CHALLENGING LEGACY DISCRIMINATION: THE PERSISTENCE OF SCHOOL PUSHOUT AS RACIAL SUBORDINATION

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ABSTRACT

Prior legal scholarship has described the school-to-prison pipeline as originating in the "zero-tolerance" school discipline policies of the 1980s and 1990s. This Article shows that, in reality, it originated in resistance to school desegregation. The initial rise in exclusionary school discipline in the United States began in the late 1960s, in reaction to federal efforts to enforce school desegregation orders. Across the country, school districts forced to desegregate adopted subjective school disciplinary policies, then deployed those policies to disproportionately exclude Black students from newly desegregated schools. The racially disparate use of school discipline received national attention during the 1970s through several pathbreaking reports that used the term "pushout" to describe how large numbers of Black students experienced repeated suspension and expulsion, eventually leading them to leave school entirely. In a story that has not yet been told in legal scholarship, I describe how civil rights advocates pushed the Office for Civil Rights to address school discipline as part of its duty to prosecute discrimination.

Today's facially race-neutral school discipline policies are thus rooted in a history of intentional racial exclusion. Although resistance to desegregation may not be the conscious motive behind suspension and expulsion of Black students, the legacy of this history persists through attitudinal and institutional

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infrastructure that originally developed to counter integration, and that persists today. I argue that these attitudes and policies constitute what I term "legacy discrimination" that has evolved to prevent Black students from accessing their education on terms equal to white students. Exclusionary school discipline serves both as a mechanism for excluding Black students and as a facially race-neutral basis for justifying their exclusion and sustaining the myth of white supremacy. Understanding today's school discipline practices as legacy discrimination reveals the inadequacy of current antidiscrimination law, but also creates pathways to address exclusionary discipline within a broader movement for racial justice in schools.

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INTRODUCTION

The year 2024 marked the seventieth anniversary of the Supreme Court's seminal *Brown v. Board of Education*[1] decision that outlawed de jure racial segregation in school, and the sixtieth anniversary of the Civil Rights Act of 1964, which through Title VI prohibits racial discrimination in schools. Yet, American schools remain racially segregated.[2] Moreover, schools that serve Black and Brown[3] students are the most likely to be underfunded and to lack key resources.[4] Racial gaps persist for almost every metric of educational opportunity—from access to qualified teachers, to access to math, science, arts, and extracurricular programming.[5]

School discipline is one critical indicator for examining racial disparities in access to educational opportunities today.[6] Across the country, significant racial

[1] 347 U.S. 483 (1954).

[2] GARY ORFIELD, SUSAN E. EATON & THE HARVARD PROJ. ON SCH. DESEGREGATION, DISMANTLING DESEGREGATION: THE QUIET REVERSAL OF *BROWN V. BOARD OF EDUCATION* 1-5 (1996); GARY ORFIELD & ERICA FRANKENBERG WITH JONGYEON EE & JOHN KUSCERA, *BROWN* AT 60: GREAT PROGRESS, A LONG RETREAT AND AN UNCERTAIN FUTURE 2-3 (2014) [hereinafter *BROWN* AT 60], https://civilrightsproject.ucla.edu/research/k-12-education/integration-and-diversity/brown-at-60-great-progress-a-long-retreat-and-an-uncertain-future/Brown-at-60-051814.pdf [https://perma.cc/LD7D-ZRFJ].

[3] In the tradition of Professor Kimberlé Crenshaw and other scholars, I capitalize "Black" and "Brown" to recognize that these groups constitute specific cultural groups. *See* Kimberlé Williams Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331, 1332 n.2 (1988).

[4] BRUCE D. BAKER, MATTHEW DI CARLO & PRESTON C. GREEN III, ALBERT SHANKER INST., SEGREGATION AND SCHOOL FUNDING: HOW HOUSING DISCRIMINATION REPRODUCES UNEQUAL OPPORTUNITY 2 (2022), https://www.shankerinstitute.org/sites/default/files/2022-05/SEGreportfinal.pdf [https://perma.cc/77PM-NBYE] (describing that across all seven U.S. metro areas, 85% of majority-Black and Latinx districts "are both inadequately funded and score below the U.S. average on math and reading tests, compared with 6% of majority-white districts").

[5] Sean F. Reardon & Ann Owens, *60 Years After* Brown*: Trends and Consequences of School Segregation*, 40 ANN. REV. SOCIO. 199, 207-10 (2014); JOEL MCFARLAND ET AL., U.S. DEP'T OF EDUC., THE CONDITION OF EDUCATION 2018, at 82 (Thomas Nachazel, Wyatt Smith & Mark Ossolinski eds., 2018), https://nces.ed.gov/pubs2018/2018144.pdf [https://perma.cc/9E7U-CHGT].

[6] While students of color experience disproportionate discipline compared to their white counterparts, this Article will focus on the experiences of Black students in particular in the aftermath of the *Brown v. Board of Education* decision. Black children have experienced the largest increase in suspension, from 6% in 1972-73 to 13.26% in 2000-01, and the discipline gap between Black and white students grew from 2.9% in 1972-73, to 8.17% in 2010. Johanna Wald & Daniel J. Losen, *Out of Sight: The Journey Through the School-to-Prison Pipeline*, *in* INVISIBLE CHILDREN IN THE SOCIETY AND ITS SCHOOLS 23, 25-26 (Sue Books ed., 3d ed. 2007).

disproportionalities in school discipline exist from pre-K through high school.[7] Black students are disciplined more often and more severely than their white peers for every category of discipline[8]—including in- and out-of-school suspensions, expulsions, and referral to alternative schools and school police.[9] Nationally, Black students experience exclusionary discipline—i.e., discipline that results in removal from the classroom—at two to three times the rate of white students, a reality that limits their access to in-class instruction and learning.[10]

Despite the fact that schools routinely rely on suspension and expulsion, exclusionary punishment is not an effective deterrent for student misbehavior.[11] Exclusionary discipline negatively impacts learning and life outcomes for students, including reducing their performance in school and increasing the risk of students dropping out and becoming involved in the criminal justice system.[12]

[7] U.S. DEP'T OF EDUC., OFF. FOR C.R., DISCIPLINE PRACTICES IN PRESCHOOL 1 (2021), https://ocrdata.ed.gov/assets/downloads/crdc-DOE-Discipline-Practices-in-Preschool-part1.pdf [https://perma.cc/TUQ7-GZKD]; U.S. DEP'T OF EDUC., OFF. FOR C.R., SUSPENSIONS AND EXPULSIONS IN PUBLIC SCHOOLS 1 (2022), https://ocrdata.ed.gov/assets/downloads/Suspensions_and_Expulsion_Part2.pdf [https://perma.cc/GU3R-9787].

[8] DANIEL LOSEN, CHERI HODSON, MICHAEL A. KEITH II, KATRINA MORRISON & SHAKTI BELWAY, ARE WE CLOSING THE SCHOOL DISCIPLINE GAP? 4-6 (2015), https://civilrightsproject.ucla.edu/resources/projects/center-for-civil-rights-remedies/school-to-prison-folder/federal-reports/are-we-closing-the-school-discipline-gap/AreWeClosingTheSchoolDisciplineGap_FINAL221.pdf [https://perma.cc/S4WB-NPKZ].

[9] *Id.*

[10] U.S. DEP'T OF EDUC., OFF. FOR C.R., STUDENT DISCIPLINE AND SCHOOL CLIMATE IN U.S. PUBLIC SCHOOLS 5-8 (2023), https://www.ed.gov/sites/ed/files/about/offices/list/ocr/docs/crdc-discipline-school-climate-report.pdf [https://perma.cc/P92U-DXVQ]; DANIEL J. LOSEN & JONATHAN GILLESPIE, OPPORTUNITIES SUSPENDED: THE DISPARATE IMPACT OF DISCIPLINARY EXCLUSION FROM SCHOOL 6 (2012), https://civilrightsproject.ucla.edu/resources/projects/center-for-civil-rights-remedies/school-to-prison-folder/federal-reports/upcoming-ccrr-research/losen-gillespie-opportunity-suspended-2012.pdf [https://perma.cc/K2UZ-NE4K].

[11] *See, e.g.*, AARON KUPCHIK, HOMEROOM SECURITY: SCHOOL DISCIPLINE IN AN AGE OF FEAR 7-8 (2010); MELANIE LEUNG-GAGNÉ, JENNIFER MCCOMBS, CAITLIN SCOTT & DANIEL J. LOSEN, LEARNING POL'Y INST., PUSHED OUT: TRENDS AND DISPARITIES IN OUT-OF-SCHOOL SUSPENSION, at v (2022), https://files.eric.ed.gov/fulltext/ED626581.pdf [https://perma.cc/TKZ6-54EY] ("[R]esearch shows that exclusionary discipline is ineffective at improving school safety and deterring infractions.").

[12] *See* CHRISTOPHER A. MALLETT, THE SCHOOL-TO-PRISON PIPELINE: A COMPREHENSIVE ASSESSMENT 43-44 (2016) (listing negative impacts of exclusionary discipline, such as failing academically, grade retention, and dropping out of high school); Am. Psych. Ass'n Zero Tolerance Task Force, *Are Zero Tolerance Policies Effective in the Schools?: An Evidentiary Review and Recommendations*, 63 AM. PSYCH. 852, 860 (2008) (concluding that zero tolerance practices did not improve student behavior and had no positive impact on school safety); Russell J. Skiba, Mariella I. Arredondo & Natasha T. Williams, *More Than a Metaphor: The Contribution of Exclusionary Discipline to a School-to-Prison Pipeline*, 47

Exclusionary discipline can cost families money as they struggle to find childcare or have to take off work while students are prohibited from attending schools.[13] Exclusionary discipline negatively impacts school environments as students are removed from school for long periods of time, missing schoolwork and becoming socialized in new environments that are not conducive to learning, often without adult supervision or their peers.[14] Because many selective schools and universities have admissions policies that ask whether a student has a school discipline record, exclusionary discipline also limits students' ability to access educational opportunities down the road.[15]

A rigorous body of research documents the "school-to-prison pipeline," a series of policies through which marginalized youth are more likely to be surveilled and policed, more likely to receive harsh discipline, and more likely to receive criminalized sanctions for school-based misbehavior—creating pathways from school to the criminal legal system.[16] In Dr. Monique Morris's book entitled *Pushout*, she describes how exclusionary school discipline and harsh punishment push Black youth to disengage and eventually leave school,

EQUITY & EXCELLENCE EDUC. 546, 558 (2014) ("[T]he experience of out-of-school suspension or expulsion in and of itself increases student risk for school disengagement, poor school outcomes, dropout, and involvement with juvenile justice . . . .").

[13] KUPCHIK, *supra* note 11, at 47; *see also* Aaron Kupchik, *Rethinking School Suspensions*, CONTEXTS, Winter 2022, at 14, 16 ("These parents told stories of lost wages and even being fired from jobs for repeatedly taking time off work to pick up their children when the principal called.").

[14] Andrew Bacher-Hicks, Stephen B. Billings & David J. Deming, *Proving the School-to-Prison Pipeline*, EDUC. NEXT, Fall 2021, at 52, 57.

[15] MARSHA WEISSMAN & EMILY NAPIER, CTR. FOR CMTY. ALTS., EDUCATION SUSPENDED: THE USE OF HIGH SCHOOL DISCIPLINARY RECORDS IN COLLEGE ADMISSIONS 13 (2015).

[16] *See, e.g.*, Russell J. Skiba & Reece L. Peterson, *School Discipline at a Crossroads: From Zero Tolerance to Early Response*, 66 EXCEPTIONAL CHILD. 335, 338-39 (2000), https://www.aacrao.org/docs/default-source/signature-initiative-docs/trending-topic-docs/criminal-history---college-admissions/educationsuspended.pdf [https://perma.cc/GZY4-GNKG] (discussing unfair and disproportionate usage of discipline on marginalized youths and subsequent negative effects); ADVANCEMENT PROJECT ET AL., EDUCATION ON LOCKDOWN: THE SCHOOLHOUSE TO JAILHOUSE TRACK 18-19 (2005), https://static.prisonpolicy.org/scans/FINALEOLrep.pdf [https://perma.cc/Y6LD-MTMX] (suggesting pipeline from school discipline to arrest "is merely a continuum of the overcriminalization of people of color"). According to the U.S. Commission on Civil Rights:

> Students of color as a whole, as well as by individual racial group, do not commit more disciplinable offenses than their white peers – but black students, Latino students, and Native American students in the aggregate receive substantially more school discipline than their white peers and receive harsher and longer punishments than their white peers receive for like offenses.

U.S. COMM'N ON C.R., BEYOND SUSPENSIONS: EXAMINING SCHOOL DISCIPLINE POLICIES AND CONNECTIONS TO THE SCHOOL-TO-PRISON PIPELINE FOR STUDENTS OF COLOR WITH DISABILITIES 10 (2019), https://www.usccr.gov/pubs/2019/07-23-Beyond-Suspensions.pdf [https://perma.cc/M7NB-H6P5].

increasing the likelihood of involvement in the criminal legal system.[17] In fact, students who are suspended or expelled are three times more likely to become involved in the criminal legal system.[18] In May of 2023, the Office for Civil Rights at the U.S. Department of Education and the Civil Rights Division at the U.S. Department of Justice released a joint document recognizing that "[d]iscrimination in student discipline forecloses opportunities for students, pushing them out of the classroom and diverting them from a path to success in school and beyond."[19]

Critically, racial disparities in school discipline are not explicable by actual differences in the conduct of students of different races or differences in socioeconomic status.[20] There is a general consensus based on decades of research that Black students are no more likely to misbehave than other students.[21] Research shows that even after controlling for differences in

[17] MONIQUE W. MORRIS, PUSHOUT: THE CRIMINALIZATION OF BLACK GIRLS IN SCHOOL 1-4 (2016) ("Indeed, nearly 48 percent of Black girls who are expelled nationwide do not have access to educational services."); *see also* Mary Ellen Flannery, *The School-to-Prison Pipeline: Time to Shut It Down*, NEA TODAY (Jan. 5, 2015), https://www.nea.org/nea-today/all-news-articles/school-prison-pipeline-time-shut-it-down [https://perma.cc/D29T-79BY] (stating suspension is number one predictor of whether children will drop out of school); TONY FABELO ET AL., BREAKING SCHOOLS' RULES: A STATEWIDE STUDY OF HOW SCHOOL DISCIPLINE RELATES TO STUDENTS' SUCCESS AND JUVENILE JUSTICE INVOLVEMENT, at xii (2011), https://csgjusticecenter.org/wp-content/uploads/2020/01/Breaking_Schools_Rules_Report_Final.pdf [https://perma.cc/UUZ2-RZEY] (detailing how students who are suspended or expelled for discretionary violations are three times more likely to be in contact with the juvenile justice system the following year); Judah Schept, Tyler Wall & Avi Brisman, *Building, Staffing, and Insulating: An Architecture of Criminological Complicity in the School-to-Prison Pipeline*, 41 SOC. JUST., no. 4, 2014, at 96, 99 (explaining student who is pushed out of school is eight times more likely to be incarcerated than those who graduate from high school).

[18] Kalinda R. Jones, Anthony Ferguson, Christian Ramirez & Michael Owens, *Seen but Not Heard: Personal Narratives of Systemic Failure Within the School-to-Prison Pipeline*, TABOO, Fall 2018, at 49, 50.

[19] U.S. DEP'T OF EDUC. & U.S. DOJ, RESOURCE ON CONFRONTING RACIAL DISCRIMINATION IN STUDENT DISCIPLINE, at i (2023), https://www2.ed.gov/about/offices/list/ocr/docs/tvi-student-discipline-resource-202305.pdf [https://perma.cc/LV22-8WH8]; *see* KRISTIN HENNING, THE RAGE OF INNOCENCE: HOW AMERICA CRIMINALIZES BLACK YOUTH 139-44 (2021) (explaining how presence of police on school campuses and use of suspensions increase likelihood of criminal involvement and pushes students out of school).

[20] *See* RUSSELL J. SKIBA & NATASHA T. WILLIAMS, EQUITY PROJECT AT IND. UNIV., ARE BLACK KIDS WORSE? MYTHS AND FACTS ABOUT RACIAL DIFFERENCES IN BEHAVIOR 5 (2014), https://indrc.indiana.edu/tools-resources/pdf-disciplineseries/african_american_differential_behavior_031214.pdf [https://perma.cc/M37N-YGKA] ("[T]here is virtually no support in the research literature for the idea that disparities in school discipline are caused by racial/ethnic differences in behavior.").

[21] HENNING, *supra* note 19, at 132.

behavior, Black students are disciplined at higher rates than white students.[22] In a comprehensive review of the empirical research to date, Richard Welsh and Shafiqua Little conclude "that the higher rates of exclusionary discipline experienced by Black students are not the result of higher rates of misbehavior or these students engaging in a greater variety of infractions or more severe infractions."[23]

So why do such consistent racial disparities in school discipline exist? One theory is that implicit and explicit biases of educators impact school discipline decisions. National data reveal that racial disparities in the administration of discipline are most pronounced for subjective offenses where educators have discretion to determine whether behavior constitutes a punishable offense.[24] Black students are more likely than their peers to be punished in response to relatively minor, less objectively harmful misbehavior.[25] For example, defiance, disruption, disrespect, insubordination, and threatening behavior are categories of discipline in which educators are asked to interpret student behavior and determine whether a student's behavior constitutes an offense.[26] While more

[22] Jeremy D. Finn & Timothy J. Servoss, *Misbehavior, Suspensions, and Security Measures in High School: Racial/Ethnic and Gender Differences*, 5 J. APPLIED RSCH. ON CHILD., no. 2, 2014, at 2; Francis L. Huang & Dewey G. Cornell, *Student Attitudes and Behaviors as Explanations for the Black-White Suspension Gap*, 73 CHILD. & YOUTH SERVS. REV. 298, 300 (2017); Michael Rocque & Raymond Paternoster, *Understanding the Antecedents of the "School-to-Jail" Link: The Relationship Between Race and School Discipline*, 101 J. CRIM. L. & CRIMINOLOGY 633, 663 (2011).

[23] Richard O. Welsh & Shafiqua Little, *The School Discipline Dilemma: A Comprehensive Review of Disparities and Alternative Approaches*, 88 REV. EDUC. RSCH. 752, 760 (2018).

[24] AJMEL QUERESHI & JASON OKONOFUA, NAACP LEGAL DEF. & EDUC. FUND, INC., LOCKED OUT OF THE CLASSROOM: HOW IMPLICIT BIAS CONTRIBUTES TO DISPARITIES IN SCHOOL DISCIPLINE 1, 4 (2017), https://www.naacpldf.org/wp-content/uploads/LDF_Bias_Report_WEB-2.pdf (detailing how Black students are disproportionately disciplined for more subjective offenses which result from false stereotypes that Black students are inherently aggressive, threatening, and dangerous); CARA MCCLELLAN, NAACP LEGAL DEF. & EDUC. FUND, INC., OUR GIRLS, OUR FUTURE: INVESTING IN OPPORTUNITY AND REDUCING RELIANCE ON THE CRIMINAL JUSTICE SYSTEM IN BALTIMORE 14 (2018), https://www.naacpldf.org/wp-content/uploads/Baltimore_Girls_Report_FINAL_6_26_18.pdf [https://perma.cc/MYX2-7VE9] ("The terms 'threat,' 'harm,' and 'disruption' are subjective terms that are more often applied to the behavior of Black girls. At least one in four suspensions of Black girls was for subjective offenses, including: disruptions, disturbance, threatening behavior, or disrespect.").

[25] KUPCHIK, *supra* note 11, at 183.

[26] MARK R. WARREN, WILLFUL DEFIANCE: THE MOVEMENT TO DISMANTLE THE SCHOOL-TO-PRISON PIPELINE 28 (2021) ("Vague discipline codes like willful defiance, 'disrupting school,' and other similar terms especially lent themselves to application in racially discriminatory ways."); Harold Jordan, *Why School Discipline Reform Still Matters*, ACLU (Oct. 19, 2023), https://www.aclu.org/news/racial-justice/why-school-discipline-reform-still-matters [https://perma.cc/UTQ5-CUTN] (stating Black students are subject to "[m]ore frequent punishment for infractions that are subjectively measured — such as disorderly

objective offenses, such as possession of drugs, alcohol, or firearms, may be easy to define, subjective offenses require educators to determine whether a student's behavior challenged authority or social norms. These relatively minor, subjective offenses also constitute the majority of disciplinary referrals, suspensions, and expulsions.[27]

According to researchers, as a result of racial bias and stereotypes, adults in schools are more likely to interpret the behavior of Black students as disrespectful, aggressive, threatening, and dangerous as compared to when white students engage in the same behavior.[28] For example, one study found that teachers were more troubled by minor misbehavior and more strongly preferred disciplinary action when they were told that the misbehavior was committed by a student with a Black-sounding name, particularly for a second infraction.[29] Another study examined over 3.5 million records from more than 4,000 school offices and found that teachers consistently wrote longer descriptions and included more negative emotion when disciplining Black students as compared to white students.[30] As law professor Kristin Henning has persuasively argued, Black youth today are more likely to be seen as threatening to white America and, as a result, are denied the freedom to test boundaries and experiment that

behavior — and for low level infractions, compared to white students"); *see also* David Simson, *Exclusion, Punishment, Racism and Our Schools: A Critical Race Theory Perspective on School Discipline*, 61 UCLA L. REV. 506, 552 (2014) ("This is especially true in vague offense categories like disrespect and defiance, which heighten the negative stereotypes of African Americans as being more threatening and dangerous.").

