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The Stuart Rome Lecture: Knocking Against the Rocks: Evaluating Institutional Practices and the African-American Boy

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Articles

THE STUART ROME LECTURE
KNOCKING AGAINST THE ROCKS: EVALUATING INSTITUTIONAL PRACTICES AND THE AFRICAN AMERICAN BOY

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A Frisky Child Knocks His Face Against the Rocks.[1]

I. INTRODUCTION

The media portrays young black men as dangerous, hostile and out of control.[2] While many African American boys do succeed, statistics about black youth reveal serious achievement gaps between them and their Caucasian counterparts in school and high rates of arrest and referral to juvenile court.[3] Research often focuses on family and cultural "deficits," looking to blame higher rates of single-parent households, poverty and an oppositional peer culture for these deeply troubling statistics.[4]

The statistics presented in this article show that some of the same social institutions charged with nurturing children actually divert many African American boys from paths to successful development.[5] Instead, these institutions label, discipline, segregate, punish, and

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* Associate Professor of Law, James E. Beasley School of Law at Temple University. I am grateful to Dean Karen Rothenberg, the Law & Health Care Program, and the Journal of Health Care Law & Policy for the honor of inviting me back to present the Stuart Rome Lecture, and to Diane Hoffmann and Susan Leviton for arranging my visit and the terrific conference. I am indebted to Kathyanne Cohen for her substantial work in the research and development of this article, to Bill Spearing for his research assistance, and to Barbara Bezdek and Daniel Losen for their helpful comments on my draft. I especially appreciated the warm response and thought-provoking comments from the participants at the conference, many of whom remain important colleagues and friends to me.

1. ASHLEY BRYAN, THE NIGHT HAS EARS: AFRICAN PROVERBS (1999).

2. Eileen Poe-Yamagata & Michael A. Jones, *And Justice for Some* 6, http://www.buildingsblocksforyouth.org/justiceforsome/jfs/pdf (last modified 1999) (on file with the Journal of Health Care Law & Policy).

3. *See infra* Part II.

4. *See, e.g.*, Jennifer Sable, *The Educational Progress of Black Students, in* NATIONAL CENTER FOR EDUCATION STATISTICS, CONDITION OF EDUCATION 1998, http://www.nces.ed.gov/pubs98/condition98/c98003.html (visited Aug. 16, 2001) (on file with the Journal of Health Care Law & Policy).

5. *See* discussion *infra* Part II.

confine them.[6] Too often, they crush the souls of black boys. This article explores the statistics available to confirm the negative treatment that African American boys encounter in our educational, mental health and juvenile justice systems.[7] The data collected here supports three main conclusions. First, African American boys are much more likely to be identified as disabled or delinquent than other children, including African American girls. Second, they are more likely than other children to be placed in educational, mental health, and juvenile justice programs that exert greater *external* control and deliver fewer services despite identified needs. Third, these negative experiences lead African American boys to stay away from or exit these institutional settings. These statistics are stark and disturbing. Unexplained by family structure, poverty, or culture,[8] they reveal widespread institutional and personal racism.[9]

I chose to become a lawyer in the belief that law can be an instrument for progressive social change. Unfortunately, the hopeful era of civil rights litigation, initiated by the NAACP and culminating in *Brown v. Board of Education*,[10] is over.[11] By now, judicial protection of a still separate and unequal status quo through doctrinal developments under the Equal Protection Clause and the Civil Rights Act of 1964 is clear.[12] Scholars have documented the deepening divide between racial inequality and formalist interpretations of civil rights law that largely help white people protect entrenched advantages.[13] Recent analyses of civil rights laws such as Title VI of the Civil Rights Act of 1964 are apt to focus on their limitations rather than their promise.[14] Work for racial equality, however, cannot stop.

Ideally, the racial disparities documented here would, on their own, spur educators, mental health professionals and juvenile justice officials to act affirmatively to evaluate and change the intertwining

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6. *Id.*

7. *See* discussion *infra* Part II.

8. *See* discussion *infra* Part II.

9. *See* discussion *infra* Parts II & III.

10. 349 U.S. 294 (1955).

11. *See, e.g.*, Derrick Bell, *Brown v. Board of Education and the Interest Conversion Dilemma, in* CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT 20, 23-24 (Kimberly Crenshaw et al., eds. 1995) [hereinafter CRITICAL RACE THEORY].

12. *See, e.g.*, Alan D. Freeman, *Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine*, 62 MINN. L. REV. 1049 (1978).

13. *See, e.g.*, DERRICK BELL, RACE, RACISM AND AMERICAN LAW (2d ed. 1980).

14. *See, e.g.*, STEPHEN C. HALPERN, ON THE LIMITS OF THE LAW: THE IRONIC LEGACY OF TITLE VI OF THE 1964 CIVIL RIGHTS ACT (1995); *see* PETER H. SCHUCK, THE LIMITS OF LAW: ESSAYS ON DEMOCRATIC GOVERNANCE (2000) (providing a far-reaching analysis on the limitations of the law).

conditions of structural and unconscious racism that so negatively affect African American boys.[15] However, given the ongoing and unchanging nature of these disparities, it appears necessary that our laws prohibiting racial discrimination be used as tools to force officials to change their institutional practices. Law invariably expresses our societal values.[16] Thus, a turn to the legal system can be effective through the force of judicial decrees, and by the creation of social norms that value racial equality.[17] While too often antidiscrimination law has been used to "create[ ] the illusion that racism is no longer responsible for the condition of the black underclass,"[18] legal challenges to racial inequalities remain one part of the "multi-dimensional groundwork" in the work for racial equality.[19]

For the programs examined in this article, the most promising legal avenue involves the federal regulations developed to enforce Title VI of the Civil Rights Act of 1964.[20] These regulations prohibit recipients of federal funds from engaging in policies and practices that have a racially disparate impact on African American boys and other minority children.[21] However, the right of private plaintiffs to seek redress under the Title VI regulations is under siege. A recent decision by the U.S. Supreme Court restricted access to the courts to enforce the regulations.[22] Lower federal court decisions in some jurisdictions have gone even further, completely eliminating private parties' access to judicial relief for violations of the Title VI disparate impact regulations.[23] These regulations are vitally important to ad-

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15. Professor Sharon Rush has written eloquently about the proactive steps that can be taken to achieve a greater degree of racial equality. *See* Sharon E. Rush, *Sharing Space: Why Racial Goodwill Isn't Enough*, 32 CONN. L. REV. 1 (1999) [hereinafter Rush, *Sharing Space*]; Sharon E. Rush, *The Heart of Equal Protection: Education and Race*, 23 N.Y.U. REV. L. & SOCIAL CHANGE 1 (1997) [hereinafter Rush, *Heart of Equal Protection*].

16. *See* Jane B. Baron & Jeffrey L. Dunoff, *Against Market Rationality: Moral Critiques of Economic Analysis in Legal Theory*, 17 CARDOZO L. REV. 431, 488 (1996).

17. *See, e.g.*, Kimberlé Williams Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, *in* CRITICAL RACE THEORY, *supra* note 11, at 103, 111.

18. *Id.* at 117.

19. Donald E. Lively, *Reformist Myopia and the Imperative Progress: Lessons for the Post-Brown Era*, 46 VAND. L. REV. 865, 896 (1993).

20. 34 C.F.R. Part 100 (2001).

21. *See, e.g.*, 34 C.F.R. § 100.3(b)(2).

22. *See* Alexander v. Sandoval, 532 U.S. 275, 293 (2001) (holding that there is no private right of action to enforce Title VI disparate impact regulations); *see also infra* Part III. (providing a discussion of the *Sandoval* decision).

23. South Camden Citizens in Action v. N.J. Dep't of Envtl. Protection, 274 F.3d 771, 788 (3d Cir. 2001) (holding that Title VI regulations are not enforceable under § 1983); Bonnie L. v. Bush, 180 F. Supp. 2d 1321, 1344 (S.D. Fla. 2001) (also holding that Title VI regulations are not enforceable under § 1983). *But see*, Lucero v. Detroit Pub. Sch., 160 F.

dressing racial discrimination by our publicly funded institutions, institutions that hold great power in the lives of our youth. Advocates must therefore challenge judicial restrictions and demand that Congress keep open this vital avenue for protecting civil rights.

The analysis in this article supports the importance of maintaining access to the courts to challenge policies and practices that negatively affect African American boys and other minority children. This article re-evaluates Title VI of the Civil Rights Act,[24] and in particular its implementing regulations,[25] to explore its promise as an effective tool to require the social institutions of childhood to effectively educate and aid African American boys. After documenting the dramatic disparities in the treatment of African American boys, this article examines doctrinal developments in the contexts of disability, language, minority and gender discrimination to suggest that a more vigorous approach to Title VI can help protect African American boys from the pervasive discrimination they face in our social institutions.[26] Advocates have been breathing new life into Title VI by using it to attack structural racism in the form of school funding.[27] I suggest that advocates also focus on the biased practices within schools, mental health and juvenile justice programs that further unconscious racism, and challenge the interrelated practices of structural and unconscious racism. Advocates must work both to ensure access to the courts to challenge policies and practices that have a racially disparate impact on minorities and to ensure that private litigants effectively employ the disparate impact regulations to diminish the harsh disparities described here.

Finally, this article outlines more recent legislation that responds to the striking disadvantages black youth experience in our education, mental health and juvenile justice systems and suggests using those provisions to advocate change in institutional practices as well as placing more such requirements into law through legislative advocacy.[28]

Supp. 2d 767, 784 (E.D. Mich. 2001) (holding that Title VI regulations are enforceable under § 1983).

24. 42 U.S.C. § 2000d (1964).

25. *See, e.g.*, 34 C.F.R. Part 100.

26. *See infra* Part IV.

27. *See, e.g.*, Campaign for Fiscal Equity v. N.Y., 719 N.Y.S.2d 475 (Sup. Ct. 2001).

28. *See infra* Part IV.

II. STATISTICAL DATA

A. *Education: Deflecting African American Boys from Avenues to Success*

> The Congress declares it to be the policy of the United States that a high-quality education for all individuals and a fair and equal opportunity to obtain that education are a societal good, are a moral imperative, and improve the life of every individual, because the quality of our individual lives ultimately depends on the quality of the lives of others.[29]

Despite the Nation's rhetorical commitment to an equal opportunity to obtain a high-quality education, the evidence overwhelmingly shows that our Nation's schools fail to meet this "moral imperative." This failure is especially evident in the treatment of African American boys in U.S. public schools. While African American boys constitute 8.7 percent of the public school population in the United States,[30] they are greatly underrepresented in those categories that define school success and grossly overrepresented in those categories that demonstrate problems in the school environment.

Public schools have failed to close longstanding gaps in achievement based on race, ethnicity and gender.[31] Even where the effects of income are limited, achievement test gaps between white and black males remain. For example, in Maryland, white boys in the fifth grade achieve satisfactory performance on the Maryland School Performance Assessment Program at almost twice the rate of their African American peers.[32] In New York, a detailed statistical analysis of student achievement demonstrated that racial achievement gaps remained even when the data was controlled for income level.[33]

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29. 20 U.S.C. § 6301(a)(1) (1994).

30. OFFICE FOR CIVIL RIGHTS, U.S. DEP'T OF EDUCATION, 1998 ELEMENTARY AND SECONDARY SCHOOL CIVIL RIGHTS COMPLIANCE REPORT: PROJECTED VALUES FOR THE NATION 1 (1998) (available by request from the Office for Civil Rights, data on file with author) [hereinafter 1998 OCR DATA].

31. *See, e.g.*, JAY R. CAMPBELL ET AL., U.S. DEP'T OF EDUCATION, NAEP 1999 TRENDS IN ACADEMIC PROGRESS: THREE DECADES OF STUDENT PERFORMANCE 31-40 (2000).

32. ACHIEVEMENT INITIATIVE FOR MARYLAND'S MINORITY STUDENTS (AIMMS) STEERING COMMITTEE, MARYLAND STATE DEPARTMENT OF EDUCATION, MINORITY ACHIEVEMENT IN MARYLAND AT THE MILLENNIUM: A SPECIAL REPORT 52-54 (January 2001) [hereinafter MD MINORITY ACHIEVEMENT].

33. Campaign for Fiscal Equity v. N.Y., 719 N.Y.S.2d 475, 491 (Sup. Ct. 2001).

TABLE 1: SATISFACTORY PERFORMANCE ON MSPAP BY SUBJECT AND INCOME, GRADE 5 1999[34]

	FARMS	READING	MATH	SCIENCE
White Males	Yes	30.7	32.8	30.9
	No	51.1	55	52.2
Black Males	Yes	15.2	14.1	14.4
	No	28.5	25.5	28.1

Other indicators of achievement are equally troubling: African American boys are only half as likely as their white male peers to be placed in Gifted and Talented Programs and more than a third less likely to be in Advanced Placement Math and Science Courses.[35] While the high school graduation rate of African American males has risen over the past thirty years, it continues to lag behind white males.[36] Black males are also underrepresented in college.[37] These racial disparities in educational attainment are demonstrated in the table below:

TABLE 2: ENROLLMENT STATUS BY RACE AND GENDER, 1998 (% OF 18-21 YEAR OLD POPULATION)[38]

	Enrolled in High School	High School Graduate	Enrolled in College	Not High School Graduate
Total	8.9	76.7	45	14.3
Black Male	18.3	59.6	32	22
White Male	9.0	75.1	42	15.9

While many traditional explanations for the lack of academic achievement of African American students focus on higher rates of

34. MD MINORITY ACHIEVEMENT, *supra* note 32. The acronym FARMS refers to the "Federal Free and Reduced Meal Service" program. *Id.* at 59.

35. 1998 OCR DATA, *supra* note 30, at 1.

36. NATIONAL CENTER FOR EDUCATION STATISTICS, DIGEST OF EDUCATION STATISTICS 2000, at 125 (2001).

37. *Id.* at 243. While black males made up 8.7% of the public school population, they only comprised 5.5% of college attendees in October 1999. White males, who made up 32.3% of the public school population, comprised 34.5% of those attending college in October 1999. Interestingly, women of all races outnumbered their male peers in college attendance in the fall of 1999 among white, black and Hispanic American groups (Asian American students were not included in the data). This gender difference was especially marked for black students, among whom males comprised 5.5% of the college population and females comprised 7.4%. African American students of both genders, however, were underrepresented in college attendance. *Id.*

38. U.S. CENSUS BUREAU, STATISTICAL ABSTRACT OF THE UNITED STATES 181 (2000).

poverty and lower levels of parental involvement in education as factors,[39] other studies point to culprits within some schools that are well within public control, including funding inequities and overburdened urban school districts, lack of teacher accountability, school staffing, teachers' reduced expectations and lack of cultural competence, and concentrated poverty.[40] Schools operated by the Department of Defense, which face their own substantial barriers to student achievement, such as low income and high mobility, have succeeded in halving the racial achievement gap found in civilian schools, and point the way toward increasing the achievement of students of color.[41] Even issues such as an "oppositional peer culture" have proven amenable to concentrated efforts to change school culture.[42]

Studies of ability grouping practices in public schools, while less comprehensive, demonstrate the same troubling pattern. "Ability grouping" describes a wide range of programs, including within class groupings for specific subjects, such as math or reading, to much more rigid between-class assignments which greatly diminish the level of interaction among students at different levels.[43] Assignments to different "tracks" may be based on test scores, grade point averages, teacher recommendations and parent requests.[44] While ability-grouping practices are widespread, they are rarely formalized in school district policy statements, and students and parents may not be informed of tracking practices in their school.[45]

Evidence that ability-grouping programs harm students placed in lower tracks is substantial.[46] Studies show that ability grouping, inde-

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39. *See, e.g.*, Sable, *supra* note 4 (discussing significant differences between white and black student achievement with a focus on "family characteristics" and not even mentioning the characteristics of the schools they attend).

40. MD MINORITY ACHIEVEMENT, *supra* note 32, at 3-12.

41. Debra Viadero, *Minority Gaps Smaller in Some Pentagon Schools*, EDUCATION WEEK (March 29, 2000), http://www.edweek.org/ (on file with the Journal of Health Care Law & Policy).

42. Debra Viadero & Robert Johnston, *Lifting Minority Achievement: Complex Answers*, EDUCATION WEEK (April 5, 2000), http://www.edweek.org/ (on file with the Journal of Health Care Law & Policy).

43. JEANNIE OAKES, KEEPING TRACK: HOW SCHOOLS STRUCTURE INEQUALITY 43-60 (1985) (describing the varied patterns of tracking programs found at the twenty-five schools studied).

44. Daniel Losen, *Silent Segregation in Our Nation's Schools*, 34 HARV. C.R.-C.L. L. REV. 517, 519-20 (1999).

45. OAKES, *supra* note 43, at 44.

46. *See, e.g., id.* at 8-9, 93-112; Robert E. Slavin, *Achievement Effects of Ability Grouping in Secondary Schools: A Best-Evidence Synthesis*, 60 REV. OF EDUC. RES. 471 (1990); HUGH MEHAN ET AL., CONSTRUCTING SCHOOL SUCCESS: THE CONSEQUENCES OF UNTRACKING LOW-ACHIEVING STUDENTS 5-10 (1996).

pendent of student background and achievement, affects student educational aspirations.[47] High ability-group placement leads to aspirations for college attendance, while low placement leads to a lack of aspiration to attend college.[48] Ability grouping choices made early in a child's educational career may later rule out enrollment in more challenging college preparatory courses in higher grades.[49] A model detracking program demonstrated substantial gains in college attendance by African American students who had participated.[50] In addition, studies have shown substantial academic gains by students of color who have been taught in cooperative learning environments rather than ability grouping programs.[51]

Because of the differences in ability grouping programs, there are no national data available on the racial and gender effects of ability grouping programs.[52] However, the more limited studies that have been conducted reveal that ability grouping programs place students of color in the lower tracks at very high rates and lead to significant racial segregation within otherwise integrated schools.[53] Given the other educational data available about African American boys, it is probable that they are even more likely than African American girls to wind up in low achievement-oriented, highly segregative educational settings.[54]

African American male students are also grossly overrepresented in special education, which is often viewed as "below" the lowest regu-

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47. Jomills Braddock, II & Marvin Dawkins, *Ability Grouping, Aspirations, and Attainments: Evidence from the National Educational Longitudinal Study of 1988*, J. NEGRO EDUC. 324, 329-30 (1993).

