

# MANAGING OUR BLIND SPOT: The Role of Bias in the School-to-Prison Pipeline

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*“That all citizens will be given an equal start through a sound education is one of the most basic, promised rights of our democracy.” —Senator Paul Wellstone<sup>1</sup>*

## INTRODUCTION

For decades, we have witnessed the increased criminalization of our nation’s youth, especially youth of color and students with disabilities, through the implementation of “zero tolerance” policies and overly harsh school disciplinary practices. Instead of improving school safety, these practices have blurred the lines between school discipline and school safety, pushing students out of school and into the juvenile justice system. Perhaps most troubling and relevant are the concerns expressed in the post-Ferguson era regarding allegations of inappropriate and excessive use of force by school police on students. In schools all over the nation, school police carry and use tasers and pepper spray in situations that do not call for this type of weaponry. Every year there is a new series of local news articles highlighting students tased or pepper-sprayed for a little more than ‘clenching their fists’<sup>2</sup> or ‘taking an aggressive stance;’<sup>3</sup> ‘Some students have been tased or pepper-sprayed and mistaken for an aggressor, when they were, in fact, attempting to break up a fight.’<sup>4</sup> These types of overly harsh school disciplinary practices and excessive use of force are imposed more frequently on African American and Latino students, than their white peers.<sup>5</sup> This disparity is largely due to the failure to address the influence of explicit and implicit biases in school

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1. Senator Paul D. Wellstone, Address at a Conference on High Stakes Testing at Columbia University Teacher’s College (Mar. 31, 2000).

2. Letter from ACLU Texas et al., to Mark D. Harnitcheck, Dir., Def. Logistics Agency (Sept. 15, 2014), [http://www.naacpldf.org/files/case\\_issue/LDF-Texas%20Appleseed-1033%20Letter.pdf](http://www.naacpldf.org/files/case_issue/LDF-Texas%20Appleseed-1033%20Letter.pdf).

3. *Id.*

4. *Id.*

5. *Id.* at 4–5.

disciplinary decisions and the continued use of draconian school disciplinary practices.

This article will highlight the intersection of explicit and implicit bias and the school-to-prison pipeline and propose the adoption of a Federal School Disciplinary Law to address the racial disparities in school disciplinary sanctions. I argue that implicit racial bias negatively influences school disciplinary decisions resulting in a disproportionate number of African Americans issued disciplinary sanctions. Part I will discuss the evolution of the school-to-prison pipeline (e.g. zero tolerance policies, criminalizing normal adolescent behavior, lack of youth developmental competence among school resource officers, and the militarization of schools). Part II will provide an overview of the role of explicit and implicit bias in the development and perpetuation of the school-to-prison pipeline. Part III will discuss federal and state responses to the school-to-prison pipeline. Part IV concludes with a proposal for the adoption of a Federal School Disciplinary Law designed to eradicate the school-to-prison pipeline through a tiered system of evidenced based school disciplinary practices, a school-community task force, mandatory implicit bias training for all school personnel, and various other targeted interventions.

## I. EVOLUTION OF THE SCHOOL-TO-PRISON PIPELINE

The school-to-prison pipeline is a disturbing trend that funnels poor and minority students out of K–12 schools and into the juvenile and criminal justice system.<sup>6</sup> This epidemic has alarming implications for students of color having access to equal education opportunity. Specifically, the disproportionate number of students of color suspended or expelled from school for minor infractions places them at a grave disadvantage by removing them from their educational learning environment. When students are not in school due to out of school suspensions they are not learning, and thus more likely to fall behind in their work.<sup>7</sup> Several research studies elucidate the

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6. Melina Angelos Healey, *The School-to-Prison Pipeline Tragedy on Montana's American Indian Reservations*, 37 N.Y.U. REV. L. & SOC. CHANGE 671, 674 (2013); India Geronimo, *Systematic Failure: The School-to-Prison Pipeline and Discrimination Against Poor Minority Students*, 13 J.L. SOC'Y 281, 281 (2011).

7. See Kathleen DeCataldo & Toni Lang, *Keeping Kids in School and Out of Court: A School-Justice Partnership*, 83 N.Y. ST. B. ASS'N J. 26, 28 (2011); Sheena Molsbee, *Zeroing Out Zero Tolerance: Eliminating Zero Tolerance Policies in Texas Schools*, 40 TEX. TECH L. REV. 325, 346 (2008); see generally ADVANCEMENT PROJECT, TEST, PUNISH, AND PUSH OUT: HOW "ZERO TOLERANCE" AND HIGH-STAKES TESTING FUNNEL YOUTH INTO THE SCHOOL-TO-PRISON PIPELINE (2010), [http://b3cdn.net/advancement/d05cb2181a4545db07\\_r2im6caqe.pdf](http://b3cdn.net/advancement/d05cb2181a4545db07_r2im6caqe.pdf) [hereinafter TEST, PUNISH, AND PUSH OUT]; ADVANCEMENT PROJECT, OPPORTUNITIES

strong correlation between the number of out of school suspensions and expulsions and student attrition.<sup>8</sup> For example, a statewide study conducted in Washington found that school districts with high numbers of suspensions and expulsions had higher dropout rates.<sup>9</sup> Additionally, out of school suspensions can often place students from impoverished households in harm's way due to their parents' inability to pay for some type of adult supervision. For example, when unarmed teen, Trayvon Martin, was fatally shot by a neighborhood watch captain he was walking from a convenient store while serving a 10-day out-of-school suspension from high school.<sup>10</sup> These types of discriminatory discipline techniques experienced by African Americans and other students of color alienate them from the learning process by removing them from their learning environment and steering them toward the juvenile and criminal justice system.<sup>11</sup> Harmful disciplinary practices foster education inequity and denies students of color the opportunity to fulfill their potential leaving them ill-equipped to succeed in today's society.<sup>12</sup>

The school-to-prison pipeline is jeopardizing the future of thousands of children every day by removing students from their school-learning

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SUSPENDED: THE DEVASTATING CONSEQUENCES OF ZERO-TOLERANCE AND SCHOOL DISCIPLINE (2002), [http://b.3cdn.net/advancement/8d91c72205a1b9d955\\_ujm6bhguv.pdf](http://b.3cdn.net/advancement/8d91c72205a1b9d955_ujm6bhguv.pdf).

8. Alicia C. Insley, *Suspending and Expelling Children from Educational Opportunity: Time to Reevaluate Zero Tolerance Policies*, 50 AM. U. L. REV. 1039, 1065 (2001); see also Ruth B. Ekstrom et al., *Who Drops Out of High School and Why? Findings from a National Study*, 87 TEACHERS C. REC. 356, 364 (1986) (noting that one-third of students who drop out do so due to poor achievement and feelings of alienation, often resulting from disciplinary problems, suspension, or expulsion); Floyd D. Weatherspoon, *Racial Justice and Equity for African-American Males in the American Educational System: A Dream Forever Deferred*, 29 N.C. CENT. L.J. 1, 18 (2006) ("The strict enforcement of school policies on zero tolerance for various infractions has a direct correlation to African-American male students being expelled and/or suspended, which may encourage them to drop out of school permanently.").

9. Linda Shaw, *Are Expelled Students More Likely to Drop Out?*, SEATTLE TIMES (Dec. 10, 2012, 11:16 PM), <http://www.seattletimes.com/seattle-news/are-expelled-students-more-likely-to-drop-out>.

10. *Trayvon Martin Shooting Fast Facts*, CNN (Feb. 7, 2016, 4:25 PM), <http://www.cnn.com/2013/06/05/us/trayvon-martin-shooting-fast-facts>.

11. Alicia Darensbourg et al., *Overrepresentation of African American Males in Exclusionary Discipline: The Role of School-Based Mental Health Professionals in Dismantling the School-to-Prison Pipeline*, 1 J. AFR. AM. MALES EDUC. 196, 198 (2010).

12. Lia Epperson, *Brown's Dream Deferred: Lessons on Democracy and Identity from Cooper v. Aaron to the "School-to-Prison Pipeline"*, 49 Wake Forest L. Rev. 687, 698 (2014) ("Instead, we are left with social disintegration in many classrooms and a bureaucratizing of draconian discipline procedures that leave students powerless and ill prepared to be active members of a democracy. These are twenty-first century consequences of those state laws and policies that thwarted principles of equity in education . . .").

environment for trivial, adolescent behavior.<sup>13</sup> Although several things contribute to the development and perpetuation of the school-to-prison pipeline, the following factors collectively have played the most significant role in the evolution of this phenomenon: (1) emergence of “get tough on crime” rhetoric, (2) reactionary response to mass school shootings, and (3) expansion of the role of law enforcement personnel in schools. Although well intended, societal responses to safety concerns for children in K–12 schools have done more harm than good to the welfare of children.<sup>14</sup> The paradigm shift toward integrating law enforcement techniques into K–12 schools as means to creating safe schools begin with zero tolerance policies.<sup>15</sup>

The term “zero tolerance,” which originated from the war on drugs campaign, was initiated in the 1980s during the get tough on crime initiative promoted by the Reagan administration.<sup>16</sup> The premise behind the zero tolerance concept was to deter crime by removing judicial discretionary power and issuing mandatory prison sentences for certain drug related offenses, regardless of whether the individual was a first time offender.<sup>17</sup> Prior to the adoption of zero tolerance legislation, judges had the discretionary power to issue less punitive sanctions such as probation or community service for first time offenders.<sup>18</sup> Although originally created for the adult criminal justice system, zero tolerance rhetoric eventually emerged in the K–12 schooling context to address drug and gang activity.<sup>19</sup> However, over time zero tolerance policies were expanded to include minor misconduct

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13. Chauncey D. Smith, Note, *Deconstructing The Pipeline: Evaluating School-to-Prison Pipeline Equal Protection Cases Through a Structural Racism Framework*, 36 FORDHAM URB. L.J. 1009, 1011–12 (2009).