[27] WARREN, *supra* note 26, at 28-29. The ACLU filed suit against South Carolina to challenge laws that "allowed students in school to be criminally charged for normal adolescent behaviors including loitering, cursing, or undefined 'obnoxious' actions on school grounds and encouraged discriminatory enforcement against Black students and students with disabilities." CYAP v. Wilson, ACLU, https://www.aclu.org/cases/kenny-v-wilson [https://perma.cc/8G5R-H2F2] (last updated Feb. 22, 2023). According to the complaint, Black children were four times more likely to be charged under this law than their white counterparts. Complaint at 1, Kenny v. Wilson, 566 F. Supp. 3d 447 (D.S.C. 2021) (No. 16-cv-2794). The district court found—and the Fourth Circuit agreed—the laws were unconstitutionally vague and allowed for discriminatory enforcement. Carolina Youth Action Project v. Wilson, 60 F.4th 770, 786 (4th Cir. 2023).

[28] U.S. COMM'N ON C.R., *supra* note 16, at 105-06; Janel A. George, *Stereotype and School Pushout: Race, Gender, and Discipline Disparities*, 68 ARK. L. REV. 101, 111 (2015).

[29] Jason A. Okonofua & Jennifer L. Eberhardt, *Two Strikes: Race and the Disciplining of Young Students*, 26 PSYCH. SCI. 617, 619 (2015).

[30] *See generally* David M. Markowitz, Angus Kittelman, Erik J. Girvan, María Reina Santiago-Rosario & Kent McIntosh, *Taking Note of Our Biases: How Language Patterns Reveal Bias Underlying the Use of Office Discipline Referrals in Exclusionary Discipline*, 52 EDUC. RESEARCHER 525 (2023) (summarizing psychological study of over 4,000 schools analyzing how racial biases impact teachers' opinion of students).

white youth are afforded.[31] Critical race theorists have explained these trends by arguing that the behavior of Black students is more likely to be interpreted as threatening or defiant because such behavior triggers deep-seated "fears of loss of dominion and control, of revolt, and of danger."[32]

Researchers have also documented the impact of adultification bias, or the perception of Black children as older, less innocent, and less worthy of nurturing and support.[33] The result is that adults are more likely to be punitive and intolerant of mistakes when judging the behavior of Black youth.[34] More recently, research has focused on the intersectional impact of adultification.[35] For example, research by Rebecca Epstein, Jamilia J. Blake, and Thalia González found that adults are more likely to view Black girls as sexually promiscuous due to harmful stereotypes about Black women's sexuality.[36] As a result, Black girls are more likely to be punished through harsh dress code policies that are based on racist and sexist stereotypes.[37] Another study concluded that colorism also drives disparate outcomes, finding that the odds of suspension were about three times greater for African American girls with darker skin tones versus African American girls with lighter skin.[38]

While the bias of individual educators may help to explain individual disciplinary decisions, it does not provide a framework for understanding systemic discrimination. Why are disparities in school discipline so consistent across the country? When did these disparities begin and what policies, practices, and social forces have sustained racially disproportionate discipline?

Often, the narrative around the school-to-prison pipeline begins in the late 1980s and early 1990s with the adoption of zero-tolerance laws that required criminal responses for school misbehavior and the rise of police in schools.[39]

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[31] *See generally* HENNING, *supra* note 19 (positing racism within American policing practices originates in part from differential treatment of Black children throughout their youth).

[32] Simson, *supra* note 26, at 547.

[33] *See* ANN ARNETT FERGUSON, BAD BOYS: PUBLIC SCHOOLS IN THE MAKING OF BLACK MASCULINITY 83-84 (2000).

[34] REBECCA EPSTEIN, JAMILIA J. BLAKE & THALIA GONZÁLEZ, GIRLHOOD INTERRUPTED: THE ERASURE OF BLACK GIRLS' CHILDHOOD 1 (2017), https://genderjusticeandopportunity.georgetown.edu/wp-content/uploads/2020/06/girlhood-interrupted.pdf [https://perma.cc/CNP7-LFFZ].

[35] *Id.* at 5.

[36] *Id.*

[37] *See* NAT'L WOMEN'S L. CTR., DRESS CODED: BLACK GIRLS, BODIES, AND BIAS IN D.C. SCHOOLS 3 (2018), https://nwlc.org/wp-content/uploads/2018/04/5.1web_Final_nwlc_DressCodeReport.pdf [https://perma.cc/YE4G-Z4SJ] (documenting how dress codes in D.C. area evoke racist and sexist stereotypes).

[38] Lance Hannon, Robert DeFina & Sarah Bruch, *The Relationship Between Skin Tone and School Suspension for African Americans*, 5 RACE & SOC. PROBS. 281, 284 (2013).

[39] NANCY A. HEITZEG, THE SCHOOL-TO-PRISON PIPELINE: EDUCATION, DISCIPLINE, AND RACIALIZED DOUBLE STANDARDS 7-11 (2016) ("For nearly two decades, scholars, educators,

The Gun-Free Schools Act of 1994[40] and the Safe Schools Act of 1994 expanded mandatory criminalized punishment for guns, alcohol, drugs, and other misconduct regardless of the circumstances.[41] In addition to federal legislation, more than 90% of public schools reported having zero-tolerance policies by 1997.[42] High-stakes testing and harsh consequences imposed on schools under the No Child Left Behind Act created additional pressure that incentivized schools to exclude "problem" students rather than be penalized for their performance.[43] The result is the disproportionate exclusion of students from marginalized backgrounds, including students of color, but also students with disabilities, low-income students, English language learners, LGBTQIA+ students, and other students who do not conform to stereotypical social norms.[44]

and activists have identified and decried the emergence of this school-to-prison pipeline. Most immediately, the pipeline is a consequence of the 'criminalization of school discipline' via zero-tolerance policies." (footnote omitted)); NAACP LEGAL DEF. & EDUC. FUND, INC., DISMANTLING THE SCHOOL-TO-PRISON PIPELINE 2 (2005).

> In the last decade, the punitive and overzealous tools and approaches of the modern criminal justice system have seeped into our schools, serving to remove children from mainstream educational environments and funnel them onto a one-way path toward prison. These various policies, collectively referred to as the School-to-Prison Pipeline, push children out of school and hasten their entry into the juvenile, and eventually the criminal, justice system, where prison is the end of the road.

Id.; Russell J. Skiba, *The Failure of Zero Tolerance*, RECLAIMING CHILD. & YOUTH, Winter 2014, at 27.

[40] The Gun-Free Schools Act of 1994, Pub. L. No. 103-382, 108 Stat. 3907 (codified as amended at 20 U.S.C. §§ 8921-23).

[41] *See* Alicia C. Insley, *Suspending and Expelling Children from Educational Opportunity: Time to Reevaluate Zero Tolerance Policies*, 50 AM. U. L. REV. 1039, 1045 (2001).

[42] Nora M. Findlay, *Should There Be Zero Tolerance for Zero Tolerance School Discipline Policies?*, 18 EDUC. & L.J. 103, 107 (2008) (highlighting normalization of zero-tolerance disciplinary policies within public schools); WARREN, *supra* note 26, at 27 ("By 1997, 94% of all schools had zero-tolerance policies for weapons or firearms, 87% for alcohol, and 79% reported mandatory suspensions or expulsions for possession of tobacco.").

[43] *See* ADVANCEMENT PROJECT, TEST, PUNISH, AND PUSH OUT: HOW "ZERO TOLERANCE" AND HIGH-STAKES TESTING FUNNEL YOUTH INTO THE SCHOOL-TO-PRISON PIPELINE 28 (rev. ed. 2010) ("[T]he pressure to improve test scores applied by the No Child Left Behind Act . . . makes the public more tolerant of . . . zero tolerance and the criminalization of young people by their schools. These policies create the perceived imperative to remove the 'bad kids' who prevent the 'good kids' from learning.").

[44] *See, e.g.*, JASON CIANCIOTTO & SEAN CAHILL, *The No Child Left Behind Act and LGBT Students*, *in* LGBT YOUTH IN AMERICAS SCHOOLS 109-20 (2012); Joshua Bleiberg & Darrell M. West, *Special Education: The Forgotten Issue in No Child Left Behind Reform*, BROOKINGS (June 18, 2013), https://www.brookings.edu/articles/special-education-the-forgotten-issue-in-no-child-left-behind-reform/ [https://perma.cc/7TKS-B2XR]; Kate Menken, *No Child Left Behind and Its Effects on Language Policy*, 29 ANN. REV. APPLIED LINGUISTICS 103, 110-12 (2009).

The use of suspensions and expulsions increased dramatically under zero-tolerance policies and increased surveillance in schools,[45] as part of a broader "tough on crime" approach rooted in the War on Drugs, that included mandatory sentencing, three strikes laws, and aggressive broken windows policing that criminalized and punished minor, nondangerous offenses.[46] Moreover, the transition to criminalizing student misbehavior also came with a cultural shift in American views of inner-city youth as threatening and of schools as places where crime and violence occurred.[47] During this time, the number of police assigned to schools increased exponentially.[48]

Overlooked in this retelling of history, however, is the initial sudden rise in exclusionary discipline that occurred when school desegregation orders were first enforced in previously segregated school districts. During the 1970s, as meaningful efforts to enforce school desegregation began, school districts adopted new disciplinary codes and, for the first time, a high proportion of Black students were suspended and expelled in newly desegregated schools. The historical context of white resistance to desegregation is thus key to fully understanding the racialized history of exclusionary discipline.

As Part I discusses, the exclusion of marginalized students through repeated suspension and expulsion, later termed "student pushout," evolved as previously segregated districts were forced to desegregate. School pushout constituted a form of "second-generation" discrimination because it was a form of race-based exclusion that adapted as a form of resistance in response to new laws prohibiting segregation. In a story that has not yet been told in legal scholarship, I describe how civil rights advocates pushed the Office for Civil Rights ("OCR"), then housed in the Department of Health Education and Welfare

[45] Nancy A. Heitzeg, *Education or Incarceration: Zero Tolerance Policies and the School to Prison Pipeline*, F. ON PUB. POL'Y, no. 2, 2009, at 1, 1; Edward W. Morris & Brea L. Perry, *The Punishment Gap: School Suspension and Racial Disparities in Achievement*, SOC. PROBS., Feb. 2016, at 68, 70.

[46] ADVANCEMENT PROJECT, *supra* note 43, at 9.

[47] *See* James Forman, Jr., *Community Policing and Youth as Assets*, 95 J. CRIM. L. & CRIMINOLOGY 1, 20-21 (2004) (explaining that rhetoric describing Black inner-city youth as threats reinforces their disparate treatment and criminalization).

[48] As of 2021, schools reported having more than 46,000 school resource officers. *See* Kendrick Washington & Tori Hazelton, *School Resource Officers: When the Cure Is Worse Than the Disease*, ACLU WASH. (May 24, 2021), https://www.aclu-wa.org/story/school-resourceofficers-when-cure-worse-disease [https://perma.cc/3UE9-VLQE]. This increased reliance on police did not come with a corresponding rise in social and emotional supports to address the root of student misbehavior. According to Civil Rights Data Collection ("CRDC") data, 1.6 million students attend a school with a sworn law enforcement officer, but not a school counselor; Latinx, Asian, and Black students were all more likely than white students to attend such schools. U.S. COMM'N ON C.R., *supra* note 16, at 11; Dana Goldstein, *Do Police Officers Make Schools Safer or More Dangerous?*, N.Y. TIMES, https://www.nytimes.com/2020/06/12/us/schools-police-resource-officers.html (last updated Oct. 28, 2021).

("HEW"), to address school discipline as part of its duty to prosecute second-generation discrimination under Title VI. I discuss the backlash that came as school districts faced new reporting requirements and investigations for racially disproportionate school discipline. I then describe how resistance to HEW's investigation of racially disparate school discipline was a major impetus for Congress considering (and nearly passing) legislation to gut the federal government's enforcement of school desegregation.

In Part II, I consider how the history of school pushout should inform efforts to challenge racially disparate school discipline as illegal today. While resistance to desegregation is likely not the conscious motivation behind school discipline decisions, the legacy of school discipline as a tool for racial subordination is deeply ingrained and persists through the attitudes and institutional policies that developed to counter integration and that continue to lead to racial disparities in exclusionary discipline. I argue that the historical context should shape how we understand and address racial disparities in school discipline as a form of what I term "legacy discrimination" that prevents Black students from accessing their education on terms equal to white students once explicit segregation was outlawed. I then outline the doctrinal and practical barriers to challenging school pushout as illegal discrimination under current antidiscrimination law and how a legacy theory would strengthen potential claims. The final section offers reflections about the importance of consciously acknowledging the historical context in which racial disparities evolved in order to remedy inequality and build a movement for radical change. Failure to do so only ensures that pervasive inequity will persist.

I. STUDENT PUSHOUT AS RESISTANCE TO DESEGREGATION

A. *"The Briefest and Rarest of Moments": Federal Enforcement of* Brown v. Board of Education

In 1954, the Supreme Court ruled in *Brown v. Board of Education* that separate schools are "inherently unequal," officially overturning de jure racial segregation in public schools.[49] Nevertheless, it took decades for meaningful enforcement of the Supreme Court's holding to begin.[50] In *Brown I*, the Court declined to determine a plan for implementing its ruling.[51] Subsequently, in *Brown II*, the Supreme Court famously ordered the lower federal courts to

[49] Brown v. Bd. of Educ. (*Brown I*), 347 U.S. 483, 395 (1954).

[50] ELIZABETH HINTON, AMERICA ON FIRE: THE UNTOLD HISTORY OF POLICE VIOLENCE AND BLACK REBELLION SINCE THE 1960S, at 145 (2021) ("Segregation of American schools did not begin to decline in a meaningful way until the late 1960s and early 1970s, as federal pressure and incentives established by the Elementary and Secondary Education Act of 1965 compelled school systems across the country to integrate.").

[51] *Brown I*, 347 U.S. at 483.

require desegregation "with all deliberate speed."[52] What followed was another decade of delay by federal courts left without clear guidance on the enforcement of *Brown*'s mandate and the explicit recognition from the Supreme Court that desegregation may require time.[53]

In many places, *Brown* was met with massive resistance.[54] In 1956, 101 members of Congress in the South pledged to defy the constitutional duty to desegregate and entered the "Southern Manifesto" agreement.[55] That same year, Senator Harry Byrd of Virginia "issued the call for 'Massive Resistance'"—a series of state and local laws that attempted to impede integration, for example by eliminating state funding for schools that desegregated.[56] Southern states passed 196 statutes against school integration.[57] At the school board level, resistance ranged from outright defying the Supreme Court's order, in some cases closing school systems entirely, to more passive "freedom of choice" plans that, as a practical matter, ensured that the status quo of segregation was maintained.[58] Ten years after *Brown*, less than 1% of schools were desegregated in Alabama, Arkansas, Georgia, Mississippi, and South Carolina.[59]

[52] Brown v. Bd. of Educ. (*Brown II*), 349 U.S. 294, 300-01 (1955) (observing that lower courts may be positioned to consider administrative issues and whether integration required more time).

[53] *See, e.g.*, J. Harvie Wilkinson III, *The Supreme Court and Southern School Desegregation, 1955 - 1970: A History and Analysis*, 64 VA. L. REV. 485, 486 (1978) (arguing that Supreme Court abdicated its role in work of school desegregation from 1955 to 1968).

[54] *See* RACHEL DEVLIN, A GIRL STANDS AT THE DOOR: THE GENERATION OF YOUNG WOMEN WHO DESEGREGATED AMERICA'S SCHOOLS 219 (2018); *The Southern Manifesto and "Massive Resistance" to* Brown, LEGAL DEF. FUND, https://www.naacpldf.org/brown-vs-board/southern-manifesto-massive-resistance-brown/ [https://perma.cc/C55S-P4GP] (last visited Mar. 18, 2025). *See generally* RICHARD KLUGER, SIMPLE JUSTICE: THE HISTORY OF *BROWN V. BOARD OF EDUCATION* AND BLACK AMERICA'S STRUGGLE FOR EQUALITY (First Vintage Books ed. 2004) (charting course of school desegregation and cataloguing instances of fierce resistance to desegregation mandate in the south).

[55] Marian Wright Edelman, *Southern School Desegregation, 1954-1973: A Judicial-Political Overview*, 407 ANNALS OF AM. ACAD. POL. & SOC. SCI. 32, 34 (1973).

[56] *The Southern Manifesto and "Massive Resistance" to* Brown, *supra* note 54.

[57] CLAY RISEN, THE BILL OF THE CENTURY: THE EPIC BATTLE FOR THE CIVIL RIGHTS ACT 16 (2014).

[58] U.S. COMM'N ON C.R., FULFILLING THE LETTER AND SPIRIT OF THE LAW: DESEGREGATION OF THE NATION'S PUBLIC SCHOOLS 6 (1976) (describing how Prince Edward County tried to abolish its public schools, while other school districts would "circumvent the law" through freedom of choice plans). White flight to private schools also impeded desegregation. *See, e.g.*, John Kifner, *White Pupils' Rolls Drop a Third in Boston Busing*, N.Y. TIMES, Dec. 15, 1975 (§ 2), at 1, https://www.nytimes.com/1975/12/15/archives/white-pupils-rolls-drop-a-third-in-boston-busing-white-pupils-rolls.html ("The public schools here have lost at least 17,760 white students, nearly a third of the white enrollment, since court-ordered busing for school desegregation began 18 months ago.").

[59] THOMAS R. DYE, AMERICAN PUBLIC POLICY: DOCUMENTS AND ESSAYS 18-19 (1969).

Recognizing that a more meaningful mechanism for implementing desegregation was needed, advocates pushed Congress to adopt the Civil Rights Act of 1964, which empowered the federal government to enforce compliance with *Brown*.[60] Explaining the need for Title VI, President Kennedy pointed to "invidious" and "indirect discrimination, through the use of Federal funds."[61] The intention behind the law was thus to ensure that public funds were not "spent in any fashion which encourages, entrenches, subsidizes, or results in racial discrimination."[62] Although Title VI applies to funds distributed by every federal agency, the majority of enforcement action has been in the context of public school desegregation and has come through OCR, originally a part of HEW but today housed in the U.S. Department of Education.[63] Title VI provides for two enforcement mechanisms: An institution or program engaged in discrimination could lose federal funding or could face litigation brought by the Department of Justice.[64]

In addition to passing Title VI, in 1965 Congress passed the Elementary and Secondary Education Act ("ESEA"), which appropriated funding for HEW to pursue its mandate to enforce desegregation.[65] In April 1965, HEW issued its first set of Title VI guidelines, which required that school districts achieve measurable progress toward desegregation as a condition for receiving funds

[60] Title VI of the Civil Rights Act of 1964, Pub. L. No. 88-352, § 601, 78 Stat. 252, 252, states that: "No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."

[61] C.R. DIV., U.S. DOJ, TITLE VI LEGAL MANUAL 1 (2024), https://www.justice.gov/crt/media/1384931/dl?inline.

[62] 110 CONG. REC. 6543 (1964) (statement of Sen. Hubert Humphrey quoting President Kennedy).

[63] *See* STEPHEN C. HALPERN, ON THE LIMITS OF THE LAW: THE IRONIC LEGACY OF TITLE VI OF THE 1964 CIVIL RIGHTS ACT 106, 186-87 (1995).

[64] 42 U.S.C. § 2000d-1 ("Compliance with . . . this section may be effected (1) by . . . termination . . . or refusal to grant or . . . continue assistance under such program or activity to any recipient as to whom there has been an express finding . . . of a failure to comply with such requirement . . . or (2) by any other means authorized by law . . . ."); *see also* JARED P. COLE, CONG. RSCH. SERV., R45665, CIVIL RIGHTS AT SCHOOL: AGENCY ENFORCEMENT OF TITLE VI OF THE CIVIL RIGHTS ACT OF 1964, at 19 (version 5, 2019), https://crsreports.congress.gov/product/pdf/R/R45665/5 [https://perma.cc/X9JG-FUKV]. The potential for litigation by the Justice Department was not merely a threat. *See* Charles S. Bullock, III & Joseph Stewart, Jr., *The Justice Department and School Desegregation: The Importance of Developing Trust*, 39 J. POL. 1036, 1039 tbl.1 (1977) (reporting 112 school desegregation suits brought by Justice Department).

[65] *See* Elementary and Secondary Education Act of 1965, Pub. L. No. 89-10, 79 Stat. 27 (1965); COLE, *supra* note 64, at 11 n.82.

under ESEA.[66] Much of HEW's investigatory action in the years after would be as part of its preclearance review of school districts.[67]

Soon after the passage of Title VI and the ESEA, the Supreme Court also gave new teeth to judicial oversight of desegregation. In 1968, the Court decided in *Green v. County School Board*[68] that desegregation required school boards to dismantle racial discrimination "root and branch."[69] At issue in *Green* was resistance to desegregation in the form of student assignment laws that automatically reassigned students to the school previously attended under segregation, unless they applied to the state board to attend another school.[70] From its enactment until September 1964, no Black students in New Kent County had applied for admission to the school serving white students under this statute and vice versa.[71] In 1966, after litigation was filed and in order to comply with Title VI, the school board repealed the law, adopting in its place a "freedom-of-choice" plan.[72] The Supreme Court found this remedy to be insufficient to address the ongoing constitutional violation identified in *Brown I* and *Brown II*, which it defined as "the pattern of separate 'white' and 'Negro' schools" established by law and "extending not just to the composition of student bodies at the two schools but to every facet of school operations—faculty, staff, transportation, extracurricular activities and facilities."[73] The Court concluded that adopting a freedom-of-choice plan eleven years after *Brown I* was simply insufficient and that "[t]he burden on a school board today is to come forward with a plan that promises realistically to work, and promises realistically to work *now*."[74] Critically, the Supreme Court finally provided a standard for lower district courts to assess whether a proposed plan "promises meaningful and immediate progress toward disestablishing state-imposed segregation" by weighing the district's proposal "in light of the facts at hand and in light of any alternatives which may be shown as feasible and more promising in their effectiveness."[75] The Court also affirmed that school boards had the "affirmative duty" to dismantle racial discrimination expediently.[76] Driving home the point,

[66] COLE, *supra* note 64, at 11 n.82.