48. *Id.*

49. Losen, *supra* note 44, at 519-20.

50. MEHAN ET AL., *supra* note 46, at 45-46.

51. *Id.* at 13.

52. For example, ability grouping programs are not included in the biennial collection of data by race, ethnicity and gender by the Office for Civil Rights. *See, e.g.*, 1998 OCR DATA, *supra* note 30.

53. Linda Darling-Hammond, *Inequality and Access to Knowledge, in* HANDBOOK OF RESEARCH ON MULTICULTURAL EDUCATION 465, 474 (James A. Banks & Cherry A. McGee Banks eds., 1995); ANNE WHEELOCK, CROSSING THE TRACKS, HOW UNTRACKING CAN SAVE AMERICA'S SCHOOLS 9 (1992); KENNETH J. MEIER ET AL., RACE, CLASS, AND EDUCATION, THE POLITICS OF SECOND-GENERATION DISCRIMINATION 3 (1989); OAKES, *supra* note 43, at 66-67 (describing the disproportionate representation of minority students in the lower tracks at six racially mixed schools); *see,* Angela Dickens, Note, *Revisiting Brown v. Board of Education: How Tracking has Resegregated America's Public Schools*, 29 COLUM. J.L. & SOC. PROBS. 469 (1995-1996) (providing an overview of the research on the negative effects of tracking programs on minority students and the segregative effects of such programs).

54. Given the negative impact of placement in the lower tracks of ability grouping programs, it is urgent that the United States Department of Education begin to measure the racial, ethnic and gender effects of ability grouping programs.

lar academic track. They are particularly disproportionately represented in the categories of mental retardation, serious emotional disturbance, and specific learning disabilities.[55] Overrepresentation in these categories has been longstanding.[56] The Office for Civil Rights has focused on these three categories because they are more open to subjective decision making.[57] Sharp variations among the states in identification rates of children in these different categories demonstrate the subjectivity of these determinations. For example, black youth are identified as having mental retardation at more than four times the rate of white students in states as diverse as Connecticut, Mississippi, North Carolina, Nebraska, and South Carolina, while they are overrepresented at a rate of less than two times in California, Idaho, Kentucky, Maine, North Dakota, Pennsylvania, Utah and West Virginia.[58]

Overrepresentation rates also varied widely among different disabilities within the same states.[59] For example, in Indiana, black students are 3.31 times more likely than white students to be identified as having mental retardation, 1.78 times as likely to be identified as having an emotional disability, but slightly less likely than white students to be identified as having a specific learning disability.[60] In Utah, black students are 1.75 times more likely than white students to be identified as having mental retardation, 3.73 times more likely to be identified as having emotional disabilities, and 2.25 times as likely to be identified as having a specific learning disability.[61]

Lower socio-economic status appears to place children at risk for somewhat higher rates of disability.[62] It is often difficult to separate

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55. 1998 OCR DATA, *supra* note 30, at 1.

56. *See* Theresa Glennon, *Race, Education and the Construction of a Disabled Class*, 1995 WIS. L. REV. 1237, 1250-58.

57. *See* Beth Harry & Mary G. Anderson, *The Social Construction of High-Incidence Disabilities: The Effect on African American Males, in* AFRICAN AMERICAN MALES IN SCHOOL AND SOCIETY: POLICIES AND PRACTICES FOR EFFECTIVE EDUCATION 34, 37-41 (Vernon C. Polite & James Earl Davis eds.1999) [hereinafter Harry & Anderson, *Social Construction*].

58. Tom Parrish, *Disparities in the Identification, Funding and Provision of Special Education, in* THE CIVIL RIGHTS PROJECT, THE CONFERENCE ON MINORITY ISSUES IN SPECIAL EDUCATION IN PUBLIC SCHOOLS, Tables 1 & 2, http://www.law.harvard.edu/civilrights/conferences/SpecEd/parrishpaper2.html (Nov. 6, 2000) (on file with the Journal of Health Care Law & Policy).

59. *Id.*

60. *Id.* at Table 2.

61. *Id.*

62. Donald P. Oswald et al., *Community and School Predictors of Over Representation of Minority Children in Special Education, in* THE CIVIL RIGHTS PROJECT, THE CONFERENCE ON MINORITY ISSUES IN SPECIAL EDUCATION IN PUBLIC SCHOOLS 11, http://www.law.harvard.edu/civilrights/conferences/SpecEd/oswald.pdf (last visited Aug. 16, 2001) (on file with the

the effects of poverty from race because, in the United States, poverty and race are correlated.[63] However, when closely scrutinized by community, rates of African American boys identified as having mental retardation actually rose in higher income communities and in communities with few nonwhite students.[64] A study conducted in Atlanta found that race appeared to be a strong factor in identification as having mild mental retardation for African American children in higher economic brackets and whose mothers had higher levels of education.[65] In addition, at the national level, the disproportions vary greatly by type of disability with African American males most overrepresented in the serious emotional disturbance category and far less disproportionately represented in the category of specific learning disability.[66] These data strongly indicate systemic bias.[67] Congress recognized the severity of the disproportionate representation of minority students in special education in the passage of the 1997 Amendments to the Individuals with Disabilities Education Act, noting, "greater efforts are needed to prevent the intensification of problems connected with mislabeling . . . among minority children with disabilities."[68]

Other studies point to a variety of factors that contribute to the disproportionate placement of African American boys in special education. These factors include issues concerning teacher readiness: lack of teacher preparation for working with diverse learners, gender and cultural gaps between a predominantly white female teaching staff and black boys, the devaluing of the patterns of language learning and usage of African American boys, sharply contrasting cultural

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Journal of Health Care Law and Policy) (finding that data supports that greater susceptibility to serious emotional disturbance and specific learning disabilities is related to greater levels of poverty).

63. U.S. DEP'T OF EDUCATION, TWENTIETH ANNUAL REPORT TO CONGRESS II-20-II-22 (1998).

64. *Id.* An analysis conducted by U.S. News & World Report also found that black students are most likely to be overrepresented in special education classes when they are students in predominantly white school districts, and that in some school districts, neither the number of black students nor household demographics accounted for the high percentage of black students. Joseph P. Shapiro et al., *Separate and Unequal*, U.S. NEWS & WORLD REPORT, Dec. 13, 1993, at 46, *available at* http://www.usnews.com/usnews/news/93ed1.htm.

65. Marshalyn Yeargin-Allsop et al., *Mild Mental Retardation in Black and White Children in Metropolitan Atlanta: A Case-Control Study*, 85 AM. J. PUB. HEALTH 324, 326 (1995).

66. 1998 OCR DATA, *supra* note 30, at 1.

67. *Id.* at 11-14.

68. 20 U.S.C. § 1400(c)(8)(A) (1999).

preferences for physical and verbal behavior, and inappropriate use of specific instructional strategies.[69]

When the special education identification and placement figures are broken out by race and gender, a stark picture appears. Using white female students as the baseline, African American boys are the most overrepresented by very significant degrees in the categories of mental retardation and serious emotional disturbance. The race and gender disparities are striking: while African American females are 2.02 times as likely as white females to be identified as mentally retarded, African American males are 3.26 times as likely.[70] African American girls are 1.4 times as likely as white females to be identified as having serious emotional disturbance, while African American boys are a remarkable 5.5 times as likely to be identified.[71]

These data are especially disturbing because special education programs have failed to achieve significant educational improvement for African American students identified as having disabilities.[72] In addition, identification as disabled often leads to the exclusion of students from the general education curriculum.[73]

While the federal government has failed to collect data concerning restrictiveness of educational placement by race and gender, smaller studies and litigation demonstrate that African American males, once identified, are even more likely than other special education students to be placed in separate classes or separate schools which exert greater external controls over them.[74] An examination of California statistics reveals that African American students identified as disabled were less likely than white students to be placed in general education classes or resource rooms and much more likely than white students to be placed in full-time, self-contained special education classes and fulltime private school placements.[75] Despite being placed in more restrictive settings and being identified as needing intensive

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69. *See* Beth Harry & Mary G. Anderson, *The Disproportionate Placement of African American Males in Special Education Programs: A Critique of the Process*, 63 J. NEGRO EDUC. 602, 610-11 (1994) [hereinafter Harry & Anderson, *Disproportionate Placement*].

70. Donald P. Oswald et al., *supra* note 62, at 19.

71. *Id.*

72. *See* Harry & Anderson, *Social Construction*, *supra* note 57.

73. Harry & Anderson, *Disproportionate Placement*, *supra* note 69, at 602.

74. *See, e.g.*, Glennon, *supra* note 56, at 1255.

75. *See* Parrish, *supra* note 58, at 16 (providing statistics based on the California Special Education Management Information System (CASEMIS)). The most striking statistic is that while 24% of white students are in self-contained classrooms, 37% of African American students are placed in similar classrooms. *Id.* at 14.

services in higher percentages, African American students in California *actually received significantly lower levels of services than white students.*[76]

TABLE 3: PLACEMENT AND SERVICE CHARACTERISTICS BY RACE IN CALIFORNIA[77]

% of Students in Special Ed	Needing Intensive Services	Mainstream	Mainstream with Related Services	Resource Room	Special Education Self-Contained	Private School
White	23	68	27	46	24	2
Black	29	57	17	41	37	4

The high level of segregation from nondisabled students and from the regular academic curriculum harms students labeled as disabled.[78] Segregated classes are not likely to provide a more appropriate education. For example, the classrooms in which students with emotional disabilities are placed tend to rely on teacher-controlled behavior management programs.[79] These programs focus on external controls, with a set system of rewards and punishments for certain behaviors, rather than encouraging students to learn to use their own strengths to develop improved social skills.[80] Thus, misidentification and misuse of restrictive placements harm children.

The data concerning the disproportionate use of school discipline are equally disturbing. African American boys receive corporal punishment at three times their percentage of the school population; out-of-school suspensions at 2.5 times their percentage of the population; and expulsions at more than three times their presence in the school population.[81]

Research shows that African American males are much more likely to be seen as having propensities for aggressive behavior.[82] As a result, they are sent out of the classroom and subjected to more severe

76. Parrish, *supra* note 58, at 14.

77. Parrish, *supra* note 58.

78. *See, e.g.*, Harry & Anderson, *Social Construction, supra* note 57.

79. *See id.*

80. *See id.*

81. 1998 OCR DATA, *supra* note 30, at 1.

82. A study involving students in Pittsburgh showed that while black boys were shown to have significantly lower levels of psychopathology (depression and aggression) than white boys, they were more likely to be seen by teachers as having higher levels of delinquency and aggression than white boys. Horacio Favrega, Jr. et al., *Adolescent Psychopathology as a Function of Informant and Risk Status*, 184 J. NERVOUS & MENTAL DISEASE 27, 32 (1996).

consequences for less serious conduct and more subjective reasons.[83] A recent study carefully examined, and ultimately rejected, two common explanations for the greater discipline rates for African American males: first, that the disproportion only reflects the greater use of school discipline with students of lower socioeconomic backgrounds; and second, that the disproportion reflects greater rates of misbehavior by black male students.[84] The authors concluded that the data they studied indicated systemic racial discrimination, largely originating at the classroom level.[85]

African American boys, finding themselves over identified as disabled, segregated from regular classes or high academic level work, over-disciplined, and falling behind in achievement rates, exit schools by dropping out. A study of 18-21 year olds finds that 22 percent of African-American males did not complete high school.[86] One study related this high drop out rate to student perceptions that "the choice of either staying in school or dropping out may be less of a choice and more of a natural response to a negative environment [from] which he [ ] is trying to escape."[87]

B. Mental Health Services: Multiple Barriers to Effective Assistance

> Racial and ethnic minorities have less access to mental health services than do whites. They are less likely to receive needed care. When they receive care, it is more likely to be poor in quality . . . . Ethnic and racial minorities do not yet completely share in the hope afforded by remarkable scientific advances in understanding and treating mental disorders. Because of preventable disparities in mental health services, a disproportionate number of minorities are not

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83. RUSSELL J. SKIBA ET AL., INDIANA EDUCATION POLICY CENTER, THE COLOR OF DISCIPLINE: SOURCES OF RACIAL AND GENDER DISPROPORTIONALITY IN SCHOOL PUNISHMENT, POLICY RESEARCH REPORT #SRS1, at 13, 16 (2000).

84. *Id.* at 16.

85. *Id.*; *see also* Michael Weitzman et al., *Black and White Middle Class Children Who Have Private Health Insurance in the United States*, 104 PEDIATRICS 151-157 (1999). (In a study of white and black middle class students, black students were more than twice as likely to have been suspended as their white peers.)

86. NATIONAL CENTER FOR EDUCATION STATISTICS, *supra* note 36, at 330.

87. SKIBA ET AL., *supra* note 83, at 17 (citing D.T. Bullara, *Classroom Management Strategies to Reduce Racially-biased Treatment of Students*, 4 J. EDUC. & PSYCHOL. CONSULTATION, 357-68 (1993)). African-American males do not often describe their teachers or other school personnel as the people they would talk to about their life goals or identify them as being important to achieving their goals. Michael Cunningham, *African American Adolescent Males' Perceptions of Their Community Resources and Constraints: A Longitudinal Analysis*, 27 J. COMMUNITY PSYCHOL. 569, 576 (1999).

> fully benefiting from, or contributing to, the opportunities and prosperity of our society.[88]

Unlike the public education and juvenile justice systems, the mental health delivery system is highly fragmented, and services are provided in a variety of settings through a vast array of both public and private funding mechanisms.[89] In addition, there is widespread agreement that the mental health care system serves few well. This fragmentation has impeded efforts to gather information about the quality and effectiveness of these services for African-American boys.[90] The picture that can be pieced together, however, suggests that African-American boys are more likely to be referred to these services by school or other authorities, and they are less likely to receive private mental health services or to continue with treatment.

A comprehensive review of mental health care studies conducted by the U.S. Surgeon General revealed that few American children who are in need of mental health care are able to receive mental health services.[91] The most recent government report on mental health care indicates that African American children are more likely than white children to have unmet needs.[92] Researchers estimate that as many as one in five children or adolescents may have a mental health problem that can be identified and treated, and that one in ten may have a more serious mental health problem that requires intervention.[93] Only one in five children with a serious emotional problem receive specialized mental health services,[94] and almost half of those children

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88. U.S. DEP'T OF HEALTH AND HUMAN SERVICES, MENTAL HEALTH: CULTURE, RACE, AND ETHNICITY – A SUPPLEMENT TO MENTAL HEALTH: A REPORT TO THE SURGEON GENERAL 3 (2001) [hereinafter 2001 MENTAL HEALTH REPORT].

89. U.S. DEP'T OF HEALTH AND HUMAN SERVICES, MENTAL HEALTH: A REPORT OF THE SURGEON GENERAL 406-08 (2000) [hereinafter 2000 MENTAL HEALTH REPORT].

90. *See* Matthew C. Johnsen et al., *Structure and Change in Child Mental Health Service Delivery Networks,* 24 J. COMMUNITY PSYCHOL. 275 (1996) (discussing the successes and failures in the movement to remedy structural fragmentation in the mental health system for children and adolescents).

91. U.S. DEP'T OF HEALTH AND HUMAN SERVICES, REPORT OF THE SURGEON GENERAL'S CONFERENCE ON CHILDREN'S MENTAL HEALTH: A NATIONAL ACTION AGENDA 10, 17 (2000), *available at* http://www.surgeongeneral.gov/cmh/childreport.htm (last visited Aug. 14, 2001) [hereinafter CHILDREN'S MENTAL HEALTH].

92. 2001 MENTAL HEALTH REPORT, *supra* note 88, at 59.

93. Center for Mental Health Services, *Mental, Emotional and Behavior Disorders in Children and Adolescents,* http://www.mentalhealth.org/publications/allpubs/CA-0006/Medbis2.html (last visited Sept. 30, 2001) (on file with the Journal of Health Care Law and Policy).

94. CHILDREN'S MENTAL HEALTH, *supra* note 91, at 11; 2000 MENTAL HEALTH REPORT, *supra* note 89, at 180.

receive specialized care only in school.[95] Frequently, children and adolescents drop out rather than complete treatment programs.[96]

The difficulties all children face receiving needed treatment may well be exacerbated for children of color. Racial inequalities are reported in many health care contexts.[97] African Americans receive less prenatal care, and fewer childhood immunizations, flu shots, and screenings for cancer than Caucasian Americans.[98] Once they enter the medical care system, they are less likely to receive costly procedures despite their overall poorer health.[99] Explanations for these disparities include lower access to insurance coverage and less ability to pay privately; physician reluctance to participate in medical assistance programs; geographic maldistribution of health resources and residential segregation; and lack of trust in and familiarity with medical resources, which inhibits early intervention and treatment; difficult cross-cultural patient-physician interactions; and racial discrimination by health care providers.[100] The Council on Ethical and Judicial Affairs of the American Medical Association stated that its review of racial disparities in medical treatment led it to conclude that they "may reflect the existence of subconscious bias."[101]

Higher rates of poor health among African Americans are mirrored in higher rates of mental health problems.[102] One important cause of this higher rate appears to be poverty, which disproportionately affects African American families.[103] The reasons for the link between poverty and mental illness are not well understood, but experts speculate that it may be partly due to the greater stress that living in poverty imposes on individuals.[104] Some researchers have also argued that African Americans may suffer from psychological stress

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95. *See* 2000 MENTAL HEALTH REPORT, *supra* note 89, at 409.