14. Emily Bloomenthal, *Inadequate Discipline: Challenging Zero Tolerance Policies as Violating State Constitution Education Clauses*, 35 N.Y.U. REV. L. & SOC. CHANGE 303, 310 (2011).

15. Avarita L. Hanson, *Have Zero Tolerance School Discipline Policies Turned into a Nightmare? The American Dream's Promise of Equal Educational Opportunity Grounded in Brown v. Board of Education*, 9 U.C. DAVIS J. JUV. L. & POL'Y 289, 298–99 (2005).

16. See, e.g., ADVANCEMENT PROJECT ET AL., EDUCATION ON LOCKDOWN: THE SCHOOLHOUSE TO JAILHOUSE TRACK, 7 (2005), [http://b.3cdn.net/advancement/5351180e24cb166d02\\_mlbrqxlh.pdf](http://b.3cdn.net/advancement/5351180e24cb166d02_mlbrqxlh.pdf); PALAK SHAH, DEFENDING JUSTICE: AN ACTIVIST RESOURCE KIT 43 (2005) (quoting President Richard Nixon as saying “[d]oubling the conviction rate in this country would do more to cure crime in America than quadrupling the funds for [Hubert] Humphrey's war on poverty”); Walker Newell, *The Legacy of Nixon, Reagan, and Horton: How the Tough on Crime Movement Enabled a New Regime of Race-Influenced Employment Discrimination*, 15 BERKELEY J. AFR. AM. L. & POL'Y 3 (2013).

17. Peter Follenweider, Comment, *Zero Tolerance: A Proper Definition*, 44 J. MARSHALL L. REV. 1107, 1111–12 (2011).

18. See *id.* at 1112.

19. *Id.* (“[I]n 1994, schools in Lexington, Kentucky and Orange County, California had already adopted [zero tolerance policies] for both drugs and gang activity.”).

such as wearing hats inside the school building and class disruptions.<sup>20</sup> This paradigm shift from developmentally appropriate responses to addressing student misconduct to a more punitive approach was further solidified by Congress's adoption of the 1994 Guns Free Act.<sup>21</sup> The legislative intent of this Act was to minimize the perceived threat of escalations in school violence by school officials and the general public.<sup>22</sup> Under this Act, Title I funded K–12 schools are required to expel any student that brings a weapon to school, “except that such State law shall allow the chief administering officer of a local educational agency to modify such expulsion . . . on a case-by-case basis . . . .”<sup>23</sup> Prior to this Act school administrators were afforded the unbridled discretionary power to determine what, if any, disciplinary sanction to issue for students in possession of weapons on school property. The purpose of allowing States to create statutes that provide school administrators with broad discretionary power is to create an exemption for special circumstances that warrant a departure from mandated sanctions. However, the influence of stereotypes and other biases against certain groups of students has impacted the ability of school administrators to apply their discretionary power in a non-biased, equitable manner.<sup>24</sup> For example, studies conducted on school discipline reveal that boys are more likely to receive harsher disciplinary sanctions than girls because they are viewed as having a higher propensity for aggressive behavior.<sup>25</sup> Many legal scholars assert that abuses of discretionary power by school administrators is the leading cause of the disproportionate representation of minorities in school disciplinary practices.<sup>26</sup>

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20. *Id.* at 1112–13.

21. *See* Molsbee, *supra* note 7, at 327.

22. *Id.*

23. 20 U.S.C. § 7151(b)(1) (2002); *see also* Ruth Zweifler & Julia De Beers, *The Children Left Behind: How Zero Tolerance Impacts Our Most Vulnerable Youth*, 8 MICH. J. RACE & L. 191, 197 (2002) (although the language in the Guns Free Act of 1994 implies that each “[s]tate is required to give the school district the [discretionary] power to alter the mandatory expulsion [mandate], many states, [such as] Michigan, do not provide [statutory authority] for this case-by-case consideration”).

24. 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, 637 (2011).

25. Nancy Levit, *Separating Equals: Educational Research and the Long-Term Consequences of Sex Segregation*, 67 GEO. WASH. L. REV. 451, 469–70, 509 (1999); John M. Wallace, Jr. et al., *Racial, Ethnic, and Gender Differences in School Discipline Among U.S. High School Students: 1991-2005*, 59 NEGRO EDUC. REV. 47, 54 (2008).

26. *See* David Simson, *Exclusion, Punishment, Racism and Our Schools: A Critical Race Theory Perspective on School Discipline*, 61 UCLA L. REV. 506, 524 (2014) (“Furthermore, numerous studies have documented that African American students are disciplined more frequently than white students for offenses that are ambiguous and vague while white students

The increase in mass school shootings in recent years is another contributing factor to the evolution of the school-to-prison pipeline. The senseless killing of children in school shootings in Newtown, Connecticut, Chardon, Ohio, Prince George's County, Maryland, Columbine and elsewhere has forever changed the societal view of schools as a safe haven where students can learn and grow.<sup>27</sup> As a result, different precautionary measures have been taken on federal, state, and local fronts. For example, some states, such as Missouri, have passed controversial gun reform legislation, like S.B. 656, which permit teachers and school administrators to bring guns to school to enhance school safety.<sup>28</sup> Under this Missouri law, school personnel serve dual roles as "School Protection Officers" thus permitting them to carry concealed weapons on campus.<sup>29</sup> Some local responses to school safety concerns are the integration of active school shooter practice drills in K–12 schools to teach school personnel and students how to maximize their safety in the event of a shooting.<sup>30</sup> Despite the myriad of approaches to addressing school safety, no one strategy has emerged as the one stop solution to school safety concerns.

School administrators, parents, policy makers, and child advocates have struggled with constructing the appropriate response to safeguard our

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are more likely to be disciplined more frequently than African American students in clearly delineated offense categories.”).

27. Kim Palmer, *1 Student Killed, 4 Injured in Shooting at Chardon High School in Northeast Ohio*, COLUMBUS DISPATCH (Feb. 27, 2012, 8:40 PM), <http://www.dispatch.com/content/stories/local/2012/02/27/27-chardon-shooting.html> (reporting high school student opening fire in an Ohio high school cafeteria); *2 Shot at Frederick High School in Maryland*, HUFFINGTON POST, [http://www.huffingtonpost.com/2015/02/04/frederick-high-school-maryland-shooting\\_n\\_6618292.html](http://www.huffingtonpost.com/2015/02/04/frederick-high-school-maryland-shooting_n_6618292.html) (last updated Apr. 6, 2015) (reporting high school shooting where two students were shot and injured); *Columbine High School Shootings*, HISTORY, <http://www.history.com/topics/columbine-high-school-shootings> (last visited May 6, 2016) (reporting the 1999 school shooting massacre at Columbine High School where thirteen people were killed); *Connecticut Shootings Fast Facts*, CNN, <http://www.cnn.com/2013/06/07/us/connecticut-shootings-fast-facts> (last updated Apr. 19, 2016, 4:11 PM) (reporting the 2012 news story of 20-year-old Adam Lanza who shot and killed a total of twenty-six people at Sandy Hook Elementary School).

28. S.B. 656, 2014 Leg., Reg. Sess. (Mo. 2014) (now codified at MO. ANN. STAT. § 21.750 (West 2014)), [http://www.senate.mo.gov/14info/BTS\\_Web/Bill.aspx?SessionType=R&BillID=28098814](http://www.senate.mo.gov/14info/BTS_Web/Bill.aspx?SessionType=R&BillID=28098814) (“[T]he open carrying of a firearm may not be prohibited by a political subdivision for any person with a valid concealed carry endorsement or permit in his or her possession who presents such endorsement or permit upon the demand of a law enforcement officer. In addition, no person carrying a concealed or unconcealed handgun may be disarmed or physically restrained by a law enforcement officer unless under arrest or if there is no reasonable and articulable suspicion of criminal activity.”).