[67] Even after the enactment of Title VI, progress was inconsistent. Frustrated by HEW's failure to act during the Nixon administration, in the fall of 1970, plaintiffs represented by the NAACP Legal Defense Fund, Inc. brought suit against HEW arguing that OCR had massively defaulted on its duty to enforce Title VI. Adams v. Richardson, 351 F. Supp. 636 (D.D.C. 1972).

[68] 391 U.S. 430 (1968).

[69] *Id.* at 438.

[70] *Id.* at 433.

[71] *Id.*

[72] *Id.*

[73] *Id.* at 435.

[74] *Id.* at 439 (emphasis added).

[75] *Id.*

[76] *Id.* at 437-38.

in 1969 the Supreme Court in *Alexander v. Holmes County Board of Education*[77] ruled that "[c]ontinued operation of segregated schools under a standard of allowing 'all deliberate speed' for desegregation is no longer constitutionally permissible."[78]

The concerted efforts of the executive and judicial branches' to implement school desegregation had a dramatic effect.[79] At the time the Civil Rights Act passed, only 1.2% of Black students in the South attended school with white students.[80] As Nikole Hannah-Jones has written: "[B]eginning in the mid-1960s, for the briefest and rarest of moments, all three branches of government took the mandate of Brown seriously,"[81] and by the early 1970s, the South was "blanketed in desegregation orders" requiring court oversight for progress toward desegregation.[82] By 1972, nearly half of the Black students in the South were attending predominantly white schools.[83] While approximately 2% of Black students nationally had access to desegregated schools in 1964, the number increased dramatically to over 30% by 1970 and continued to grow until reaching a peak of approximately 43.5% in l988.[84]

It was during the era of meaningful enforcement of desegregation that student pushout began.[85]

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[77] 396 U.S. 19 (1969).

[78] *Id.* at 20.

[79] *See* Peter E. Holmes, *The Role of the U.S. Department of Health Education and Welfare*, 19 HOW. L.J. 51, 52 (1975) ("In 1970, school desegregation increased at an unprecedented annual rate.").

[80] GERALD N. ROSENBERG, THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE? 52 (2d ed. 2008) ("Ten years after *Brown* only 1.2 percent of black schoolchildren in the South attended school with whites."). With the exception of Texas and Tennessee, "the percent drops to less than one-half of one percent (.48 percent)." *Id.*

[81] Nikole Hannah-Jones, *It Was Never About Busing*, N.Y. TIMES (July 12, 2019), https://www.nytimes.com/2019/07/12/opinion/sunday/it-was-never-about-busing.html.

[82] *See id.* Later decades are regarded as a period of retrenchment in school desegregation litigation, as many districts were declared unitary and released from court oversight without ever fully integrating. Sean F. Reardon, Elena Tej Grewal, Demetra Kalogrides & Erica Greenberg, Brown *Fades: The End of Court-Ordered School Desegregation and the Resegregation of American Public Schools*, 31 J. POL'Y ANALYSIS & MGMT. 876, 878 (2012)*; see also* Milliken v. Bradley, 418 U.S. 717, 752 (1974) (holding federal district court did not have authority to issue multi-district desegregation plan where there was no showing of multi-district constitutional violation); Missouri v. Jenkins, 515 U.S. 70, 97-98 (1995) (requiring finding of interdistrict intent to discriminate in order for court to issue intradistrict desegregation remedy).

[83] *See* Hannah-Jones, *supra* note 81.

[84] *See BROWN* AT 60, *supra* note 2, at 10.

[85] *See* Cara McClellan & Matthew Delmont, *Policy Dialogue: Racial Segregation in America's Schools*, 63 HIST. EDUC. Q. 126, 135 (2023) (discussing how quickly second-generation discrimination issues emerged during implementation of desegregation and explaining that school discipline was one form of resistance to desegregation through repeated

Figure 1. Percentage of Black Students in Majority White Schools, 1954-2011.[86]

Year	Percent Black Students in Majority White Schools
1954	0
1960	0.1
1964	2.3
1967	13.9
1968	23.4
1970	33.1
1972	36.4
1976	37.6
1980	37.1
1986	42.9
1988	43.5
1991	39.2
1994	36.6
1996	34.7
1998	32.7
2000	31.0
2001	30.2
2006	27.7
2011	23.2

Source: U.S. Department of Education, National Center for Education Statistics, Common Core of Data (CCD), Public Elementary/Secondary School Universe Survey Data. Data prior to 1991 obtained from the analysis of the Office of Civil Rights data in Orfield, G. (1983). *Public School Desegregation in the United States, 1968-1980.* Washington, D.C.: Joint Center for Political Studies.

B. *Pushout as Adaptive Discrimination*

School policies that separated students based on race did not end with the enforcement of desegregation. A 1970 report entitled *The Status of School Desegregation in the South* detailed how, even within school districts that were desegregated in 1970, more than one-quarter of districts retained policies that segregated students by race within classrooms, for example through room dividers or race-based seat assignments.[87] As these attempts to overtly segregate were dismantled, more subtle methods for evading desegregation evolved.

Prior legal scholarship has theorized that as discrimination was prohibited under law, it evolved in response to legal restrictions, taking on new forms.[88] Professor Elise Boddie devised the term "adaptive discrimination" to describe

suspensions or expulsions that made Black students drop out or get pushed out of school in contravention of *Brown*'s mandate).

[86] *Reprinted from* BROWN AT 60, *supra* note 2, at 10 tbl.3.

[87] AM. FRIENDS SERV. COMM. & NAT'L COUNCIL OF CHURCHES OF CHRIST, THE STATUS OF SCHOOL DESEGREGATION IN THE SOUTH 31-34 (1970).

[88] *See, e.g.*, Crenshaw, *supra* note 3, at 1345-46 (arguing that formal reform has merely repackaged racism, eliminating symbolic manifestations of racial oppression, but allowing perpetuation of material subordination of Blacks).

discrimination that adapts to new legal and social environments by mutating to evade prohibitions against intentional discrimination.[89] Past legal scholarship has also identified ways that race-neutral policies and practices evolved to exclude people of color after segregation was prohibited. For example, Professor Susan Sturm has distinguished second-generation discriminatory exclusion from de jure exclusion, in that second-generation discrimination involves "social practices and patterns of interaction among groups . . . that, over time, exclude nondominant groups."[90]

As the following Sections will describe, after the Supreme Court ruled that de jure segregation was unconstitutional, suspension and expulsion provided new technology for excluding students through race-neutral means. School pushout thus constitutes an example of second-generation discrimination that adapted in response to legal prohibitions of segregation.

1. The Roots of the Term "Student Pushout"

Prior to the 1960s, school suspension was rarely used as a tool for student discipline.[91] During the first years of desegregation, however, the number of Black students who were suspended and expelled jumped significantly.[92] Professors Russell Skiba and Ashley White describe how from the very beginning of desegregation, Black students received racially disparate

[89] Elise C. Boddie, *Adaptive Discrimination*, 94 N.C. L. REV. 1235, 1239-40 (2016).

[90] Susan Sturm, *Second Generation Employment Discrimination: A Structural Approach*, 101 COLUM. L. REV. 458, 460 (2001).

[91] *See* Kirsten L. Allman & John R. Slate, *School Discipline in Public Education: A Brief Review of Current Practices*, INST. J. EDUC. LEADERSHIP PREPARATION, Apr.-June 2011 at 1, 2 https://files.eric.ed.gov/fulltext/EJ973838.pdf [https://perma.cc/ADT7-Q7A9] ("School administrators' use of out-of-school suspension began as a method of reducing student misbehavior in the 1960s and has continued to be used since that time."); A. Troy Adams, *The Status of School Discipline and Violence*, 567 ANNALS AM. ACAD. POL. & SOC. SCI. 140, 146 (2000) (highlighting use of in-school suspension as means to separate "disruptive students" from larger class settings); Avarita L. Hanson, *Have Zero Tolerance School Discipline Policies Turned into a Nightmare? The American Dream's Promise of Equal Educational Opportunity Grounded in* Brown v. Board of Education, 9 U.C. DAVIS J. JUV. L. & POL'Y 289, 298-99 (2005) ("[I]nto the 1970s school systems began to frequently use out-of-school suspensions and expulsions . . . .").

[92] Russell Skiba and Ashley White have explained how the transition from segregated to desegregated schools led to increased rates of exclusionary discipline and the Black-White disciplinary gap that worsened during the 1990s and continues to this day. Russell Skiba & Ashley White, *Ever Since Little Rock: The History of Disciplinary Disparities in America's Schools*, *in* DISPROPORTIONALITY AND SOCIAL JUSTICE IN EDUCATION 3, 5 (Nicholas Gage et al. eds., 2022); *see* Aaron Kupchik & Felicia A. Henry, *Generations of Criminalization: Resistance to Desegregation and School Punishment*, 60 J. RSCH. CRIME & DELINQ. 43, 45 (2023) ("[B]efore the Civil Rights Era and racial desegregation of schools, suspension was rarely if ever used.").

exclusionary discipline.[93] They recount the experience of Minnijean Brown-Trickey, one of the Black students who first desegregated Central High School in 1957 but was later pushed out through exclusionary discipline. Like the other nine Black students integrating Central High School, Minnijean faced constant racial harassment.[94] On December 17, 1957, she was attempting to find a seat in the cafeteria, when she was confronted by a group of white boys who were trying to trip her, causing her to spill a bowl of chili on one of the boys.[95] Minnijean was suspended, and the boy was sent home to change his clothes.[96] When she returned from her suspension in January, she faced more harassment, including a student who dumped a bowl of hot soup on her and a student who kicked her in the back.[97] Minnijean snapped at one of her harassers and was expelled for the remainder of the school year.[98] She never returned to Central High after that; instead, her family relocated to New York.[99]

In 1972, several national civil rights organizations convened to discuss the systematic exclusion of Black children from schools through student discipline.[100] The host organization of the convening, the NAACP Legal Defense and Educational Fund, Inc., reported the group's belief that: "It is important for the courts to understand that Black students' problems evolve out of desegregation,"[101] noting later that desegregation is when "patterns of handling discipline changed."[102] As Dr. Boyd Bosma, a specialist in civil liberties and intergroup relations with the National Education Association, later described:

> We defined the problem in a way that I think differed from any previous attempt at definition. We called the phenomenon student displacement. The term now is student pushouts. We used "displacement" and "pushouts" because we felt that a semantic understanding had to take place before we could deal effectively with the institutional basis of the kinds of problems that we were facing.[103]

The "pushout" phenomenon would soon become the subject of national attention through a series of pathbreaking reports. In 1973, the Robert F.

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[93] Skiba & White, *supra* note 92, at 4.

[94] *Id.* at 3.

[95] *Id.* at 4.

[96] *Id.*

[97] *Id.*

[98] *Id.*

[99] *Id.*

[100] NAT'L INST. EDUC., IN-SCHOOL ALTERNATIVES TO SUSPENSION 111 (Antoine M. Garibaldi ed., 1979).

[101] NAACP LEGAL DEF. & EDUC. FUND, INC., BLACK STUDENT "PUSHOUTS"– A NATIONAL PHENOMENON 20 (1972) [hereinafter Black Student "Pushouts"].

[102] *Id.* at 37.

[103] Nat'l Inst. Educ., *supra* note 100, at 111.

Kennedy Memorial and the Southern Regional Council ("SRC")[104] released a report entitled *The Student Pushout: Victim of Continued Resistance to Desegregation*.[105] The report examined data from school districts under desegregation orders from 1971 to 1972 and found that large numbers of minority students were induced to drop out of many recently desegregated school systems.[106] According to the SRC, school administrators were subverting desegregation by suspending and expelling Black students at higher rates.[107] The report defined the "pushout" as "the student who through discriminatory treatment is excluded from school, or else is so alienated by the hostility of the school environment that he or she leaves."[108] The student pushout included "blacks who offend the status quo when brought into a white school majority or any school setting where the values of white middle-class society dominate."[109] This pioneering report identified a need for a new term to describe the phenomenon of districts pushing students out. As reported by one news outlet at the time: "[I]t may be that a new classification—not drop outs, not expulsions[,] not extended suspensions—is required to adequately describe these students" who are "victims of discriminatory discipline procedures in public schools."[110]

How widespread were racial disparities in exclusionary discipline? According to one major study, over 67% of surveyed school districts showed higher Black than white suspension rates.[111] Other studies more closely examined the correlation with orders to desegregate. According to the SRC:

- In Little Rock, Arkansas, from school year 1968-69 to 1971-72, the number of Black students suspended rose from 829 to 1,504, while the number of white students fell from 500 to 377. By the 1971-72 school

[104] ROBERT F. KENNEDY MEM'L & S. REG'L COUNCIL, THE STUDENT PUSHOUT: VICTIM OF CONTINUED RESISTANCE TO DESEGREGATION, at v (1974). The SRC is a non-profit organization headquartered in Atlanta, Georgia, which was founded to strive for racial equality in the South. Randall L. Patton, *Southern Regional Council*, NEW GA. ENCYC., https://www.georgiaencyclopedia.org/articles/government-politics/southern-regional-council/ [https://perma.cc/4FRK-HUNM] (last updated Feb. 21, 2013).

[105] ROBERT F. KENNEDY MEM'L & S. REG'L COUNCIL, *supra* note 104, at v.

[106] *Id.* at 8-9.

[107] *Id.* at 10-11.

[108] *Id.* at vii-viii.

[109] *Juvenile Justice and Delinquency Prevention and Runaway Youth: Hearings on H.R. 6265 and H.R. 9298 Before the Subcomm. on Equal Opportunities of the H. Comm. of Educ. and Lab.*, 93d Cong. 456 (1974) (statement of Leon Hall, Director, School Desegregation Project, Southern Regional Council).

[110] *Options on Education: Pushouts: New Outcasts from Public School* (National Public Radio broadcast Sept. 9, 1974).

[111] Nancy L. Arnez, *Implementation of Desegregation as a Discriminatory Process*, 47 J. NEGRO EDUC. 28, 31 (1978).

year, Black students were approximately 80% of students suspended but 37.7% of student enrollment.[112]

- In the Charlotte-Mecklenburg County, North Carolina, school district, suspensions rose from 1,544 in 1968-69 to 6,652 in 1970-71,[113] the year when the Supreme Court's decided *Swann v. Charlotte Mecklenburg Board of Education*.[114] Expulsions rose from 25 Black students in 1968-69 to 94 Black students in 1971-72.[115]
- In St. Petersburg, Florida, suspensions increased from 3,500 in 1968-69 to 8,200 in 1970-71. Black students constituted approximately half of suspended students but only 16% of the enrollment.[116]

In 1974, the U.S. Commission on Civil Rights ("USCCR") conducted a series of hearings on the status of school desegregation in Boston, Massachusetts; Denver, Colorado; Tampa, Florida; and Louisville, Kentucky. The resulting report also confirmed a spike in Black student suspensions as consent orders were enforced:

- In Hillsborough County, Florida, during 1971-72, the first year of desegregation, the number increased to 8,598 students, up from 4,805 the year prior to total desegregation. By 1973-74, the number increased to 10,149, with approximately half of the suspensions assigned to minority students, despite composing only 20% of student enrollment.[117]
- In Denver, Colorado, during the first four months of desegregation, "3,844 students were suspended, 2,748 of whom were minority students." Of the junior high school suspensions, 73% were minority students although they constituted only 45% of the junior high population.[118]
- In Jefferson County, Kentucky, some high schools were suspending Black students at rates seven to fifteen times as high as the rate for white student suspensions, and suspensions were highest in the newly desegregated schools that were previously reserved for white students.[119]

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[112] S. Reg'l Council & Robert F. Kennedy Mem'l, *Pushouts: A Conflict of Cultures*, 7 S. EXPOSURE, Summer 1979, at 126, 126, https://www.facingsouth.org/sites/default/files/2023-02/Just%20Schools%20-%20Reduced.pdf.

[113] *Id.*

[114] 402 U.S. 1, 1 (1971).

[115] S. Reg'l Council & Robert F. Kennedy Mem'l, *supra* note 112, at 126.

[116] *Id.*

[117] U.S. COMM'N ON C.R., *supra* note 58, at 256.

[118] *Id.* at 257.

[119] *Id.* at 258.

Yet another study by the Children's Defense Fund ("CDF"), *School Suspensions: Are They Helping Children?*, found that in the 1972-73 school year, nearly twenty districts suspended one-third to one-half of the Black students enrolled.[120] Some districts had suspended more than 50% of their Black students.[121] Research conducted in the decades that followed further confirmed a correlation between court-enforced desegregation and increased racial disparities in suspension and expulsion.[122]

[120] CHILD.'S DEF. FUND, SCHOOL SUSPENSIONS: ARE THEY HELPING CHILDREN? 9 (1975).

[121] *See Student Suspensions: Hearing Before the Subcomm. on Elementary, Secondary, and Vocational Educ. of the H. Comm. on Educ. and Lab.*, 94th Cong. 30 (1975) [hereinafter *Student Suspension Hearing*] (describing one district that suspended 64% of its Black students and another that suspended 53%).

[122] Mark J. Chin, *Desegregated but Still Separated? The Impact of School Integration on Student Suspensions and Special Education Classification*, 141 J. URB. ECON., May 2024, at 1, 4 (finding that after integration, school districts that were integrating during 1970s and 1980s experienced immediate and robust increase in racial disparities in suspensions); Joe Larkin, *School Desegregation and Student Suspension: A Look at One School System*, 11 EDUC. & URB. SOC'Y 485, 493-95 (1979) (studying desegregation of Milwaukee public schools and finding increase in suspensions following desegregation); Clarence H. Thornton & William T. Trent, *School Desegregation and Suspension in East Baton Rouge Parish: A Preliminary Report*, 57 J. NEGRO EDUC. 482, 492-93, 498-99 (1988) (finding that in first year of 1981 court order, disparity in Black and white suspension rates increased in East Baton Rouge Parish, Louisiana's desegregating schools and especially in "high status schools"); CHRISTINE H. ROSSELL ET AL., A REVIEW OF THE EMPIRICAL RESEARCH ON DESEGREGATION: COMMUNITY RESPONSE, RACE RELATIONS, ACADEMIC ACHIEVEMENT AND RESEGREGATION 297-99 (1981) (finding close association between desegregation and racial disparities in suspensions); *see also* George B. Daniels & Rachel Pereira, *Equal Protection as a Vehicle for Equal Access and Opportunity: Constance Baker Motley and the Fourteenth Amendment in Education Cases*, 117 COLUM. L. REV. 1779, 1780 n.8 (2017) (citing Prince George's County and Columbus, Ohio, as examples of positive statistical relationship between desegregation and punishment of Black students in 1980s).

Figure 2. Twenty Worst Districts in OCR Survey for Black Student Suspensions (1972-73).[123]

Elementary and Secondary Schools Combined

Rank	District	Number Suspended	District	Percent Suspended
1	Cleveland, Ohio	8,412	Joliet, Ill.[1]	63.9
2	Orleans Parish, La.	7,993	Proviso, Ill.[1]	53.1
3	Duval County, Fla.	6,628	Bloom, Ill.[1]	49.6
4	Dallas Independent, Tex.	6,324	Central Union, Calif.[1]	48.0
5	Memphis, Tenn.	6,173	Zion-Benton, Ill.[1]	47.2
6	Pittsburgh, Pa.	5,694	Roseville, Calif.[1]	43.6
7	Detroit, Mich.	5,560	Fremont, Ohio	42.2
8	Milwaukee, Wisc.	5,401	Worth, Ill.[1]	40.4
9	Houston, Tex.	5,181	Thorton, Ill.[1]	40.1
10	Indianapolis, Ind.	4,643	Merced Union, Calif.[1]	40.0
11	Prince Georges County, Md.	4,438	North Chicago, Ill.[1]	38.0
12	Caddo Parish, La.	4,262	Oroville Union, Calif.[1]	37.0
13	Jefferson Parish, La.	4,014	Millville, N.J.	36.5
14	E. Baton Rouge, La.	3,960	Monmouth, N.J.[1]	35.2
15	Dade County, Fla.	3,634	Ewing, N.J.	35.0
16	Atlanta, Ga.	3,354	Bremen, Ill.[1]	34.8
17	Richland County, S.C.	3,018	Delano, Calif.[1]	33.6
18	Richmond, Calif.	3,011	S. Gloucester County, N.J.[1]	33.2
19	Norfolk, Va.	2,882	Henderson, Ky.	33.0
20	Hillsborough County, Fla.	2,850	Sweetwater, Calif.[1]	32.2

[1] These are regional high school districts with larger than usual proportions of secondary students. Their suspension rates are far above the average black secondary suspension rate of 11.8 percent.

Source. OCR forms OS/CR-102's for Fall 1972 and Fall 1973 as filed by local school districts. See Appendix A for description of data and calculations.

Although not all districts had such extreme increases in the use of suspension and expulsion of Black students, racial disparities could be found in most districts across the country at the time.[124] CDF estimated that nationally, Black students "were suspended more than three times as often as white students," or 12.8% to 4.1%.[125] According to CDF, almost two million children between the ages of seven and seventeen have been pushed out of school, and ten states pushed more than 6% of their school-age population out of school.[126]

[123] *Reprinted from* CHILD.'S DEF. FUND, *supra* note 120, at 68 tbl.2.