96. *Id.* Most of the research on early termination of services has focused on demographic or diagnostic correlates of early termination; few researchers have directly asked children or their parents why they discontinued treatment. *See* Stanley Sue, *In Search of Cultural Competence in Psychotherapy and Counseling*, 53 AM. PSYCHOL. 440 (1998).

97. ALVIN F. POUISSAINT & AMY ALEXANDER, LAY MY BURDEN DOWN 65-83 (2000) (reviewing historical and current unequal health and mental health care given to African Americans); David Barton Smith, *Addressing Racial Inequities in Health Care: Civil Rights Monitoring and Report Cards*, 23 J. HEALTH POL. POL'Y & L. 75, 75 (1998).

98. Smith, *supra* note 97, at 75.

99. *Id.* at 76.

100. *Id.* at 76-77.

101. Council on Ethical and Judicial Affairs, *Black-White Disparities in Health Care*, 263 J. AM. MED. ASSOC. 2344, 2346 (1990).

102. 2000 MENTAL HEALTH REPORT, *supra* note 89, at 82, 84.

103. *Id.*; *see also* 2001 MENTAL HEALTH REPORT, *supra* note 88, at 57.

104. *Id.*; *see* Marc A. Zimmerman et al., *Resilience Among Urban African American Male Adolescents: A Study of the Protective Effects of Sociopolitical Control on Their Mental Health*, 27 AM. J.

associated from living in a pervasively racist society.[105] Thus, as a group, African Americans are thought to have higher rates of mental illness than Caucasian Americans, but these racial disparities in prevalence disappear when income levels are held steady.[106]

The studies concerning racial disparities in the receipt of mental health care are inadequate and conflicting. However, several factors that may affect the mental health care of young black males appear to be at work. First, African Americans are less likely to receive their mental health care in private outpatient settings, where they may experience a greater ability to choose care that is appropriate to their needs.[107] Second, clinician bias is pervasive and affects the quality of care provided to African Americans.[108] In addition, African American parents do not view the mental health system as helpful, and they do not turn to it for assistance as often as white parents do.[109]

African Americans are less likely than Caucasian Americans to receive privately financed mental health care, especially in individual outpatient practice.[110] They are overrepresented in public inpatient mental health programs, present at similar rates to other groups in publicly financed community mental health programs, and greatly un-

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PSYCHOL. 733 (1999) (discussing the feeling of helplessness due to the lack of sociopolitical control and takes on psychological well-being).

105. POUISSANT & ALEXANDER, *supra* note 97, at 95-96, 102-104, 142.

106. *Id.* at 84.

107. Arthur L. Whaley, *Racism in the Provision of Mental Health Services: A Social-Cognitive Analysis*, 68 AM. J. ORTHOPSYCHIATRY 47, 52 (1998).

108. "Bias in clinician judgment is thought to be reflected in overdiagnosis or misdiagnosis of mental disorders." 2000 MENTAL HEALTH REPORT, *supra* note 89, at 88. "African-Americans have fewer mood/anxiety and substance abuse diagnoses but significantly more organic/psychotic diagnoses. These differences probably reflect ethnocentric clinician bias in the diagnostic assessment of youth from cultural/racial backgrounds." Mark D. Kilgus et al., *Influence of Race on Diagnosis in Adolescent Psychiatric Inpatients*, 34 J. AM. ACAD. CHILD ADOLESC. PSYCHIATRY 67 (1995); *see also* Carl C. Bell & Harshad Mehta, *The Misdiagnosis of Black Patients with Manic Depressive Illness*, 72 NATL. MED. ASSOC. 141 (1980).

109. 2001 MENTAL HEALTH REPORT, *supra* note 88, at 63-65 (noting that the child welfare system is the "principal gatekeeper for African American mental health care"); *see also,* Steven P. Cuffe et al., *Race and Gender Differences in the Treatment of Psychiatric Disorders in Young Adolescents*, 34 J. AM. ACAD. CHILD ADOLESCENT PSYCHIATRY 1536 (1995); Mark D. Kilgus et al., *supra* note 108, at 70; William P. McMiller et al., *Help-Seeking Preceding Mental Health Clinic Intake among African-American, Latino and Caucasian Youth*, 35 J. AM. ACAD. CHILD ADOLESCENT PSYCHIATRY 1091, 1092 (1996) (explaining that minority parents are more likely to first turn to their family, religious leaders, and community). Parents of different cultural backgrounds may have different criteria for believing that their child has a serious emotional problem. *Id.* at 1097. It has been theorized that African American parents tend to view professional and agency contact as multiplying the risk that their children will be wrongly labeled, medicated, or hospitalized. *Id.*

110. *See* 2000 MENTAL HEALTH REPORT, *supra* note 89, at 85.

derrepresented in privately financed individual outpatient practice.[111] The under representation in private outpatient care persists even among African Americans with private health insurance, which suggests that socioeconomic levels do not explain the lower rates of utilization of private outpatient treatment.[112]

Few studies of mental health care have focused on children of color. However, studies of racial differences in mental health care suggest that clinician bias negatively affects the diagnosis and treatment of African American clients.[113] They tend to receive more serious diagnoses, be assigned to more junior professionals for counseling, and receive low-cost, less preferred treatment with minimal contact or medication only.[114] African American clients are less likely to be given intensive psychotherapy and more likely to be treated in more restrictive settings.[115] Research indicates that African Americans receive less effective treatment.[116] This failure seems to be attributed at least in part to a higher rate of inaccurate diagnosis, as well as clinician bias.[117]

White therapists diagnose identical symptoms differently, depending on the race of the client.[118] In addition, the severity of the diagnosed illnesses of African American clients varied by the race of the psychologist.[119] Specifically, African American clients are more likely to be misdiagnosed with a severe psychopathology.[120] Studies also suggest that white psychologists are more likely to consider black patients to be violent.[121] Several studies show that white clinicians spend considerably less time with black patients than with white pa-

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111. 2001 MENTAL HEALTH REPORT, *supra* note 88, at 65; 2000 MENTAL HEALTH REPORT, *supra* note 89, at 85. African Americans are least likely to seek help from a therapist in private practice and are underrepresented in such services, however "African Americans who have undergone treatment for mental health problems are more likely than whites to be confined to jails and prisons and mental hospitals and more likely as well to become homeless". Lonnie R. Snowden, *African American Service Use for Mental Health Problems*, 27 J. COMMUNITY PSYCHOL. 303, 310-311 (1999).

112. 2000 MENTAL HEALTH REPORT, *supra* note 89, at 85.

113. *Id.*

114. Whaley, *supra* note 107, at 52 (reviewing results of various studies); *see also,* Charles R. Ridley et al., *Training in Cultural Schemas: An Antidote to Unintentional Racism in Clinical Practice*, 70 AM. J. ORTHOPSYCHIATRY 65, 66 (2000).

115. Whaley, *supra* note 107, at 52.

116. 2001 MENTAL HEALTH REPORT, *supra* note 88, at 66-67.

117. *Id.*

118. *Id.*

119. *See* Sue, *supra* note 96, at 441; *see also,* Barbara A. Noah, *Racial Disparities in the Delivery of Health Care*, 35 SAN DIEGO L. REV. 135, 150 (1998).

120. Whaley, *supra* note 107, at 51 (basing assertions on a review of the psychiatric literature).

121. *See* Sue, *supra* note 96, at 440-47.

tients,[122] and they are likely to view a black male with high scores on an IQ test as less psychologically equipped to benefit from verbal therapy than a white patient with a far lower IQ test score.[123] As a result, members of minority groups may fear or feel ill at ease with the mental health system, seeing it as oriented toward a white, middle-class population.[124] African American clients are more likely to express dissatisfaction and unfavorable impressions of their treatment and to terminate that treatment prematurely.[125]

These different experiences may partly explain why African American parents are more likely to turn to their family, religious leaders and the community for help with their children's emotional and behavioral problems, while white families are more apt to seek out mental health services.[126] African American parents fear that professional and agency contact will only increase the likelihood that their children will be wrongly labeled, medicated, or hospitalized.[127]

While African American families are less likely to seek help from mental health professionals, their male children are more likely to be referred for treatment by schools, courts and other agencies for treatment in community mental health programs.[128] While African American boys are more likely to be referred for services, they are less likely to benefit from or continue in services.[129]

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122. *See id.*

123. *See id.* (citing studies).

124. *See id.* at 441.

125. *See id.* at 441-42; Ridley et al., *supra* note 114, at 66; *see also,* Khanh-Van T. Bui & David T. Takeuchi, *Ethnic Minority Adolescents and the Use of Community Mental Health Care Services,* 20 AM. J. OF PSYCHOL. 403, 412-15 (1992).

126. A study of parents' first contact point in seeking help for their children showed that African American parents are more likely to make first contact with "nonprofessional sources" such as family and community contacts. Conversely, white parents were more likely to have made their first contact with mental health professionals. McMiller et al., *supra* note 109, at 1087.

127. 2000 MENTAL HEALTH REPORT, *supra* note 89, at 11 (stating that psychiatrists unaware that there are genetic differences among the races in the metabolization rate for drugs may prescribe pharmacotherapies in dosages that are too high, resulting in uncomfortable side effects); *see also* POUISSANT & ALEXANDER, *supra* note 97, at 77; Regina Bussing et al., *Knowledge and Information about ADHD: Evidence of Cultural Differences Among African-American and White Parents,* 46 SOC. SCI. MED. 919, 926 (1998) (theorizing that one reason that African American parents are reluctant to seek help for their children's ADHD is a lack of trust between African Americans and the medical community fostered by a long history of inequitable treatment).

128. 2000 MENTAL HEALTH REPORT, *supra* note 89, at 181.

129. *Id.* at 181-82; *see also,* Will Drakeford & Lili Frank Garfinkel, *Differential Treatment of African American Youth,* http://www.edjj.org/Publications/pub_06_13_00_2.html (visited on May 9, 2001) (on file with the Journal of Health Care Law and Policy) (claiming that by inaccurately perceiving African American clients as less distressed than white clients, ther-

Researchers have come to recognize that they have operated from a "deficit" model concerning African American boys.[130] The research literature generally ignores the many black boys who function well in high-risk environments, and they and their families are usually described in terms of pathology.[131] This bias may also affect the mental health treatment provided to African American boys by undermining its effectiveness.

C. *Juvenile Justice: The Criminalization of African-American Youth*

> [D]isparate juvenile and criminal justice rates for minorities are not a new phenomenon. Yet until recently we have not been sufficiently concerned to ask the important questions: Why do these rates exist? What can we do about them? How can we avoid this continued problem in the future? These questions are not easy ones to ask . . . .[132]

Risky, illegal behavior is not uncommon among adolescents, nor is it particular to any racial or ethnic group. A recent household survey conducted by the Centers for Disease Control shows that, as a percentage of their demographic group, white male adolescents were more likely than black male adolescents to engage in risky and/or illegal conduct.[133] White males were more likely to drive after drinking, carry a weapon, and bring a weapon to school, and they engaged in physical fights in approximately the same percentages as their black male peers.

TABLE 4: ILLEGAL AND VIOLENT BEHAVIOR, 1999[134]

	Driving After Drinking	Carried a Weapon	Weapon at School	In a Physical Fight
White	18.7	28.6	11	43.2
Black	10.6	23.1	5.3	44.4
Hispanic	17.2	29.5	12.3	50.5

apists may delay start of therapy, misdiagnose seriousness of potential risk and be influenced when developing treatment formulation.).

130. Edmund W. Gordon, *Foreword* to VERNON C. POLITE & JAMES EARL DAVIS, AFRICAN AMERICAN MALES IN SCHOOL AND SOCIETY: PRACTICES AND POLICIES FOR EFFECTIVE EDUCATION, at ix (1999); Cunningham, *supra* note 87, at 571.

131. Gordon, *supra* note 130, at ix.

132. NATIONAL COALITION OF STATE JUVENILE JUSTICE ADVISORY GROUPS, A REPORT ON THE DELICATE BALANCE 2 (1989).

133. Laura Kann et al., *Youth Risk Behavior Surveillance – United States, 1999*, http://www.cdc.gov/epo/mmwr/preview/mmwrhtml/ss4905a1.htm (last modified June 9, 2000) (on file with the Journal of Health Care Law & Policy).

134. *Id.*

Similarly, with the exception of marijuana use, heavy use of alcohol and illegal drugs was reported to be far more prevalent among white male adolescents.

TABLE 5: DRUG AND ALCOHOL USE, 1999[135]

	Heavy Drinking	Marijuana	Cocaine	Heroin	Meth-amphetamine
White	39.1	29.6	11	3.4	10.9
Black	17.4	31.2	2.8	1.6	2.2
Hispanic	37.5	34.8	18.3	3.1	11

Although black males do not disproportionately engage in risky and illegal conduct, they are disproportionately subject to arrest.[136] Police decisions to arrest an individual are often discretionary. With the exclusion of serious crimes, police who observe illegal behavior may simply give a warning or make an arrest.[137] While media attention has been drawn to racial disparities in traffic stops, recent juvenile arrest data demonstrate racial disparities in almost every offense category, indicating that such disparities are not limited to car stops.[138]

TABLE 6: JUVENILE ARREST OFFENSES[139]

Most Serious Offense Charge	Estimated Number of Juvenile Arrests	Percent Of Total Arrests	
		White	African American
Total Arrests	2,603,300	71	26
Violent Crime	112,200	55	42
Property Crime	596,100	70	25
Vandalism	126,800	80	17
Weapons Violation	45,200	66	32
Drug Abuse Violations	205,800	66	32
Disorderly Conduct	183,700	67	32
Curfew and Loitering Law Violations	187,800	71	27
Runaways	165,100	78	18

135. *Id.*

136. OFFICE OF JUVENILE AND DELINQUENCY PREVENTION, JUVENILE ARRESTS 4 (1999).

137. Poe-Yamagata & Jones, *supra* note 2, at 6.

138. Madeline Wordes & Timothy Bynum, *Policing Juveniles - Is There Bias Against Youths of Color?, in* MINORITIES IN JUVENILE JUSTICE (Kimberly Kempf Leonard et al. eds., 1995); *see also* Poe-Yamagata & Jones, *supra* note 2, at 7-9, 11.

139. OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION, *supra* note 136, at 4.

TABLE 7: JUVENILE JUSTICE OVERVIEW, 1997[140]

%	White/Hispanic	Black
Population	79	15
Arrested	71	26
Referred	66	31
Detained Pretrial	53	44
Formally Processed	63	34
Waived to Adult Court	50	46
Adjudicated Delinquent	64	32
Placed on Probation	66	31
Residential Placement	60	36

Once arrested, African American youth are "cumulatively disadvantaged."[141] As illustrated in the table above, at every stage in the process, racial disproportionalities fall more harshly on African American adolescents.[142] Once a youth is arrested, either juvenile probation or a prosecutor's office determines whether to dismiss the case, handle it informally, or refer the case for formal intervention by the juvenile court.[143] While black youth were 26% of juveniles arrested, they were 31% of those referred for formal processing in juvenile court.[144] White youth, however, who constituted 71% of those arrested, were only 66% of those referred for formal processing.[145] Thus, white youth were far more likely to have their arrests dealt with informally. At the next stage, when a determination is made whether to follow through with a referral for formal processing, African American youth are once again treated more harshly.[146] In particular, African American youth are far more likely to have formal petitions filed against them for drug offenses.[147] African American youth are also far more likely to be held in pretrial detention.[148] As illustrated in the

140. Poe-Yamagata & Jones, *supra* note 2, at 8-17.
141. *Id.* at 4.
142. *See id.*
143. *Id.* at 8.
144. *Id.*
145. *Id.*
146. *Id.* at 10-11.
147. In 1997, 78% of drug offense cases involving African American youth were formally processed, while only 56% of drug offense cases involving white youth were formally processed. *Id.* at 11; *see also,* Wordes & Bynum *supra* note 139 .
148. "In Maryland, although African Americans make up only 17 percent of the youth population, they account for 39 percent of arrests and a staggering 64 percent of the over 7000 annual admissions to state detention facilities. Indeed 81 percent of the youth in the state's largest juvenile detention institution, the Cheltenham Youth Facility, are African American." Stacey Gurian-Sherman, *Back to the Future: Returning Treatment to Juvenile Justice,*

above table, of the white youth referred to juvenile court, a smaller percentage were held in detention facilities, while a larger percentage of the African American youth referred to juvenile court were detained.[149] Black youth were more than twice as likely to be detained for a drug offense than white youth.[150] Once adjudicated delinquent, white youth are much more likely to receive probation than black youth. While more white youth adjudicated delinquent are placed on probation than placed in custody, these figures are reversed for African American youth, who are more likely to receive a disposition of custody than to receive probation.[151]

The same pattern of racial disproportionality appears in the decisions to waive youth to adult court for prosecution. While only about 1% of petitioned cases are waived to adult court, African American youth are much more likely than white youth to be waived to criminal court even when charged with the same offense.[152] The racial disparities in waivers to adult court varied widely among the states. While overall minority youth were waived at 2.8 times their presence in the population, the states ranged from a low of 0.7 in Vermont to a high of 7.9 times their presence in the population in Iowa.[153]

These cumulative disparities result in extraordinary racial disproportions in juvenile confinement in residential placements. While

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15 CRIM. JUST. 30, 32 (2000). One reason for this disparity may be the way minority boys are viewed by those who administer the juvenile justice system. Gurian-Sherman described the findings of sociologists George Bridges and Sara Steen:

> [J]uvenile probation officers consistently portray African American and white offenders differently. African American youth were situated similarly in the study to white youth in age, crimes charged, and criminal history. Bridges and Steen reviewed reports by probation officers prior to sentencing that included facts and perceptions about the offenders, their families and life circumstances. Probation officers depicted the crimes committed by African American youth as being caused by deficiencies in their internal attributes and character, such as disrespect for authority or the condoning of criminal behavior. White youth on the other hand were portrayed as victims of negative environmental factors, such as internal family conflict or association with delinquent peers.