29. *Id.*

30. See, e.g., Bethany J. Peak, *Militarization of School Police: One Route on the School-to-Prison Pipeline*, 68 ARK. L. REV. 195, 217 (2015).

children from becoming victims of a school shooting. The growing fear and sense of helplessness felt by the nation for ensuring children's safety in schools has served as a catalyst for an array of policy changes that have essentially militarized schools through the expansion of the role of law enforcement measures. The transformation of our nation's schools is evident by efforts to arm school personnel, increase police presence<sup>31</sup> in schools, metal detectors, and harsher disciplinary measures.<sup>32</sup> For example, in California public schools, students are forced to walk through metal detectors and are subjected to handheld magnetometer inspections and police dog sniff searches.<sup>33</sup> However, instead of improving school safety, increased reliance on school resource officers and law enforcement practices have blurred the lines between school discipline and school safety, pushing students into the juvenile justice system for routine discipline matters.<sup>34</sup>

Out of school suspensions, expulsions, and school-based arrests were once reserved for serious offenses including fighting that resulted in serious bodily harm and bringing weapons or drugs on campus. But these days, students are just as likely to be removed from their schooling environment for talking back to a teacher, cursing, walking into class late, or even student eye rolling.<sup>35</sup> For example, an African American eighth-grader in Louisiana was arrested and spent six days in a juvenile detention center for throwing Skittles candy at another student.<sup>36</sup> This illuminates the persistent pattern of school

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31. Epperson, *supra* note 12.

32. Peak, *supra* note 30, at 196 ("Every day, millions of students attend schools that have armed police, metal detectors, and pat downs."); Kerrin C. Wolf, *Booking Students: An Analysis of School Arrests and Court Outcomes*, 9 NW. J.L. & SOC. POL'Y 58, 60 (2013) ("In response to the proposals for gun control, the National Rifle Association ("NRA") countered with calls for changes to security at schools, specifically calling for armed guards at every school in the country. The National Association of School Resource Officers ("NASRO") echoed the NRA's position but predictably noted that the armed personnel should be school resource officers specifically trained to operate in the school environment. Ahead of federal action, school districts responded to the shooting in Newtown by reassessing their existing security policies and by adopting new policies, such as increasing police presence and making school entrances more secure.").

33. Johanna R. Shargel, *Searches in Public Schools Create Many Fourth Amendment Tests: The Line Between Legal and Illegal Searches for Guns and Drugs is Not Always Clear*, L.A. LAW., Nov. 2003, at 19, 19.

34. ADVANCEMENT PROJECT ET AL., POLICE IN SCHOOLS ARE NOT THE ANSWER TO THE NEWTOWN SHOOTING 4 (2013), [http://www.naacpldf.org/files/publications/Police in Schools Are Not the Answer to the Newtown Shooting - Jan. 2013.pdf](http://www.naacpldf.org/files/publications/Police%20in%20Schools%20Are%20Not%20the%20Answer%20to%20the%20Newtown%20Shooting%20-%20Jan.%202013.pdf) ("We have seen young people who are pushed out of schools by hostile and prison-like school cultures. We have seen time, energy, and resources devoted to the criminalization, not the education, of young people.").

35. Christina Hoag, *California Advocates Seek to Reduce Student Suspensions by Axing 'Willful Defiance' Charge*, HUFFINGTON POST (Apr. 7, 2012, 1:44 PM), [http://www.huffingtonpost.com/2012/04/07/defiance-seen-as-cause-of\\_n\\_1409982.html](http://www.huffingtonpost.com/2012/04/07/defiance-seen-as-cause-of_n_1409982.html).

36. *Discrimination Against Students of Color Rampant in Louisiana School District*, S. POVERTY LAW CTR. (May 7, 2015), <http://www.splcenter.org/get-informed/news/discrimination->

administrators relying too heavily on school resource officers for routine student misbehavior and the criminalization of normal adolescent behavior.<sup>37</sup> A more equitable school disciplinary sanction would have been denial of recess time for a reasonable period of time or after school detention.

The introduction of criminal justice practices into K–12 school settings is unfortunately not a new phenomenon. More than 100 years ago, juvenile courts and policies were created utilizing adult policing practices to help deter youth delinquency, despite the body of neurobiological evidence that youth perceive and respond differently due to their developmental stage.<sup>38</sup> The practice of using adult policing practices on children is very disconcerting due to the potential harm to their developmental growth and overall well-being. Currently, school resource officers are assigned to K–12 schools without adequate training on youth developmental competence, which is “the understanding that children and adolescents’ perceptions and behaviors are influenced by biological and psychological factors related to their developmental stage.”<sup>39</sup> According to a study conducted by the Strategies for Youth Organization, police academies spend less than one percent of their training on how to interact with youth.<sup>40</sup> As a result, police officers utilize adult policing practices on youth, as opposed to developmentally specific techniques that take into account their neurobiological developmental stage.<sup>41</sup> The failure to consider youth developmental stages in addressing youth delinquency is problematic because holding youth to adult standards results in overly harsh responses to normal adolescent behaviors.<sup>42</sup> The practice of utilizing adult policing practices on youth often leads to excessive uses of force that place children in harm’s way.<sup>43</sup> Properly trained school resource

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against-students-of-color-rampant-in-louisiana-school-district; *see also* Molsbee, *supra* note 7, at 339 (2008) (discussing how reports of police ticketing students for actions of normal adolescent behavior, like chewing gum in class, have also become common).

37. Healey, *supra* note 6, at 676 (discussing how schools throughout the nation are relying more heavily on school resource officers for minor misbehavior traditionally handled by school administrators and teachers).

38. Jeff Q. Bostic et al., *Policing the Teen Brain*, 53 J. AM. ACAD. CHILD & ADOLESCENT PSYCHIATRY 127, 127 (2014).

39. STRATEGIES FOR YOUTH, IF NOT NOW, WHEN?: A SURVEY OF JUVENILE JUSTICE TRAINING IN AMERICA’S POLICE ACADEMIES 13 (2013), [http://strategiesforyouth.org/sfysite/wp-content/uploads/2013/03/SFYReport\\_02-2013\\_rev.pdf](http://strategiesforyouth.org/sfysite/wp-content/uploads/2013/03/SFYReport_02-2013_rev.pdf).

40. *Id.* at 4.

41. *See id.* at 11–12.

42. Lisa H. Thureau, *Rethinking How We Police Youth: Incorporating Knowledge of Adolescence into Policing Teens*, 29 CHILD. LEGAL RTS. J. 30, 31 (2009) (“It is not news that juvenile developmental characteristics such as impulsivity, self-centeredness and resistance to authority increase the chances that that police/juvenile interactions will involve conflict, disrespect and confrontational behavior.”).

43. *Id.*



officers know how to adjust their behavior, language, and timing to account for a child's developmental stage.<sup>44</sup> For example, a police officer trained in youth developmental competence will give youth more time to respond to their commands because they understand that because of the way their brain processes information it takes them more time to process information. An untrained officer utilizing adult policing practices will interpret a child's delayed response to a command as disrespectful, non-compliant behavior, which often results in a disciplinary sanction for "willful defiance."<sup>45</sup>

Although there are several broad categories of school disciplinary offenses, one in particular—willful defiance—permits a high level of subjectivity, which greatly contributes to the disproportionate treatment of children from traditionally marginalized groups.<sup>46</sup> Almost half of school disciplinary sanctions issued against students of color are for willful defiance as opposed to violent offenses.<sup>47</sup> For instance, during the 2011–2012 school year, forty-eight percent of the 710,000 suspensions were for "willful defiance," a term commonly used for disobeying a school authority figure.<sup>48</sup> Furthermore, nineteen percent of school suspensions in California for willful defiance were issued to African-Americans even though they only account for six percent of the state's public school enrollment.<sup>49</sup> The willful defiance disciplinary category is where explicit and implicit biases are most prevalent and harmful to students of color.

## II. THE ROLE OF IMPLICIT BIAS IN THE PERPETUATION OF THE SCHOOL-TO-PRISON PIPELINE

*"Implicit biases come from the culture. I think of them as the thumbprint of the culture on our minds. Human beings have the ability to learn to associate two things together very quickly—that is innate. What we teach ourselves,*

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44. See Lisa H. Thureau & Johanna Wald, *Controlling Partners: When Law Enforcement Meets Discipline in Public Schools*, 54 N.Y.L. SCH. L. REV. 977, 1000–01 (2010).

45. See generally *id.*

46. PUB. COUNSEL, FIX SCHOOL DISCIPLINE: HOW WE CAN FIX SCHOOL DISCIPLINE TOOLKIT 5 (2012), <http://nyspbis.org/RegionalForum1516/Guides%20and%20Workbooks/Fix%20School%20Discipline%20Toolkit%20for%20Educators.pdf>.

47. *Id.*

48. Samantha Buckingham, *A Tale of Two Systems: How Schools and Juvenile Courts Are Failing Students*, 13 U. MD. L.J. RACE, RELIGION, GENDER & CLASS 179, 186 (2013).

49. Susan Frey, *New Law Limits Student Discipline Measure*, EdSOURCE (Sept. 28, 2014), <http://edsources.org/2014/new-law-limits-student-discipline-measure/67836#.VCmBAildVq0>.