[124] *See* JOHN EGERTON, SCHOOL DESEGREGATION: A REPORT CARD FROM THE SOUTH 4 (1976) ("No one knows the full extent of the student pushout-dropout problem, but it is generally acknowledged to be extremely serious; and in virtually every place where spot-checks have been made, the students who leave school by choice or by compulsion are disproportionately black and overwhelmingly poor.").

[125] Letter from Marian Wright Edelman, Exec. Dir., Child. Def. Fund, to Peter Holmes, Dir., Off. for C.R. (Dec. 19, 1974), *reprinted in* CHILD.'S DEF. FUND, *supra* note 120, app. C, at 172.

[126] *See* CHILD.'S DEF. FUND, CHILDREN OUT OF SCHOOL IN AMERICA 1 (1974).

Suspensions tended to last from three to ten days in most school districts, but districts including Montgomery, Alabama; Savannah, Georgia; and New Orleans, Louisiana, adopted what they termed "indefinite suspension," which tended to have the same impact as expulsion.[127] According to a 1972 report by the Alabama Council on Human Relations and others, indefinite suspensions were at the discretion of school administrators and could last "a semester, a year—or forever."[128] The report also observed that upon returning from suspensions, "many black students drop out because of the harassment they receive from some teachers and administrators and because of the futility of trying to make up their work" after the lost instructional time that comes with suspensions.[129] In some districts, students who were suspended and expelled were assigned to alternative schools where the enrollment was mostly or entirely Black, recreating the segregated school setting that had just been disbanded.[130]

2. New Rules for Desegregated Schools

School discipline was a strategic focus for anti-integrationists as schools desegregated. Indeed, even before the process of school desegregation began, opponents of integration warned that admitting Black students to white schools would lead to disorder and violence.[131] As desegregation began in earnest, anti-integration groups urged school district leaders to adopt harsher disciplinary policies.[132] For example, "Citizens for Community Schools, an antibusing group in Prince George's County . . . shifted its attention from busing and desegregation to student conduct."[133] Disciplinary policies became a "key point of debate among candidates during the 1973 school board race," and a way of

[127] ALA. COUNCIL ON HUM. RELS. ET AL., IT'S NOT OVER IN THE SOUTH: SCHOOL DESEGREGATION IN FORTY-THREE SOUTHERN CITIES EIGHTEEN YEARS AFTER BROWN 79-80 (1972).

[128] *See id.* at 79.

[129] *Id.* at 80.

[130] *Id.* at 81.

[131] *See, e.g.*, Yuvraj Joshi, *Racial Justice and Peace*, 110 GEO. L.J. 1325, 1351 (2022) (describing Arkansas Governor Orval Faubus's declaration that integration of Central High School would cause "imminent danger of tumult, riot and breach of the peace"). During the *Brown v. Board* litigation, Texas and other states defended segregation as necessary to maintain public peace and order. *Id.* at 1349 n.146. Segregationists argued that the very presence of Black students in white schools would cause civil unrest, omitting that mob violence and threats by white supremacists were the primary source of tumult and danger in newly desegregated school settings. *Id.* at 1349.

[132] U.S. COMM'N ON C.R., *supra* note 58, at 261; *see "Massive Resistance,"* EJI: SEGREGATION IN AM., https://segregationinamerica.eji.org/report/massive-resistance.html [https://perma.cc/FCF3-94CG] (last visited Mar. 18, 2025) (describing how threats of mob violence and chaos by white leaders opposed to segregation succeeded in delaying desegregation).

[133] U.S. COMM'N ON C.R., *supra* note 58, at 261.

signaling their views about desegregation.[134] Teachers and teacher organizations were also part of the movement to push for harsher disciplinary policies in response to desegregation in their schools.[135]

In many cases, school districts adopted new school discipline codes to regulate racially-mixed settings.[136] As a 1970 report by the American Friends Service Committee and the National Council of Churches of Christ describes: "Some school districts have found a sudden need for new dress and discipline codes, a need that apparently did not exist as long as the schools were segregated."[137] It was no secret that the new rules were considered necessary due to stereotypes that portrayed Black students as socially deficient. The report observed that: "While an effort is frequently made to couch these new codes in 'nonracial' terms, black students feel, with justification, that they are directed at them."[138] In some cases, the impetus for the new rules was made explicit. For example, in adopting its post-desegregation code of conduct which banned "any apparel or emblem that designates or symbolizes a particular race or power," the school board of Nacogdoches, Texas, admitted: "[A] few years ago, we would not have had to spell out these things."[139]

Advocates objected that the new policies resulted in exclusionary discipline for student behavior that presented no real danger or threat to other students.[140] They argued that new disciplinary codes were not intended to ensure safety, but to enforce white supremacy and "keep black students 'in their place'" upon entering desegregated environments.[141] An examination of some of the "offenses" for which Black students were suspended evinces how social control of Black students motivated exclusionary discipline. In Pickens County, South Carolina, a Black student was suspended for talking to white females.[142] And in Mineral Springs, Arkansas, two Black female students were suspended for refusing to say "yes sir" and "yes ma'am."[143]

In Prince George**'**s County, Maryland, a 1976 USCCR report found a substantial increase in the number and racial disproportionality of suspensions after the 1973 desegregation decree was adopted.[144] According to the district

[134] *See id.*

[135] *Id.* at 261-62.

[136] *See* AM. FRIENDS SERV. COMM. & NAT'L COUNCIL OF CHURCHES OF CHRIST, *supra* note 87, at 60-63.

[137] *Id.* at 60.

[138] *Id.* (emphasis omitted).

[139] *Id.* at 61.

[140] ALA. COUNCIL ON HUM. RELS. ET AL., *supra* note 127, at 6.

[141] *See* AM. FRIENDS SERV. COMM. & NAT'L COUNCIL OF CHURCHES OF CHRIST, *supra* note 87, at 62.

[142] *Id.*

[143] *Id.* at 63.

[144] U.S. COMM'N ON C.R., A LONG DAY'S JOURNEY INTO LIGHT: SCHOOL DESEGREGATION IN PRINCE GEORGE'S COUNTY 386-88 (1976).

court's statistical analysis in *Vaughns v. Board of Education*,[145] "disproportionate suspension of black students is particularly concentrated in five areas detailed in the Code [of Student Conduct]—disruption, disrespect, insubordination, loitering and fighting."[146] Black students and their families argued that "the definitions of those five offenses in the Code are vague, and permit school faculty and staff members impermissibly to apply subjective judgments."[147] They further argued that "in contrast, the five offenses with the lowest ratios of black to white student suspensions [we]re accompanied by definitions which require little or no subjective evaluation in determining whether a student's conduct runs afoul of the Code."[148]

In Louisville, Kentucky, a 1976 USCCR report on the desegregation process similarly found that the Louisville-Jefferson County teachers' union "pushed for a strong disciplinary policy" after school desegregation.[149] These disciplinary policies often included subjective offenses that granted educators great discretion.[150] The Louisville school district, where Black youth constituted the majority of students, merged with the majority-white Jefferson County school system in 1975 under the terms of a desegregation consent order.[151] In the year following the forced desegregation, the suspension rate for Black students was 69.4%.[152] According to the Kentucky Chapter of the National Bar Association ("NBA"), in the 1976-77 school year, 78% of suspensions in Jefferson County were for nonviolent offenses.[153] Approximately 57% of Black student suspensions in Jefferson County middle schools and 56% of Black student suspensions in Jefferson County high schools were for offenses deemed discretionary or subjective, and included such infractions as disobedience, disrespect, and intimidation.[154] The Kentucky NBA Chapter's study demonstrated that many Black student suspensions were due to the "attitudes, practices, and policies" of teachers and administrators rather than student misbehavior.[155] Other studies at the time confirmed that Black students were suspended for different reasons than students of other races; some rules, such as making the possession of an afro pick a weapons offense, were only applicable to Black children.[156] The CDF also concluded that the increase in exclusionary

[145] 574 F. Supp. 1280 (D. Md. 1983), *rev'd*, 758 F.2d 983 (4th Cir. 1985).

[146] *Id.* at 1311.

[147] *Id.* at 1311-12 (footnote omitted).

[148] *Id.* at 1312.

[149] U.S. COMM'N ON C.R., *supra* note 58, at 261-62.

[150] *Id.* at 262.

[151] Arnez, *supra* note 111, at 32-33.

[152] *Id.* at 35.

[153] *Id.* at 36.

[154] *Id.*

[155] *Id.* at 36-37.

[156] CHILD.'S DEF. FUND, *supra* note 126, at 132.

discipline was "more a function of school policies and practices rather than of students' behavior."[157]

New school codes of conduct also focused on dress and grooming—policies that were not considered necessary before Black students were admitted. Dress codes often regulated Black cultural symbols, such as banning afros.[158] Dress codes also were a mechanism for controlling Black students' expression of their sexuality and enforcing a social order. For example, in Orangeburg County, South Carolina, the principal openly stated that the dress code was necessary because the school district "had to be more conservative, especially with regard to the girls' dress because black and white boys and girls were now attending school together."[159] The new dress and grooming codes also communicated the demeaning message that Black students were unclean or uncouth. In Forest, Mississippi, the school board required for the first time "that pupils and employees daily wear clean clothes, 'free of body odor,'" take a daily "all-over bath," and wear deodorant.[160]

According to the SRC, schools had "become battlegrounds where tradition fights change,"[161] and school discipline is used to punish students who "cannot or will not conform to the sometimes parochial values of school administrators," including "blacks who offend the status quo when brought into a white school majority or any school setting where the values of white middle-class society dominate."[162] The SRC pointed in particular to the ways school discipline served as a mechanism for enforcing social norms limiting interracial contact, and to school regulations that were enforced in "an unfair and arbitrary manner to restrict" Black cultural expression and pride.[163] According to the SRC, Black students were suspended for behavior labeled as disrespectful or for challenging authority more than any other offenses, even though similar conduct was not considered offensive or threatening when committed by white students.[164] In case after case, school officials relied on subjective school discipline policies regulating dress and behavior to maintain social control over Black students.

3. School Staff and Hostility Toward Black Students

Although the law had changed to require racial integration, the racially biased views of many school staff members in formerly all-white schools had not. As past scholarship has documented, the dismissal and demotion of Black educators following the *Brown* decisions led to the absence of educators most familiar with

[157] CHILD.'S DEF. FUND, *supra* note 120, at 26.

[158] AM. FRIENDS SERV. COMM. & NAT'L COUNCIL OF CHURCHES OF CHRIST, *supra* note 87, at 61.

[159] *Id.* at 60.

[160] *Id.* at 61.

[161] S. Reg'l Council & Robert F. Kennedy Mem'l, *supra* note 112, at 126.

[162] *Id.*

[163] *Id.*

[164] *Id.* at 127.

the culture and communities of Black students.[165] Some Black parents perceived the large-scale firing of Black teachers as leaving "black children totally at the mercy of a white-dominated school system."[166] They viewed desegregated schools as "openly hostile" environments in which "white teachers and administrators blamed [Black students] for . . . whatever violence or disruptions accompanied desegregation," and administered punishment in a disparate manner as a result.[167]

Educators in northern desegregating school systems were also alleged to harbor hostility toward Black students, leading to racially disparate discipline in desegregating districts. For example, in the midst of the Boston school desegregation litigation,[168] a member of the Citywide Coordinating Council who was appointed to "monitor the implementation of Boston's desegregation order" stated that the "climate and milieu within which teachers and administrators function bear directly on the racial disparity in suspensions, for the entire system is saturated by hostility to the court's desegregation order and to the black students who are perceived as having caused the order."[169] During a Boston desegregation trial, an attorney for the plaintiffs echoed this idea, observing that, where school officials were prohibited by law from segregating white students, "they have, through the suspension device, created a revolving door that sends black children home almost as fast as they arrive at a 'desegregated' school."[170] As a 1971 report by the Alabama Council on Human Relations and others described, "second generation" desegregation problems "usually result from vestiges of the dual school system and become more manifest when some real movement has been made toward desegregation."[171] The Council expressed concern that these "second generation" problems could "so undermine the movement toward desegregation as to seriously threaten its chances for success."[172]

In 1974, the National Education Association ("NEA"), the largest labor union in the country, adopted school desegregation guidelines for local and state

[165] *See generally* LESLIE T. FENWICK, JIM CROW'S PINK SLIP: THE UNTOLD STORY OF BLACK PRINCIPAL AND TEACHER LEADERSHIP (2022) (connecting strategic mass terminations of Black school principals and teachers in wake of *Brown* decisions to current underrepresentation of Black teachers and systemic inequalities); VANESSA SIDDLE WALKER, THE LOST EDUCATION OF HORACE TATE (2018).

[166] MATTHEW F. DELMONT, WHY BUSING FAILED: RACE, MEDIA, AND THE NATIONAL RESISTANCE TO SCHOOL DESEGREGATION 179 (2016).

[167] *Id.*

[168] Morgan v. Kerrigan, 401 F. Supp. 216 (D. Mass. 1975).

[169] DELMONT, *supra* note 166, at 180.

[170] Memorandum in Support of Plaintiffs' Motion for Further Relief Concerning Student Discipline at 4, Morgan v. Kerrigan, 401 F. Supp. 216 (No. 72-911-G).

[171] ALA. COUNCIL ON HUM. RELS. ET AL., *supra* note 127, at 108.

[172] *Id.*

education associations.[173] The guidelines recognized the "'student pushout' phenomenon" as a factor leading to the "[d]isplacement of ethnic minority students" through a double standard in disciplining.[174] The guidelines specially identified the role of teachers in either counteracting or fostering the pushout phenomena, stating: "When teachers have ignored or opposed desegregation, the results have been conflict in the school and community, vandalism and violence, discipline problems, suspensions and expulsions, poor teacher and student morale, and general decline of educational quality in the school system."[175] In contrast, "[w]hen teachers have taken aggressive and positive action," the "teaching and learning conditions have significantly improved."[176]

4. Punishing Black Students for Protest and Activism

Advocates also argued that Black students were punished when agitating for integration and equal treatment in their schools. Black students who engaged in racial justice activism were labeled "troublemakers," disciplined, and in some cases, removed from schools.[177] For example, the NEA reviewed reports over a twelve-month period between March 1971 and March 1972 and found there were approximately 25,000 suspensions and expulsions and 2,570 arrests of students "growing out of protests, walkouts, and other school disruptions."[178] These protests often stemmed from mistreatment of Black teachers or harsh disciplinary policies implemented during desegregation.[179] The NEA identified systemic discrimination against students of color, especially Black, Chicano, Puerto Rican, and Native American students as the cause.[180] One student described the issue this way:

> My high school was desegregated in 1971. Some of the black students were branded as Black Militants and troublemakers by the White Administration. There was even what was known as the Black List on which many of these students[']names appeared. These students in many cases were bullied by the White Administration. These were students fighting for their rights. Many blacks were suspended or expelled for such

[173] NAT'L EDUC. ASS'N, SCHOOL DESEGREGATION GUIDELINES FOR LOCAL AND STATE EDUCATION ASSOCIATIONS 11 (1980) (originally adopted by NEA Board of Directors in 1974).

[174] *Id.* at 23.

[175] *Id.* at 3.

[176] *Id.*

[177] KATHRYN SCHUMAKER, TROUBLEMAKERS: STUDENTS' RIGHTS AND RACIAL JUSTICE IN THE LONG 1960S, at 157-58 (2019) (describing punitive exclusion of student groups from public schools in Little Rock, Arkansas, and Prince Edward County, Virginia, following *Brown* decisions); *see also* NAACP LEGAL DEF. & EDUC. FUND, INC., *supra* note 101, at 5-6 (describing suspension and expulsion of Black students for their activism, such as "walking out or peacefully demonstrating").

[178] *Student Suspensions Hearing*, *supra* note 121, at 138-39.

[179] *Id.*

[180] *Id.* at 138.

> things as chewing gum in class, waving to someone outside the classroom, being suspected of fighting, being suspected of burning a poster and supposed insubordination. After being bullied and suspended or expelled so many times some of these students left school, never to return.[181]

Law professor Alan Westin conducted a study of American high schools in the late 1960s and early 1970s, which found that much of the harsh discipline stemmed from unrest due to conflicts generally associated with race dynamics between Black and Latino students and white teachers and faculty.[182] He concluded that suspensions and other traditional forms of punishment for dealing with student disruptions were counterproductive.[183]

In her book, *America on Fire*, Professor Elizabeth Hinton argues that the origins of the school-to-prison pipeline can be found in the era of Black rebellion, which reverberated between the schools and the streets, leading to increased militarization and the use of police for social control in both settings.[184] She documents the dynamic relationship between the punishment of students for school protests and arrest and violence against protesters in the streets in both southern and northern cities.[185] Professor Walter Stern has also argued that "local officials recast Black students' political activity as criminal behavior in order to justify punitive solutions and the targeting of Black youth as culpable for student conflict."[186] Schools frequently relied on police to deal with student protest.[187] As the Alabama Council on Human Relations and others report observed, "administrators are increasingly using law enforcement personnel as aides in controlling students who are dissident, disruptive, dangerous or just different (the distinctions are not always clear to all administrators)."[188]

Indeed, the underlying facts in *Goss v. Lopez*,[189] the 1975 case in which the Supreme Court first recognized due process rights of students prior to exclusionary discipline, provides an example of how the punishment of Black students was often doled out in connection with organized protest and activism.[190] During the 1960s, Black families in Columbus, Ohio, repeatedly

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[181] *Options on Education: Pushouts: New Outcasts from Public School*, *supra* note 110.

[182] SCHUMAKER, *supra* note 177, at 105-06.

[183] *Id.* at 107-08.

[184] HINTON, *supra* note 50, at 148-49 (detailing how militarization and surveillance of schools began in direct response to Black rebellion during 1960s and 1970s and students who protested were frequently arrested, suspended, and expelled).

[185] *Id.* at 149-69.

[186] Walter C. Stern, *School Violence and the Carceral State in the 1970s: Desegregation and the New Educational Inequality in Louisiana*, 89 J.S. HIST. 483, 488 (2023).

[187] ALA. COUNCIL ON HUM. RELS. ET AL., *supra* note 127, at 82-83.

[188] *Id.* at 82.

[189] 419 U.S. 565 (1975).

[190] *Id.* at 569-71.

accused the school board of providing separate and unequal education.[191] In 1967, parents began boycotting the district's schools,[192] and students put forth their own demands of their schools.[193] In 1971, a white seventeen-year-old shot two Black Central High students.[194] Black students rebelled, running through the halls and disrupting classes in protest.[195] More than fifty students were suspended.[196] One of the students accused of being part of the group of student protesters, Dwight Lopez, became the named plaintiff in the *Goss* case.[197] He was referred to the district's alternative school.[198] The other plaintiffs, who were all Black students, had similar accounts of being disciplined in the aftermath of the protests for alleged involvement, including engaging in a Black Power salute.[199] When the case was appealed to the Supreme Court, the NAACP, Southern Christian Leadership Conference, and other amici relied upon *The Student Pushout* report to show that Black student suspensions were racially discriminatory and a threat to civil rights.[200]

Although the Supreme Court did not address the racial justice implications of school discipline, including allegations that exclusionary discipline was being issued pretextually to exclude Black students because they were Black and engaged in civil rights protest, the Supreme Court ruled for plaintiffs in a five-to-four decision, holding that the students' constitutional rights were violated.[201] The Court recognized that students held both property and liberty interests in education, and because of this entitlement, the government could not take away a student's education without due process and a hearing.[202] Thus, the work of advocacy groups to document school pushout improved due process rights for all students,[203] although the disproportionate impact on Black student activists went unacknowledged by the Supreme Court.

C. *HEW Recognizes School Pushout as Second-Generation Discrimination*

The research of the SRC, CDF, and other grassroots advocates had real impact, not only in courts, but on the executive branch and Congress. The reports

[191] SCHUMAKER, *supra* note 177, at 96.

[192] *Id.* at 96-97.

[193] *Id.* at 97.

[194] *Id.* at 99.

[195] *Id.*

[196] *Id.*

[197] *Id.* at 99-100.

[198] *Id.* at 100.

[199] *Id.* at 100-01.

[200] *Id.* at 122.

[201] Goss v. Lopez, 419 U.S. 565, 583-84 (1975).

[202] *Id.*

[203] *See* Woods v. Wright, 334 F.2d 369, 369-70, 375 (5th Cir. 1964) (acknowledging that "discipline for truancy or for any other wrongdoing cannot be made an instrument of racial discrimination or imposed for asserting a constitutional right or privilege").

on post-*Brown* school discipline generally agreed that racial disproportionality in suspensions often occurred "immediately following efforts to desegregate the schools" and was "likely to emanate from 'ill-defined offenses' that require subjective interpretation."[204] Advocates and researchers observed that disproportionality in discipline was a major contributor to "resegregation" or second-generation discrimination.[205] Following the release of its report, CDF wrote to the Director of the HEW Office for Civil Rights, Peter Holmes, and urged OCR to adopt a specific compliance policy under Title VI with regard to disciplinary policies and practices and to design a specific compliance program.[206] Subsequently, CDF published a second report entitled *School Suspensions: Are They Helping Children?*, which made specific recommendations for what a compliance program could look like.[207] It called on OCR to review districts for discrimination when the imposition of expulsions and suspensions results in substantially greater exclusion of minority group students than all other students unless the district can demonstrate that its discipline system is nondiscriminatory.[208]

In 1972, Congress passed the Emergency School Aid Act ("ESAA"),[209] which through prereview, required more stringent reforms to end racially discriminatory treatment. In enacting the ESAA, Congress "explicitly prohibited, by statute, discriminatory disciplinary treatment and provided that no funds under the act were to be granted to districts that engage in such treatment."[210] According to Holmes, there was "no doubt that this prohibition arose from a concern, expressed during hearings and referred to generally in the legislative history, about the 'push-out' phenomenon and about reports that minority children were being discriminatorily suspended and expelled from school."[211]

In 1974, when Congress considered the Runaway Youth Act,[212] Holmes testified at length about school pushout.[213] Observing that the "pushout

[204] Thornton & Trent, *supra* note 122, at 484.