Id. at 33.

149. Poe-Yamagata & Jones, *supra* note 2, at 9-10; *see also*, Coramae Richey Mann, *A Minority View of Juvenile "Justice,"* 51 WASH. & LEE L. REV. 465, 472 (1994).

150. African American youth were detained in 38% of drug offense cases, while white youth were detained in only 14% of drug offense cases. Poe-Yamagata & Jones, *supra* note 2, at 10.

151. *Id.* at 14.

152. *Id.* For drug offenses, 0.7% of white youth were waived, while 1.8% of black youth were waived to adult court for criminal prosecution. *Id.*

153. *See id.*; *see also* OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION, JUVENILE COURT STATISTICS 29 (1996) (stating that 1.4% of formally processed cases involving black juveniles were waived, compared with 0.8% of cases involving whites and juveniles of other races).

black youth are only 15% of the adolescent population, they represent 40% of those in confinement.[154] White youth, who are 66% of the adolescent population, represent only 37% of those in confinement.[155] In addition, black youth are much more likely to be sent to public juvenile facilities, primarily locked local detention facilities or locked state correctional facilities, which are generally more restrictive and more prison-like than private facilities.[156] African American youth as a group also receive longer sentences than white youth for the same offenses.[157]

TABLE 8: JUVENILE JUSTICE CONFINEMENT, 1997[158]

%	White	Black
Population	66	15
Residential Placement	37	40
Public Residential Placement	34	40
Private Residential Placement	46	39
Residential Placement for Drug Offenses	23	56
Adult Prison	25	58
National Custody Rate for Residential Placement	204 (per 100,000)	1,018 (per 100,000)
Maryland's Custody Rate for Residential Placement	123 (per 100,000)	592 (per 100,000)

Apart from the obvious detriments of confinement in juvenile facilities, African American youth who are confined in juvenile facilities often find themselves in rural, predominantly white, environments.[159] These facilities are often far from family members, which makes family therapy or continuity of relationships almost impossible.[160] In addition, employees in these juvenile facilities are often from these same predominantly white rural areas, and studies have noted that relationships between these predominantly white guards and their charges are often hostile and characterized by overt racial prejudice.[161] Finally,

154. OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION, JUVENILE OFFENDERS AND VICTIMS: 1999 NATIONAL REPORT (1999); Poe-Yamagata & Jones, *supra* note 2, at 2.

155. Poe-Yamagata & Jones, *supra* note 2, at 2.

156. *Id.* at 18.

157. Barry C. Feld, *The Social Context of Juvenile Justice Administration: Racial Disparities in an Urban Juvenile Court, in* MINORITIES IN JUVENILE JUSTICE 66, *supra* note 129, at 73.

158. OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION, *supra* note 154; Poe-Yamagata & Jones, *supra* note 2.

159. Mann, *supra* note 137, at 474-75.

160. *Id.*

161. *Id.*

there are very few minority mental health professionals working in juvenile correctional facilities.[162]

For troubled youth, the juvenile justice system is often their final opportunity to receive needed mental health and educational services.[163] Race is a key factor in determining whether a juvenile who "has gotten in trouble" will receive mental health treatment or confinement in a juvenile facility. This decision is crucial, because numerous studies have documented the severe lack of mental health and other rehabilitative services in juvenile correctional facilities, so juveniles sent to those facilities are unlikely to receive beneficial services.[164] Juvenile court decision makers who choose between placement in a mental health treatment center or confinement in juvenile detention much more frequently send white youth to treatment and black youth to detention.[165]

TABLE 9: 1998 MARYLAND STUDY: RACIAL DISPARITIES AMONG SENTENCING TO RESIDENTIAL TREATMENT V. JUVENILE DETENTION[166]

Disposition	White	Black
Treatment at Residential Center	120 (35%)	132 (16%)
Juvenile Detention Facility	223 (65%)	672 (84%)

Researchers studied youth who were faced with a disposition of either mental health treatment or juvenile detention in 1998 in Maryland. One-third of white youth were sentenced to mental health treatment, while only one in six African American adolescents were sent for similar treatment.[167] Black youth were far more likely to be sent to juvenile detention facilities which often lack any treatment programs whatsoever.[168] A commenter from the National Center for Juvenile Justice candidly stated, "Let's be frank. There's a feeling out there

162. Brent Pattison, *Minority Youth in Juvenile Correctional Facilities: Cultural Differences and the Right to Treatment*, 16 LAW & INEQ. 573, 583 (1998).

163. Black youths enter a cycle of detention and incarceration instead of treatment, while white youths are admitted to mental health facilities for similar offenses. *See* Guriam-Sherman, *supra* note 148, at 35.

164. *See* Barry C. Feld, *Violent Youth and Public Policy: A Case Study of Juvenile Justice Reform*, 79 MINN. L. REV. 965, 1077, 1080, 1083 (1995).

165. Todd Richissin, *Race Predicts Handling of Most Young Criminals; Care vs. Punishment of Mentally Ill Youths Correlates with Color; Juvenile Justice Analysis*, BALTIMORE SUN, June 25, 1999, at 1A; *see* Poe-Yamagata & Jones, *supra* note 2, at 2 (discussing disproportionate detention).

166. Richissin, *supra* note 165.

167. *Id.*

168. *Id.*; *see* Guriam-Sherman, *supra* note 148, at 32 (discussing the inadequate services provided by Maryland detention facilities due to overcrowding).

when a black kid commits a crime of, 'Oh well, blacks will be blacks.' A white kid commits the same crime and the reaction is, 'This kid needs some help.'"[169] Similar disparities were evident in studies conducted in Connecticut and New York.[170] Studies also show that even where white and black youth in the juvenile justice system who were evaluated for emotional disorders had similar scores on the Child Behavior Checklist, black youth were less likely than white youth to be treated in a psychiatric facility rather than assigned to a correctional facility.[171]

Others have argued that the juvenile justice system has two tracks: "One for those of families, largely middle- and upper-class, with means to afford private behavioral health treatment services, and a second for children of low income families, largely African American, Hispanic American, and Native American children living in single-parent homes, perhaps surviving through public assistance, children whose parents know of no treatment options to suggest to juvenile justice decision makers."[172]

While the educational and literacy levels of youth entering the juvenile justice system are desperately low, youth sent into juvenile correctional facilities are less likely to receive appropriate education services than youth who remain in their communities and in public schools.[173] In addition, incarcerated youth demonstrate high rates of

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169. Richissin, *supra* note 165.

170. Stuart L. Kaplan & Joan Busner, *A Note on Racial Bias in the Admission of Children and Adolescents to State Mental Health Facilities Versus Correctional Facilities in New York*, 149 AM. J. PSYCHIATRY 768, 770 (1992); W. John Thomas et al., *Race, Juvenile Justice, and Mental Health: New Dimensions in Measuring Pervasive Bias*, 89 J. CRIM. L. & CRIMINOLOGY 615 (1999).

171. Robert Cohen, *To Prisons or Hospitals: Race and Referrals in Juvenile Justice*, 2 J. HEALTH CARE FOR THE POOR AND UNDERSERVED 248, 248-49 (1991).

172. ARIZONA STATE JUVENILE JUSTICE ADVISORY COUNCIL, MINORITY YOUTH ISSUES COMMITTEE, EQUITABLE TREATMENT OF MINORITY YOUTH: A REPORT ON THE OVER REPRESENTATION OF MINORITY YOUTH IN ARIZONA'S JUVENILE JUSTICE SYSTEM 73-74 (1993). *See also*, Joseph B. Tulman & Mary G. Hynes, *Enforcing Special Education Law on Behalf of Incarcerated Children: A Blueprint for Deconstruction*, 18 CHILD. LEGAL. RTS. J. 48, 48-49 (1998) (detailing how adolescents with access to private services are able to escape the juvenile justice system).

173. Peter E. Leone & Sheri Meisel, *Special Report: Improving Education Services for Students in Detention and Confinement Facilities*, http://www.edjj.org/publications/pub12_20_99.html (visited Aug. 15, 2001) (on file with the Journal of Health Care Law and Policy); Osa Coffey & Maia Gemignani, *Effective Practices in Juvenile Correctional Education: A Study of the Literature and Research 1980-1992* (1994) (available from ERIC Document Reproduction Service, ERIC Identifier ED391995).

mental retardation, emotional disturbance and learning disabilities, and these special learning needs are not adequately addressed.[174]

The juvenile justice process is highly discretionary. At every juncture, decisions regarding whether to arrest, whether to formally process, and what type of disposition to assign are made by decision makers with a high level of discretion based on factors that are subject to various interpretations. At every level, race plays a factor in assigning African American youth to more punitive approaches, thereby limiting their access to needed educational and treatment services.

III. THE SOCIAL CONSTRUCTION OF RACIAL DISCRIMINATION

This exhaustive look at the available data leads to three major conclusions: first, that African American boys are more likely to be over identified as disabled or delinquent; second, they are more likely to be over controlled and under serviced in education, mental health and juvenile justice programs, and they are more likely to be excluded from schools; and third, they are more likely, when they can, to avoid schools and mental health programs, thereby not gaining expected benefits.

The traditional analysis of these disparities focuses on the characteristics of African American males and their families to "explain" these extraordinary differences in their experiences in schools, mental health care systems, and juvenile justice programs.[175] These disparities, it is claimed, reflect their high levels of poverty, single-parent families, lack of parental involvement, an oppositional black male culture, and a "lack of school readiness."[176] However, as described above, where researchers have held these other factors steady, race and gender continue to have a powerful effect on what happens to African American boys in all of these settings.[177]

Over the last twenty years, across a variety of disciplines, researchers have developed a greater understanding of the workings of racism. They have investigated the features of the institutional settings in which these disparities develop in order to examine the processes that "create" or enlarge racial and gender differences. Thus, to take pov-

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174. *See* Leone & Meisel, *supra* note 173, at 4 (providing an overview of the extensive litigation that has been brought to enforce the rights of incarcerated youth to special education services).

175. *See generally* Sable, *supra* note 4.

176. *See, e.g.*, Nicholas Zill et al., *School Readiness and Children's Developmental Status*, (1995) (available from ERIC Document Reproduction Service, ERIC Identifier ED389475).

177. *See supra* Parts I & II.

erty as an example, one can attempt to explain the achievement gap between African American males and white males by the much higher number of African American children living in poverty.[178] Yet, one could also examine what is different about the schools that poor children attend.[179] We can ask, what is different about the experiences of African American boys in these institutional settings?

This approach relies on social construction theory.[180] The basic insight of social construction theory is that much of what we accept as fact is, rather, a culturally influenced interpretation of phenomena.[181] We are each born into a society in which a web of social meanings already exists.[182] Our own set of social meanings is profoundly affected not only by the larger society within which we live, but also the smaller communities of which we are a part.[183]

When we apply categories such as disabled or delinquent, we think they are based on objective criteria.[184] Social construction theory guides us to see them as shaped by social, political, economic, media, and other forces. Social construction theory challenges us to question the "taken-for-granted" perceptions of events. These perceptions can be questioned by listening to the multiple experiences, perspectives, and explanations of all of those who participate in institutional settings.[185] The dominant perspective – that African American boys can't learn and don't obey – is reflected in the statistics described in Part II.[186] Those whose views are less heard, however, begin to tell a very different story - one in which chaotic and crowded schools leave little room for attention for students; in which the stereotypes held by institutional actors lead them to assign negative motives to the ambiguous actions of African American boys, and in which

178. 2001 MENTAL HEALTH REPORT, *supra* note 88, at 56.

179. *See, e.g.*, James M. O'Neill, *More Minorities Take SAT, But Gap in Scores Grows*, THE PHILADELPHIA INQUIRER, Aug. 29, 2001, at A3, *available at* http://inq.philly.com/content/inquirer/2001/08/29/national/SAT29.htm?template=APrint.htm (quoting Gaston Caperton, president of the College Board, an association of colleges that administers the Scholastic Assessment Test, who stated, "This opportunity gap is very alarming to us. The real difference is the quality of education that students have had. We need a Marshall Plan to get serious about the gap."); *see also* 2001 MENTAL HEALTH DATA, *supra* note 88, at 54 (acknowledging that African American children are more likely to attend "substandard" schools).

180. Glennon, *supra* note 56, at 1242-44.

181. *Id.* at 1244.

182. *Id.* at 1243.

183. *Id.*

184. *Id.* at 1301-02.

185. Martha Minow, *Making All the Difference, in* POWER, PRIVILEGE, AND LAW: A CIVIL RIGHTS READER 17-18 (Leslie Bender & Daan Braveman eds. 1995).

186. *See supra* Part II.

cultural differences result in interactions that are difficult, frustrating and often painful for all involved. This story is not about the objective and benign use of classifications and labels to help children. Instead, it is a story of racial discrimination.

The understanding of racial discrimination articulated by our legal culture has diverged sharply from the understanding of racism developed over the last twenty years or so. Our legal culture has defined racial discrimination primarily as "intentional discrimination"[187] exemplified by segregated schools and public accommodations. Although few would now declare themselves to be racists, African Americans continue to experience racism as an everyday occurrence, and numerous statistics demonstrate differential treatment in many spheres.[188]

Rather than focusing on the explicit intent or desire of a person to discriminate against another, theorists define racism as "any behavior or pattern of behavior that tends to systematically *deny access* to opportunities or privileges to members of one racial group while *perpetuating access* to opportunities and privileges to members of another racial group."[189]

Another definition of racism focuses on the assignment of difference across racial lines:

> [R]acism [means] . . . the generalization, institutionalization, and assignment of values to real or imaginary differences between people in order to justify a state of privilege, aggression, and/or violence. Involving more than the cognitive or affective content of prejudice, racism is expressed behaviorally, institutionally, and culturally. The ideas or actions of a person, the goals or practices of an institution, and the symbols, myths or structure of a society are racist if (a) imaginary or real differences of race are accentuated; (b) these differences are assumed absolute and considered in

187. Intentional discrimination means that a person has consciously chosen to treat people differently because of their race. *See, e.g.*, Washington v. Davis, 426 U.S. 229, 239 (1976) (quoting Akins v. Texas, 325 U.S. 398, 403-04 (1995)); Charles R. Lawrence, *The Id, The Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 318-19 (1987).

188. *See, e.g.*, Cassandra Jones Havard, *African-American Farmers and Fair Lending: Racializing Rural Economic Space*, 12 STAN. L. & POL'Y REV. 333 (2001) (describing racial discrimination in federal agricultural loan programs); Desiree Kennedy, *Consumer Discrimination: The Limitations of Federal Civil Rights Protection*, 66 MO. L. REV. 275 (2001) (describing the everyday racism in retail settings); David Rudovsky, *Law Enforcement by Stereotypes and Serendipity: Racial Profiling and Stops and Searches without Cause*, 3 U. PA. J. CONST. L. 296 (2001) (detailing everyday racial bias in street level policing).

189. Ridley et al., *supra* note 114, at 66 (emphasis added).

terms of superior and inferior; and (c) these are used to justify inequity, exclusion or domination.[190]

Most often, such behavior is not intentional.[191] Lack of intentionality does not, however, eliminate the harm caused by racism.[192] For example, racial disparities in the placement of special education have been widely known and reported on for thirty years now, yet they continue to persist and undermine the educational opportunities of African American boys.[193]

A number of theories have been developed to explain nonintentional racism. Two main categories include structural or institutionalized racism, which focuses on how the structures of society perpetuate and reinforce racism,[194] and unconscious racism, which focuses on the ways in which unconscious but deeply held racist beliefs damage the interactions among people of different races.[195] These two forms of racism work together.[196] Structural systems and individual behavior are interrelated, reinforcing and perpetuating each other.[197]

Structural racism describes the striking disparities in the lives of white and black Americans.[198] White Americans overwhelmingly control material resources and power.[199] They continue to run America's corporations and government and schools.[200] African American children are twice as likely as white children to grow up in poverty.[201] Black children continue to predominantly attend schools that are under funded and under resourced, often lacking the basics of a quality education.[202] Likewise, they are more likely to receive mental

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190. HUSSEIN ABDILAHI BULHAN, FRANTZ FANON AND THE PSYCHOLOGY OF OPPRESSION 13 (1985).

191. *See* Lawrence, *supra* note 187, at 323.

192. *See id.* at 319-20.

193. Harry & Anderson, *Social Construction*, *supra* note 57, at 35-36; Glennon, *supra* note 56, at 1250-52.

194. Frances Lee Ansley, *Stirring the Ashes: Race, Class and the Future of Civil Rights Scholarship*, 74 CORNELL L. REV. 993, 1024 n.129 (1989).

195. Lawrence, *supra* note 187, at 321-44.

196. *See* Kennedy, *supra* note 188, nn. 166-171 and accompanying text.

197. *See id.*

198. *See generally* DOUGLAS S. MASSEY & NANCY A. DENTON, AMERICAN APARTHEID: SEGREGATION AND THE MAKING OF THE UNDERCLASS (1993); ROY BROOKS, RETHINKING THE AMERICAN RACE PROBLEM (1990).