*what we choose to associate is up to us.*”—Dr. Mahzarin Banaji<sup>50</sup>

The field of social cognition serves as a foundation for the majority of research in this area.<sup>51</sup> The concept of implicit bias is based on the science of implicit cognition, which “suggests that individuals do not always have conscious, intentional control over the processes of social perception, impression formation, and judgment that motivate their actions.”<sup>52</sup> Rather, there are many implicit mental processes that operate outside of an individual’s conscious intentional focus, including implicit attitudes, implicit perceptions, implicit memories, and implicit stereotypes.<sup>53</sup> Implicit biases live within our schemas.<sup>54</sup> “A schema is a cognitive framework” or mechanism that assists in organizing and interpreting information.<sup>55</sup> “Schemas can be useful because they allow us to take shortcuts in interpreting the vast amount of information that is available in our environment.”<sup>56</sup> “However, these mental frameworks also cause us to exclude pertinent information” and instead “focus . . . only on things that confirm our pre-existing beliefs and ideas.”<sup>57</sup> Schemas can perpetuate stereotypes and serve as a hindrance to retaining new information that does not conform to our established ideas about the world.<sup>58</sup> An example of a schema is the traditional gender categories of male and female. Implicit bias lies within those schemas because of our natural tendency to unconsciously develop pre-existing beliefs and ideas about those gender schemas such as the notion that females are more proficient in English and males are more competent in math and science fields.<sup>59</sup> As one can imagine, the influence of these types of stereotypes can

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50. CATHERINE HILL, CHRISTIANNE CORBETT & ANDRESSE ST. ROSE, AM. ASS’N UNIV. WOMEN, WHY SO FEW?: WOMEN IN SCIENCE, TECHNOLOGY, ENGINEERING, & MATHEMATICS 78 (2010), <http://www.aauw.org/files/2013/02/Why-So-Few-Women-in-Science-Technology-Engineering-and-Mathematics.pdf>.

51. Jerry Kang, *Trojan Horses of Race*, 118 HARV. L. REV. 1489, 1495–96 (2005) (explaining the foundations of scientific research on implicit attitudes).

52. CONSTANTINE SANDIS, THE THINGS WE DO AND WHY WE DO THEM 45 (2011).

53. Anthony G. Greenwald & Linda Hamilton Krieger, *Implicit Bias: Scientific Foundations*, 94 CAL. L. REV. 945, 947 (2006).

54. Michael Brownstein, *Implicit Bias*, STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Feb. 26, 2015), <http://plato.stanford.edu/entries/implicit-bias/>.

55. Kendra Cherry, *What is a Schema?*, ABOUT (Apr. 20, 2016), [http://psychology.about.com/od/sindex/g/def\\_schema.htm](http://psychology.about.com/od/sindex/g/def_schema.htm).

56. *Id.*

57. *Id.*

58. Linda Ray, *Thinking Differently? It Might Be a Clash of Schemas*, NEURESOURCE GRP. (June 30, 2015), <http://www.neuresourcegroup.com.au/thinking-differently-it-might-be-a-clash-of-schemas/>.

59. See Kang, *supra* note 51, at 1492–93.

be highly destructive in a multitude of contexts such as employment decisions and judicial decisions in courts of law. For example, a judge may unconsciously issue a harsher sentence on a male than female due to the stereotypical depiction of males having a higher propensity for violence.

Since implicit bias is a relatively new phenomenon, it is not uncommon for some individuals to doubt its authenticity.<sup>60</sup> The Implicit Association Test (IAT), created in 1997, was designed to determine whether an individual holds an implicit bias against a certain group of people.<sup>61</sup> Specifically, the IAT measures the relative strength of association between a target concept such as gender and an attribute concept, which is a positive and negative meaning we attach to the target group.<sup>62</sup> “The IAT is a response latency measure that rests on an assumption it shares with other measures of associative strength—that the more strongly two concepts have come to be associated with one another, the faster and more accurately they can be paired together.”<sup>63</sup> Essentially, the test measures whether the test taker associates “good characteristics” more with one group over another.<sup>64</sup> There are several benefits to taking an IAT. First the test helps unmask prejudice that individuals may be unaware of that is negatively influencing their judgment.<sup>65</sup> Unconscious prejudice can be detrimental in legal and education settings. Another benefit of taking an IAT is that it promotes prejudice reduction because individuals that are made aware of their unconscious bias are more likely to engage in self-correction during decision-making.<sup>66</sup> Lastly taking an IAT helps dispel hegemonic notions that we are living in a color-blind society where race is no longer a contributing factor to inequity.<sup>67</sup> It is difficult for many people to accept that they harbor implicit biases that are contradictory to their egalitarian beliefs and values.<sup>68</sup> According to the leading implicit bias expert, Professor Mahzarin Banaji, “even the most well-meaning person unwittingly allows unconscious thoughts and feelings to influence seemingly objective decisions.”<sup>69</sup> Based on implicit bias research, there are four sources

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60. Gregory Mitchell & Philip E. Tetlock, *Antidiscrimination Law and the Perils of Mindreading*, 67 OHIO ST. L.J. 1023, 1030–31 (2006).

61. Reshma M. Saujani, “The Implicit Association Test”: A Measure of Unconscious Racism in Legislative Decision-Making, 8 MICH. J. RACE & L. 395, 406 (2003).

62. *Id.*

63. Andrew Scott Baron & Mahzarin R. Banaji, *The Development of Implicit Attitudes: Evidence of Race Evaluations from Ages 6 and 10 and Adulthood*, 17 PSYCHOL. SCI. 53, 54 (2006).

64. Saujani, *supra* note 61.

65. *Id.* at 408.

66. *Id.* at 410.

67. *Id.* at 410–11.

68. Mahzarin R. Banaji et al., *How (Un)ethical Are You?*, HARV. BUS. REV., Dec. 2003, at 1, 1, <http://www.foundationforeuropeanleadership.org/assets/downloads/infoItems/145.pdf>.

69. *Id.*

of unconscious, biased decision making: bias that favors one's own group, implicit forms of prejudice, conflict of interest, and an inclination to overrate our individual contributions.<sup>70</sup> Unconscious stereotypes that we associate toward certain groups of people affect even the most fair-minded individuals, resulting in implicit prejudice.<sup>71</sup>

For example, some individuals associate African American males as having a higher propensity for violence, dishonesty, and laziness.<sup>72</sup> Similarly, unconscious stereotypes can also associate certain characteristics to Asian Americans such as being highly intelligent and loving karate. Associating certain characteristics to groups of people, at even young ages, affects our ability to perceive people from an individualist, non-stereotypical perspective.<sup>73</sup> As a result, implicit biases appear in all facets of society in terms of gender, race, disability, sexual orientation, ethnicity, and many others. However, for the purpose of this article the focus is on implicit racial bias and how it negatively influences school disciplinary decisions.

A myriad of empirical research has been conducted over the last decade, which provide evidence that implicit racial bias is pervasive among many who consciously subscribe to a belief in racial equality. The work of Linda Hamilton Krieger which explores the intersection of unconscious bias and discrimination in the workplace highlights the following three themes in relation to social cognition research that are relevant to implicit racial bias: (1) biases and stereotypes operate regardless of whether an individual has an explicit intent to do so; (2) stereotyping is automatically triggered by normal cognitive processes, and (3) people have limited control over their cognitive processes.<sup>74</sup> This study is groundbreaking because it helps illuminate that stereotypes and racial attitudes are not only implicit but also involuntary.<sup>75</sup> Thus, individuals that possess implicit racial biases toward certain groups of people are unintentionally allowing those biases to influence their decision-making. Thus, if messages about race or gender are not framed in terms that address conscious networks, unconscious attitudes will triumph.<sup>76</sup>

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70. *Id.*

71. *Id.* at 2.

72. See, e.g., Seymour Bryson, *Relationship Between Race and Attitudes Toward Black Men*, 26 J. MULTICULTURAL COUNSELING & DEV. 282, 284 (1998) (citing *The Ten Biggest Myths About Black Men*, EBONY, Aug. 1983, at 96, 98, 100).

73. Banaji et al., *supra* note 68, at 2.

74. Linda Hamilton Krieger, *The Content of our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161, 1187–88 (1995).

75. Justin D. Levinson, *Forgotten Racial Equality: Implicit Bias, Decisionmaking, and Misremembering*, 57 DUKE L.J. 345, 354 (2007).

76. DREW WESTEN, *THE POLITICAL BRAIN* 223 (2007).

The effect of unconscious biases is especially disconcerting in the context of school disciplinary decisions. The majority of school disciplinary sanctions are the product of split second decisions, which as implicit bias research reveal is the context in which our unconscious biases have the greatest influence.<sup>77</sup> For example, in a classroom setting, it is very common for teachers to be confronted with unexpected classroom disruptions that require them to make split second decisions regarding whether disciplinary action is appropriate and if so, the severity of the sanction. Due to the unbridled discretionary power afforded to school teachers and administrators by state education codes, school disciplinary sanctions can range anywhere from a verbal warning to out of school suspension for the same behavior. It is within this sea of subjectivity where implicit bias abounds. For example, a study which explored the psychological association between criminality and race asked police officers to look at a series of pictures and determine which faces looked more criminal.<sup>78</sup> The police officers in the study viewed African American faces as more criminal, and those with stereotypical African American features such as a large nose and full lips as the most criminal of all.<sup>79</sup> Although this study was conducted in the adult criminal justice field, as opposed to K-12 schools, the findings demonstrate how individuals such as school resource officers and teachers can unknowingly give African American students harsher sanctions than their White peers due to unconscious bias.