[205] *Id.*

[206] CHILD.'S DEF. FUND, *supra* note 126, at 286, 289, 291-92, 294.

[207] CHILD.'S DEF. FUND, *supra* note 120, at 72.

[208] *Id.* at 75.

[209] Emily M. Hodge, *School Desegregation and Federal Inducement: Lessons from the Emergency School Aid Act of 1972*, 32 EDUC. POL'Y 86, 87 (2018).

[210] *Oversight Hearing on HEW Enforcement of School-Related Civil Rights Problems, 1975: Hearing Before the Subcomm. on Educ. of the Comm. on Lab. & Pub. Welfare U.S. S.*, 94th Cong. 5 (1975) [hereinafter *Oversight Hearing on HEW Enforcement*] (statement of Peter E. Holmes, Director, Office for Civil Rights, Department of Health, Education, and Welfare).

[211] *Id.*

[212] *Juvenile Justice and Delinquency Prevention and Runaway Youth*, *supra* note 109, at 1.

[213] *Id.* at 474-84 (statement of Peter Holmes, Director, Office for Civil Rights, Department of Health, Education, and Welfare).

problem" has been "going on ever[] since the desegregation movement has been in existence," Congresswoman Shirley Chisholm asked why OCR had not yet brought charges against schools pushing out minority students.[214] Holmes responded that it was "a matter of priority," and that the department needed to first deal more broadly with school desegregation, the assignment of students, and the dismissal of Black school faculty.[215] Earlier in the hearing, Holmes committed that OCR would "pursue vigorously"[216] the pushout problem and had directed the Division of Elementary and Secondary Education about a month before the hearing to begin conducting investigatory reviews of school districts with serious pushout problems.[217] Importantly, he expressed his belief that the agency must not take the issue out of the larger context of desegregation.[218] Holmes identified plans to implement a robust pushout investigation program in 1975, and agreed to report back to the subcommittee regarding its progress every three months.[219]

D. *The Anne Arundel County Investigation and Resistance to OCR's Review of School Discipline*

Soon after, OCR acknowledged the disproportionate suspension of Black students as a new form of second-generation discrimination that it had a duty to combat.[220] OCR officials credited the SRC report as the basis for Congress instructing OCR to focus on "ferreting-out" and eliminating within recently desegregated public school systems "a condition identified as 2nd generation discrimination," which was defined as "what goes on in the schoolhouse after it has been desegregated," with attention focused on whether discipline is disparately applied and administered to students of color.[221] Writing in *Howard Law Journal*, Peter Holmes reflected on the need for HEW to focus more on addressing the qualitative experience of students in schools, including school discipline and "other possible areas of discrimination that may be just as educationally harmful to minority students as the measurable consequences of their enrollment" in segregated schools.[222]

During the 1973-74 school year, OCR began collecting data on the racial impact of suspensions and expulsions as part of its annual school-enrollment survey.[223] According to Peter Holmes, the purpose of this data collection was to "determine not only the extent of the problems, in terms of any widespread

[214] *Id.* at 484.

[215] *Id.*

[216] *Id.* at 478.

[217] *Id.* at 476.

[218] *Id.* at 478-79.

[219] *Id.* at 483.

[220] *Student Suspensions Hearing*, *supra* note 121, at 80.

[221] *Oversight Hearing on HEW Enforcement*, *supra* note 210, at 85.

[222] Holmes, *supra* note 79, at 60.

[223] *Oversight Hearing on HEW Enforcement*, *supra* note 210, at 6.

disparity that may exist on the basis of race or ethnicity, but also to discern where the most serious compliance questions appear to have arisen."[224] In June of 1974, HEW announced that "Anne Arundel County would be the first pilot investigation of second generation discrimination" through school discipline.[225]

The investigation of Anne Arundel was instituted in response to complaints filed by parents alleging racial discrimination. In May of 1973, a group of Black parents filed three separate complaints with OCR, alleging that school officials were systematically communicating to children a message of "sit down, shut up, or get out."[226] A complaint from a parent group at Annapolis Elementary School alleged that seven Black students had been suspended for a total of 225 days, while no white students had been suspended.[227] The parents alleged that suspension was often open-ended and students had been expelled or suspended for as many as five months.[228] They asserted that students were frequently searched—at times without even a charge or reason for the search.[229] They also detailed examples of tortious punishment, including students who were denied lunch,[230] students who had bags placed over their heads as punishment and were ordered to sit near the room heater,[231] students who were allowed to go to the bathroom or drink water only once a day,[232] students who were forced to stand on a stool with their hands over their heads,[233] and instances where staff ridiculed students on matters of personal hygiene in public[234] and told a student she "should have been white."[235] School district officials refused to meet with the parents and shut down the parents' association meeting when these complaints were raised.[236]

OCR asked the school district to respond to the allegations, but the school district said it could not comment on hearsay and that the complaints were too general.[237] When OCR requested more information as a condition of federal funding, the superintendent, Dr. Edward J. Anderson, called the request uncalled for and arrogant.[238] Dr. Anderson then wrote to Congresswoman Marjorie Holt regarding OCR, stating: "These people are systematically attempting, and in

[224] *Id.*
[225] *Id.* at 2.
[226] *Id.* at 10-11.
[227] *Id.* at 64.
[228] *Id.* at 28.
[229] *Id.* at 29.
[230] *Id.* at 28.
[231] *Id.* at 29.
[232] *Id.*
[233] *Id.*
[234] *Id.*
[235] *Id.* at 163.
[236] *Id.* at 154.
[237] *Id.* at 44.
[238] *Id.* at 51.

some cases succeeding, in turning the races against each other and in destroying the American Public School System."[239]

In a letter sent on December 12, 1974, to the State Investigating Committee on push-out, Anne Arundel District Official Thomas Roades defended the district's racial disparities in discipline by explaining that the gap correlates with racial disparities in IQ.[240] According to Roades, the assumption that students of different races should be suspended at roughly the same rate incorrectly "assum[es] that all children are precisely equal in all ways." But "[t]he IQ distribution for Anne Arundel County by race shows approximately 79.9% of black students with IQ's [sic] of 99 or below, and 38.4% of white students with IQ's [sic] of 99 or below."[241] He explained that, in his view, schools are simply responding to misbehavior, pointing out that police arrest statistics show similar disproportionality between races.[242]

The Maryland State Board of Education appointed a task force to investigate the charges of discrimination and student discipline practices in Anne Arundel County.[243] The task force concluded there was no evidence to support the claim of discriminatory treatment.[244] According to the task force, the higher proportion of Black students referred to alternative schools "cannot be viewed on its face as evidence of discrimination."[245] Instead, it claimed the disparity "should be viewed as evidence of the school system's desire to provide this important rehabilitative service to those students who exhibit serious behavior problems without regard to race."[246] Ultimately, the task force rejected what it referred to as the "'push out' theory."[247]

On April 30, 1975, the Senate Committee on Labor and Public Welfare held an Oversight Hearing on HEW Enforcement of School-Related Civil Rights Problems.[248] Peter Holmes was called to testify on HEW's investigations of

[239] *Id.* at 52.

[240] *Id.* at 258. Aside from the racism and ableism built into this defense, Roades also failed to acknowledge research at the time showing that IQ was itself known to have racial disparities built into its assessment tool. *See, e.g.*, Larry P. v. Riles, 495 F. Supp. 926, 934-35, 991-92 (N.D. Cal. 1979) (holding California schools' use of IQ tests, that were known to have a discriminatory impact against Black children, violated Title VI, the Rehabilitation Act of 1973, and the Education for All Handicapped Children Act).

[241] *Oversight Hearing on HEW Enforcement*, *supra* note 210, at 258.

[242] *Id*. The connection between IQ and student discipline was repeated in the school district's in-house report summarizing the findings of its investigation into its own suspension practices. *See id.* at 273-74.

[243] *Id.* at 365 (statements of Joseph Morton, Regional Coordinator of Maryland State Department of Education Task Force).

[244] *Id.* at 370, 372.

[245] *Id.* at 373.

[246] *Id.*

[247] *Id.* at 374.

[248] *Id.* at 1.

school discipline.[249] By that time, HEW identified a total of four districts that raised serious compliance questions, but the hearing focused on Anne Arundel County, Maryland.[250] Anne Arundel Superintendent Dr. Anderson and other educational officials in Maryland argued that they should not have to comply with the investigation and pointed to the state task force's finding that there was no discrimination.[251] Dr. Anderson testified as to the "dangerous" conditions in Anne Arundel schools, stating: "[O]ur schools in some cases are virtually jungles."[252]

A group of Black parents advocated that the investigation should go forward and alleged that racial discrimination remained rampant.[253] One parent complained that her son was suspended twenty or thirty times[254] and "has become fearful of school."[255] She pled: "[P]lease investigate my child's case. I would like to further his education."[256] The parents further asserted that the task force's report should be disregarded as illegitimate.[257] Emphasizing the need for federal oversight, one commentator remarked that "local school districts and their parent organizations are no more objective in investigating themselves than police departments are in investigating police brutality."[258]

In October of 1975, the House of Representatives held yet another hearing on school suspensions, focusing on HEW's school discipline investigations.[259] OCR released a memo outlining its expectation that schools collect and maintain more comprehensive records on school discipline as related to race, ethnicity, and sex.[260] For its part, OCR explained that the recordkeeping was designed to assess and address the national problem of discrimination in the application of school discipline.[261]

Advocacy agencies provided statements supporting HEW's move to collect information as a first step in addressing the pushout problem.[262] Dr. Marian Wright Edelman, the executive director of CDF, emphasized that HEW needs

[249] *Id*. at 4.

[250] *Id*. at 6.

[251] *Id.* at 261.

[252] *Id.* at 293.

[253] *Id.* at 384-86 (statements of Carl Snowden, Samuel Gilmer, Johnnie Stubbs, and Glenda Neal, A Coalition for Justice Panel).

[254] *Id.* at 153.

[255] *Id.* at 152.

[256] *Id.* at 153.

[257] *Id.* at 385.

[258] *Id.* at 392.

[259] *Student Suspensions Hearing*, *supra* note 121, at 1.

[260] *Id*. at 5-7. The memo outlines the data and records elementary and secondary schools need to compile pursuant to Title VI of the Civil Rights Act of 1964 and Title IX of the Education Amendments of 1972. *See id.*

[261] *Id*. at 2.

[262] *Id*. at 29 (testimony of Dr. Marian Wright Edelman of the Children's Defense Fund).

this data to ensure districts comply with Title VI of the Civil Rights Act of 1964.[263] She urged the development and support of educational alternatives within the schools to meet the needs of many different kinds of students and teachers, including students of color, but also low-income students and students with disabilities.[264] The American Friends Service Committee recommended that data collection should not only continue, but should be expanded to include figures broken down by sex to comply with Title IX, noting that an intersectional analysis of the data revealed Black females were suspended four times as often as white females.[265]

On the other hand, educational entities, including school boards, principals' associations, and school districts, overwhelmingly objected to the recordkeeping requirements.[266] They voiced concerns related to staffing, budget shortages, and federal intrusion in state and local affairs.[267] Some districts argued further that the data did not actually show discrimination.[268] According to some school officials, data itself was not indicative of discrimination; others stated that minorities simply require more discipline, and disciplinary discrimination is a "conspiracy" theory[269] and a political issue pushed by the "ultra left."[270] Districts opposed to data collection also asserted that OCR's oversight and tracking of the issue would cause "a further deterioration of discipline in the public schools."[271]

E. *A "Numerical Difference" or Discrimination?*

The investigation in Anne Arundel became a focal point for airing questions about the source of racially disparate discipline. Are racially disproportionate outcomes indicative of racial bias and discrimination justifiable based on actual differences between members of different racial groups?[272] For example, during

[263] *Id.* at 36.

[264] *Id*. at 73.

[265] *Id.* at 156-57.

[266] *See, e.g.*, *id.* at 88-98 (statement of Dr. August W. Steinhilber, Assistant Executive Director, Office of Federal Relations, National School Boards Association).

[267] *Id.* at 106-08 (statement of Dr. Ben Sheppard, Chairman of the Dade County School Board (Miami, Florida)) (insisting HEW and OCR directives pose unmanageable administrative burden and intrude on proper domain of state and local school authorities).

[268] *Id.* at 113-14 (statement of James A Runkel, District Superintendent of Schools of the Board of Cooperate Educational Services in Wayne-Finger Lakes (Stanley, New York)).

[269] *Id.* at 152 (statement of Dr. George C. Overstreet, Daviess County Public Schools (Owensboro, Kentucky)) (arguing that disproportionate discipline of minority students may be justified).

[270] *Id.* at 121 (statement of Raymond G. Howard, Cameron County School Superintendent (Brownsville, Texas)); *id.* at 199-20 (statement of Marvin L. Waite, President, Nevada Association of School Administrators) ("The fact of life is that more of them need disciplining than whites, especially in the initial months of integrating schools.").

[271] *Id.* at 154 (statement of Gene Lavender, Superintendent of Schools (Norfolk, Nebraska)).

[272] *Oversight Hearing on HEW Enforcement*, *supra* note 210.

a 1973 USCCR hearing, a white administrator in Prince George's County schools explained: "I personally would expect that the suspension rate for whites and blacks would conform generally to the racial distribution of students in the system. If proportionately greater numbers of blacks are suspended than whites, I think we have a problem of discrimination."[273]

Those who argued that students behave differently often relied on racist assumptions and essentialism, in some cases endorsing the debunked theory of eugenics, much like the Maryland official discussed above, who testified that Black students need more discipline due to their lower IQs.[274] More nuanced explanations of different behavior pointed to the impact of socioeconomic status, culture, and resources available to Black students.[275] Others argued that racial disparities in school discipline result from bias and discrimination in how adults assess student behavior and administer disciplinary sanctions.[276]

The controversy provides a window into larger debates about the legal significance of racial disproportionality.[277] In its report, the SRC advocated that data showing racial disparities in discipline should be sufficient to shift the burden of proof for establishing illegal discrimination from an affirmative burden on the plaintiff to a burden on the defendant school district.[278] But during the HEW oversight hearings, members of the house questioned the legal relevance of racial disparities for establishing discrimination.[279] Senator Beall of Maryland argued that "statistical differences in disciplinary action alone" should not be sufficient to trigger what he described as "the massive fishing expedition that HEW has been conducting in Anne Arundel County."[280]

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[273] U.S. COMM'N ON C.R., *supra* note 58, at 260.

[274] Similar unfounded claims are still deployed today by the right. *See* Jonathan Butcher, *With Students Fighting More at School, Safety Should Come Before "Equity*,*"* HERITAGE FOUND. (Mar. 30, 2023), https://www.heritage.org/education/commentary/students-fighting-more-school-safety-should-come-equity [https://perma.cc/LBX5-SHXT] (arguing that "higher incidences of fights on school property, drug use and gang activity among Black and Hispanic students . . . should prompt different discipline for the sake of protecting innocent students regardless of race"); FED. COMM'N ON SCH. SAFETY, FINAL REPORT OF THE FEDERAL COMMISSION ON SCHOOL SAFETY 67-70 (2018), www2.ed.gov/documents/school-safety/school-safety-report.pdf [https://perma.cc/TPR6-5H8H] (highlighting President Trump's Commission on school safety's argument that disparities in suspension were due to different levels of prior misbehavior by students of color).

[275] *Oversight Hearing on HEW Enforcement*, *supra* note 210, at 258.

[276] *Student Suspensions Hearing*, *supra* note 121, at 31 (statement of Dr. Marian Wright Edelman, representing Children's Defense Fund) ("It is the racially discriminatory action and inaction of school officials which is at fault.").

[277] For an overview of persistent racial disparities throughout all arenas of American life today, see *Students for Fair Admissions, Inc. v. President & Fellows of Harvard College*, 600 U.S. 181, 384 (2023) (Jackson, J., dissenting).

[278] *See* ROBERT F. KENNEDY MEM'L & S. REG'L COUNCIL, *supra* note 104, at 64.

[279] *Oversight Hearing on HEW Enforcement*, *supra* note 210, at 2.

[280] *Id.*

According to Senator Beall, if the burden of proving that discrimination does not exist shifted to the county where there is a disparity, there was a real risk that HEW would harass districts to unnecessarily provide paperwork and engage in resource-intensive investigations.[281] He advocated for HEW to focus on investigating "the validity of the individual complaints" instead of engaging in a more systemic, county-wide investigation based on a school-level complaint.[282]

Peter Holmes responded that investigations of discrimination are not based on statistics alone.[283] Instead, OCR survey results are normally used as one factor along with other factors like "the number and nature of complaints alleging violations in particular districts" and "information brought to [OCR's] attention by civil rights groups and other sources."[284] Still, Senator Beall expressed concern that tough scrutiny of racial disparities would lead to the imposition of "a quota system for discipline."[285]

Congresswoman Marjorie Holt of Maryland took Beall's argument even further, asserting that OCR's data collection constituted "a new racism which operates in the guise of government policy, classifies individuals according to race and imposes racial quotas on institutions of many kinds."[286] Incensed by the Anne Arundel investigation, Congresswoman Holt proposed House Bill 16900, to prohibit HEW from requiring schools to keep "any records, files, reports, or statistics pertaining to the race, religion, sex, or national origin of teachers or students."[287] Congresswoman Holt explained that she believed HEW was using statistical evidence it gathered to "manufacture cases of discrimination."[288] According to Congresswoman Holt, she did not want "to set this country back in the civil rights movement in any way,"[289] but she was concerned HEW was harming the education of children because they wanted to "demonstrate that there is still some second-generation discrimination."[290]

Bill 16900 would later become the Holt Amendment. Under the Holt Amendment, federal funds would have been withheld from school systems that classify or assign teachers or students by race, hindering HEW's effort to enforce

[281] *Id.*

[282] Senator Beall also noted that the original complaints were received from a school that had a Black principal, suggesting that the claims of discrimination were unfounded. *Id.*

[283] *Id.* at 6.

[284] *Id.*

[285] *Id.* at 2.

[286] Memorandum from Ken Cole to the President (Oct. 9, 1974) (on file with author).

[287] 120 CONG. REC. 38174 (1974).

[288] *Id.* at 38185.

[289] *Id*. at 38184.

[290] *Id.*

Title VI. [291] Subsequently, Secretary Caspar Weinberg of HEW expressed concern that the amendments restricting access to school data would end HEW's "basic authority to enforce civil rights laws, particularly title VI . . . and title IX . . . ."[292] Peter Holmes recognized that the proposal was motivated by HEW's Anne Arundel County investigation.[293] Indeed, Senator Beall specifically amended the bill to add language prohibiting HEW from compelling any school system to cooperate "in any pilot investigation of the problems of discrimination in disciplinary action."[294]

Ultimately, the Holt Amendment, or the Antibusing Amendment as it became known colloquially, was narrowly defeated in the Senate.[295] When the Anne Arundel School District continued to refuse to comply with HEW's investigation, the Justice Department filed suit against Anne Arundel County under Title VI, and the district court ordered the school district to cooperate.[296] In the end, the HEW investigation of Anne Arundel concluded with HEW finding the district was not in compliance with Title VI and ordering the district to adopt a new code of conduct limiting the subjective offenses.[297] Dr. Anderson continued to defiantly claim that the racial disparities were due to differences between students of different races.[298]

The racial disparities in exclusionary discipline in Anne Arundel County schools persisted for decades after the 1975 investigation.[299] Indeed, in 2012, OCR again opened an investigation into racially disparate discipline of Black students in Anne Arundel County, which still maintained one of the highest rates of suspensions for Black students in the region.[300] Then Anne Arundel

[291] Robert T. Garrett, *House Actions May Mean End to Affirmative Action*, HARVARD CRIMSON (Oct. 29, 1974), thecrimson.com/article/1974/10/29/house-actions-may-mean-end-to [https://perma.cc/7V2L-Q46T].

[292] 120 CONG. REC. 38174 (1974).

[293] Holmes, *supra* note 79, at 63.

[294] 120 CONG. REC. 36558 (1974).

[295] Richard D. Lyons, *House Bars Busing Curb, Sends Funds Bill to Ford*, N.Y. TIMES, Dec. 17, 1974, at 1, https://www.nytimes.com/1974/12/17/archives/house-bars-busing-curb-sends-funds-bill-to-ford-curbs-on-busing.html.

[296] CHILD.'S DEF. FUND, *supra* note 120, at 72.

[297] Robert P. Wade, *U.S. Backs Arundel's Pupil Code: Civil Rights Office Approves Plan for Unbiased Discipline*, BALT. SUN, July 26, 1977, at C1.

[298] *See id.*

[299] *See, e.g.*, Danielle Wright, *Feds to Investigate Discrimination in Maryland Schools*, BET (Apr. 11, 2012, 6:39 PM), https://www.bet.com/article/ne1pae/feds-to-investigate-discrimination-in-maryland-schools [https://perma.cc/CC3G-7CSU] (noting there was little change in racially disparate rates of exclusionary discipline between 2004 complaint and 2012 complaint raising same concerns).