199. *See* U.S. CENSUS BUREAU, STATISTICAL ABSTRACTS OF THE UNITED STATES: 2000, 447, 475-76 (2000). While 48.9% of white families earn $50,000 or more, 28.4% of African American families earn $50,000 or more; while 8% of white families live below the poverty line, 23.4% of black families live below the poverty line. *Id.*

200. Rush, *Sharing Space*, *supra* note 15, at 21.

201. U.S. CENSUS BUREAU, *supra* note 199, at 476.

202. *See supra* Part II.A.

health and health care in publicly funded settings that tend to employ less experienced staff, in which continuity of care is rarely available, and where funding constraints limit the quantity and quality of the service provided.[203] African American youth who break the law are more likely to be caught, and once in the system, to be given harsher treatment at every stage in the system.[204]

Racism also damages human relationships. Interpersonal relationships within even under funded schools and busy community mental health clinics create the possibility of building safe and nurturing relationships that promote learning, development and healing. Yet, this essential basis for quality learning, effective mental health treatment and rehabilitation is all too often lacking, undermined by unconscious racism.[205]

Unconscious racism creates cognitive distortions that reinforce racist beliefs and sets in place a spiraling process of interactive failures that has been described as "reciprocal distancing."[206] The theories of cognitive distortion and reciprocal distancing challenge the belief that characteristics such as behavior and ability are fixed within the individual.[207] In doing so, they point out how fundamentally subject to interpersonal interactions they are.[208]

Studies of attitudes towards other racial groups show that Caucasian Americans tend to hold negative feelings toward African Americans.[209] These racial stereotypes create significant cognitive distortions.[210] Individuals seek out and pay more attention to information that is relevant to the stereotype or that confirms their preconceptions and ignore or forget information that disconfirms or contradicts expectations.[211] In addition, people are likely to see stereotypes confirmed even if the behavior is ambiguous or actually contradicts their expectations.[212] For example, when white students were

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203. *See supra* Part II.B.

204. *See supra* Part II.C.

205. *See* Lawrence, *supra* note 187, at 329-44.

206. Sharone Maital, *Reciprocal Distancing: A Systems Model of Interpersonal Processes in Cross-Cultural Consultation,* 29 SCH. PSYCHOL. REV. 389, 390 (2000).

207. *See id.* at 390-91.

208. *See id.*

209. Charles M. Judd et al., *Stereotypes and Ethnocentrism: Diverging Interethnic Perceptions of African American Youth and White American Youth,* 69 J. PERSONALITY & SOC. PSYCHOL. 460, 461 (1995).

210. *See* Lawrence, *supra* note 187, at 339 (explaining how individuals interpret past events in ways that support and reconfirm stereotyped beliefs).

211. *Id.*; *see also* WALTER STEPHAN, REDUCING PREJUDICE AND STEREOTYPING IN SCHOOLS 7-13 (1999).

212. STEPHAN, *supra* note 211, at 9.

shown a tape of either a white or a black male pushing another person, 75% of the viewers saw the black male as violent, while only 17% saw the white male as violent in the exact same scenario.[213]

Finally, and most importantly, people base their *own* behavior toward different racial groups on those stereotypes.[214] Anticipating negative behavior or lack of ability changes how one person approaches another.[215] The person who is the subject of that stereotype may well react to the negativity by acting in ways that confirm those initial stereotypical expectations.[216]

The second description of unconscious racism emphasizes the reciprocal effects of racial and cultural differences.[217] This term describes a process of progressive disengagement resulting from a series of "interactive failures" that occur between students and teachers, therapists and patients, juvenile court officers and juveniles.[218] Initial failures in interaction lead to mutual feelings of failure, frustration and disappointment.[219] The child who feels hurt may withdraw.[220] The professional's "feelings of anger and guilt may then result in labeling the child as a way of attributing the failure to stable characteristics of the child or the situation."[221] The process involves both cognitive and emotional aspects. At the cognitive level, meanings are ascribed to actions taken by the other, and the negative feelings associated with the interaction can lead people to interact differently in the future.[222] Thus, children who believe that they can never please the teacher are apt to see that belief confirmed by the teacher's behavior and, because of the negative feelings associated with that confirmation, avoid or otherwise limit their chances of being hurt again.[223] Teachers, unwilling to see themselves as failures, will often provide explanations for the failed interactions that have to do with the children's own characteristics or those of their family.[224]

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213. *Id.*

214. *Id.* at 12.

215. *Id.*

216. *Id.* For example, a teacher expecting a group of students to be slow learners may assign less difficult material and may give students less feedback and encouragement in completing their tasks. In return, the students may not try as hard, thus, acting in ways which confirm the teacher's low expectations. *Id.*

217. *See* Maital, *supra* note 206, at 389.

218. *Id.* at 390-91.

219. *Id.* at 391.

220. *Id.*

221. *Id.*

222. *See id.*

223. *See id.* at 391.

224. *See id.* at 394-95. For example, a teacher may believe that the child is disabled, uncooperative, or that the family does not value education. *Id.*

In the institutional contexts of education, mental health and juvenile justice, these processes of cognitive distortions based on stereotypes and reciprocal distancing take place in situations of power imbalances.[225] Teachers and other professionals in schools, treatment facilities, and juvenile court settings, because of their power, are more likely to act on their cognitive and emotional reactions in ways that negatively change the lives of the children involved.[226] Parents tend to have little power to exert on behalf of their children. Thus the labels imposed in these settings - disabled, uncooperative, delinquent, dangerous – may adhere to and harm children subject to this type of stereotyping.

These interactive processes of structural and unconscious racism create dramatic disparities in areas such as placement in ability groups and special education, and in the use of discipline in schools, mental health treatment services and the programs that are offered to them.[227] In addition, they make the restrictiveness and punitiveness of the juvenile justice system seem natural and normal.[228] They are further made to appear normal by a jurisprudence concerning racial discrimination that not only makes them invisible and unimportant, but makes voluntary efforts to diminish the inequalities unconstitutional and places legal challenges to these processes out of the hands of private individuals.[229]

To date, structural and unconscious racism have received little recognition or support in this Nation's courts. Instead, the courts have gone down a quite different path - one in which only intentional discrimination is actionable, institutional practices designed to alleviate current and historical societal discrimination are illegal, and private litigants are unable to bring private rights of action to challenge institutional practices that, like the practices outlined here, disproportionately and adversely affect people of color.[230] This approach, justi-

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225. *See id.* (noting the inbalance of power between the student and the teacher); Poe-Yamagata & Jones, *supra* note 2, at 6 (explaining that the discretionary aspect of whether to arrest an individual is subject to police bias); *see also* 2001 MENTAL HEALTH REPORT, *supra* note 88; 2000 MENTAL HEALTH REPORT, *supra* note 89 (discussing the biases present in the doctor/patient relationship and in the diagnosis of mental health).

226. *See* STEPHAN, *supra* note 211, at 12 (acknowledging that the teacher's reaction to the student may limit the student's ability to succeed because the student is never given the opportunity to attempt the more challenging subject matters).

227. *See* 1998 OCR DATA, *supra* note 30, at 1.

228. *See supra* Part I.

229. *See infra*, notes 233—260 and accompanying text.

230. *See* Washington v. Davis, 426 U.S. 229, 239 (1976).

fied by the principle of "color-blindness," serves to leave in place a pervasive condition of racial inequality.[231]

This blindness to the condition of racial inequality has led the U.S. Supreme Court to require that plaintiffs alleging racial discrimination prove that the discrimination was intentional - proof of discriminatory effect is not sufficient.[232] In *Keyes v. School District 1*,[233] the Court held that *de facto* segregation of a school district did not violate the Equal Protection Clause of the Fourteenth Amendment.[234] Where a school district or state did not have an explicit policy of segregating students, the Court required plaintiffs to demonstrate that school officials had the purpose or intent to segregate.[235] This decision ignores the extreme negative impact of segregated school districts.

The Court reiterated its position that violations of the Equal Protection Clause, absent a stated discriminatory policy, require discriminatory intent in *Washington v. Davis*.[236] In *Davis*, the Court rejected a challenge to an employment test with a failure rate for black applicants of four times the rate for white applicants, and no clear relevance to the police officer position for which the test was being used.[237] Once again, plaintiffs were required to prove discriminatory intent by showing that the police department employed the test with the purpose or intent of discriminating against African Americans.[238] The Court refused to describe the use of an unsubstantiated employment test that presented an extraordinary disparate impact on African Americans as racial discrimination.[239]

The Supreme Court's insistence on color-blindness has led lower federal courts to view affirmative efforts by public schools to address longstanding racial inequities and school segregation with the greatest skepticism. For example, the First Circuit rejected a minimal affirmative action policy governing admissions to the premier public school in Boston, Massachusetts, Boston Latin.[240] Students, predominantly white, who attended private schools were better prepared and per-

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231. *See* Kimberlé Williams Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law, in* CRITICAL RACE THEORY, *supra* note 11, at 106.

232. Freeman, *supra* note 12, at 1056.

233. 413 U.S. 189 (1973).

234. *Id.* at 205-08.

235. *Id.* at 205-06. Professor Freeman described this occurrence as the "perpetrator perspective." Freeman, *supra* note 12, at 1052-57.

236. 426 U.S. 229 (1976).

237. *Id.* at 242, 246.

238. *Id.* at 241-42.

239. *Id.* at 245-46.

240. Wessmann v. Gittens, 160 F.3d 790, 808-09 (1st Cir. 1998).

formed better on the standardized test than did students from public schools.[241] Students from the predominantly minority Boston Public Schools received little or no training for the standardized test, and many elementary schools in Boston had never sent a single child to Boston Latin.[242] In addition, the test had never been validated for the purpose for which it was used and had a disproportionate effect on minority students.[243] Despite the clear racial and ethnic inequality in access to Boston Latin, the First Circuit concerned itself only with protecting the rights of the few white children who might not gain entrance to the school because of the admissions program.[244]

Similarly, the Fourth Circuit rejected a Montgomery County, Maryland school transfer program that limited the ability of students to transfer schools if their move would decrease the level of integration in the school they were assigned to attend.[245] Without considering whether the denial of a transfer harmed the student in any way other than that his denial was based on a racial classification, the court rejected the school district's argument that the racial balancing it attempted to accomplish through the transfer program served a compelling governmental interest in preventing racial isolation.[246] The program was rejected even though it was part of the school dis-

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241. *Id.* at 820 (Lipez, J., dissenting); *see also,* Karen Avenso, *Relatively Few Schools Fill Most Seats at Boston Latin,* BOSTON GLOBE, Aug. 29, 1996, at A1 (noting that students attending private and parochial schools are predominately white and are better prepared by educators and their parents for the Independent School Entrance Exam, ISSE, a standardized test used for admission to Boston Latin School).

242. Avenso, *supra* note 241. Seventy percent of the 513 students entering Boston Latin in 1996 came from private schools or just five of the seventy-five public elementary schools in Boston. *See id.*

243. *Wessmann,* 160 F.3d at 819 (Lipez, J., dissenting); *see supra* Avenso note 241 (pointing out that students attending private and parochial schools were disproportionately white and better prepared for standardized test employed). Understandably, the Boston Public Schools did not seek to admit any evidence concerning whether the test used had a discriminatory effect. *Wessmann,* 160 F.3d at 803. Perhaps this evidence would have been before the court had the petition of the Boston Branch of the NAACP to intervene been granted. *Wessmann,* 160 F.3d at 819 (Lipez, J., dissenting)

244. *Wessmann,* 160 F.3d at 808. The court protected the right to be admitted based on the numerical results of test scores that were not statistically significant in predicting academic success. *See also Defeat for Diversity at Boston Latin,* BOSTON GLOBE, Nov. 20, 1998, at A26.

245. Eisenberg v. Montgomery County Pub. Sch., 197 F.3d 123 (4th Cir. 1999); *see also* Tuttle v. Arlington Cty. School Bd., 195 F.3d 698, 704-05 (4th Cir. 1999). *But see* Brewer v. West Irondequoit Cent. Sch. Dist., 212 F.3d 738 (2d Cir. 2000) (finding that transfer programs that denied transfers from city school district to suburban school district to white students was justified by the school district's compelling interest in reducing racial isolation in the involved schools).

246. *Eisenberg,* 197 F.3d at 131.

trict's voluntary effort to dismantle its former system of racial segregation.[247]

The Supreme Court stepped further away from recognizing the pervasive reality of racial and ethnic discrimination in our governmental and federally funded institutions in its recent decision in *Alexander v. Sandoval*,[248] in which the Court found that no private cause of action exists under the Title VI regulations.[249] As demonstrated by the cases discussed below, *Sandoval* reverses thirty years of litigation under Title VI and Title IX.[250] The majority in *Sandoval* acknowledged that Congress authorized federal agencies to promulgate "rules, regulations, or orders of general applicability" to effectuate the proscriptions of Sections 601 and 602 of Title VI.[251] Yet, the Court took great pains to reinforce its earlier findings that Section 601 forbids only intentional discrimination, and in fact, allows recipients of federal financial assistance to engage in practices that have a discriminatory effect as long as the discriminatory effect is not intentional.[252] Justice Scalia, writing for the majority, concluded that the search for whether a congressional intent to create a private cause of action under the regulation existed must begin and end with the text of Section 602.[253] In that inquiry, the majority held that Congress did not clearly evidence the intent to create a private cause of action under the Title VI regulations.[254] In so doing, the Court ignored the many times it had relied on the presumption that at the time the Title VI regulations were promulgated, it was assumed that Congress intended to permit private causes of action in order to protect individual rights guaranteed by federal law.[255] Over the last thirty years, nearly every federal Court of Appeals and numerous district courts have either silently accepted or expressly permitted private individuals to pursue disparate impact claims under the Title VI regulations.[256]

While the dissent in *Sandoval* anticipated that private plaintiffs would still be permitted to judicially enforce the Title VI regulations through § 1983,[257] this avenue for judicial redress appears increas-

247. *Id.* at 125.
248. 532 U.S. 275 (2001).
249. *Id.* at 293.
250. *See infra* Part IV.
251. 42 U.S.C. § 2000d, 2000d-1 (1994); *see also Sandoval*, 532 U.S. at 278.
252. *Sandoval*, 532 U.S. at 281.
253. *Id.* at 288.
254. *Id.* at 292-3.
255. *Id.* at 294 (Stevens, J., dissenting).
256. *Id.*
257. *Id.* at 301 (Stevens, J. dissenting). Section 1983 states:

ingly unlikely. The Third Circuit recently determined that the Title VI disparate impact regulations cannot be enforced via § 1983, thereby overruling the conclusion it had reached only two years earlier that such an action was permitted.[258] The Third Circuit found that the regulations are "too far removed from Congressional intent to constitute a 'federal right' enforceable under § 1983."[259] The Third Circuit noted that the majority in *Sandoval* repeatedly emphasized that the statutory language of Title VI only supports a claim for intentional discrimination and refused to acknowledge that the Title VI regulations, which prohibit actions that have a discriminatory impact as well as actions taken with discriminatory intent, are valid.[260] This emphasis suggests that *Sandoval* may lay the groundwork for the Supreme Court to go even further and eliminate enforcement of disparate impact regulations by federal agencies as well.

As the analysis of the data concerning the deeply troubling disparities in the treatment of African American boys demonstrates, advocates must fight to preserve the disparate impact regulations and the right of private plaintiffs to enforce them in court. Judicial rejection of private actions, either directly under the regulations or through § 1983, does not have to be the final word. Congress could overturn these decisions as it has done in the past. For instance, Congress passed the Civil Rights Act of 1991[261] to protect the scope of Title VII of the Civil Rights Act of 1964.[262] Congress, at the strenuous urging of civil rights advocates, passed the statute to overrule the Supreme Court's decision in *Wards Cove Packing Company v. Atonio*,[263] as

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> Every person who, under color of any statute, [or] regulation . . . of any State . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . .

42 U.S.C. § 1983 (1994).

258. South Camden Citizens in Action v. N.J. Dep't of Envtl. Prot., 274 F.3d 771, 788 (3d Cir. 2001) (overruling Powell v. Ridge, 189 F.3d 387 (3d Cir. 1999)). The right to sue under § 1983 to enforce the Title VI regulations was also rejected in *Bonnie L. v. Bush*, 180 F. Supp.2d 1321 (S.D. Fla. 2001). Only one court has permitted an action under the Title VI regulations to go forward under § 1983 since the Supreme Court's decision in *Sandoval*. Lucero v. Detroit Pub. Sch., 160 F. Supp. 2d 767, 784 (E.D. Mich. 2001).

259. *South Camden*, 274 F.3d at 790.

260. *See id.* at 789-90. The Court merely "assume[s] for purposes of deciding this case that regulations promulgated under § 602 may validly proscribe activities that have a disparate impact on racial groups, even though such activities are permissible under § 601." *Sandoval*, 532 U.S. at 275.

261. Civil Rights Act of 1991, 42 U.S.C. §§ 1981(a), 2000e-2 (1994).

262. 42 U.S.C. § 2000e (1994).

263. 490 U.S. 642 (1989).

well as other judicial decisions restricting the scope of Title VII which made it more difficult for plaintiffs to assert a disparate impact claim under Title VII.[264] Even earlier, Congress had enacted the Civil Rights Restoration Act[265] after the Supreme Court handed down *Grove City College v. Bell*,[266] which found that Title IX's impact was restricted to the specific program or activity within an educational institution that actually received the federal funds.[267] Federal agencies had applied this ruling beyond Title IX to Title VI and Section 504 of the Rehabilitation Act of 1973 as well.[268] The Civil Rights Restoration Act explicitly provided that as long as an entity accepts federal funds, *all* programs within the entity are bound by the terms of these civil rights statutes.[269]

In both of these situations, civil rights advocates launched a forceful case on behalf of Congressional action to reinstate rights essential to effective civil rights enforcement. The judicial decisions eliminating a private right of action and cause of action under § 1983 to enforce the Title VI regulations deserve an equally strong Congressional response. The discussion that follows highlights the promise of litigation under the Title VI disparate impact regulations to alleviate the racial disparities that affect the treatment of African American boys by our public institutions. This promise, however, will quickly disappear without access to the courts.