Since the science of implicit bias is a relatively new area of research, there are unfortunately a limited number of empirical studies, especially in relation to the school-to-prison pipeline. However, research in this area continues to grow as stakeholders in education seek empirically based interventions to dismantle the school-to-prison pipeline. A recent study conducted at Stanford University explored what role, if any, implicit bias played in racial disparities in school discipline among five middle schools across three school districts.<sup>80</sup> The findings of this study revealed not only that teachers possessed

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77. Amanda Merkwae, *Schooling the Police: Race, Disability, and the Conduct of School Resource Officers*, 21 MICH. J. RACE & L. 147, 169 (2015) (stating that a school resource officer's split-second decision about a student's conduct, which may be influenced by conscious or unconscious racial or disability bias, determines the punishment a student receives); Danfeng Soto-Vigil Koon, *Cal. Gov't Code § 11135: A Challenge to Contemporary State-Funded Discrimination*, 7 STAN. J. C.R. & C.L. 239, 241(2011) (stating that racial disparities in schools and other institutions are frequently caused by the impact of unconscious biases on split second decisions).

78. R. Richard Banks, Jennifer L. Eberhardt, & Lee Ross, *Discrimination and Implicit Bias in a Racially Unequal Society*, 94 CAL. L. REV. 1169 (2006).

79. *Id.* at 1172-73.

80. Jason Okonofua & Jennifer Eberhardt, *Two Strikes: Race and the Disciplining of Young Students*, 26 PSYCHOL. SCI. 617 (2015).

unconscious racial bias toward students of color, but that this bias could be significantly reduced with the proper intervention and training.<sup>81</sup> According to the Stanford study, the number of school suspensions were reduced by 50% as a result of the de-biasing intervention training provided to teacher participants.<sup>82</sup> The intervention focused on reframing how teachers view discipline as opportunities for growth as opposed to strictly punitive.<sup>83</sup> Another study found that students whom teachers viewed as displaying a “black walking style” were perceived as being highly aggressive and more likely to need special education services.<sup>84</sup> The findings in these two studies coupled with the discipline gap between students of color and their white peers suggest there is a strong correlation between implicit bias and racial disparities in school disciplinary sanctions. In an ideal world, school learning environments would be immune from unconscious negative attitudes about race. However, that is not the current reality. Stakeholders in education can no longer afford to demonstrate deliberate indifference to the significance of race and the role implicit bias plays in perpetuating racial disparities in school discipline. Despite the laudable goals of school reform measures such as Restorative Justice and Positive Behavioral Interventions and Supports,<sup>85</sup> all of these efforts will not yield systemic reform without addressing implicit bias.

### III. FEDERAL AND STATE RESPONSES TO SCHOOL-TO-PRISON PIPELINE

Despite the overwhelming empirical data indicating the harmful effects of school disciplinary policies on students of color, there is an absence of systemic reform efforts to address this phenomenon on the federal level.<sup>86</sup> To

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81. *Id.*

82. *Id.*

83. *Id.*

84. La Vonne Neal et al., *The Effects of African American Movement Styles on Teachers' Perceptions and Reactions*, 37 J. SPECIAL EDUC. 49 (2003).

85. Khin Mai Aung, *Pitting Our Youth Against Each Other: Moving School Harassment and Bullying Policy from a Zero Tolerance Discipline to Safe School Environment Framework*, 3 U.C. IRVINE L. REV. 885, 897–98 (2013) (“Restorative justice is generally defined as ‘a set of principles and practices grounded in the values of showing respect, taking responsibility, and strengthening relationships.’ Restorative justice approaches hold individuals accountable for their actions, but focus on repairing any damage caused by harmful acts and preventing such acts from recurring instead of on punishment. Among other things, restorative justice incorporates practices like mediated nonconfrontational discussions, actual classroom coursework in conflict management, or positive character development and social-emotional skill building.”).

86. See Joan M. Wasser, *Note: Zeroing in on Zero Tolerance*, 15 J.L. & POL. 747, 760–63 (1999). It is well established in the field of education that extensive use of suspension and expulsion does not minimize the reoccurrence of misbehavior, but actually contributes to

date, the federal response to addressing the school-to-prison pipeline has been symbolic as opposed to substantive through a series of policy recommendations, program initiatives, and suggested guidelines on how to eradicate the harmful school disciplinary policies. For example, the U.S. Department of Health and Family Services and U.S. Department of Education released a joint policy statement, which provided recommendations from federal agencies to support efforts by states' early childhood programs to prevent suspension and practices in early childhood settings.<sup>87</sup> The policy statement highlighted recent data released by the U.S. Department of Education Office for Civil Rights, which revealed the high rates of suspensions and expulsions in preschool settings and the negative effect on student's academic trajectory and life outcomes.<sup>88</sup> Additionally, in 2014 the U.S. Department of Justice released a joint letter in collaboration with the U.S. Department of Education Office for Civil Rights to provide guidance to K–12 schools regarding their legal obligation to implement student discipline policies without discriminating on the basis of national origin, color, race, disability, religion, or sex.<sup>89</sup> Essentially, this guidance letter illuminates the gross racial disparities in school discipline outcomes and schools' legal responsibilities to ensure that disciplinary policies and practices comport with all relevant constitutional mandates, federal laws, and civil rights statutes and regulations.<sup>90</sup>

Despite the various federal guidelines issued to address draconian school disciplinary policies, their impact has been wholly inadequate. The racial disparities in school disciplinary policies and adverse effects on students' academic trajectory continue to persist.<sup>91</sup> Although the federal response to school discipline reform has been substandard, there is hope for robust reform at the state level. One state, California, has attempted to lead the nation toward dismantling the school to prison pipeline with the unprecedented

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increased misbehavior, poor academic achievement, increased school dropout, and higher rates of juvenile incarceration and delinquency. *Id.* at 762–63.

87. U.S. DEP'T OF HEALTH & HUMAN SERVS., U.S. DEP'T OF EDUC., POLICY STATEMENT ON EXPULSION AND SUSPENSION POLICIES IN EARLY CHILDHOOD SETTINGS 1 (2014), <http://www2.ed.gov/policy/gen/guid/school-discipline/policy-statement-ece-expulsions-suspensions.pdf>.

88. U.S. DEP'T OF EDUC. OFFICE FOR CIVIL RIGHTS, DATA SNAPSHOT: EARLY CHILDHOOD EDUCATION 2–6 (2014), <https://www2.ed.gov/about/offices/list/ocr/docs/crdc-early-learning-snapshot.pdf>.

89. U.S. DEP'T OF JUSTICE & U.S. DEP'T OF EDUC., DEAR COLLEAGUE LETTER ON THE NONDISCRIMINATORY ADMINISTRATION OF SCHOOL DISCIPLINE 1 (2014), <http://www.justice.gov/crt/about/edu/documents/dcl.pdf>.

90. *Id.* at 2–6.

91. David Simson, *Exclusion Punishment, Racism and Our Schools: A Critical Race Theory Perspective on School Discipline*, 61 UCLA L. REV. 506, 523–25 (2014).

passage of A.B. Bill 420.<sup>92</sup> This landmark legislation is designed to keep children in school and compel schools to adopt alternative approaches to school discipline by limiting the circumstances in which K–12 schools may issue an out of school suspension or expulsion.<sup>93</sup> Additionally, the legislative purpose of this law is to minimize the abuse of discretionary power for subjective school disciplinary categories.<sup>94</sup>

Prior to the passing of A.B. Bill 420, any student in grades K–12 could be suspended or expelled for willful defiance of a school official’s directives. As previously mentioned, this highly subjective disciplinary category is very controversial because it results in overly harsh disciplinary sanctions for normal adolescent behaviors such as talking back to a teacher or involvement in a paper ball fight in the school cafeteria. Thus, California’s A.B. 420 is significant legislation because it is the first step toward preventing the criminalization of normal adolescent behavior. California’s school disciplinary bill eliminates suspensions and expulsions for our nation’s youngest and most vulnerable children for the “catch-all” category willful defiance,<sup>95</sup> which accounted for more than forty percent of all suspensions issued to California students.<sup>96</sup> Specifically, this bill changes existing legislation by placing a 3.5 year moratorium on all expulsions and suspensions in California public schools for children in grades K–3 for minor misbehavior.<sup>97</sup> Section (k)(2) of the act states:

Except as provided in Section 48910, a pupil enrolled in kindergarten or any of grades 1 to 3, inclusive, shall not be suspended for any of the acts enumerated in this subdivision, and this subdivision shall not constitute grounds for a pupil enrolled in

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92. *California Passes AB 420 to Reduce Harsh Student Discipline Practices*, SAN DIEGO ANTI-DEFAMATION LEAGUE (Oct. 1, 2014), <http://sandiego.adl.org/2014/10/01/california-passes-ab-420-to-reduce-harsh-student-discipline-practices/>.

93. Susan Frey, *supra* note 49.

94. *Id.*

95. Assemb. B. 420, 2014 Gen. Assemb., Reg. Sess. (Cal. 2014) (stating that willful defiance has been defined as “disrupting school activities or otherwise willfully defying the valid authority of [those] school personnel engaged in the performance of their duties”).