[300] Donna St. George, *Federal Officials Investigate Discipline Practices at Anne Arundel Schools*, WASH. POST (Apr. 21, 2012), https://www.washingtonpost.com/local/education/federal-officials-investigate-discipline-practices-at-anne-arundel-schools/2012/04/21/gIQAhfLaYT_story.html.

Superintendent, Kevin M. Maxwell, suggested once again that the disparities stemmed from subjective violations like "disrespect and insubordination."[301]

The controversy over the Anne Arundel investigation surfaced fundamental questions about the significance of racial inequality in outcomes in American schools as they were desegregating. The debate revealed a willingness of many educators, legislators, and the general public, to accept racial disproportionalities in exclusionary discipline as natural, from the very start of *Brown*'s enforcement. Moreover, the controversy over HEW's Anne Arundel County investigation demonstrates how early efforts to eliminate race-conscious data collection were intertwined with resistance to remedying segregation and inequality.

F. *Dangerous, Integrated Schools*

Rising school crime and violence provided a new justification for the increased use of suspensions and expulsions. School discipline offered a reason for opposing desegregation that was not explicitly racist.[302] Unlike de jure segregation, which was morally wrong, the disproportionate exclusion of misbehaving Black students could be justified as a necessary and unbiased response to rising crime and danger in newly desegregated schools. The stigma associated with student misbehavior, rule violation, and punishment in turn reinforced the disparate treatment of Black youth as necessary. As one newly desegregated school district explained in suspending three Black students for the semester, the students deserved exclusion because they were "'not sincere' about getting an education."[303]

Concerns over order and safety dominated discussions about HEW's oversight and the larger project of enforcing desegregation.[304] The dangerousness of integrated schools featured prominently in Congress's discussion of the Holt Amendment.[305] Embedded in this narrative was the assumption that Black students were the source of increased disorder and crime.

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[301] *Id.*

[302] For a discussion of the impact today, see The Integrated Schools Podcast, *School Safety: More Than One Dimension*, INTEGRATED SCHS., at 27:28 (Apr. 5, 2023), https://integratedschools.org/podcast/s9e12-school-safety-more-than-one-dimension/ [https://perma.cc/VK7A-68B4] (discussing how racial makeup of schools is today used by white parents as proxy for safety today, despite fact that data suggests that majority of Black schools are not actually more at risk for dangerous behavior).

[303] AM. FRIENDS SERV. COMM. & NAT'L COUNCIL OF CHURCHES OF CHRIST, *supra* note 87, at 62.

[304] *See, e.g.*, HEITZEG, *supra* note 39, at 30, 36 (describing how "coded racial appeals" made resegregation of public schools possible by conflating crime and Blackness under guise of race-neutral rhetoric).

[305] *See* 125 CONG. REC. 20358-412 (1979) (frequently citing violence in integrated schools and communities as a primary consideration).

An Anne Arundel teacher stated this point succinctly, saying: "We had no problems here until these children were transferred . . . ."[306]

During the HEW enforcement hearings, Senator M.G. Snyder from Kentucky argued that court-enforced desegregation "lead[s] to turmoil in the schools and discipline problems."[307] He voiced how a constituent complained that under court-ordered segregation: "We have watched discipline, respect and order in the schools steadily decline through the years of busing."[308] According to Senator Snyder, it was no surprise that "[s]uspensions jumped up dramatically in the 1975-76 school year that busing was implemented" and continued to increase in the years after.[309] To support his argument that busing was "disruptive," and harsh discipline justified,[310] he asserted that "after 4 years of busing—burglaries and thefts were up. Destruction of property was up. Disruption and disobedience at extracurricular activities was up. Possession and sale of drugs went up 36 percent. Possession of alcoholic beverages was up 86 percent and arson was up 116 percent." [311]

The narrative of rising violence and crime in schools provided a new basis for opposing integration, despite data showing that Black students were more likely to be punished for minor, nondangerous offenses.[312] Even legislators who voiced support for racial equality cited concerns about safety as a basis for opposing busing and supporting the Holt Amendment.[313] As one senator put it: "We are not arguing black against white or defending bigotry here, we are arguing for commonsense, parents' rights, children's rights, quality education, and simple justice."[314] Rejecting this repackaging of anti-desegregation rhetoric to focus on discipline, a community leader in Louisville said bluntly: "Instead of trying to find an alternative to busing . . . our elected officials and . . . the school board [should] find alternatives to suspensions."[315]

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[306] *Oversight Hearing on HEW Enforcement*, *supra* note 210, at 387.

[307] 125 CONG. REC. at 20367.

[308] *Id*.

[309] *Id.*

[310] *Id.*

[311] *Id.*

[312] *Oversight Hearing on HEW Enforcement*, *supra* note 210, at 1-2. The Annual Gallup Poll on public attitudes toward public education indicated that Americans regarded lack of discipline as the number one school problem nearly every year from 1969-75. Segregation and integration were ranked as the second most pressing school problem. *Id.*; *cf.* 1 NAT'L INST. OF EDUC., VIOLENT SCHOOLS — SAFE SCHOOLS: THE SAFE SCHOOL STUDY REPORT TO THE CONGRESS 2 (1978) ("The evidence from a number of studies and official sources indicates that while acts of violence and property destruction in schools increased from the early sixties to the seventies, both increases leveled off after the early 1970's.").

[313] *See, e.g.*, 125 CONG. REC. at 20397 (quoting Senator Dornan describing Black schools as "drug infested with no discipline").

[314] *Id.*

[315] U.S. COMM'N ON C.R., *supra* note 58, at 268-69.

A rigorous body of scholarship has documented the broader shift by politicians to using coded racial rhetoric after explicit racism became illegal.[316] Often politicians utilized coded racial rhetoric through "law and order" appeals that equated Blackness with dangerousness and criminality without explicitly mentioning race.[317] In her foundational text, scholar Michelle Alexander describes how after the *Brown* decisions, when it became "no longer socially permissible to use race explicitly, as a justification for discrimination, exclusion, and social contempt," labeling people of color as threats and criminals allowed for the continuation of "all the practices we supposedly left behind."[318] The effort to tie Blackness with crime dates at least back to the Reconstruction era when Southern states disproportionately punished recently freed Black people through subjective laws that criminalized behavior like loitering.[319] In other regions of the country, the criminalization of Black people occurred through laws prohibiting "'suspicious characters,' disorderly conduct, keeping and visiting disorderly houses, drunkenness, and violations of city ordinances."[320] As Khalil Gibran Muhammad writes, disparate crime rates in the North were driven by subjective policies that were deployed to support a narrative of Black people as inherently criminal and dangerous.[321] The misuse of crime data to support a perception of Black criminality would continue into the twentieth century and would serve as a major justification for mass incarceration.

The linking of Blackness with crime and disorder in a post-*Brown* world similarly provided the justification for exclusionary discipline in desegregated schools. In his book, *Willful Defiance*, Professor Mark Warren describes how "[a]s public institutions and public discourse turned to 'law and order' approaches to urban communities of color, public schools turned to discipline and control."[322] Professor Matthew Kautz has also documented how the

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[316] *See, e.g.*, Nancy A. Heitzeg, *On the Occasion of the 50th Anniversary of the Civil Rights Act of 1964: Persistent White Supremacy, Relentless Anti-Blackness, and the Limits of the Law*, 36 HAMLINE J. PUB. L. & POL'Y 54, 70 (2015).

[317] *See, e.g.*, KATHERYN RUSSELL-BROWN, THE COLOR OF CRIME: RACIAL HOAXES, WHITE CRIME, MEDIA MESSAGES, POLICE VIOLENCE, AND OTHER RACE-BASED HARMS 72-74 (3d ed. 2021).

[318] MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS 2 (2010).

[319] ELIZABETH HINTON, LESHAE HENDERSON & CINDY REED, VERA INST. OF JUST., AN UNJUST BURDEN: THE DISPARATE TREATMENT OF BLACK AMERICANS IN THE CRIMINAL JUSTICE SYSTEM 2 (2018), https://vera-institute.files.svdcdn.com/production/downloads/publications/for-the-record-unjust-burden-racial-disparities.pdf [https://perma.cc/B86Z-QP35].

[320] *Id.*

[321] KHALIL GIBRAN MUHAMMAD, THE CONDEMNATION OF BLACKNESS: RACE, CRIME, AND THE MAKING OF MODERN URBAN AMERICA 8 (2010).

[322] WARREN, *supra* note 26, at 26.

opposition to desegregation in Boston turned from busing to school discipline.[323] He writes that "in the highly contested era of desegregation, 'order' operated as a facially race-neutral euphemism for segregation."[324] School discipline thus became a tool for both excluding Black youth from integrated environments and justifying their exclusion through racially coded explanations of Black students as dangerous and threats to the school environment.[325]

II. ADDRESSING RACIAL DISPARITIES IN SCHOOL DISCIPLINE TODAY

As I have described in Part I, exclusionary school discipline through suspensions and expulsions provided a new mechanism for excluding Black students in the face of legally mandated integration. Within education research, scholars would later adopt the term "second-generation discrimination" to describe the use of school policies to maintain segregation within desegregated schools.[326] In their book *Race, Class and Education*,[327] Kenneth Meier, Joseph Stewart, Jr., and Robert England argued that racial disparities in student discipline within schools indicate a consistent pattern of second-generation educational discrimination.[328] They posit that while initial efforts to gain access to educational opportunities for Black students focused on eliminating segregated schools and gaining access to white school systems, this focus "ignored the continued resistance to integration and permitted the development of other methods of limiting access."[329] By disproportionately using exclusionary disciplinary action against Black students, school systems were able to regulate interracial contact. They conclude that as a result, "black students attending desegregated schools received lower-quality educational opportunities" than their white peers.[330]

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[323] Matthew B. Kautz, *From Segregation to Suspension: The Solidification of the Contemporary School-Prison Nexus in Boston, 1963-1985*, 49 J. URB. HIST. 1059 (2023) (describing how Boston's schools reinforced criminalization of Black youth that occurred during desegregation of busing through the disciplinary systems in schools).

[324] Matthew B. Kautz, *Past, Present, and Future: Making and Unmaking the School-Prison Nexus*, POVERTY & RACE, Apr.-July 2023, at 17, 17.

[325] *See, e.g.*, EDUARDO BONILLA-SILVA, RACISM WITHOUT RACISTS: COLOR-BLIND RACISM AND THE PERSISTENCE OF RACIAL INEQUALITY IN AMERICA 2-3 (5th ed. 2018) (arguing that racial inequality can be reproduced through facially race-neutral practices).

[326] K. Jurée Capers, *The Role of Desegregation and Teachers of Color in Discipline Disproportionality*, 51 URB. REV. 789, 791 (2019); Tamela McNulty Eitle & David James Eitle, *Inequality, Segregation, and the Overrepresentation of African Americans in School Suspensions*, 47 SOCIO. PERSPS. 269, 273 (2004).

[327] *See, e.g.*, KENNETH J. MEIER, JOSEPH STEWART, JR. & ROBERT E. ENGLAND, RACE, CLASS, AND EDUCATION: THE POLITICS OF SECOND-GENERATION DISCRIMINATION 123-25 (1989).

[328] *Id.* at 5.

[329] *Id.* at 6.

[330] *Id.*

As the last Part described, the evolution of exclusionary discrimination was not lost on advocates at the time. They identified and objected to the use of suspensions and expulsions as a new form of second-generation, racialized exclusion that evolved simultaneously with desegregation efforts and advocated for HEW to address it as such. As Professor J. Harvie Wilkinson III wrote in *The Supreme Court Review* in 1975, "Many in the black community view the suspension of minority students as the rearguard attempt of school officials to perpetuate dual school systems, a problem calling for the exercise of judicial remedial powers just as surely as the breakup of de jure segregation mandated by *Brown*."[331]

While the connection between the use of suspension and expulsion and the history of de jure segregation is rarely explicitly recognized today, the perception that school discipline is used to "push out" Black students remains. To be clear, there are important ways in which the features of racially disparate school discipline today are different than during the Civil Rights Era. As previously discussed, racial discrimination has largely evolved from explicit animus into more discreet implicit bias and stereotypes.[332] The desire to resist desegregation is usually not the explicit motivation behind school desegregation decisions today. Most educators rely on harsh, exclusionary discipline for Black students because that is how they were trained.[333] That is not to say that explicit racial animus and hostility do not still occur and lead to disparate discipline. [334] Nor do I mean to suggest that racially motivated discipline policies no longer exist; rules banning Black hairstyles remain all too common, for example.[335] Moreover, I do not mean to suggest that implicit bias and stereotypical bias do not constitute intentional discrimination; they do, so long as they motivate different treatment based on race.

But the context in which school discipline takes place has changed in important ways since the era of enforced desegregation. Significant, government-led efforts to desegregate schools have largely ended, and due to resegregation, many schools are still racially segregated regardless of who is

[331] J. Harvie Wilkinson III, Goss v. Lopez*: The Supreme Court as School Superintendent*, 1975 SUP. CT. REV. 25, 31.

[332] TOM RUDD, KIRWAN INST. FOR THE STUDY OF RACE & ETHNICITY, RACIAL DISPROPORTIONALITY IN SCHOOL DISCIPLINE: IMPLICIT BIAS IS HEAVILY IMPLICATED 3, 5 (2014), https://aasb.org/wp-content/uploads/racial-disproportionality-schools-02.pdf [https://perma.cc/T5S8-JY98].

[333] *See id.* at 4.

[334] *See, e.g.*, Discrimination Complaint at 19, NAACP of Bucks Cnty. et al. v. Pennridge Sch. Dist., No. 03221202 (Dep't of Educ., Office for C.R., Nov. 15, 2023) (alleging student was suspended for fight that ensued after he was called the N-word by another student who said: "You're not going to do nothing, little boy").

[335] *See, e.g.*, Tesfaye Negussie & Davi Merchan, *Black High School Student Suspended in Texas Because of Dreadlocks Files Lawsuit*, ABC NEWS (Sept. 23, 2023, 3:45 PM), https://abcnews.go.com/US/black-high-school-student-suspended-texas-dreadlocks/story?id=103306266 [https://perma.cc/8KAH-RHYW].

suspended or expelled.[336] While in some cases, Black students are still excluded from predominately white school environments and the preoccupation with regulating interracial interactions persists, the forces leading to racially disparate exclusionary punishment cannot be explained as primarily motivated by the need to regulate racially mixed environments.[337] Many inner-city public schools are now predominately or exclusively made up of low-income students of color.[338] While the main target for suspensions and expulsions has not changed, research suggests that punitive discipline is most severe in segregated school settings serving Black and Latinx students.[339]

Relatedly, while the vast majority of educators are white, a significant number of educators responsible for assigning suspensions and expulsions in urban schools are themselves people of color.[340] While some research has found that Black and Latinx students are less likely to be suspended or expelled in schools with higher proportions of Black and Latinx teachers,[341] this does not negate the reality that Black and Latinx educators routinely participate in a system that harshly punishes Black students. In fact, research suggests that Black educators are disproportionately asked to take the lead in disciplining Black students, a reality that may contribute to the pushout of Black educators from

[336] *See* BROWN AT 60, *supra* note 2, at 11; Reardon et al., *supra* note 82, at 877.

[337] Decoteau J. Irby, *Revealing Racial Purity Ideology: Fear of Black-White Intimacy as a Framework for Understanding School Discipline in Post-*Brown *Schools*, 50 EDUC. ADMIN. Q. 783, 784-86 (2014).

[338] *See* ERICA FRANKENBERG, JONGYEON EE, JENNIFER B. AYSCUE & GARY ORFIELD, HARMING OUR COMMON FUTURE: AMERICA'S SEGREGATED SCHOOLS 65 YEARS AFTER *BROWN* 8 (2019), https://www.civilrightsproject.ucla.edu/research/k-12-education/integration-and-diversity/harming-our-common-future-americas-segregated-schools-65-years-after-brown/Brown-65-050919v4-final.pdf [https://perma.cc/6Y2W-72MB].

[339] *See* Kelly Welch & Allison Ann Payne, *Racial Threat and Punitive School Discipline*, 57 SOC. PROBS. 25, 28 (2010) (finding that schools with large enrollments of Black students are more likely to use zero-tolerance and other exclusionary discipline practices than schools with large enrollments of white students); David M. Ramey, *The Social Structure of Criminalized and Medicalized School Discipline*, 88 SOCIO. EDUC. 181, 192-93 (2015) (highlighting differences in school discipline rates based on school racial composition).

[340] CONSTANCE A. LINDSAY, ERICA BLOM & ALEXANDRA TILSLEY, URB. INST., DIVERSIFYING THE CLASSROOM: EXAMINING THE TEACHER PIPELINE (2017), https://www.urban.org/features/diversifying-classroom-examining-teacher-pipeline.

[341] *See, e.g.*, Stephen B. Holt & Seth Gershenson, *The Impact of Demographic Representation on Student Attendance and Suspensions*, 47 POL'Y STUD. J. 1069, 1091 (2019) (finding that students, especially non-white male students, with racially mismatched teachers experienced a 20% increase in suspensions); Constance A. Lindsay & Cassandra M.D. Hart, *Teacher Race and School Discipline: Are Students Suspended Less Often When They Have a Teacher of the Same Race?*, EDUC. NEXT, Winter 2017, at 72, 74 (finding consistent evidence that North Carolina students are less likely to be removed from school as punishment when they and their teachers are the same race).

the profession.[342] Former U.S. Secretary of Education John King has written about how Black teachers are asked to pay an "invisible tax" that includes greater responsibility for disciplining Black students.[343] On the other hand, for some educators, discipline may be motivated not by hostility, but by a desire to prepare Black children for the realities of a life where they are expected to submit to a racial social hierarchy.[344] Thus, Black teachers may be more punitive in punishing Black youth for insubordination in order to prepare them for the world beyond school in which Black people are harshly punished for challenging or "offending" white authority in the world.[345] Indeed, Black parents' demands for strict order and safety have also driven school districts to adopt harsh, zero-tolerance policies in more recent years.[346]

As this Part discusses, the failure to accurately identify the historical evolution of exclusionary discipline limits our ability to fully understand and address the racial dynamics that underlie school discipline today. A new theory of

[342] ASHLEY GRIFFIN & HILARY TACKIE, EDUC. TR., THROUGH OUR EYES: PERSPECTIVES AND REFLECTIONS FROM BLACK TEACHERS 4-6 (2016), https://edtrust.org/wp-content/uploads/2014/09/ThroughOurEyes.pdf [https://perma.cc/Y99J-4JRP] (describing how Black teachers are more likely to be asked to take on role as disciplinarian in their school, contributing to their dissatisfaction with the teaching profession); Ed Brockenbrough, "*The Discipline Stop": Black Male Teachers and the Politics of Urban School Discipline*, 47 EDUC. & URB. SOC'Y 499, 518 (2015) (noting that eight out of eleven men in study became frustrated by disciplinary roles expected of them as Black male teachers); Carol Eleze Ford Battle, Black Female Educator Retention: Exploring Conditions Needed to Thrive 1, 20 (2022) (Ph.D. dissertation, University of California San Diego, California State University, San Marcos) (describing professional fatigue that causes Black teachers to leave because they are expected to serve as disciplinarians and curators of culturally relevant resources).

[343] John King, Opinion, *The Invisible Tax on Teachers of Color*, WASH. POST (May 15, 2016), https://www.washingtonpost.com/opinions/the-invisible-tax-on-black-teachers/2016/05/15/6b7bea06-16f7-11e6-aa55-670cabef46e0_story.html.

[344] *See, e.g.*, Richard O. Welsh & Neha Sobti, *Moving from Pathology to Politicized Care: Examining Black School Leaders' Perspectives on School Discipline*, 33 J. SCH. LEADERSHIP 579, 595 (2023) (sharing Black principal's perspective that "Black students must experience discipline in school in a way that is parallel to law enforcement in public places").

[345] Deborah Brooks Lawrence & Barbara Ella Milton, Jr., *Black Students Don't Need Your 'Tough Love.' They Need Compassion.*, CHALKBEAT (Nov. 14, 2022, 4:00 PM), https://www.chalkbeat.org/2022/11/14/23454109/tough-love-discipline-black-students/ [https://perma.cc/AT8T-GDVZ].

[346] *See* JAMES FORMAN, JR., LOCKING UP OUR OWN: CRIME AND PUNISHMENT IN BLACK AMERICA 10-12 (2017) (describing how as crime rose from the late 1960s to the 1990s, African American residents' support for additional policing and tough-on-crime policies increased); *see also* Rachel M. Perera & Melissa Kay Diliberti, *Survey: Understanding How U.S. Public Schools Approach School Discipline*, BROOKINGS (Jan. 19, 2023), https://www.brookings.edu/articles/survey-understanding-how-us-public-schools-approach-school-discipline/ [https://perma.cc/23CQ-57Z2] (noting that majority of U.S. public schools had zero-tolerance policies during 2021-22 and schools serving mostly Black students were more likely to have zero-tolerance policies than others).

discrimination that I term "legacy discrimination" conceptualizes racial disparities in exclusionary school discipline as ongoing systemic discrimination rooted in white supremacy. I first consider the challenges within existing doctrine that limit the ability to recognize historical discrimination as informing ongoing systemic racism. I then argue that legacy discrimination persists through attitudinal and institutional processes that provide the infrastructure to sustain discrimination even when individuals are not conscious of the reasons that unequal treatment persists. I conclude by suggesting how a legacy theory of discrimination supports a shared understanding of how racial disparities in school discipline connect to a broader movement to combat white supremacist systems in schools today.