IV. REQUIRING THAT EDUCATION, MENTAL HEALTH AND JUVENILE JUSTICE PROGRAMS BE EQUALLY EFFECTIVE FOR AFRICAN AMERICAN BOYS

These judicial interpretations regarding discrimination under the Equal Protection Clause and Title VI, and the exclusion of private litigants from judicial enforcement of the Title VI regulations, do not

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264. Congressional intent to overturn *Wards Cove* and a number of other judicial decisions to limit the scope of Title VII in the Civil Rights Act of 1991 is explained in the House Report accompanying the legislation. H.R. REP. NO. 102-40(I), at 23-93 (1991), *reprinted in* 1991 U.S.C.C.A.N. 549, 561-83.

265. Civil Rights Restoration Act of 1987, Pub. L. 100-259, 102 Stat. 28 (1988) (codified at 20 U.S.C. §§ 1687, 1688; 42 U.S.C. § 2000d-4a; 29 U.S.C. § 794 (1994)).

266. 465 U.S. 555 (1984).

267. *Id.* at 574. The decision was made under Title IX of the Education Amendments of 1972, which ban discrimination on the basis of sex in any education program which receives federal funding. Pub. L. 92-318, 86 Stat. 235 (1972) (codified as amended at 20 U.S.C. § 1681 (2000)). *See infra* Part IV.B (describing Title IX in greater depth).

268. HALPERN, *supra* note 14, at 198-200. *See infra* Part IV.A (providing a detailed description of Section 504 of the Rehabilitation Act of 1973).

269. *See* Civil Rights Restoration Act of 1987, Pub. L. 100-259, 102 Stat. 28 (1988) (codified at 20 U.S.C. §§ 1687, 1688; 42 U.S.C. § 2000d-4a; 29 U.S.C. § 794 (1994)).

exemplify what we have come to understand about structural and unconscious racism. While this judicial blindness to racial discrimination threatens to undermine enforcement of the Title VI regulations, this Article focuses instead on the promise of these regulations.[270] The task here is to examine the interpretive space that is available under the Title VI regulations to employ them to further racial equality. Under this approach, racial equality means that in the three contexts considered here, governmental programs would be "equally effective" in serving African American boys as they are in serving other children.

In order to evaluate the remaining interpretive space, this Article looks beyond judicial interpretation of the Title VI regulations, to Section 504 of the Rehabilitation Act (Section 504), which bans discrimination on the basis of disability,[271] and Title IX of the Education Amendments of 1972 (Title IX), which bans discrimination on the basis of gender.[272] Discrimination based on race, ethnicity, gender and disability have their own very different histories, and these cannot be collapsed or ignored. Yet, in the contexts of disability, gender and race, longstanding societal beliefs and widespread practices rendered the fact of discrimination almost invisible. It was long considered "normal" to expect that children with disabilities would either be institutionalized, segregated in separate schools and classrooms, or hidden at home.[273] Similarly, it was "normal" for adults with disabilities to be unemployed or for girls to limit their ambitions to motherhood or a few select professions.[274] In the area of race, it was "normal" for racial groups to live, attend school and work separately, and for African Americans to hold positions of service rather than power.

The history of the race, disability and gender civil rights movements has included sustained challenges to widespread and deeply held beliefs that these and other inequities were normal, predictable and based not on bias, but on real and important differences among people.[275] These movements have challenged the notions that indi-

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270. While this article does not pursue an analysis of the intersection of discrimination based on race and gender, or even race, gender and disability, such claims should also be considered. *See* Kimberlé Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics,* 1989 U. CHI. LEGAL F. 139 (1989).

271. 29 U.S.C. § 794 (1994).

272. 20 U.S.C. § 1618 (1994).

273. 20 U.S.C. § 1400(c)(2)(A)-(E) (Supp. V 1999).

274. *See, e.g.,* Nadine Taub & Elizabeth M. Schneider, *Women's Subordination and the Role of Law, in* FEMINIST LEGAL THEORY: FOUNDATIONS (D. Kelly Weisberg ed., 1993).

275. *See, e.g., id.*

viduals with disabilities cannot learn or work, that women's lives are centered in the home, and that racial segregation and inequality are acceptable.[276] They have challenged the belief that changes in the practices of our social institutions would make no difference in increasing equality because the limitations or disparities are caused not by those institutional practices, but rather from individual limitations, desires and choices.

We are past the days when state education laws permitted school officials to deny entrance to the "uneducable," when classified job listings were separated by gender, and when African Americans were punished for crossing the color line in stores, waiting rooms and public transportation. However, we still see that deeply held beliefs about what is "normal" affect our ability to see discrimination. Thus, many continue to argue that children with disabilities would be better served in segregated classrooms, that women need fewer athletic opportunities than men, and that African American boys experience greatly reduced success in school because of differences related to the characteristics of individuals or group characteristics, differences that cannot be affected by changes in institutional practices. We have too often accepted as fact that governmental programs cannot be equally effective for members of these groups.

This article looks across the areas of disability, gender and racial discrimination to highlight the possibility that Section 504, Title IX and Title VI can be interpreted to require governmental agencies and other recipients of federal funds to transform their programs to be "equally effective" at serving individuals with disabilities, females and racial minorities. While "equally effective" as a phrase is not widely used in the regulations under any of these statutes, it provides an affirmative description of the explicit regulatory mandates.

The "equal effectiveness" standard can be the basis for directly challenging beliefs that inequalities are due to characteristics of the protected class rather than the result of discriminatory institutional practices. In order to hold these programs accountable for failing to provide equally effective services, litigants need to highlight and call into question the long accepted institutional practices that prevent programs from effectively meeting the learning, mental health and rehabilitation needs of African American boys. They must also be prepared to successfully rebut the argument that it is the characteristics of African American boys rather than institutional practices that prevent the services from being more effective.

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276. *See id.*

A. *Section 504 and the Americans with Disabilities Act*

Section 504 of the Rehabilitation Act of 1974[277] and the Americans with Disabilities Act of 1990[278] (ADA) are the two civil rights statutes that protect individuals with disabilities.[279] Section 504 was enacted to combat discrimination on the basis of disability by recipients of federal monies,[280] while the ADA prohibits discrimination on the basis of disability in employment, public services (including transportation), public accommodations and telecommunications.[281] Under Section 504, federal agencies were charged with implementing regulations.[282] The Departments of Education ("DOE"), Health and Human Services ("HHS"), and Justice ("DOJ") have promulgated the following regulations:

> A recipient, in providing any aid, benefit, or service, may not . . . on the basis of handicap: . . . Provide a qualified handicapped person with an aid, benefit, or service that is not as effective as that provided to others; . . . For the purposes of this part, aids, benefits, and services, to be equally effective are not required to produce the identical result or level of achievement for handicapped and nonhandicapped persons, but *must afford handicapped persons equal opportunity to obtain the same result, to gain the same benefit, or to reach the same level of achievement, in the most integrated setting appropriate to the person's needs.*[283]

The regulations also prohibit recipients of federal funds from utilizing "criteria or methods of administration (i) that have the effect of sub-

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277. 29 U.S.C. § 794 (1999).

278. 42 U.S.C. § 12101 (1995).

279. *See generally*, Curtis D. Edmonds, *Four Emerging Issues in Americans with Disabilities Act Litigation Involving Hospitals and Other Health Care Providers*, 20 REV. LITIG. 623 (2001); Robert Silverman, *Emerging Disability Policy Framework: A Guidepost for Analyzing Public Policy*, 85 IOWA L. REV. 1691 (2000).

280. 29 U.S.C. § 794 (a) (1999).

281. 42 U.S.C. § 12101(a)(3) (1994).

282. 29 U.S.C. § 791(f)(1),(2) (1999).

283. DOE, Nondiscrimination on the Basis of Handicap in Programs and Activities Receiving Federal Financial Assistance, 34 C.F.R. § 104.4 (b)(1)-(b)(2) (2000); HHS, Nondiscrimination on the Basis of Handicap in Programs or Activities Receiving Federal Financial Assistance, 45 C.F.R. § 84.4(b)(1)-(b)(2) (2001) (emphasis added). The relevant DOJ regulations include slight grammatical differences, but the substance of the text and the language is nearly identical. DOJ, Nondiscrimination on the Basis of Disability in State and Local Government Services, 28 C.F.R. § 35.130(b)(1)(iii) (2001); DOJ, Enforcement of Nondiscrimination on the Basis of Handicap in Programs or Activities Conducted by the Department of Justice, 28 C.F.R. § 39.130(b)(1)(iii) (2001); DOJ, Implementation of Executive Order 12250, Nondiscrimination on the Basis of Handicap in Federally Assisted Programs 28 C.F.R. § 41.51(b)(1)(iii) (2001).

jecting qualified handicapped persons to discrimination on the basis of handicap, [or] (ii) that have the purpose or effect of defeating or substantially impairing accomplishment of the objectives of the recipient's program . . . with respect to handicapped persons."[284]

Section 504 and the ADA have led to some dramatic societal changes. They have literally changed the face of our society by mandating that buildings be readily accessible to disabled persons.[285] Public transportation is more accessible, and many sidewalks, public arenas and other facilities now are designed to accommodate wheelchair users. They have helped to dramatically increase the percentage of individuals with disabilities who attend college[286] and are employed.[287]

Individuals with disabilities have challenged the failure of employers to make "reasonable accommodations" in the workplace.[288] They have been successful where they have focused courts away from employer arguments that individual limitations, not employer choices, impede the individual's ability to work. Employers have been re-

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284. *See* 34 C.F.R. § 104.4(b)(4); 45 C.F.R. § 84.4(b)(4) (emphasis added). Again, the relevant DOJ regulations includes slight grammatical differences, but the substance of the text and language is nearly identical. *See* 28 C.F.R. § 35.130(b)(3); 28 C.F.R. § 39.130(b)(3); 28 C.F.R. § 41.51(b)(3).

285. *See* DOJ, Nondiscrimination on the Basis of Disability by Public Accommodations and in Commercial Facilities 28 C.F.R. § 36.304 (2001); HHS, Nondiscrimination on the Basis of Handicap in Programs or Activities Receiving Federal Financial Assistance, 34 C.F.R. § 104.21-.23 (2000). *See, e.g.*, Cheatham County (TN) Sch. Dist., 34 IDELR 181 (2000) (increasing accessibility of its elementary school playground), Donna (TX) Independent Sch. Dist., 34 IDELR 73 (2000) (obtaining commitment from school district to install an elevator to make the second floor of the school accessible), Metropolitan Nashville-Davidson County (TN) Sch. Dist., 34 IDELR 271 (2000) (finding that accessibility issues had been remedied by new school construction), Dallas County (MO) R-1 Sch. Dist., 34 IDELR 183 (2000) (obtaining commitments to modify bathroom, parking facilities, and drinking fountains at middle school and to develop plan for improving gymnasium accessibility in the high school).

286. A recent survey found that while only 29% of individuals with disabilities had completed some college in 1986, that by 2000, nearly half of adults with disabilities had completed some college. National Organization on Disability, *Education and Disability Statistics: A Historical Perspective,* http://www.nod.org/const/dsp_cont_item_view.cfm (July 25, 2001) (on file with the Journal of Health Care Law & Policy).

287. The percentage of persons with disabilities who say they can work who are employed has increased from 46% to 56% in the last fifteen years. National Organization on Disability, *Employment Rates of People with Disabilities,* http://www.nod.org/const/dsp_cont_item_view.cfm (July 24, 2001) (on file with the Journal of Health Care Law & Policy).

288. The concept was judicially created under Section 504 and specifically codified in the ADA. LAURA F. ROTHSTEIN, DISABILITY LAW 170 (1995); 42 U.S.C. § 12111(9) (1995); 29 C.F.R. § 1630.2(o) (2001). Under the ADA, employers are required to make any accommodation that would not result in undue hardship to them. 42 U.S.C. § 12111(10); 29 C.F.R. § 1630.2(p).

quired to accommodate workers with disabilities by eliminating heavy lifting,[289] transferring or reassigning employees or creating a new position for employees,[290] and changing work responsibilities or work environment.[291] These work place modifications demonstrate the possibility of deconstructing the able-bodied norm in order to create a workplace that is reasonably accommodating to individuals who fall outside that norm.

The Section 504 regulations make it clear that programs must make their aids, benefits and services "equally effective" for individuals with disabilities.[292] Despite this language, the United States Supreme Court has hesitated to find that Section 504 prohibits practices that have a disparate negative impact on individuals with disabilities. In *Alexander v. Choate,*[293] the Court stated, "[w]hile we reject the boundless notion that all disparate-impact showings constitute a prima facie case under § 504, we assume without deciding that § 504 reaches at least some conduct that has an unjustifiable disparate impact upon the handicapped."[294] Despite this lack of clarity, a number of courts have found that Section 504 provides for claims of disparate negative impact.[295] This trend has been limited, however, by a judicial willingness in some cases to protect long accepted norms of institu-

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289. *See, e.g.,* Tuck v. HCA Health Serv. of Tennessee, 842 F. Supp. 988 (M.D. Tenn 1992) (finding in non-jury trial that hospital failed to reasonably accommodate an employee who had injured her back while working, and that the hospital should have transferred her to available positions which entailed light duty).

290. *See, e.g.,* Norville v. Staten Island Univ. Hosp., 196 F.3d 89 (2d Cir. 1999). "[W]here a comparable position is vacant and the disabled employee is qualified for the position, an employer's refusal to reassign the employee to that position – absent some other offer of reasonable accommodation – constitutes a violation of the ADA." *Id.* at 99. *See, e.g.,* Vollmert v. Wisconsin Dep't of Transp., 197 F.3d 293 (7th Cir. 1999) (finding that the employer failed to reasonably accommodate learning disabled employee when it transferred her without meeting her training needs).

291. *See, e.g.,* Marcano-Rivera v. Pueblo Intern, Inc., 232 F.3d 245 (1st Cir. 2000) (finding that the employer failed to accommodate employee with amputated legs who was required to work cash register at busy times which forced her to install specially designed stool and move herself from her wheelchair to the stool in front of impatient customers); Higgins v. New Balance Athletic Shoe, Inc., 194 F.3d 252 (1st Cir. 1999) (holding that the employer could not ignore employee's request for accommodation for hearing impairment by relocating loud speaker).

292. Recipients cannot provide a service "that is not as effective as that provided to others." 28 C.F.R. § 35.130(b)(1)(iii) (2001); 34 C.F.R. § 104.4(b)(1)(iii) (2000); 45 C.F.R. § 84.4(b)(1)(iii) (2001).

293. 469 U.S. 287 (1985).

294. *Id.* at 299.

295. *See, e.g.,* Berg v. Florida Dep't of Labor and Employment Security, 163 F.3d 1251, 1254 (11th Cir. 1998); Brennan v. Stewart, 834 F.2d 1248, 1261 (5th Cir. 1988); Robinson v. Kansas, 117 F. Supp. 2d 1124, 1145 (D. Kan. 2000); Galusha v. New York Dep't of Envt. Conservation, 27 F. Supp. 2d 117 (N.D.N.Y. 1998).

tional practice. Courts have refused to order changes to programmatic elements considered "essential" to the program.

For example, in *Guckenberger v. Boston University*,[296] students with disabilities challenged, *inter alia*, the requirement that they successfully complete four semesters of foreign language courses in order to graduate.[297] Based on a record of deliberations by a University committee that had considered the issue and determined that it was an essential feature of the academic program, the court found that the University's refusal to waive the foreign language requirement did not violate Section 504 or the ADA.[298] In this instance, the court accepted a "norm" that had been developed originally in the absence of individuals with disabilities, despite the heavy burden it placed on some students with disabilities.[299] Some courts have accepted testing norms[300] and eight semester rules for participation in high school athletic programs.[301] In these cases, the failure to "qualify" for the benefit is seen as resting within the individual's limitations, not institutional norms.

Other courts, however, have rejected the application of these norms. An Oregon court rejected the eight-semester limitation on participation in high school athletic programs, finding that its primary purpose, to encourage students to graduate in four years, may be inappropriate for some students with disabilities.[302] Many of these cases demonstrate the importance of persuading courts that the "norm," such as completion of high school in four years, is itself open to challenge.

The Office of Civil Rights ("OCR") has required other substantial modifications to school programs in ways that also challenged long developed norms. For example, OCR has required school districts to

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296. 974 F. Supp. 106 (D. Mass. 1997).

297. *Id.* at 114.

298. Guckenberger v. Boston Univ., 8 F. Supp. 2d 82 (D. Mass. 1998). In initial litigation the court found that Boston University's refusal to waive the foreign language requirement for some students with learning disabilities was not supported by professional, academic judgment. *Guckenberger*, 974 F. Supp. at 149. The Court's second determination was made in response to its order that the University develop "a deliberative procedure for considering whether modification of its degree requirements in foreign language would fundamentally alter the nature of its liberal arts programs." *Id.* at 154.

299. The courts appear to be less willing to question the professional judgment of professional educators in higher education than they are those in elementary and secondary education. *See*, Anne P. Dupre, *Disability, Deference, and the Integrity of the Academic Enterprise*, 32 GA. L. REV. 393 (1998).

300. *See, e.g.*, Wynne v. Tufts Univ. Sch. of Medicine, 976 F.2d 791, 793-95 (1st Cir. 1992).

301. *See, e.g.*, McPherson v. Michigan High Sch. Athletic Ass'n., 119 F.3d 453, 462 (6th Cir. 1997).