96. *California Enacts First-in-the-Nation Law to Eliminate Suspensions for Minor Misbehavior*, ACLU OF N. CAL. (Sept. 27, 2014), <https://www.aclunc.org/news/california-enacts-first-nation-law-eliminate-student-suspensions-minor-misbehavior> [hereinafter *California Enacts*]. Findings of prevalence and racial disparity in suspensions for willful defiance during the 2011–2012 academic year compelled Los Angeles Unified School District to consider banning school suspensions for willful defiance; see Teresa Watanabe, *L.A. Unified Bans Suspensions for ‘Willful Defiance’*, L.A. TIMES (May 12, 2013), <http://articles.latimes.com/2013/may/12/local/la-me-adv-laUSD-discipline-20130513>; see also *Fact Sheet: School Discipline and the Pushout Problem*, DIGNITY IN SCHS. 1 (2010), [http://www.dignityinschools.org/files/DSC\\_Pushout\\_Fact\\_Sheet.pdf](http://www.dignityinschools.org/files/DSC_Pushout_Fact_Sheet.pdf).

97. CAL. EDUC. CODE § 48900(k)(2) (West 2016).



kindergarten or any of grades 1 to 12, inclusive, to be recommended for expulsion.<sup>98</sup>

Additionally, the bill eliminates the expulsion of students in grades K–12 under the disciplinary category of willful defiance, for disrupting the school environment or otherwise disobeying the directives of school officials.<sup>99</sup> Although California’s efforts to address racial disparities and overly harsh school sanctions in school disciplinary practices through the enactment of A.B. 420 is commendable, the law is unlikely to achieve substantive reform.

#### A. *California School Disciplinary Bill Shortcomings*

Although California’s school disciplinary bill is likely to reduce the number of frivolous expulsions and out of school suspensions, the overall impact will be minimal. This is largely due to several flaws within the design of the bill that severely limit the law’s ability to foster robust change within the state of California’s school disciplinary regime. The law’s 2018 sunset provision, as opposed to an indefinite mandate, banning all expulsions and suspensions send a symbolic message to K–12 school leaders that the state’s commitment to eliminating harmful school disciplinary policies is only cursory. In lieu of the compelling data released by the California Department Education, which illuminated that the highly suggestive catch all category, willful defiance, accounted for forty-three percent of all suspensions,<sup>100</sup> it is irrational to place only a temporary ban on this harmful sanction. How could the state of California not permanently ban this destructive practice? The law should have imposed a permanent ban on willful defiance and all other disciplinary categories for non-violent offenses, as opposed to exhibiting deliberate indifference to overly harsh disciplinary sanctions and abuses of discretionary power. A permanent ban on out of school suspensions and expulsions for non-violent offenses would foster systemic change by forcing K–12 school leaders to implement alternative, evidence-based practices such as restorative justice<sup>101</sup> and keep children in schools. Some schools in California have already passed progressive policies to eliminate the willful defiance category from the disciplinary landscape. For example, in 2014 Oakland Unified School Board voted to prohibit the use of willful defiance

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98. *See id.*

99. Assemb. B. 420, 2014 Gen. Assemb., Reg. Sess. (Cal. 2014).

100. *See California Enacts*, *supra* note 96.

101. *About Restorative Justice*, CTR. FOR JUSTICE & RECONCILIATION, <http://restorativejustice.org/restorative-justice/about-restorative-justice/tutorial-intro-to-restorative-justice/> (last visited June 11, 2016) (defining restorative justice as “a theory of justice that emphasizes repairing the harm caused by criminal behavior”).

to suspend or expel students and invested over two million dollars to expand existing restorative justice practices.<sup>102</sup> Thus, A.B. 420 was a missed opportunity to transition from draconian school disciplinary practices to an evidenced-based developmental approach that would foster student growth, as opposed to a strictly punitive focus.

The second fatal flaw in A.B. 420 is the law's limited scope. The law's restriction on suspensions and expulsions for willful defiance is only applicable to grades K–3 as opposed to the entire student population.<sup>103</sup> The law's protection of select grade levels constitutes a total disregard for the welfare of students in grades 4–12 who are being ciphred out of schools and into the juvenile and criminal justice system for normal adolescent behavior. The law's deliberate indifference to the well-being of all children is incomprehensible, especially considering the overwhelming empirical evidence which document the disproportionate numbers of students of color, especially African Americans, that are suspended for willful defiance.<sup>104</sup>

The most crucial barrier to the effectiveness of California's school disciplinary bill is the failure to address the influence of implicit and explicit racial bias in school disciplinary decisions. The law's text is void of any acknowledgement or mandates to minimize the influence of racial biases in issuing school disciplinary sanctions, despite the overwhelming empirical data regarding gross racial disparities<sup>105</sup>. This display of deliberate indifference to the significance of race in the perpetuation of the school-to-prison pipeline is highly problematic because it undermines the legislative intent of the law. How can school address racial inequalities in school disciplinary practices without acknowledging race in the strategy for change? California's A.B. 420 law's color-blind approach toward achieving equitable disciplinary practices disregards the role of implicit bias in perpetuating racial disparities. The California legislation's race-neutral approach to addressing the school-to-prison pipeline is not an isolated incident, but represents a growing trend among state legislatures in which revisions to disciplinary codes fail to address racial bias. For example, Oregon's House Bill 2192, which took effect in 2014, revised the state's discipline code by limiting the circumstances in which students can be expelled and requiring school officials to consider the age and past disciplinary history of a student when

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102. Susan Frey, *Oakland Ends Suspensions for Willful Defiance, Funds Restorative Justice*, EDSOURCE (May 14, 2016), <http://edsource.org/2015/oakland-ends-suspensions-for-willful-defiance-funds-restorative-justice/79731>.

103. Assemb. B. 420, 2014 Gen. Assemb., Reg. Sess. (Cal. 2014).

104. Buckingham, *supra* note 48, at 186–87.

105. TEST, PUNISH, AND PUSH OUT, *supra* note 7, at 15.

issuing a sanction.<sup>106</sup> Despite the commendable goals of the Oregon legislation the law still fails to include procedural safeguards to protect students from overly harsh sanctions due to racial bias and continues to allow school administrators the discretionary power to modify the criteria for expulsions on a “case-by-case basis. It is under this umbrella a deniability of racial bias and unbridled subjectivity that implicit bias abounds. Revisions to the Oregon education statute should have incorporated mandatory implicit bias training for all school personnel and required schools with racial disparities in school disciplinary outcomes to develop school disciplinary improvement plans.

The California A.B. 420 law will not yield robust, substantive change due to the law’s *laissez-faire* approach to dismantling the school-to-prison pipeline and total disregard of the significance of race. The inconvenient truth is that race still matters in the context of school discipline, and thus must be a part of the solution. Furthermore, it is irrational to develop a law that protects only a select group of students, while allowing others to be susceptible to the documented harms of unjust disciplinary practices. The notion that only children in grades K–3 should be shielded from overly harsh disciplinary policies undermines efforts to promote equal educational opportunity in K–12 schools. Education laws and policies should ensure that all children are protected from harmful institutional policies and practices. Every child matters, not just a select few.

#### IV. FEDERAL SCHOOL DISCIPLINARY BILL

The endemic challenge of dismantling the school-to-prison pipeline is not insurmountable and demands swift action to prevent students of color from being unfairly funneled into the juvenile and criminal justice system. We cannot allow the innocent children to be denied equal education opportunity due to overly harsh school disciplinary sanctions that unjustly remove them from their learning environment. I am proposing the adoption of a federal school disciplinary law designed to reduce abuse of discretionary power by school officials, minimize the influence of implicit bias, and stop the over reliance on school resource officers for routine school disciplinary matters. This federal school disciplinary law will impose mandates on all Title I funded K–12 schools. Any school district that fails to adhere to the law will risk losing their Title I funding. The proposed law will consist of the following four components: (1) permanent ban on all out of school suspensions and expulsions for non-violent offenses; (2) mandatory implicit

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106. OR. REV. STAT. ANN. § 339.250 (2013).

bias training; (3) annual school discipline report card; and (4) School Disciplinary Community Review Board.

*A. Permanent Ban on Out-of-School Suspensions and Expulsions*

Every day an egregious amount of children, especially minority children, are removed from schools due to overly harsh and inequitable school disciplinary sanctions.<sup>107</sup> This disturbing practice is problematic because when children are not in school they are not learning and are at a higher risk for not completing high school.<sup>108</sup> According to recent school discipline data released by the U.S. Department of Education's Office of Civil Rights, more than three million children in grades kindergarten to the twelfth grade were suspended at least once in the 2011–2012 school year.<sup>109</sup> Although, as previously discussed, federal and state law requires that students be expelled for specific actions that fall under “zero tolerance” policies, administrators still have wide discretion for all other behaviors.<sup>110</sup> Therefore, this law is designed to address abuses of discretion for subjective catchall categories such as “willful defiance” that account for the majority of disciplinary sanctions imposed on students of color.<sup>111</sup> The proposed federal law would eliminate school administrators' authority to suspend or recommend for expulsion a student enrolled in grades K–12 for disrupting school activities or otherwise willfully defying the authority of those school personnel engaged in the performance of their duties. Under this law, a pupil shall not be suspended from school or recommended for expulsion, unless the superintendent of the school district or the principal of the school in which the pupil is enrolled determines that the pupil has committed any of the following acts:

- (A) Caused or threatened to cause physical harm to another person;
- (B) Intentionally used force or violence upon another, except in self-defense;
- (C) Possessed, sold, or otherwise furnished a firearm, knife, explosive, or other dangerous object;

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107. Buckingham, *supra* note 48, at 188–89 n.28.

