; Richardson & Goff, *supra* note 307, at 2647.

329. *See supra* note 309 and accompanying text.

subjective problem behaviors such as "disrupting the classroom."[330] In a groundbreaking statewide study, Tony Fabelo and his colleagues found that Texas's ninth grade black students had a 31% higher likelihood of receiving a discretionary school disciplinary action than white students, even after controlling for several other salient factors such as student poverty.[331] These researchers concluded that "race was a predictive factor for whether a student would be disciplined, particularly for discretionary disciplinary actions."[332] Such findings suggest that, in order to reduce racial disparities in discipline, school district officials, school administrators, teachers, parents, and students should work together to reduce ambiguities in their school discipline codes.[333] The goal should be to collectively and collaboratively create school discipline codes that contain clear, unambiguous guidelines regarding when and how a student should be disciplined.[334]

3.   Require Schools to Report Disaggregated Data Relating to Discipline

Finally, to reduce racial disparities related to discipline, schools should be required to collect and report disciplinary data disaggregated by race.[335] As explained above, perhaps the most efficient process for achieving reform within a complex system such as a state education system, a school district, and a school is to define and set goals, measure and report progress towards achieving those goals, and be held accountable.[336] Using data gathering and

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330. McIntosh et al., *supra* note 276, at 3; *see also* Losen, *supra* note 67, at 52.

331. FABELO ET AL., *supra* note 43, at 45–46.

332. *Id.* at 46.

333. McIntosh et al., *supra* note 276, at 16.

334. *Id.* at 9. Notably, Guenevere Nelson-Melby led a team of SROs, school officials, and court officials to create clear guidelines for when schools should contact law enforcement for various student offenses. *See Court, School, and Law Enforcement Collaborative Task Force: Guidelines for Schools in Contacting Law Enforcement*, INDIAN LEGAL CLINIC AT THE SANDRA DAY O'CONNOR COLL. OF LAW (Aug. 14, 2014), http://conferences.asucollegeoflaw.com/schooltoprison/files/2014/01/School-Guidelines-8-14-14.pdf; *Court, School, and Law Enforcement Collaborative Task Force: Guidelines for Schools in Contacting Law Enforcement Appendix A*, INDIAN LEGAL CLINIC AT THE SANDRA DAY O'CONNOR COLL. OF LAW (June 19, 2014), http://conferences.asucollegeoflaw.com/schooltoprison/files/2014/01/Appendix-A.pdf; *Court, School, and Law Enforcement Collaborative Task Force: Guidelines for Schools in Contacting Law Enforcement Appendix B—Exception Reference Guide*, INDIAN LEGAL CLINIC AT THE SANDRA DAY O'CONNOR COLL. OF LAW (June 19, 2014), http://conferences.asucollegeoflaw.com/schooltoprison/files/2014/01/Reference-Sheet2.pdf. School officials might seek to replicate these efforts in their own schools.

335. *See supra* Part II.B.5.

336. *See supra* Part II.B.5; *see also* McIntosh et al., *supra* note 276, at 16.

reporting systems currently available (or keeping track by hand if schools cannot afford or schools choose not to use such data systems),[337] school administrators and teachers should collect and regularly review (i.e., weekly or monthly) the disaggregated data to identify emerging patterns and discuss how to address racial gaps as they appear.[338] In addition, schools should report detailed data describing the number and reasons for adverse disciplinary actions such as suspension, expulsion, or referrals to law enforcement by student subgroups.[339] Further, federal and state governments should incorporate this information into broader accountability systems and make them accessible to parents, civil rights activists, lawyers, and others.[340]

CONCLUSION

Public schools hold a unique place in our nation. We rely on our public school educators to teach students the knowledge and skills they need to become productive citizens; transmit social, moral, and political values so that they can fully participate in and maintain our democracy; and help students learn how to socialize and appropriately interact with adults and each other so that they can live happy and peaceful lives.[341] To make this possible, our children need to remain in school, become fully engaged in the educational process, graduate, and avoid the juvenile justice system. In addition, minority students deserve to be treated equally in our schools in all respects, but particularly with respect to school discipline because of the heavy consequences associated with suspension, expulsion, arrest, and detainment.[342] Indeed, the health and strength of our nation depend on us rectifying the school-to-prison pipeline problem and its disproportionate impact on minority students.

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337. *Id.* at 14.

338. *See id.*

339. *See supra* Part II.B.5.

340. *See supra* Part II.B.5; *see also* Losen, *supra* note 126, at 248; Losen, *supra* note 91, at 10.

341. Of course, what role public schools do play and should play has been the subject of much debate. *See, e.g.*, Anne Proffitt Dupre, *Should Students Have Constitutional Rights? Keeping Order in the Public Schools*, 65 GEO. WASH. L. REV. 49, 64–69 (1996) (providing an interesting discussion of two competing missions of public schools); Betsy Levin, *Educating Youth for Citizenship: The Conflict Between Authority and Individual Rights in the Public Schools*, 95 YALE L.J. 1647, 1649 (1986) ("The mission of schools as transmitters of social, moral, and political values makes it inevitable that disputes will arise over which values are to be inculcated and who is authorized to make these decisions. There is no consensus, for example, on whether schools should emphasize a common language, and culture promoting assimilationist and national norms, or emphasize pluralism and diversity.").

342. *See supra* Part I.

Just as no human being is perfect, no school is perfect. Nevertheless, the existence of successful schools in very challenging environments is tangible evidence that we, as a society, are capable of providing a good school for every child—a school that will help students graduate, successfully enter a post-secondary institution or the workforce, and avoid becoming incarcerated.[343]

We need more schools where students view their experience as too important to risk being suspended, expelled, or referred to law enforcement, or too special to be spoiled by crime or violence.[344] We need more schools where children want to attend because they feel part of a special community that cares for one another, helps each other succeed, and expects the best from one another.[345] These schools do not rely on SROs, metal detectors, zero-tolerance policies, suspensions, expulsions, and referrals to law enforcement to create a climate where students can learn. Rather, these schools focus intensely on (a) teaching and learning and meeting the needs of their students; (b) helping students develop social and emotional intelligence, including race relations intelligence; (c) enhancing the school climate and teaching students appropriate behavior using a multi-tiered-behavior intervention model like SWPBIS; (d) employing restorative justice circle groups to resolve differences and integrate offenders back into the school community; (e) using data to identify and address emerging negative patterns; and (f) understanding and countering implicit bias.

These are the schools that will reverse the school-to-prison pipeline and rectify its accompanying racial disparities. These are the schools that will help more students faced with formidable challenges take full advantage of the educational opportunities available to them and stay clear of the juvenile justice system, while still keeping our schools safe. Surely we owe it to our children and our future to take this better approach.

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343. *See supra* Part II; *see also* OFER ET AL., *supra* note 232, at 22–42 (describing how six New York City school serving students from disadvantaged households and neighborhoods have created safe, thriving learning communities without relying punitive disciplinary models); Noguera, *supra* note 69, at 207.

344. Nance, *supra* note 63, at 57.

345. *See id.*; Michael Powell, *In a School Built on Trust, Metal Detectors Inject Fear*, N.Y. TIMES (Sept. 17, 2012), http://www.nytimes.com/2012/09/18/nyregion/in-a-brooklyn-school-metal-detectors-inject-fear.html.