302. Bingham v. Oregon Sch. Activities Assoc., 37 F. Supp. 2d 1189 (D. Or. 1999).

ensure students with disabilities access to field trips,[303] to provide a fulltime aide,[304] to establish equal counseling opportunities[305] and participation in athletic programs,[306] to protect students from harassment related to their disabilities,[307] and to alter testing procedures.[308]

B. Title IX

Title IX of the Education Amendments of 1972 bans discrimination on the basis of sex in any education program which receives federal dollars.[309] While the general regulations promulgated by HHS and DOE under Title IX do not contain disparate impact language, specific subsections of those regulations do contain language forbidding actions that have the effect of discriminating.[310]

In significant ways, Title IX has successfully changed previously held gender norms regarding the types of education, training and access to athletic and other extracurricular opportunities that both men

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303. *See, e.g.*, Palm Beach County (FL) Sch. Dist., 34 IDELR 38 (2000).

304. *See, e.g.*, Lake Washington (WA) Sch. Dist. No. 414, 33 IDELR 44 (1999)

305. *See, e.g.*, Grand Rapids (MI) Pub. Sch. Dist., 34 IDELR 40 (2000).

306. *See, e.g.*, LeRoy (NY) Cent. Sch. Dist., 31 IDELR 190 (1999) (requiring that students with disabilities be given an equal opportunity to participate on interscholastic sports teams).

307. *See, e.g.*, Georgetown (MA) Pub. Schs., 34 IDELR 65 (2000); Flagler County (FL) Sch. Dist., 34 IDELR 182 (2000).

308. *See, e.g.*, Prince George's County Pub. Schs., 34 IDELR 95 (2000) (obtaining agreement to provide accommodations for student with disabilities taking state-required writing test).

309. 20 U.S.C. § 1681 (2000).

310. 34 C.F.R. § 106.31 (2001); 45 C.F.R. § 86.31 (2001). The DOJ did not promulgate regulations under Title IX as it is designed for agencies which administer funds for education programs. The DOE has implemented regulations which require effective accommodation in the area of athletics. 34 C.F.R. § 106.16.

The DOE has issued the following regulation relating to nondiscrimination in admission and recruitment:

> "A recipient shall not administer or operate any test or other criterion for admission which has a disproportionately adverse effect on persons on the basis of sex unless the use of such test or criterion is shown to predict validly success in the education program or activity in question and alternative tests or criteria which do not have such a disproportionately adverse effect are shown to be available."

34 C.F.R. § 106.21; *see also*, 45 C.F.R. § 86.36(b).

The DOE has also issued the following regulation relating to nondiscrimination in access to course offerings: "Where use of a single standard of measuring skill or progress in a physical education class has an adverse effect on members of one sex, the recipient shall use appropriate standards which do not have such effect." 34 C.F.R. § 106.34; *see also* 45 C.F.R. § 86.34(d).

The DOE regulations provide that: "Where a recipient finds that a particular class contains a substantially disproportionate number of individuals of one sex, the recipient shall take such action as necessary to assure itself that such disproportion is not the result of discrimination on the basis of sex in counseling or appraisal materials by counselors." 34 C.F.R. § 106.36; *see also* 45 C.F.R. § 86.37.

and women wanted. More recently, Title IX has been used to challenge gendered assumptions regarding human interactions within the school environment.[311] As we witness a new generation of girls expecting to be fighter pilots, astronauts and construction workers, as we watch girls flock to soccer, basketball and hockey teams, we realize that in striking ways, the gender norms have changed.

Title IX has served to change the historical norms associated with sports. Most notably, the Act and its accompanying regulations have forced society to rethink the assumption that women do not want to play sports. The implementing regulations accompanying Title IX call for "equal athletic opportunity for members of both sexes."[312] In determining whether this mandate is met, one consideration, among many, is "whether the selection of sports and levels of competition effectively accommodate the interests and abilities of student athletes of both sexes[.]"[313] Courts require "not merely some accommodation, but full and effective accommodation."[314]

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311. *See, e.g.*, Davis v. Monroe County, 526 U.S. 629 (1999). U.S. Dep't of Education, Title IX: A Sea of Change in Gender Equity in Education, http://www.ed.gov/pubs/TitleIX/part3.html (last updated July 10, 1997) (on file with the Journal of Health Care Law and Policy) (describing many of these changes).

312. 34 C.F.R. § 106.41(c) (2001). When enacted in 1972, Title IX included "broad proscriptive language" that caused much anxiety in the world of academia. Cohen v. Brown University, 991 F.2d 888, 893 (1st Cir. 1993). Universities were unsure of the reach of Title IX in large part due to the fact that the statute lacked secondary legislative materials. *See id.* By congressional mandate, in 1975, the former Department of Health, Education and Welfare, promulgated regulations. *See id.* Four years later, HEW's Office of Civil Rights ("OCR"), after notice and comment, published a "Policy Interpretation" that addressed the issue of equal athletic opportunity. *See id.*, at 893-94. In 1984, the Supreme Court held that Title IX was "program specific," which meant that the Act could only reach programs that separately received federal funding. Grove City College v. Bell, 465 U.S. 555, 574 (1984). This holding served as the death knell to the regulations that addressed athletic programs because those programs are not direct recipients of federal monies. *See Cohen*, 991 F.2d at 894. Congress responded to the Supreme Court's ruling by passing the Civil Rights Restoration Act of 1987. *See* 20 U.S.C. § 1687 (1988). The Act made clear that as long as a university accepted federal funds, the entire university was required to comply with Title IX. *See id.* The floor debate demonstrates that a key purpose behind the legislation was to create equality for female athletic programs. *See id.*

313. 34 C.F.R. § 106.41(c)(1) (citing nine additional factors; however, the call for effective accommodation is the most commonly cited factor in litigation); *see also* Roberts v. Colorado State Bd. of Agric., 998 F.2d 824, 829 (10th Cir. 1993).

314. *Roberts*, 998 F.2d at 831-32; *Cohen*, 991 F.2d at 898. *See also* Pederson v. Louisiana State Univ., 213 F.3d 858 (5th Cir. 2000); Kelley v. Board of Trustees, 35 F.3d 265, 269-70 (7th Cir. 1994) (determining that university's decision to terminate male swim team and not female swim team was a "reasonable response to the requirements of the applicable [Title IX] regulation and policy interpretation."); Favia v. Indiana Univ., 7 F.3d 332, 343 (3d Cir. 1993) (affirming district court grant of preliminary injunction against university which cut female gymnastics and field hockey teams); Gonyo v. Drake Univ., 837 F.Supp. 989, 995-96 (S.D. Ia. 1992) (affirming district court denial of preliminary injunction against university brought by male wrestlers after program was eliminated).

In applying the "effective accommodation" standard, courts have refused to give credence to arguments that women are less interested in sports than men.[315] When female students sued their university under Title IX for its failure to field an intercollegiate women's fast pitch softball and soccer team,[316] the defendant University argued that no Title IX violation had occurred because the record failed to demonstrate a sufficient interest and ability among the female plaintiff class.[317] The Court of Appeals rejected this attempt to blame the lack of participation on the desires of the female students, observing that the "heart of this contention is that an institution with no coach, no facilities, no varsity team, no scholarships, and no recruiting in a given sport must have on campus enough national-caliber athletes before a court can find sufficient interest and abilities to exist."[318] In this case, plaintiffs successfully focused the court on the institutional practices that diminished female participation in sports rather than any inherent lack of interest by women college students.

Title IX has also been used to successfully challenge the standard for academic achievement awards.[319] New York awarded merit scholarships based solely on the Scholastic Aptitude Test ("SAT") scores. Under this criteria, women received a far lower percentage of the scholarships than men because they consistently, as a group, scored 10 points lower on the verbal portion of the SAT and at least 40 points lower on the math portion.[320] In this case, the court scrutinized whether the SAT was an appropriate measure of academic achievement, challenging the norm itself, rather than accepting as inevitable that women might perform worse than men.[321]

Girls have begun to challenge the widely accepted practice of sexual harassment in the school environment. School districts have resisted Title IX claims concerning sexual harassment, arguing that they cannot control such conduct.[322] However, courts are increasingly willing to find that actions such as unwanted touching and sexually suggestive words and motions are no longer an accepted norm of school

315. *See Pederson*, 213 F.3d at 880.

316. *See* Pederson v. Louisiana State Univ., 912 F.Supp. 892, 897 (M.D. La. 1996) (providing factual background).

317. *See id.* at 898; *see also Pederson*, 213 F.3d at 878.

318. *See Pederson*, 213 F.3d at 878.

319. *See* Sharif by Salahuddin v. N.Y. St. Educ. Dep't, 709 F. Supp. 345 (S.D.N.Y. 1989).

320. *Id.* at 355.

321. *See id.* at 362. In reaching this conclusion, the court adopted the disparate impact analysis used under the Title VI regulations. *See id.* at 361-62. *See also, infra* Part IV.C (providing an explanation of the disparate impact test used under Title VI).

322. *See* Davis v. Monroe County Bd. of Educ., 526 U.S. 629, 640 (1999).

behavior but can instead create an unacceptably hostile educational environment.[323] The revised guidelines issued by the Department of Education's Office of Civil Rights reinforce the notion that peer harassment can prevent a student from effectively participating in school, and that schools are responsible for ensuring that sexual harassment does not so impede students' participation.[324]

C. Title VI

Title VI prohibits recipients of federal financial assistance from excluding, denying a benefit, or subjecting anyone to discrimination on the basis of race, color or national origin.[325] The statute charges each federal agency, which extends federal financial assistance to implement Title VI.[326] As a result, the DOE, HHS, and DOJ have each issued disparate impact regulations.[327]

The Title VI regulations promulgated by these three agencies largely track each other. They provide that:

> A recipient, in determining the types of services, financial aid, or other benefits, or facilities which will be provided under any such program, or the class of individuals to whom, or the situations in which, such services, financial aid, other benefits, or facilities will be provided under any such program, or the class of individuals to be afforded an opportunity to participate in any such program, may not, directly or through contractual or other arrangements, utilize criteria or methods of administration *which have the effect of subjecting individuals to discrimination because of their race, color, or national origin, or have the effect of defeating or substantially impairing accomplishment of the objectives of the program* as respect individuals of a particular race, color, or national origin.[328]

The DOJ regulations differ only in their inclusion of "any disposition" as one of the activities that is covered by the regulations.[329] The regulatory language does not specifically discuss whether programs

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323. *See, e.g., Davis*, 526 U.S. 629.

324. *See* Department of Education, *Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties*, http://www.ed.gov/offices/OCR/shguide/index.html (Jan. 2001) (on file with the Journal of Health Care Law & Policy).

325. 42 U.S.C. § 2000d (1999).

326. 42 U.S.C. § 2000d-1.

327. *See* 28 C.F.R. § 42.104 (2001); 34 U.S.C. § 100.3 (2001); 45 C.F.R. § 80.3 (b)(2) (2001).

328. *See* 28 C.F.R. § 42.104 (b)(2) (emphasis added); 34 U.S.C. § 100.3 (b)(2) (emphasis added); 45 C.F.R. § 80.3 (b)(2)(emphasis added).

329. *See* 28 C.F.R. § 42.104 (b)(iii-v).

must be "equally effective." However, language prohibiting recipients from employing methods of administration that have "the effect of . . . substantially impairing accomplishment of the objectives of the program"[330] provides advocates with an opportunity to argue that this requirement can only be met through methods that are equally effective at aiding individuals in meeting program goals.[331]

This regulatory language has devolved into a tripartite test, described as a "disparate impact" analysis. This approach, borrowed from judicial interpretations of Title VII of the Civil Rights Act of 1964,[332] requires plaintiffs to make a prima facie case that a facially neutral practice has a racially disproportionate adverse effect.[333] They must also show a causal link between the challenged practice and the identified disparate impact.[334] If plaintiffs are successful in meeting this standard, defendants must prove that the challenged practice is substantiated by "educational necessity."[335] The challenged course of action must be "demonstrably necessary to meet an important education goal . . . ."[336] Finally, if defendants meet this burden of persuasion,[337] plaintiffs must demonstrate that "there exists a comparably effective alternative practice which would result in less disproportionality," or that the defendant's proffered justification is a pretext for discrimination.[338]

Title VI has been used to challenge a wide variety of practices by state and local health and education agencies, largely without success.[339] After a lengthy hiatus in which few Title VI cases were filed

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330. 34 C.F.R. § 100.3(b)(2).

331. *See* Powell v. Ridge, 189 F.3d 387, 393 (3d Cir. 1999); Elston v.Talladega County Bd. of Educ., 997 F.2d 1394, 1407 (11th Cir. 1993); Larry P. v. Riles, 793 F.2d 969, 982, n.9 (9th Cir. 1984) (en banc). The Title VI disparate impact test was first recognized by the Supreme Court in *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), and adopted by five Supreme Court justices for actions under the Title VI regulations in *Guardians Ass'n v. Civil Service Comm'n of New York*, 463 U.S. 582 (1983).

332. *See* Georgia State Conference of Branches of NAACP v. Georgia, 775 F.2d 1403, 1417 (11th Cir. 1985).

333. *See Elston*, 997 F.2d at 1407.

334. *See id.*

335. *Id.* at 1412; *see also Larry P.*, 793 F.2d at 982.

336. *Elston*, 997 F.2d at 1412.

337. *See id.* at 1407, n.14.

338. *See id.* at 1407.

339. No reported decisions concerning mental health or juvenile justice were found; however, a few recent cases that have used the Title VI regulations to challenge racial profiling practices by state police have survived motions to dismiss. *See generally* Maryland State Conference of NAACP Branches v. Maryland Dep't of State Police, 72 F. Supp. 2d 560 (D. Md. 1999) (refusing to dismiss claims by the Maryland NAACP chapter and individual motorists representing a class challenging state police stops, detentions and searches as a violation of the Title VI regulations); Rodriguez v. California Highway Patrol, 89 F. Supp.

outside the context of school segregation, there has been an increase in judicial decisions under Title VI. Title VI challenges in the health context include actions brought against health facilities placement choices, state regulations permitting discriminatory nursing home practices, and challenges to a hospital's disclosure to police of results of cocaine tests of pregnant women.[340]

The Title VI regulations have been much more widely used in the context of education. Plaintiffs have challenged a wide variety of educational practices at the state level, including school funding;[341] school residency requirements;[342] disproportionate representation of African American students in special education;[343] high-stakes testing;[344] and the failure to prevent racial segregation in local school districts.[345] They have also challenged practices of local school districts, including facilities location;[346] school transfer programs;[347] placement in special education;[348] and the quality of educational programs for English language learners.[349]

2d 1131 (N.D. Cal. 2000) (denying motion to dismiss plaintiffs' claim that the state's drug interdiction efforts disparately impact motorists of color).

340. *See, e.g.*, Linton v. Comm'r of Health and Env't, 779 F. Supp. 925 (M.D. Tenn. 1990) (successfully challenging state's limited bed certification policy for Medicaid patients requiring nursing home care); Ferguson v. City of Charleston, 532 U.S. 67 (2001).

341. *See* Robinson v. Kansas, 117 F. Supp. 2d 1124 (D. Kansas 2000); Campaign for Fiscal Equity v. New York, 719 N.Y.S.2d 475 (N.Y. App. Div. 2001); Powell v. Ridge, 247 F.3d 520 (3rd Cir. 2001).

342. *See, e.g.*, Paynter v. New York, 720 N.Y.S.2d 712 (N.Y. App. Div. 2000) (challenging combination effect of local residency requirements and state repeal of low income housing statute).

343. *See, e.g.*, State Conference of Branches of NAACP v. Georgia, 775 F.2d 1403 (11th Cir. 1999); Larry P. v. Riles, 793 F.2d 969 (9th Cir. 1984).

344. *See, e.g.*, GI Forum Image de Tejas v. Texas Educ. Agency, 87 F. Supp. 667 (W.D. Tex. 2000).

345. *See, e.g.*, United States v. Yonkers, 888 F. Supp. 591 (S.D.N.Y. 1995).

346. *See, e.g.*, Elston v. Talladega County Bd. of Educ. 997 F.2d 1394, 1407 (11th Cir. 1993); Meyers v. Bd. of Educ. San Juan Sch. Dist., 905 F. Supp. 1544 (D. Utah 1995) (challenging local school district decision to not locate schools in Navajo Mountain area of the Navajo reservation).

347. *See, e.g.*, Young v. Montgomery County Bd. of Educ., 922 F. Supp. 544 (M.D. Ala. 1996) (challenging policy preventing student athletes who transfer from schools in which they are in the majority to schools in which they are in the minority to play athletics during the first year of their attendance at the new school).

348. *See, e.g.*, PASE v. Hannon, 506 F. Supp. 831 (N.D. Ill. 1980).

349. *See* Flores v. Arizona, 48 F. Supp. 2d 937 (D. Ariz. 1999); Valeria G. v. Wilson, 12 F. Supp. 2d 1007 (N.D. Calif. 1998); Gomez v. Illinois State Bd. of Educ., 811 F.2d 1030 (7th Cir. 1987) (challenging alleged failure of school districts to evaluate students for English proficiency and provide bilingual or compensatory education); Teresa P. v. Berkeley Unified Sch. Dist., 724 F. Supp. 698 (N.D. Calif. 1989) (plaintiffs focused only on proving discriminatory intent and did not attempt to show a racially discriminatory effect).

Where plaintiffs have been successful under Title VI, they have been able to undermine the educational norms asserted by school officials, norms that make the difficulties facing students appear to lie within themselves rather than in the state's or schools' educational practices, and they have been able to argue instead that educational programs should be equally effective for all students. This tension was at the forefront in the U.S. Supreme Court's first interpretation of the Title VI regulations.