108. Insley, *supra* note 8, at 1053 n.74.

109. *Civil Rights Data Collection*, ED.GOV, [http://ocrdata.ed.gov/StateNationalEstimations/Estimations\\_2011\\_12](http://ocrdata.ed.gov/StateNationalEstimations/Estimations_2011_12) (last visited May 10, 2016) (stating that the exact number of students receiving one or more in-school suspensions during the 2011–12 academic year was 3,385,868).

110. *See supra* Part I.

111. Buckingham, *supra* note 48, at 186–87.

- (D) Unlawfully possessed, used, solicited, sold, or arranged, to sell a controlled substance on school property;
- (E) Committed or attempted to commit a crime as defined by state criminal law statutes;
- (F) Harassed, threatened, or intimidated a fellow student, including but is not limited to bullying; or
- (G) Any act, message, or activity on social media for the purpose of defaming, bullying, or causing physical harm to another student.

Although this is not an exhaustive list of all of the possible violent offenses that can be committed in a schooling environment that would warrant possible suspension or expulsion, it is intended to provide schools with a framework for eliminating the practice of issuing out of school suspensions or expulsions under the guise of willful defiance for normal adolescent behavior. Additionally, providing a list of offenses is intended to demystify hegemonic notions that it is acceptable to remove students from their learning environment for non-violent offenses. Providing K–12 schools with more guidance on school disciplinary practices will also discourage school officials to rely upon the “catch all” category, willful defiance, and focus more on developmental approaches to school discipline, such as restorative justice principles.

### B. *Mandatory Implicit Bias Screening and Training*

In light of the growing racial disparities in school disciplinary sanctions<sup>112</sup> we can no longer afford to show deliberate indifference to the significance of race in dismantling the school-to-prison pipeline. As previously discussed, a wealth of research suggests that most individuals, including school teachers and principals, harbor racial stereotypes that affect, often unknowingly, their perceptions of the character and qualities of different races and ethnic groups.<sup>113</sup> This proposed law is designed to address the undeniable influence of racial bias in school disciplinary decisions. Under this law all school

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112. *Id.* at 186.

113. Carol Izumi, *Implicit Bias and the Illusion of Mediator Neutrality*, 34 WASH. U. J.L. & POL'Y 71, 93 (2010). Over two million people have taken the Implicit Association Test to measure their level of unconscious bias. More than 75% of the White test takers revealed an unconscious bias in favor of Whites and in opposition to Blacks. *Id.* (“Implicit stereotyping effects undermine the current belief about the role of consciousness in guaranteeing equality in the treatment of individuals irrespective of sex, class, color, and national origin. . . . Implicit stereotyping critically compromises the efficacy of “good intention” in avoiding stereotyping and points to the importance of efforts to change the material conditions within which (psychological) stereotyping processes emerge and thrive.”)

personnel would be required to take an Implicit Association Test (IAT) every two years to identify any unconscious racial biases they may harbor for students of color.<sup>114</sup> The results of the test will be completely confidential. Research has shown that unconscious stereotypes can be unlearned and that mere awareness of the bias compels people to engage in cognitive correction.<sup>115</sup> Therefore, this testing mandate will help identify and mitigate the influence of racial bias in school disciplinary decisions.<sup>116</sup> In addition, to the mandatory implicit bias testing, it is also imperative that school personnel receive implicit bias training as part of their ongoing professional development. Implicit bias training will provide participants with strategies for managing their behavioral responses to unconscious bias for the purpose of de-biasing the school disciplinary process.<sup>117</sup>

### C. Annual School Discipline Report Card

Similar to the No Child Left Behind Act,<sup>118</sup> the Federal School Disciplinary Bill will require all Title I funded schools to establish a discipline accountability system to ensure that all public schools are taking affirmative steps to eliminate racial disparities in school discipline policies and practices. School district discipline report cards will document individual schools' disciplinary practices over a specified period of time in order to

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114. I want to acknowledge that implicit biases against students based on other characteristics such as their class, gender, sexual orientation, and religion can also result in the unfair targeting of students and issuance of harsher school disciplinary sanctions. However, this paper is focusing solely on the influence of unconscious racial biases on school disciplinary decisions. I will explore the influence of other biases in a future article.

115. Jeffrey Rachlinski et al., *Does Unconscious Racial Bias Affect Trial Judges?*, 84 NOTRE DAME L. REV. 1195, 1203 (2009).

116. Patricia G. Devine et al., *Long-Term Reduction in Implicit Race Bias: A Prejudice Habit-Breaking Intervention*, 48 J. EXP. SOC. PSYCHOL. 1267, 1268 (2012) According to Psychologist, Patricia Devine, the de-biasing process is synonymous with breaking a bad habit. The process of breaking a prejudice habit requires: (1) awareness of the prejudice, (2) self-motivation to minimize the prejudice, (3) recognizing the contexts in which the prejudice exists, and (4) understanding how to implement strategies to provide counter-narratives. *Id.*

117. Robert J. Smith, *Reducing Racially Disparate Policing Outcomes: Is Implicit Bias Training the Answer?*, 37 U. HAW. L. REV. 295, 300 (2015).

118. Pub. L. No. 107-110, 115 Stat. 1425 (2001) (repealed 2015); see Joseph O. Oluwole & Preston C. Green, III, *No Child Left Behind Act, Race, and Parents Involved*, 5 HASTINGS RACE & POVERTY L.J. 271, 275 (2008) (“NCLB requires that states disaggregate data on AYP for economically disadvantaged students, racial and ethnic groups, students with disabilities, and limited English proficient (“LEP”) students. As part of this accountability system, states must implement annual academic assessments in mathematics, science, and reading or language arts ‘as the primary means of determining the yearly performance of the State and of each local educational agency and school in the State in enabling all children to meet the State’s challenging student academic achievement standards.’”).

highlight positive developments toward reducing racial disparities and also identify areas that require significant improvement, such as school-based arrests. To this end, this law will require that school discipline data be disaggregated by race/ethnicity. Additionally, school district discipline report cards must contain the following aggregated by race:<sup>119</sup> (1) out of school suspension rate per 100 students; (2) percentage of change in all students; (3) expulsion rate per 100 students; (4) referrals to law enforcement per 100 students; and (5) Racial Inequality Index.

Schools with discipline data that reveal racial disparities will be required to develop a School Discipline Improvement Plan to the U.S. Department of Education Office of Civil Rights. The plan should detail how the school will restructure their disciplinary policies and practices to address the disproportionate effect on students of color. If the school fails to eliminate the racial disparities in school discipline sanctions after year one, the school will be categorized as “Under Review.” Schools in the Under Review Stage will be required to submit all recommended out of school suspensions and expulsions cases to a designated principal from a neighboring school district for review. Each year school superintendents will select a Designated Review Principal and submit their names to the State Department of Education. Each State’s Department of Education will then assign each school district a designated principal to a particular school district for the purpose of reviewing school disciplinary decisions that remove students from the school environment. The Designated Review Principal will have the discretionary power to overturn any disciplinary sanctions that are deemed overly harsh in schools in the Under Review Stage. The Designated Review Principal is intended to provide another layer of protection for students that subjected to biased decision-making.

#### *D. School Disciplinary Community Review Board*

Under this law, each Title I funded K–12 school will be required to create a School Discipline Community Review Board for the purpose of increasing school accountability for racial disparities in school disciplinary practices and addressing student misbehavior in an unbiased and equitable manner. The board is designed to deter school principals and teachers from imposing

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119. I want to acknowledge the importance of requiring school discipline report cards to also aggregate discipline data not only by race, but also by English language learners, economically disadvantaged students, and students with disabilities. However, because this paper focuses on the influence or explicit and implicit racial bias on school disciplinary policies and practices, the proposed federal law will focus on race. I will pursue other forms of discrimination in school discipline in a future article.

racially biased, overly harsh sanctions due to a monthly audit of disciplinary decisions. Specifically, the School Discipline Community Review Board will review all disciplinary sanctions that involve out of school suspensions and expulsions to evaluate whether the sanction was appropriate for the documented misconduct. The Review Board will also analyze the school's disciplinary decisions to identify any patterns of discrimination in school disciplinary decisions in relation to a student's race, gender, sexual orientation, or other social marker. The Board will submit a quarterly report documenting their findings to the U.S. Department of Education's Office of Civil Rights and the U.S. Department of Justice. Both of these agencies conduct investigations into potential violation of students' rights such as disparate impact discrimination under Title VI of the Civil Rights Act of 1964 and violations of students' constitutional rights.<sup>120</sup>

The School Discipline Community Review Board would consist of a representative from the local department of social services, parent, teacher, lawyer, and one representative from a local community-based organization. This diverse disciplinary Review Board is designed to look at school disciplinary sanctions from a developmental and holistic approach as opposed to a one-size-fits-all perspective. Additionally, this neutral Board will help illuminate unduly harsh disciplinary decisions that result from school personnel from fatigue as a result of dealing with student misbehavior on a daily basis. This Board is also designed to help identify overly severe disciplinary decisions motivated by discriminatory reasons such as race, gender, and sexual orientation.