A. *The Shortcomings of Civil Rights Era Theories of Discrimination for Recognizing School Pushout*

As prior scholarship has described, courts generally fail to recognize the throughline in evolving forms of discrimination. Professor Reva Siegel coined the term "preservation-through-transformation" to describe the process through which the Supreme Court tends to recognize older forms of explicit discrimination while denying the effects of new, more subtle forms of discrimination; thus, the Court allows for subordination to be legitimized when it occurs through mechanisms that look different from those in the past.[347] More recently, in her *Harvard Law Review* Foreword, Professor Khiara Bridges described how the Court under Chief Justice Roberts has adopted a narrow definition of what "counts" as discrimination.[348] This narrow definition is grounded in pre-Civil Rights era explicit policies, and it reinforces status-based hierarchies by maintaining the legitimacy of the Court through limited interventions, while simultaneously denying the vast ways that facially race-neutral policies preserve inequality.[349] As Professor Dorothy Roberts points out in response to Bridges, the Roberts Court's failure to recognize discrimination when it does not resemble Jim Crow violations "ignores the persistence of white supremacist structures after the civil rights revolution."[350] A new theory of discrimination is thus necessary that would instead focus on charting "the

[347] Reva Siegel, *Why Equal Protection No Longer Protects: The Evolving Forms of Status-Enforcing State Action*, 49 STAN. L. REV. 1111, 1113-14 (1997) (describing "preservation-through-transformation," or the idea that in response to demands to end racial subordination, the law adapts just enough to preserve status quo in new ways).

[348] Khiara M. Bridges, *The Supreme Court, 2021 Term—Foreword: Race in the Roberts Court*, 136 HARV. L. REV. 23, 25 (2022).

[349] *Id*. at 24-25 ("The crux of the Roberts Court's apparent racial common sense is that racism against people of color is what racism looked like during the pre–Civil Rights Era — in the bad old days.").

[350] Dorothy E. Roberts, *Racism, Abolition, and Historical Resemblance*, 136 HARV. L. REV. F. 37, 38-39 (2022).

connections between pre-Civil Rights and post-Civil Rights forms of white supremacy as a compelling way to address current racial injuries."[351]

Existing doctrine falls woefully short in its ability to recognize school pushout as illegal discrimination, in part because racial disparities in school discipline appear on the surface to be based on race-neutral treatment, disconnected from any Jim Crow Era roots. The two types of legal violations recognized during the Civil Rights Era, disparate treatment claims and disparate impact claims,[352] involve practical and doctrinal challenges that make them ill-suited for recognizing racial disparities in school discipline as a form of evolving systemic race discrimination.[353] The discriminatory intent requirement under disparate treatment claims is best suited for addressing discrimination based on racial animus, and ill-suited to address racial disparities in school discipline today.[354] Rather than being a form of individualized intentional disparate treatment, today's school pushout is best understood as a form of systemic or institutional discrimination.[355] With regard to disparate impact, Supreme Court decisions during the 1970s gutted this theory by requiring plaintiffs bringing a claim under the Equal Protection Clause of the Fourteenth Amendment to demonstrate evidence of intent rather than disparate impact alone.[356] In addition, the Supreme Court severely limited disparate impact discrimination claims under Title VI,

[351] *Id.* at 39.

[352] *See generally* CATHERINE Y. KIM, DANIEL J. LOSEN & DAMON T. HEWITT, THE SCHOOL-TO-PRISON PIPELINE: STRUCTURING LEGAL REFORM 35 (2010).

[353] Russell J. Skiba, Suzanne E. Eckes & Kevin Brown, *African American Disproportionality in School Discipline: The Divide Between Best Evidence and Legal Remedy*, 54 N.Y.L. SCH. L. REV. 1071, 1088 (2009-2010).

[354] *See*, *e.g.*, Catherine Y. Kim, *Procedures for Public Law Remediation in School-to-Prison Pipeline Litigation: Lessons Learned from* Antoine v. Winner School District, 54 N.Y.L. SCH. L. REV. 955, 957 (2009-2010) ("Unfortunately, systemic legal challenges to the school-to-prison pipeline face substantial doctrinal obstacles. . . . [D]octrinal developments, at least at the federal level, prohibit discrimination claims brought by private parties absent proof of discriminatory intent.").

[355] For example, the *McDonnell-Douglas* framework, established under *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), and originally developed for Title VII employment cases and applied in cases alleging discrimination in individual instances, is ill suited for challenging systemic racial disparities in school discipline. *See* KIM et al., *supra* note 352, at 36; *see also, e.g.*, Parker *ex rel.* Parker v. Trinity High Schs., 823 F. Supp. 511, 520 (N.D. Ill. 1993) (finding comparators were not similarity situated because of how long and severe the fights were).

[356] Washington v. Davis, 426 U.S. 229, 242 (1976) (holding that proof of discriminatory intent is required to establish claim pursuant to Equal Protection Clause of Fourteenth Amendment to United States Constitution); Pers. Adm'r of Mass. v. Feeney, 442 U.S. 256, 279 (1979) (holding that disparate impact is not sufficient to show intentional discrimination unless plaintiff can establish that decisionmaker "selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group").

ruling in *Alexander v. Sandoval*[357] that there is no private cause of action for disparate impact under the statute, despite its purpose being to provide redress for the effects of de jure segregation.[358]

The Court's doctrine in the context of ongoing school desegregation litigation could offer a potential legal theory for courts to recognize the link between historical discrimination and ongoing harms today, but federal courts also fail to fully recognize the evolving nature of discrimination, even in desegregation cases, when it does not resemble or otherwise seems too removed in time from de jure segregation. As discussed previously, under controlling doctrine in school desegregation litigation, school systems previously segregated by law are under a "continuing" and "affirmative duty to take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch."[359] Courts are thus mandated to determine whether ongoing conditions of inequality in a school district constitute vestiges of the de jure system. There is a significant body of case law recognizing racial disparities in school discipline as a vestige of de jure segregation and requiring courts to treat school discipline as one of the factors for assessing whether a school district has fulfilled its duty to remedy segregation in good faith.[360] In *Hawkins v. Coleman*,[361] the first successful constitutional challenge to racially disparate

[357] 532 U.S. 275 (2001).

[358] *Id*. at 285 (holding that proof of discriminatory intent is required to establish private rights of action brought pursuant to Title VI).

[359] Green v. Cnty. Sch. Bd., 391 U.S. 430, 437-38, 440 (1968). In the higher education context, the Supreme Court established a three-step inquiry for assessing discrimination by examining whether a current policy is traceable to the de jure segregated system, has continued discriminatory effect, and can be modified or practicably eliminated consistent with sound educational policy. United States v. Fordice, 505 U.S. 717, 732 (1992).

[360] *See*, *e.g.*, Memorandum of Law in Support of Joint Motion to Approve Proposed Consent Order at 5, Barnhardt v. Meridian Mun. Separate Sch. Dist., No. 65-CV-1300 (S.D. Miss. Mar. 22, 2013) ("Eliminating racial discrimination in student discipline is part of establishing a 'truly unitary school system.'"); Little Rock Sch. Dist. v. Arkansas, 664 F.3d 738, 751 (8th Cir. 2011) (applying good-faith compliance and elimination of prior vestiges of discrimination to extent practicable standard to case involving student discipline); Fisher v. Tucson Unified Sch. Dist., 652 F.3d 1131, 1140-41 (9th Cir. 2011) (describing lower court's finding that school district failed to demonstrate good faith and "raised significant questions" as to whether it eliminated vestiges of racial discrimination to extent possible); Thomas v. Sch. Bd. St. Martin Par., 544 F. Supp. 3d 651 (W.D. La. 2021) (noting school district's failure to comply with consent order in good faith or reduce racial discrimination over time). *But see* Tasby v. Estes, 643 F.2d 1103, 1108 (5th Cir. Unit A, Apr. 1981) (describing student discipline as "fundamentally unlike" other *Green* factors used for assessing desegregation, because individual student school discipline decisions can be explained on grounds other than race).

[361] 376 F. Supp. 1330 (N.D. Tex. 1974).

school discipline,[362] Black parents brought a case on behalf of their children against the Dallas Independent School District in 1974.[363] The Court ruled that the district was liable for discrimination, finding that the statistics evidenced racial discrimination and that the disproportionate discipline was the result of institutional racism that the school system had an affirmative duty to remedy.[364] Still, in more recent cases, courts have too often failed to recognize the link between de jure segregation and current exclusionary discipline practices.[365]

Moreover, the Supreme Court has mounted significant barriers for plaintiffs seeking remedial relief in school desegregation cases by imposing time limitations and admonishing that court supervision will not extend indefinitely, even when segregation and racial disparities in accessing educational opportunity persist.[366] In *Freeman v. Pitts*,[367] the Supreme Court adopted a narrow analysis of what qualifies as a vestige of discrimination through a cramped understanding of whether there is a causal link to a de jure system, in part based on how much time has passed since the end of de jure segregation.[368] Even while recognizing that vestiges may be "subtle and intangible,"[369] and that history "can linger and persist," the Supreme Court held that a school district's

[362] Mark G. Yudof, *Suspension and Expulsion of Black Students from the Public Schools: Academic Capital Punishment and the Constitution*, 39 LAW & CONTEMP. PROBS. 374, 401 (1975).

[363] *Coleman*, 376 F. Supp. at 1331.

[364] *Id.* at 1337 (finding that desegregation program had "not worked to materially change the existing racism" which court determined was "chief cause of the disproportionate number of Blacks being suspended and given corporal punishment").

[365] *See, e.g.*, Wessmann v. Gittens, 160 F.3d 790, 821-22 (1st Cir. 1998) (holding that there was not strong basis in evidence for finding that low teacher expectations for minority students resulting in racially disparate discipline was caused by de jure segregation); United States v. City of Yonkers, 181 F.3d 301, 312-13 (2d Cir. 1999) (finding insufficient evidence that low teacher expectations and lack of multicultural curricula were vestiges of discrimination); Coal. to Save Our Child. v. State Bd. of Educ., 90 F.3d 752, 778 (3d Cir. 1996) (characterizing the racial academic achievement gap as rooted in socioeconomic conditions and not segregation).

[366] *See* Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll., 600 U.S. 181, 314 (2023) (Kavanaugh, J., concurring) (observing that "in the elementary and secondary school context after [*Brown*] . . . the Court authorized race-based student assignments for several decades—but not indefinitely into the future"); *see also* Pasadena City Bd. of Educ. v. Spangler, 427 U.S. 424, 433-434, 436 (1976); Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 31-32 (1971).

[367] 503 U.S. 467 (1992).

[368] *Id.* at 496 ("As the de jure violation becomes more remote in time . . . it becomes less likely that a current racial imbalance in a school district is a vestige of the prior de jure system."); *see also* Ryan Tacorda, *Acknowledging Those Stubborn Facts of History: The Vestiges of Segregation*, 50 UCLA L. REV. 1547, 1555-56 (2003) (describing how circuit courts have adopted limited understanding of causal link between persistent, subtle inequality, and de jure segregation).

[369] *Freeman*, 503 U.S. at 495-96.

good faith efforts today may be sufficient to remedy the historical discrimination and release the school district from court supervision incrementally, regardless of whether the discriminatory violation had been cured in all aspects.[370] In *Board of Education v. Dowell*,[371] the Supreme Court's test for determining whether a school district has eliminated the vestiges of discrimination recognized that school desegregation remedies should be limited in time, emphasizing the value of returning a school district to local control even when inequality continues.[372] Some courts have also expressed the need to defer to educator discretion in making school discipline decisions even when they have failed to effectively eliminate the vestiges of segregation.[373] These doctrinal limitations fail to account for the dynamic ways that discrimination adapts to shape attitudes and institutional policies such that it persists over long periods of time in ways that may not be perceived by educators.[374]

Critically, the Court's school desegregation doctrine also limits liability for school segregation to school districts that engaged in de jure segregation.[375] Plaintiffs must first establish segregative intent of de facto segregated school districts in order to hold them accountable for ongoing discriminatory treatment.[376] Yet the history of school pushout shows the de jure and de facto

[370] *Id.* at 496 (finding district made "good faith" effort to become unitary).

[371] 498 U.S. 237 (1991).

[372] *Id.* at 247-48 (1991) (recognizing that race-based "injunctions entered in school desegregation cases" were not meant to "operate in perpetuity").

[373] *See* CHARLES J. RUSSO, REUTTER'S THE LAW OF PUBLIC EDUCATION 750 (5th ed. 2004) (describing tendency of courts to grant educators great discretion in making disciplinary decisions); Insley, *supra* note 41, at 1052-54 (observing that courts consistently defer to school officials making disciplinary decisions except in extreme or abnormal cases); Sweet v. Childs, 507 F.2d 675, 680 (5th Cir. 1975) (reasoning that school discipline should be left to local districts).

[374] *See* Boddie, *supra* note 89, at 10.

[375] Freeman v. Pitts, 503 U.S. 467, 496 (1992) ("The vestiges of segregation that are the concern of the law . . . must be so real that they have a causal link to the de jure violation being remedied."); Erika K. Wilson, *Monopolizing Whiteness*, 134 HARV. L. REV. 2382, 2412 (2021) ("Courts routinely find that schools are racially segregated but fail to find the segregation actionable because plaintiffs cannot show that the de facto segregation is the product of segregative intent by the state."). Thus, outside of ongoing school desegregation cases in previously de jure segregated school districts, plaintiffs must first establish segregative intent in order to hold school districts accountable for ongoing discriminatory treatment. Keyes v. Sch. Dist. No. 1, 413 U.S. 189, 198-202 (1973) (holding that in district where racial segregation in public schools was never codified in law, other evidence may be indicative of "segregative intent" on part of school board, such as gerrymandering attendance zones, designing feeder schools on basis of race, or selecting sites for new school construction based on racial demographics).

[376] For a database of school desegregation orders that are still being enforced, see Yue Qiu & Nikole Hannah-Jones, *A National Survey of School Desegregation Orders*, PROPUBLICA (Dec. 23, 2014), https://projects.propublica.org/graphics/desegregation-orders [https://perma.cc/K6FE-V3RT].

divide is a distinction without practical meaning when it comes to the experiences of students. Both de jure and de facto segregated districts resisted integration and engaged in school pushout as a tool for maintaining a white supremacist social order in the aftermath of *Brown*.[377]

In short, federal courts' limited consideration of historical context in Equal Protection and Title VI jurisprudence disguises the racialized meaning of policies rooted in historical discrimination that appear facially race-neutral today.[378] Ignoring the legacy of discrimination whitewashes policies that only fifty years ago were explicitly motivated by racial discrimination.[379] The throughline between current racial disparities and historical discrimination is all but erased when we apply a limited time window to systemic problems like school discipline.

B. *Challenging Pushout as Second-Generation Discrimination*

As discussed *supra*,[380] legal scholarship has recognized second-generation discrimination as discrimination that evolved as civil rights legislation prohibited explicit segregation. As traditional Civil Rights Era tools proved inadequate for challenging second-generation discrimination, antidiscrimination law recognized a new theory of discrimination: hostile environment discrimination.[381] Hostile environment claims are intended to challenge second-generation discrimination that resulted in exclusionary treatment or limited the terms of inclusion based upon race or sex.[382]

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[377] NAACP LEGAL DEF. & EDUC. FUND, INC., *supra* note 101, at 2-3 (describing student pushout phenomenon in both southern and northern schools); *see* Katie R. Eyer, *The New Jim Crow Is the Old Jim Crow*, 128 YALE L.J. 1002, 1037-38 (2019) (explaining racial segregation in North occurred through de facto policies and "nominally 'colorblind' Jim Crow policies, which were intended to (and did) instantiate segregation and discrimination"); Wilson, *supra* note 375, at 2396 ("Even in states that did not require school segregation by law, practices for assigning students to schools had the effect of facilitating exclusionary closure.").

[378] *See* W. Kerrel Murray, *Discriminatory Taint*, 135 HARV. L. REV. 1190, 1194 (2022) (observing that current legal doctrine has undertheorized whether or why "discriminatory predecessors" matter in evaluating whether current policies are discriminatory).

[379] As Professor Yuvraj Joshi has written, treating history as a distinct and isolated period, rather than as circumstances informing conditions today "erases linkages between the past and present to conceal structural racism." Yuvraj Joshi, *Racial Time*, 90 U. CHI. L. REV. 1625, 1638 (2023).

[380] *See supra* Section II.A.

[381] *See* Letter from Russlyn Ali, Assistant Sec'y for C.R., U.S. Dep't of Educ., to Colleague (Oct. 26, 2010), https://www.mass.gov/doc/commission-to-review-statutes-relative-to-implementation-of-the-school-bullying-law-testimony-6/download.

[382] For further discussion of how hostile environment claims might be used to challenge more subtle forms of discrimination in the education context, see Cara McClellan, *Discrimination as Disruption: Addressing Hostile Environments Without Violating the Constitution*, 34 YALE L. & POL'Y REV. *INTER ALIA*, Nov. 16, 2015, at 1,

The hostile environment theory of discrimination first developed in the context of Title VII.[383] As workplaces were forced to desegregate, new forms of covert exclusion developed, and advocates shifted to challenging how employees in a protected class might experience different work conditions once they had access to new employment settings. In one of the first cases to recognize a hostile theory of discrimination, *Rogers v. Equal Employment Opportunity Commission*,[384] a Latinx plaintiff alleged that her employer discriminated against her by segregating patients based upon race.[385] The Fifth Circuit recognized that even though this discrimination did not have a tangible detrimental effect on Rogers directly, the work climate affected her ability to equally participate in her place of employment.[386] The *Rogers* court observed: "As patently discriminatory practices become outlawed, those employers bent on pursuing a general policy declared illegal by Congressional mandate will undoubtedly devise more sophisticated methods to perpetuate discrimination among employees."[387]

Although the Supreme Court has never decided a hostile environment case under Title VI, lower courts have recognized a viable cause of action.[388] The Department of Education OCR and the Department of Justice have also provided guidance on hostile environment liability under Title VI,[389] recognizing that harassment is unlawful when it is sufficiently serious to deny or limit the individual's ability to participate in or benefit from the educational

https://yalelawandpolicy.org/sites/default/files/IA/discrimination_as_disruption_0.pdf [https://perma.cc/C67M-UGDM].

[383] 42 U.S.C. §§ 2000e to 2000e-17.

[384] 454 F.2d 234 (5th Cir. 1971).

[385] *Id.* at 236.

[386] *Id.* at 238-39.

[387] *Id.* at 239.

[388] *See, e.g.*, Monteiro v. Tempe Union High Sch. Dist., 158 F.3d 1022, 1033-34 (9th Cir. 1998) (holding that school district violates Title VI when: (1) there is a racially hostile environment; (2) the district had notice of the problem; and (3) it failed to respond adequately to redress the racially hostile environment); Bryant v. Indep. Sch. Dist. No. I-38, 334 F.3d 928, 933 (10th Cir. 2003) ("[W]hen administrators who have a duty to provide a nondiscriminatory educational environment for their charges are made aware of egregious forms of intentional discrimination and make the intentional choice to sit by and do nothing, they can be held liable under § 601."); Zeno v. Pine Plains Cent. Sch. Dist., 702 F.3d 655, 673 (2d Cir. 2012) (affirming district court's final judgment awarding plaintiff $1 million in damages); L.L. v. Evesham Twp. Bd. of Educ., 710 F. App'x 545, 549 (3d Cir. 2017) ("In order to establish liability based on a hostile environment for students under Title VI, a plaintiff must demonstrate 'severe *or* pervasive' harassment based on the student's race . . . and 'deliberate indifference to known acts of harassment.'").

[389] *See generally* OFF. FOR C.R., U.S. DEP'T OF EDUC., RACE AND SCHOOL PROGRAMMING (2023), https://www2.ed.gov/about/offices/list/ocr/letters/colleague-20230824.pdf [https://perma.cc/J3P8-7VAA] (explaining schools' obligations to prevent hostile educational environments and applicable legal standards).

programming or when enduring the harassing conduct becomes a condition of accessing one's education.[390] Applying the Department of Education's framework under Title VI in *Monteiro v. Temple Union High School District*,[391] the Ninth Circuit found that once on notice of race-based harassment, a school district can be liable for a racially hostile environment.[392]

The critical challenge in bringing a hostile-environment claim arising from racial disparities in suspensions will be convincing a decision maker that school discipline disparities that persist today are a form of race-based treatment; racial animus is often not the conscious motivation behind suspension and expulsion today, and judicial decision makers are often reluctant to infer race as motivation without direct evidence.[393] The school environment that Minnijean attended, where students explicitly shouted "one down, eight to go" at the time of her suspension, does not reflect the context in which most suspension decisions occur today.[394] And as discussed above, the Roberts Court has demonstrated an unwillingness to recognize racial discrimination when it does not resemble Jim Crow era racial discrimination.[395]

A new theory of discrimination is needed to help articulate the ways race-based exclusion through school discipline has evolved from second-generation discrimination to today. By focusing on how institutional policies and attitudes continue to reinforce a white-supremacist social order, a legacy theory would help to explain today's exclusionary discipline as designed to maintain racial status, even when it might not appear to be race-based.

C. *Federal Administrative Enforcement to Stop Pushout*

The Department of Education OCR and the Department of Justice EOS (collectively "the Departments") succeeded HEW and continue to have jurisdiction under Title VI to investigate racially disparate school discipline. Importantly, both departments continue to recognize a disparate-impact theory of discrimination as actionable and continue to prosecute second-generation discrimination despite severe limitations on the ability to do so in federal

[390] Letter from Russlyn Ali, Assistant Sec'y for C.R., U.S. Dep't of Educ., to Colleague, *supra* note 381, at 2-6 (providing examples include usage of racial slurs and threats).

[391] *Monteiro*, 158 F.3d at 1033.