In *Lau v. Nichols*,[350] Chinese American students challenged the practice of the San Francisco School District to give many of them instruction only in English, thus ignoring their lack of English language skills. The Ninth Circuit Court of Appeals had denied the plaintiffs' claim, reasoning that "[e]very student brings to the starting line of his educational career different advantages and disadvantages caused in part by social, economic and cultural background, created and continued completely apart from any contribution by the school system."[351] The Superintendent of the School District had placed the blame for the failure to gain English language skills squarely on the shoulders of the plaintiffs, stating:

> The immigrant family, in settling with its own people, has limited opportunities for assimilation into the American culture and language. Often, the immigrant student's only contact with the English language is during class time. After class, during lunch and recesses, the immigrant child tends to seek friends among other new arrivals. . . . In so doing, there develops a further bond of reinforcing the Chinese language. Few opportunities are afforded . . . for the student to speak English once he is back home in Chinatown.[352]

The Supreme Court reversed, applying federal regulations under Title VI that barred criteria or methods that had the effect of discriminating or limited beneficiaries' ability to accomplish the program's objectives.[353] The Court found that it was "obvious that the Chinese-speaking minority receive fewer benefits than the English-speaking

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350. *See* 414 U.S. 563 (1974).

351. Lau v. Nichols, 483 F.2d 791, 797 (9th Cir. 1973), *rev'd* 414 U.S. 563 (1974).

352. *Id.* at 801-02 (Hill, J., dissenting) (quoting Dr. Robert E. Jenkins, CHINESE BILINGUAL EDUCATION: A PRELIMINARY REPORT (1968)).

353. *See Lau*, 414 U.S. at 568-69. The Court also cited clarifying guidelines concerning the educational rights of English language learners issued by the Department of Health, Education and Welfare in 1970, which stated that a district "must take affirmative steps to rectify [ ] language [deficiencies] in order to open its instructional program to these students," and that the program "must be designed to meet such language skill needs as soon as possible and must not operate as an educational deadend or permanent track." *Id.*

majority . . . which denies them a meaningful opportunity to participate in the educational program – all earmarks of the discrimination banned by the regulations."[354]

Almost thirty years later, state educational agencies and school districts continue to make the same argument put forward by the San Francisco Public Schools in 1973: that student difficulties lie within themselves, not in the design of educational programs. For example, minority, non-U.S. origin and disabled students recently challenged the school funding program maintained by the State of Kansas.[355] The students alleged that the school districts that they are most likely to attend receive less funding per pupil on a statewide basis, and, as a result, receive fewer educational opportunities than white, U.S. origin and non-disabled students.[356] The State argued that the educational harms that the plaintiffs alleged were due to "societal ills," not the school funding practices of the State.[357]

A similar, more detailed, argument was made in a school funding case that went to trial in New York. In that case, the State argued that the low graduation rates of students in New York City, 84% of whose students are members of racial or ethnic minorities, were "a product of various socio-economic deficits experienced by the large number of at-risk students in the New York City public schools."[358] The State argued that "the crucial determinants of student performance are students' socio-economic characteristics, and enhanced resources can do little to overcome the educational deficits that at-risk children bring to school."[359] Plaintiffs demonstrated through extensive testimony and evidence that numerous educational initiatives successfully improve the educational achievement of at-risk students, and effectively countered this argument.[360]

The same issues have arisen in Title VI disparate impact cases involving challenges to ability grouping practices and overrepresentation of minority students in special education. Defendants have argued that the higher rates of placement of minority students in lower

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354. *Id.*

355. Robinson v. Kansas, 117 F. Supp. 2d 1124 (D. Kansas 2000).

356. *See id.* at 1129-30.

357. *See id.* at 1141.

358. Campaign for Fiscal Equity v. New York, 719 N.Y.S.2d 475, 517 (N.Y. App. Div. 2001).

359. *Id.* at 520.

360. *See id.* at 525-26.

tracks of ability grouping and special education programs are the result of other factors, such as "family background" and "hard work."[361]

Defendants do not explicitly argue that African American students cannot learn. However, by advocating in Title VI cases that the students' socio-economic background, rather than the approach used by states and schools in administering their educational programs, state and local education agencies reinforce the effects of institutional racism. In addition, the agencies appeal to the unconscious racist belief that African American and other students of color cannot be successfully taught, that they are inferior students.

Thus, those who challenge forms of structural racial discrimination must be prepared to demonstrate that racial and ethnic minority students suffer disproportionately from negative educational outcomes not because of demographic factors, but because of institutional practices that disadvantage them. Plaintiffs must openly challenge the unstated racial norm that only white, middle-class students are "ready to learn," prove forcefully that all students are ready to learn, and demonstrate that institutional and unconscious racial discrimination in state and local practices systematically disadvantages racial and ethnic minority students.[362] In this manner, litigants can challenge the unstated racial norms, just as litigants under Title IX and Section 504 have challenged the gender and (dis)ability norms.

Title VI disparate impact litigants have largely ignored unconscious racial discrimination in making their claims. While the litigants in some cases have argued that reduced teacher expectations for minority student achievement or an insufficiently multicultural educational approach was a vestige of past segregation,[363] litigants under Title VI do not seem to have attempted to provide evidence on these or other possible facets of unconscious racial discrimination.

Plaintiffs should not limit their claims to the effect of structural racial inequities. Rather, they should focus on proving the combined effects of institutional and unconscious racial discrimination. For example, in a case alleging a Title VI violation relating to the disproportionate representation of African American boys in suspensions and expulsions, plaintiffs should focus not just on the statistical disparities in suspension and expulsion, but on the greater likelihood that the schools which have high percentages of African American boys are under funded, concentrate students with high levels of poverty, have

361. *See* Georgia State Conference of Branches of NAACP v. Georgia, 775 F.2d 1403, 1419 (11th Cir. 1985).

362. Harry & Anderson, *Social Construction, supra* note 57, at 46-50.

363. *See, e.g.*, United States v. Yonkers, 197 F.2d 41, 51-54 (2d Cir. 1999).

fewer teachers who are certified, experienced, or have obtained masters or doctoral degrees, exhibit poor school governance, and have fewer facilities and programs, particularly in areas that give students positive feelings about their schools, such as athletics, arts and music programs.[364] In addition, evidence should focus on the teacher-student interactions that, over time, lead to a referral for discipline.[365] Only by revealing the complex workings of institutional and unconscious racism can advocates challenge courts to force schools and other institutions that serve children to ensure that their services are equally effective for all, not just some, of their participants.

GI Forum v. Texas Education Agency[366] demonstrates the difficulties facing plaintiffs in Title VI cases. In that case, plaintiffs challenged the adoption of a graduation test, one that strongly disparately and negatively affected minority students.[367] While the court acknowledged that plaintiffs had shown that minority students in Texas "have been, and to some extent continue to be, the victims of educational inequality,"[368] the court refused to link these general claims of inequality with unequal access to learning the items presented on the graduation test.[369] Clearly, the standard of proof will be very high on litigants claiming the effects of structural and unconscious racism, and their proofs need to be constructed to meet the most skeptical of minds. In an effort to hold education, mental health and juvenile justice programs accountable for equal effectiveness, plaintiffs need to carefully construct the relationship between institutional practices and the negative effects on African American boys.[370]

The complex workings of institutional and unconscious racism can also be the subjects of complaints to federal agencies, such as DOE, DOJ and HHS, that are charged with implementing Title VI

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364. Linda Darling-Hammond, *Creating Standards of Practice and Delivery for Learner-Centered Schools*, 4 STAN. L. & POL'Y REV. 37 (1992/1993) (noting the importance of evaluating the resources organizational approaches and teaching practices that are needed to provide all students with an equal opportunity for success).

365. SKIBA ET AL., *supra* note 83, at 15-18; Beth Harry et al., *Of Rocks and Soft Places: Using Qualitative Methods to Investigate the Processes that Result in Disproportionality, in* MINORITY ISSUES IN SPECIAL EDUCATION, (forthcoming).

366. GI Forum Image De Tejas v. Texas Educ. Agency, 87 F. Supp. 2d 667 (W.D. Texas 2000).

367. *See id.* at 673. The court noted that the racial and ethnic disparities in the test passage rates cut across socio-economic lines. *See id.* at 679.

368. *Id.* at 674.

369. *See id.*

370. *See* Paul Weckstein, *School Reform and Enforceable Rights to Quality Education, in* LAW AND SCHOOL REFORM (Jay Heubert ed. 1999) (providing an excellent discussion on how to develop a broad-based approach to improving education for all students).

regulations in federally funded programs under their jurisdiction.[371] Because these agencies have their own investigators and are able to negotiate resolutions to alleviate racial disparities in their programs, they may be able to obtain stronger remedies in a shorter timeframe than private litigants can through court action.[372]

The measures suggested here are far from easy, and these proofs and arguments will be made to very skeptical audiences. However, litigation provides the opportunity to create essential narratives of racial inequality, and success in cases such as *Campaign for Fiscal Equity v. New York* can reverberate to the benefit of students of color around the country. These cases also point to the urgent need for advocates to act to protect access to the courts by private litigants seeking to enforce the Title VI disparate impact regulations.

V. REQUIRING STATES TO MONITOR AND CORRECT RACIAL DISPARITIES

The severely disproportionate treatment of African American children, and specifically African American boys, has not completely escaped Congressional notice. In a few instances, Congress has made findings about these disproportions and required agencies and recipients of federal funds to take explicit actions to alleviate these disproportions. While it is not clear whether failure to comply with these provisions is actionable, these statutory provisions create opportunities to advocate for the collection of adequate data on racial, ethnic and gender disparities and to ensure that states follow through on programmatic changes to alleviate found disparities. In addition, they may provide models for legislative advocacy to include specific evaluation and reform efforts in other areas, such as mental health, that show serious disproportionalities in treatment.

The two most useful provisions involve the IDEA and the Juvenile Justice and Delinquency Prevention Act (JJDPA), which not only require states to collect data by race, but also require states to take affirmative steps to reduce the disproportionate representation of minority youth in special education and residential juvenile facili-

371. *See* 34 C.F.R. § 100.7(b) (2000) (concerning the filing of complaints, investigations and resolution of complaints).

372. *See* U.S. COMMISSION ON CIVIL RIGHTS, EQUAL EDUCATIONAL OPPORTUNITY PROJECT SERIES, VOL. I, at 205-19 (1996) (providing a description of OCR's complaint review process).

ties.[373] A few other statutes require the collection of information that can be used in political advocacy and to make claims under Title VI.

In 1997, during the reauthorization of the IDEA, Congress found that minority students were disproportionately represented in special education.[374] Congress found that "[g]reater efforts are needed to prevent the intensification of problems connected with mislabeling and high dropout rates among minority children with disabilities."[375] The 1997 amendments require states to monitor school districts for potential discrimination in suspensions and expulsions of children with disabilities; establish performance goals, using indicators such as performance on assessments, dropout rates, and high school completion; when the state's indicators point to ineffective progress for students with disabilities, the state must adjust its improvement plan accordingly; intervene by revising policies, procedures and practices, where significant racial disproportionality exists in special education identification and placement.[376]

A similar provision in the JJDPA goes even further by reducing federal funding to states that fail to demonstrate that they have made efforts to reduce or eliminate racial disparities in juvenile confinement. Since 1974, Congress has authorized federal financial assistance to help states in preventing juvenile crime, to rehabilitate juveniles found to be delinquent, and to improve the quality of the administration of juvenile justice.[377] These "Formula Grant" funds are allocated among the various states on the basis of the relative population of people under age eighteen.[378] In 1988, Congress identified the disproportionate confinement of juveniles from minority groups as a serious problem, and Congress amended the JJDPA to require states participating in the JJDPA Formula Grant Program to

> address efforts to reduce the proportion of juveniles detained or confined in secure detention facilities, secure correctional facilities, jails, and lockups who are members of minority groups if such proportion exceeds the proportion such groups represent in the general population.[379]

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373. *See* Juvenile Justice and Delinquency Prevention Act, 42 U.S.C. §§ 5601-5786 (1994). *See generally* 42 U.S.C. § 5667(c) (1994).

374. *See* Individuals with Disabilities Education Act Amendments of 1997; Pub. L. No. 105-17, 111 Stat. 37 (1997).

375. 20 U.S.C. § 1400(c)(8)(A) (1994).

376. *See* 34 C.F.R. § 300.755 (2000).

377. *See* 42 U.S.C. § 5601 (1994).

378. *See id.* § 5632(a)(1).

379. Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, 102 Stat. 4181 § 7258 (1988) (codified at 42 U.S.C. § 5633(a) (1994).

In 1992, Congress further amended the JJDPA to make efforts to reduce racial and ethnic disproportion in confinement a "core requirement."[380] That is, any state that fails to make the required efforts to reduce disproportionate confinement would receive a 25% reduction in their next annual formula grant and would become ineligible to receive any further funds under the program if they do not make a financial and substantive commitment to complying with the provision.[381] In some cases, private litigants have been permitted to sue under § 1983 to enforce required provisions of the JJDPA.[382]

The Office of Juvenile Justice and Delinquency Prevention (OJJDP) issued regulations under this section. These regulations require that applications for Formula Grant funds include information that demonstrates that states have made "specific efforts to reduce the proportion of juveniles detained or confined" in secure facilities.[383] States must provide detailed data on minority confinement rates, a complete assessment of disproportionate minority confinement, and specify a time-limited plan of action to reduce the disproportion.[384]

The OJJDP maintains an active website that makes available research on the issue of disproportionate confinement.[385] The Office also provides a catalog for every state's research reports on the issue, including the reports from five federally funded pilot programs.[386]

A few other statutes require states to collect helpful information concerning racial and ethnic groups. For example, Title I of the Elementary and Secondary Education Act ("Title I") provides states and local school districts federal funds targeted to the educational needs of economically disadvantaged students.[387] During the 1994 reauthorization of Title I, Congress added a requirement that states conduct yearly assessments of student achievement, and mandated

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380. *See* An Act to Amend the Juvenile Justice and Delinquency Prevention Act of 1974, Pub. L. 102-586, 106 Stat. 4982 § 2(f)(3)(A)(ii) (1992)(codified at 42 U.S.C. § 5633(c)(3)(1994)).

381. 42 U.S.C. § 5633(c)(3)(A).

382. *See* Horn v. Madison County Fiscal Court, 22 F.3d 653, 658 (6th Cir. 1994); James v. Jones, 148 F.R.D. 196, 199-200 (W.D. Ky. 1993).

383. 28 C.F.R. § 31.303(j) (2000).

384. *See id.*

385. *See, e.g.*, OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION, MINORITIES IN THE JUVENILE JUSTICE SYSTEM, 1999 NATIONAL REPORT SERIES, JUVENILE JUSTICE BULLETIN (1999); Carl E. Pope & William Feyerherm, *Minorities and the Juvenile Justice System: Research Summary* http://www.ojjdp.hcjrs.org/dmc/tools/index.html (1995) (on file with the Journal of Health Care Law and Policy).

386. OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION, CATALOG OF STATE RESEARCH REPORTS ON DISPROPORTIONATE MINORITY CONFINEMENT, *available at* http://www.ojjdp.ncjrs.org/dmc/tools/index.html (last modified July 2, 2001).

387. *See* 20 U.S.C. § 6301 (2000).

that states report the results of those yearly assessments, disaggregated by race, ethnicity, gender, English proficiency status, migrant status, disability status, and socioeconomic status of the students who took the assessments.[388] When Title I was reauthorized in 2001, these requirements were strengthened, requiring that states demonstrate adequate yearly progress in enabling all students to meet academic achievement standards, and that they demonstrate this progress for specific groups of students, including students who are economically disadvantaged, students from each major racial and ethnic group, and students with disabilities.[389]

Recently, Congress established the National Center on Minority Health and Health Disparities.[390] The Center is charged with coordinating and supporting an interdisciplinary health research agenda to address the health needs of racial and ethnic minorities.[391] While the statute establishing the Center does not require the same degree of action required under the IDEA and the JJDPA, these and other provisions provide opportunities for advocates to ensure that the disparities that negatively affect African American boys and other racial and ethnic minority children receive priority attention.

VI. CONCLUSION

This Nation has tolerated a shockingly high level of disparate treatment of racial and ethnic minorities. As this article clearly shows, African American boys have been excessively subjected to practices in our public education, mental health and juvenile justice systems that label, discipline, segregate, punish and confine them.[392] When African American boys enter our schools, mental health and juvenile justice programs, the programs they receive should be equally effective and designed to enable them to achieve the academic success, good mental health and rehabilitation that are the goals of those programs.[393] In order to accomplish this goal, advocates should argue for a strong interpretation of the Title VI disparate impact regulations to clearly attack the unstated racial norms of these institutions and the accompanying structural and unconscious racial discrimination that

388. The Improving America's Schools Act, Pub. L. No. 103-382, 108 Stat. 3518, § 1111(b)(3)(I) (codified at 20 U.S.C. § 6311(b)(3)(I) (2000)).

389. No Child Left Behind Act of 2001, Pub. L. No. 107-110, 115 Stat. 1425, § 1111(b)(2) (codified at 20 U.S.C. § 6311(b)(2) (2000)).

390. *See* Minority Health and Health Disparities Research and Education Act of 2000, Pub. L. No. 106-525, 114 Stat. 2495 § 101 (codified at 42 U.S.C. § 287c-31 (1994)).

391. *See* 42 U.S.C. § 287c-31(a).

392. *See supra,* Part II.

393. *See supra,* Part IV.

so impede African American boys. At a time when access to the courts to enforce the Title VI disparate impact regulations is under siege, advocates must act forcefully to protect that access and to utilize the regulations to their fullest in the service of racial equality.