Each member of the Board has a distinct purpose toward promoting equitable school disciplinary practices. The inclusion of a representative from a local department of social services is to help identify students' misbehavior that stems from social issues such as poverty, homelessness, domestic violence, undiagnosed behavior disability, and victims of bullying. The Review Board will consider things such as a child's life circumstances in terms of family life, health, and schooling experience. Is the child a victim of bullying? Homeless? Experiencing health issues? Often, school officials

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120. See, e.g., *Justice Department Releases Investigative Findings Showing Constitutional Rights of Children in Mississippi Being Violated*, U.S. DEP'T JUSTICE (Aug. 10, 2012), <http://www.justice.gov/opa/pr/justice-department-releases-investigative-findings-showing-constitutional-rights-children> (investigating whether students' due process rights had been violated through disproportionate punishment); *United States Department of Education Announces Voluntary Resolution of Mississippi's Tupelo Public School District School Discipline Investigation*, U.S. DEP'T EDUC. (Sept. 25, 2014), <http://www.ed.gov/news/press-releases/us-department-education-announces-voluntary-resolution-mississippi-tupelo-public-school-district-school-discipline-investigation> (ensuring nondiscrimination after Mississippi's Tupelo School District school discipline investigation).



approach non-compliance and misbehavior from a zero tolerance perspective without considering things such as the child's grade level, family circumstances, and individual challenges.<sup>121</sup> These trained officials can help students and their parents locate resources for interventions, services and support. Additionally, the inclusion of lawyers will help illuminate any violations of students' constitutional rights such as a denial of due process for a long-term suspension or expulsion.<sup>122</sup>

### E. *Limitations of the Proposed Legislation*

Despite the meritorious goals of the proposed Federal School Disciplinary Bill, it is important to address potential limitations of the law. For the mandatory implicit bias training to be effective, school personnel must be motivated to participate in the de-biasing process. Because discourse surrounding race is often uncomfortable for many individuals, it is highly probable that some school personnel may be reluctant to fully engage in the training. Additionally, despite the wealth of empirical evidence documenting the authenticity of implicit bias, many individuals still question whether the phenomenon exists. Thus, skepticism coupled with resistance to engage in discourse related to issues of race may hinder school personnel's commitment to the successful implementation of the law. The Title I enforcement tool incorporated into this proposed law is intended to motivate school personnel to support the successful implementation of this law to avoid loss of Title I funding. Lastly, another potential limitation is related to the law's proposed ban on all suspensions and expulsions for non-violent offenses. Many teachers and school administrators rely on the 'threat' of suspension or expulsion to deter student misconduct and maintain a school environment that is conducive to learning. As a result, some teachers and school administrators posit that moratoriums on school suspensions and expulsions may severely limit their ability to do their jobs.<sup>123</sup> The most effective means of addressing

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121. George Bear, *Discipline: Effective School Practices*, in HELPING CHILDREN AT HOME AND SCHOOL III: HANDOUTS FOR FAMILIES AND EDUCATORS S4H18-1 (2010), [https://www.nasponline.org/Documents/Research%20and%20Policy/Advocacy%20Resources/S4H18\\_Discipline.pdf](https://www.nasponline.org/Documents/Research%20and%20Policy/Advocacy%20Resources/S4H18_Discipline.pdf).

122. *See, e.g., Goss v. Lopez*, 419 U.S. 565, 579 (1975) (stating that in disciplinary proceedings, students have the right to due process including notice and the opportunity to be heard).

123. Frey, *supra* note 49 (“‘I don’t like anything that would inhibit my ability to do my job,’ said Paul Meyers, superintendent of Standard Elementary School District in Bakersfield. . . . ‘If a kid comes into kindergarten and is cussing and flipping off the teacher, what can the teacher do? Restrain him and then put him back in class?’ he asked. ‘They’re taking away a tool and not replacing it with anything.’”).

these concerns are to provide school personnel with training on alternative approaches to school discipline. However, the current budgetary crisis<sup>124</sup> that is currently impacting many K–12 schools throughout the country may prohibit schools from implementing this type of professional development due to a lack of resources. Lastly, it is important to acknowledge that some legal scholars may oppose the proposed federal school disciplinary law as an unwarranted act of federalism that imposes on states’ autonomy over their local education systems.<sup>125</sup> However, potential resistance under the guise of federalism fails to acknowledge the inconvenient truth . . . states have grossly mismanaged the disciplinary crisis in K–12 schools. The federal government is uniquely positioned to bring forth substantive reform to this education crisis<sup>126</sup> through the passage of a uniform school disciplinary law. Our children can no longer wait on individual states to develop innovative, developmental approaches to school discipline. A stronger, uniform response is necessary through the passage of the proposed federal school disciplinary law. Ideally, the proposed federal school disciplinary law will serve as a catalyst for more collaboration between the federal government and states toward ensuring equal educational opportunity in K–12 schools.

#### CONCLUSION

Every day, thousands of students of color, especially African Americans, are denied access to schools due to overly harsh school disciplinary policies. Several research studies highlight how out of school suspensions and expulsions negatively impact students’ academic trajectory and place them at a higher risk for becoming a high school dropout. Yet, despite the overwhelming evidence of the harmful impact of the current school

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124. Michael A. Rebell, *Safeguarding the Right to a Sound Basic Education in Times of Fiscal Constraint*, 75 ALB. L. REV. 1855, 1855 (2012). The economic downturn has produced significant shortfalls in state government revenue, which has resulted in significant reductions in educational expenditures for K–12 schools. As a result, schools have increased class sizes, reduced curriculum offerings, and minimized the budget for instructional supplies. *Id.*

125. Sarah G. Boyce, *The Obsolescence of San Antonio v. Rodriguez in the Wake of the Federal Government’s Quest to Leave No Child Behind*, 61 DUKE L.J. 1025, 1028 (2012) (stating “the federal government has continued to encroach upon the states’ traditional role in education”); see also *No Child Left Behind and the Political Safeguards of Federalism*, 119 HARV. L. REV. 885, 905 (2006) (stating the notion that local control of education was “a desirable end in itself [wa]s a virtually uncontested position, put forth by commentators, courts, and government officials alike”).

126. Kimberly Jenkins Robinson, *The Past, Present, and Future of Equal Educational Opportunity: A Call for a New Theory of Education Federalism*, 79 U. CHI. L. REV. 427, 455 (2012) (“As a result, ‘the federal government is uniquely positioned to mobilize a national effort and encourage state and local action whenever a critical educational need arises.’”).

disciplinary system on students of color, very little progress has been made on reforming the system. The disproportionate number of minorities subjected to overly harsh disciplinary sanctions is due to explicit and implicit bias, teachers' lack of classroom management skills, adult policing practices on children, and overreliance on law enforcement officers for minor student misbehavior.<sup>127</sup> In theory, school resource officers should improve school safety and foster positive relations between law enforcement and the citizens they serve, particularly minorities. This is especially important in light of the increased scrutiny regarding the treatment of minority children following the deaths of Michael Brown in Ferguson, Missouri and Tamir Rice in Cleveland.<sup>128</sup> However, in practice, many school resource officers are helping to further as opposed to hinder the school-to-prison pipeline by using adult policing practices on minority children and issuing racially biased school discipline sanctions. Schools' personnel's explicit and implicit racial bias further exacerbate the harm inflicted upon students of color by issuing harsher disciplinary sanctions that unjustly remove students from their learning environments for normal adolescent behavior.

The adoption of a federal school disciplinary bill is the most efficient path to achieving robust, systemic reform in K–12 school disciplinary policies and practices. A federal bill will provide greater accountability for K–12 schools to address the racial disparities in school disciplinary sanctions and force school administrators to utilize alternative, evidence-based practices that address the emotional and social issues that are the catalyst for the misbehavior, as opposed to exclusionary, punitive disciplinary practices. Lastly, the adoption of a federal school disciplinary bill will no longer allow school administrators demonstrate deliberate indifference to the significance of race in dismantling the school-to-prison pipeline. The stark reality is that race, unfortunately, does matter and it is imperative that school personnel is trained on how manage their blind spot. Every child, regardless of its race or ethnicity deserves a chance to equal education opportunity. The school-to-prison pipeline erodes educational equity and thus must be eradicated with all deliberate speed. Our children cannot wait until tomorrow. . . . The time is now.

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127. Buckingham, *supra* note 48, at 208.

128. Timothy Williams & Mitch Smith, *Cleveland Officer Will Not Face Charges in Tamir Rice Shooting Death*, N.Y. TIMES (Dec. 28, 2015), [http://www.nytimes.com/2015/12/29/us/tamir-rice-police-shooting-cleveland.html?\\_r=0](http://www.nytimes.com/2015/12/29/us/tamir-rice-police-shooting-cleveland.html?_r=0).