[392] *Id.*

[393] *See, e.g.*, Katie R. Eyer, *That's Not Discrimination: American Beliefs and the Limits of Antidiscrimination Law*, 96 MINN. L. REV. 1275, 1278 (2012) (explaining that "the core findings of psychology scholars have been remarkably simple: most people, in most factual circumstances, are unwilling to make robust attributions to discrimination").

[394] Kehinde Andrews, *Minnijean Brown-Trickey: The Teenager Who Needed an Armed Guard to Go to School*, GUARDIAN (Nov. 26, 2020, 1:00 AM), https://www.theguardian.com/society/2020/nov/26/minnijean-brown-trickey-little-rock-nine [https://perma.cc/2ZLB-4RTV].

[395] *See* Bridges, *supra* note 348.

court.[396] While HEW rejected early advocates' requests to treat racially disparate discipline as creating a presumption of discrimination, the Departments recognize that in specific cases, violations of antidiscrimination laws "underlie these disparities."[397]

However, OCR's remedial relief remains limited to district-by-district investigations that require procedural reforms to school discipline processes. In 2024, the Departments released a joint document summarizing their investigations involving student discipline policies or practices pursuant to Title VI of the Civil Rights Act of 1964.[398] The remedies they outline include actions such as training faculty and staff on policies and procedures, increasing due process protections, conducting climate surveys, revising the code of conduct to require early interventions for misbehaving students, and requiring more detailed data collection.[399]

For example, an OCR investigation of Victor Valley School District found a pattern of harsher and more frequent disciplinary actions for Black students, particularly for minor, subjective behaviors, such as dress code violations, "inappropriate behavior," "defiance," and "disruption."[400] After OCR found that Victor Valley was not in compliance with federal civil rights law, the District entered a Resolution Agreement with OCR that included:

(1) revising student discipline policies and procedures to reduce reliance on subjective and vague discipline categories;

(2) revising policies and procedures to make clear that schools will not involve law enforcement in routine student discipline;

(3) conducting school climate surveys to assess perceptions of fairness and safety in the district;

(4) regularly analyzing student discipline data; and

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[396] A disparate impact claim is cognizable under Title VI administrative regulations when there is an unjustifiable disparate racial impact. *See* 28 C.F.R. § 42.104(b)(2) (2024) ("A recipient . . . may not . . . utilize criteria . . . which have the effect of . . . defeating or substantially impairing accomplishment of the objectives of the program as respects individuals of a particular race, color, or national origin."); *see also* Tex. Dep't of Hous. & Cmty. Affs. v. Inclusive Cmtys. Project, Inc., 576 U.S. 519, 524 (2015) ("[A] plaintiff bringing a disparate-impact claim challenges practices that have a 'disproportionately adverse effect on minorities' and are otherwise unjustified by a legitimate rationale." (quoting Ricci v. DeStefano, 557 U.S. 557, 577 (2009))).

[397] *See* OFF. FOR C.R., U.S. DEP'T OF EDUC. & C.R. DIV., U.S. DOJ, RESOURCE ON CONFRONTING RACIAL DISCRIMINATION IN STUDENT DISCIPLINE, at i (2023), https://www.justice.gov/archives/opa/press-release/file/1585291/dl?inline.

[398] *See generally id.*

[399] *Id*. at 2-17.

[400] *See* Letter from Zachary Pelchat, Reg'l Dir., Off. for C.R., U.S. Dep't of Educ., to Elvin Momon, Superintendent, Victor Valley Union High Sch. Dist. 2 (Aug. 16, 2022), https://www2.ed.gov/about/offices/list/ocr/docs/investigations/more/09145003-a.pdf [https://perma.cc/X8K2-F64U].

(5) committing to accurate and complete student discipline recordkeeping and reporting going forward and publicly reporting discipline data disaggregated by race.[401]

While reducing reliance on subjective and vague discipline categories is an important step, OCR agreements have stopped short of recognizing suspensions as a tool rooted in a racist history of exclusion. Instead, remedies have tended to focus on making the school discipline process more consistent and transparent. The limited remedial action OCR has taken represents a missed opportunity for more radical change, such as eliminating exclusionary school-discipline devices entirely because of their racist roots. OCR and EOS possess the long-term records and data that date back to early enforcement of desegregation under HEW, making it possible to draw the connection between enforcement of school desegregation in a school district and subsequent rising rates of suspension and expulsion. According to *ProPublica*, segregation between Black students and white students in Victor Valley is very high compared to other schools,[402] but the history of how segregation began and is sustained was not discussed as part of OCR's findings. Similarly, OCR's 2012 investigation of school discipline in Anne Arundel County makes no mention of the pilot investigation during the 1970s.

OCR and EOS are uniquely situated to impose remedial relief that addresses suspension today as situated within a history of racial exclusion. Such action is politically unlikely however, as both federal agencies are limited by the willingness of the President to enforce civil rights and invest resources and national politics, which often does not prioritize the needs of vulnerable and politically unpopular youth. While the Departments reaffirmed a commitment to investigating school discipline under President Joseph Biden, President Donald Trump has taken steps to disband the Department of Education entirely.[403]

D. *A New Approach: Legacy Discrimination*

A legacy theory would help to map the nexus between racial disparities in discipline today and their historical roots to support more radical remedial relief. While contemporary legal claims often fail to consider how historical discrimination has evolved into new forms, a legacy theory of discrimination would consider how racial subordination is maintained in new forms over

[401] *See generally* Resolution Agreement, Victor Valley Union High Sch. Dist., OCR Case No. 09-14-5003 (Aug. 15, 2022), https://www2.ed.gov/about/offices/list/ocr/docs/investigations/more/09145003-b.pdf [https://perma.cc/MG76-4MDD].

[402] *See Victor Valley Union High School District*, PROPUBLICA, https://projects.propublica.org/miseducation/district/0636972 [https://perma.cc/DN7D-VU7P] (last updated Oct. 2018).

[403] Ana Faguy, *What Does the US Education Department Do – and Can Trump Dismantle It?*, BBC, https://www.bbc.com/news/articles/c79zxzj90nno [https://perma.cc/F7SH-L4YD] (last updated Mar. 12, 2025).

time.[404] In explaining the ways that American public education is structured to adapt to and maintain white supremacy, Dr. W.E.B. Du Bois wrote that schools maintain a racially segregated population through what was later termed "caste education," which conditions individuals to act and behave in line with the customs of racial subordination rooted in slavery, but constantly evolving.[405] As Professor Clayton Pierce has observed, "Du Bois's concept of caste shows how racial and class inequality are maintained through adaptive techniques of governance such as Jim Crow laws and a segregated schooling system that ultimately work on behalf of racial capitalism . . . ."[406] School pushout is best understood as a modern technology within a centuries-old project of maintaining racial hierarchy through caste education. Indeed, many of the subjective violations under school discipline codes mirror offenses that were punished as part of plantation discipline during slavery or through the Black codes after slavery was abolished.[407]

Racial hierarchy is maintained in schools through school pushout using both attitudinal and institutional mechanisms.[408] Attitudinal mechanisms include implicit bias and the pervasive perception that Black students are less innocent and more deserving of punishment than white students. As discussed *supra*, deep-seeded racial stereotypes dating back to slavery lead to adultification bias,[409] or the perception of Black children as older, less innocent, and less worthy of nurturing and support, resulting in adults punishing Black students more harshly than their peers. Such attitudes are not always rooted in animus; they may also stem from the perception that Black students need harsher treatment to prepare for a world that will treat them differently.

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[404] For a discussion of the process through which the legacy of an event creates a pathway that reproduces itself after the initial event ends, see PAUL PIERSON, POLITICS IN TIME: HISTORY, INSTITUTIONS, AND SOCIAL ANALYSIS 17-53 (2004).

[405] W.E.B. DU BOIS, BLACK RECONSTRUCTION IN AMERICA, 1860-1880, at 695 (First Free Press ed. 1998).

[406] Clayton Pierce, *W.E.B. Du Bois and Caste Education: Racial Capitalist Schooling from Reconstruction to Jim Crow*, 54 AM. EDUC. RSCH. J. 23S, 33S (2017).

[407] *See* ERIC FONER, A SHORT HISTORY OF RECONSTRUCTION 60-61 (2014) (describing how recently freed Black people were punished for insubordination and insolence toward white people after Emancipation as way of maintaining the white-supremacist social order that existed under slavery).

[408] In using the terms institutional and attitudinal mechanisms, I draw on theories explaining how capital punishment serves to maintain white supremacy. *See* David Rigby & Charles Seguin, *Capital Punishment and the Legacies of Slavery and Lynching in the United States*, 694 ANNALS AM. ACAD. POL. & SOC. SCI. 205, 207 (2021) (theorizing that legacy of lynching and slavery are reproduced through attitudinal mechanisms, which influence extent of public support for racist policies and practices, and institutional mechanisms such as differential funding for prosecutors' offices and capital defense).

[409] EPSTEIN et al., *supra* note 34, at 2 (framing adultification bias as "perception of Black girls as less innocent and more adult-like than their white peers").

Institutional mechanisms include disciplinary codes and policies that were adopted to resist school desegregation through second-generation discrimination. As discussed *supra*, there are many examples of subjective rules and policies that were adopted during desegregation, including dress codes that are used to punish Black hairstyles or attire and rules that focus on regulating the conduct of Black students when labeled as insubordinate, defiant, and threatening.[410] These subjective policies lead to the disparate exclusionary punishment of Black students for behavior that is not considered offensive when committed by students of other backgrounds. Attitudes, including stereotypical and implicit bias, drive racially disparate outcomes under subjective policies. The high rates at which Black students are suspended and expelled in turn reinforce white supremacy by confirming the stereotype of Black students as generally disobedient, dangerous, and not suited for the educational environment.[411]

A legacy theory of discrimination would focus on how policies and practices, adopted for the purpose of maintaining white supremacy, continue to provide the infrastructure used to exclude students from school today. First, research indicates that Black students are disproportionately punished for subjective offenses in their school districts under policies adopted to resist desegregation.[412] Second, data shows that historical racial disproportionalities in exclusionary discipline date back to when districts first desegregated and adopted these policies.[413] The plethora of reports and records during desegregation, as well as HEW's recognition of second-generation discrimination, supports the nexus from desegregation to ongoing patterns of discrimination as demonstrated by studies showing that Black students today are disproportionately punished under policies that evince stereotypical views of their behavior.

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[410] *See* discussion *supra* Section I.B.2. A 2022 report by the United States Government Accountability Office concluded that "most dress codes (an estimated 59 percent) contain rules about students' hair, hairstyles, and hair coverings, and these rules may disproportionately impact Black students." U.S. GOV'T ACCOUNTABILITY OFF., GAO-23-105348, DEPARTMENT OF EDUCATION SHOULD PROVIDE INFORMATION ON EQUITY AND SAFETY IN SCHOOL DRESS CODES 14 (2022), https://www.gao.gov/assets/gao-23-105348.pdf [https://perma.cc/58ZX-6VM2].

[411] *See also* Kautz, *supra* note 324, at 20 (arguing that at systemic level, over time "[p]olicymakers and education reformers have used the suspension and school-based arrest statistics produced by these discriminatory systems of punishment to naturalize and rationalize school segregation, punitive disciplinary policies, and the reallocation of educational resources into surveillance and policing"); Simson, *supra* note 26, at 534 ("Completing the vicious cycle, the experiences of American youth confirms and rigidifies broader social meanings that associate inferiority and lack of true societal belonging with blackness, and superiority and societal leadership with whiteness.").

[412] U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 410, at 32.

[413] Kautz, *supra* note 323, at 1049-50.

By focusing on how current attitudinal and institutional policies serve to maintain white supremacy, legacy discrimination recognizes discrimination that is so deeply ingrained in society that contemporary actors do not even question the roots of current policies and the stereotypes they perpetuate. This is key because discrimination through school pushout has evolved with social norms that discourage explicit racism. Consider a recent study by Professor Aaron Kupchik and Professor Felicia A. Henry that examined "how resistance to school desegregation, measured by the number of court cases contesting school segregation from 1952 − 2002, relates to suspensions from school and days missed due to suspension."[414] They found that "schools in districts marked by resistance to school desegregation have significantly and substantially higher rates of suspensions for Black students and days missed by Black students due to suspension," regardless of whether the school actors were aware of the historical battles over desegregation.[415] Legacy discrimination focuses on the historical roots of a policy or practice, the institutional mechanisms through which they are sustained, and the ongoing evidence of attitudinal bias, even when actors are not conscious of their role in perpetuating systemic discrimination.[416]

A legacy theory reminds us that discrimination consists of policies and attitudes that reinforce a social order of white supremacy. It offers an answer for why this history matters even though exclusionary school discipline appears separate from the segregation that occurred decades ago. Under this analysis, segregation and the maintenance of segregated schools were merely a tool for maintaining a system of racial subordination within a long line of shifting strategies that persists to this day. Rather than considering whether the historical root of a discriminatory practice is "remote" in time, a legacy theory would consider the link between a historical discriminatory practice and the practice today through the persistence of attitudes and underlying policies.

E. *Building a Movement to Dismantle White Supremacy in Schools*

Demonstrating a historical link between suspensions today and past discrimination would support a more radical remedy to eliminate the discriminatory practice, instead of minor reforms. The failure to consider decades-old discrimination as relevant to conditions today limits our ability to redress school pushout as a race-based injury. In contrast, recognizing racial disparities in school discipline as a form of deep-seated, racial exclusion is more likely to lead to remedies that effectively redress the root of the harm: racial subordination.[417] If we think of school pushout as the result of zero-tolerance policies and laws that mandate suspension, this may lead us to focus on modest reforms, such as requiring in-school suspensions instead of out-of-school

[414] Kupchik & Henry, *supra* note 92, at 43.

[415] *Id.* at 43-44.

[416] *Id.* at 70-71.

[417] Welsh & Little, *supra* note 23, at 774.

suspension. Research has shown that reforms that focus on eliminating disciplinary consequences without addressing systemic racial bias only produce new forms of racially disparate outcomes.[418] Presciently, in 1978, when the National Institute of Education held a conference on alternatives to suspension, a spokesperson for the NEA observed that:

> [S]chools have become very sophisticated in their ways of excluding children from education . . . . If we provide in-school alternatives to suspension that are only more sophisticated means of excluding them from further opportunities, then we have continued to participate in an evil that will only further handicap our whole society.[419]

In contrast, a legacy theory of school pushout would focus on addressing the root: attitudes and policies that lead to suspensions and that continue to entrench a racial hierarchy today. This would require schools to abolish suspensions that constitute race-based subordination, and to directly address adults' racially biased attitudes that create discriminatory discipline. Indeed, a 2017 report by CADRE, a Los Angeles grassroots organization, observed that despite reforms to reduce reliance on zero-tolerance discipline, racial disparities in school pushout remain pervasive and anti-Black racism is "at the root of this crisis."[420] Only when school staff acknowledge the historical cause of racial disparities in exclusion will we begin to accurately diagnose and remedy its evolving legacy by eliminating the policies and directly attacking the bias that leads to school pushout.[421]

Mapping the historical links between how a racial hierarchy is maintained through pushout during the Civil Rights Era and today also creates pathways for

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[418] Rachel M. Perera, *Reforming School Discipline: What Works to Reduce Racial Inequalities?*, BROOKINGS (Sept. 12, 2022), https://www.brookings.edu/articles/reforming-school-discipline-what-works-to-reduce-racial-inequalities/ [https://perma.cc/W7UJ-J7JQ] (summarizing research showing that alternatives to suspension fail to reduce racial disparities but directly addressing racial bias and improving relationships between students and educators are more successful interventions when it comes to closing racial discipline gap); *see also* Skiba & White, *supra* note 92, at 5 (observing that despite overall decrease in school discipline since 2011-12, racial disparities persist in part due to overreliance on race-neutral intervention strategies); Rebecca A. Cruz, Allison R. Firestone & Janelle E. Rodl, *Disproportionality Reduction in Exclusionary School Discipline: A Best-Evidence Synthesis*, 91 REV. EDUC. RSCH. 397, 410 (2021) (finding new discipline practices involving universal screening and monitoring actually increased or were ineffective at reducing racial disparities); Welsh & Little, *supra* note 23, at 773 ("[T]he evidence suggests that remedies to discipline disparities should focus on the disposition and biases of teachers and school leaders' behavior management rather than student misbehavior.").

[419] NAT'L INST. EDUC., *supra* note 100, at 112.

[420] CADRE, HOW CAN YOU LOVE THE KIDS BUT HATE THE PARENTS? A SHADOW REPORT ON THE UNFULFILLED PROMISES OF LAUSD SCHOOL DISCIPLINE REFORM IN SOUTH LA 2 (2017), https://www.cadre-la.org/core/wp-content/uploads/2017/10/Final-SR-Report.CADRE_.Oct-2017.ENG_.pdf [https://perma.cc/HR7C-4245].

[421] Welsh & Little, *supra* note 23, at 781.

connecting to broader movements for racial justice in schools.[422] Just as abolitionists have called for moving beyond reformist reforms to changes that get at the root cause of white supremacist systems, school pushout requires a remedy that addresses the system of white supremacy in schools that allows pushout to persist.[423] A legacy theory of discrimination offers a historical analysis that can strengthen existing racial-justice organizing by recognizing the use of suspension and expulsion as a tool of white supremacy. Grassroots organizations like The Black Organizing Project, IntegrateNYC, and the Dignity in Schools Campaign are making radical demands for rethinking school discipline as a tool of racial subordination.[424] A legacy theory of school pushout helps to deepen and expand that frame. In so doing, a legacy theory can further enliven and support demands for radical social change in public education and the pursuit of an abolition democracy.[425]

Although this may at first seem like a lofty goal, grassroots organizations are in fact already succeeding in making demands to abolish racially biased school suspension policies. While complete abolition of suspensions may be unrealistic in an age of mass shootings that, though rare, push education policy in the direction of severe discipline, abolition of suspensions for subjective and low-level offenses is gaining support in some states. In October 2023, California passed Bill 274[426] which prohibits schools from issuing suspensions for discipline categories, including "willful defiance," tardiness, and truancy. As California legislators recognized, the vast majority of suspensions and

[422] As Professor Dorothy Roberts has written, "[w]hite supremacy's historical trajectory has central significance in much of abolitionist theorizing." *See* Roberts, *supra* note 350, at 56.

[423] *See, e.g.*, Amna A. Akbar, *Non-Reformist Reforms and Struggles over Life, Death, and Democracy*, 132 YALE L.J. 2497, 2507 (2023) ("Non-reformist reforms aim to undermine the prevailing political, economic, social order, construct an essentially different one, and build democratic power toward emancipatory horizons."); *see also* Zoe Masters, *After Denial: Imagining with Education Justice Movements*, 25 U. PA. J.L. & SOC. CHANGE 219, 241 (2022) ("The framework of non-reformist steps is not merely applied by analogy from abolition to education justice. . . . Building a world where prisons are unimaginable requires radically transforming schools . . . .").

[424] BLACK ORG. PROJECT, THE PEOPLE'S PLAN FOR POLICE FREE-SCHOOLS 3 (2019), http://blackorganizingproject.org/wp-content/uploads/2019/11/The-Peoples-Plan-2019-Online-Reduced-Size.pdf [https://perma.cc/H9WV-8GXF]; *The 5 Rs Of Real Integration*, INTEGRATENYC, https://integratenyc.org/platform [https://perma.cc/GF7R-WYS7] (last visited Mar. 18, 2025); *Solutions Not Suspensions: A Call for a Moratorium on Out-of-School Suspensions*, DIGNITY IN SCHS. CAMPAIGN, https://dignityinschools.org/take-action/solutions-not-suspensions-a-call-for-a-moratorium-on-out-of-school-suspensions/ [https://perma.cc/FF4Y-QHY7] (last visited Mar. 18, 2025).

[425] Abolition democracy is the term coined by W.E.B. Du Bois to describe the post-slavery movement for a society that ensures all people economic, political, and social capital to live as equal members. *See* DU BOIS, *supra* note 405.

[426] S.B. 274, 2023 Leg., 2023-2024 Reg. Sess. (Cal. 2023), 2023 Cal. Stat. 6128.

expulsions serve no educational purpose and unfairly exclude Black and other marginalized students. Congresswoman Ayanna Pressley introduced federal legislation called The Ending PUSHOUT Act, which would establish $2.5 billion in new federal grants to support states and schools that commit to ban unfair and discriminatory school discipline practices and improve school climates.[427] Removal from school should be limited to the rare instances where students pose an objective threat of immediate physical danger to others. Fifty years after CDF and other advocates called for an end to school suspensions,[428] it's time for lawmakers across the country to finally abolish suspensions and invest in research-based approaches for addressing student misbehavior.

CONCLUSION

As our country passes the seventieth anniversary of *Brown*, we must honestly reckon with the complex ways schools evaded the Supreme Court's mandate to desegregate. One significant way that school districts resisted *Brown*'s call for the end of a racial caste system is through a new use of exclusionary discipline in schools. Whereas suspension and expulsion were rarely, if ever, used prior to the 1960s, when meaningful efforts to end de jure segregation began, a high proportion of Black students faced a new form of exclusion through school discipline. School district officials, teachers, and staff deployed suspensions and expulsions as a tool to evade the prohibition on de jure segregation by disproportionately excluding Black students from newly desegregated schools under the guise of racially neutral rules. Unfortunately, many of the same school discipline policies and practices continue to exclude Black students today.

A theory of legacy discrimination helps to clarify how policies that seem race neutral are in fact rooted in a history of explicit racial exclusion. The evolving story of school pushout teaches us why racial disparities will not simply disappear with time when the institutional policies and racial bias that have led to racial subordination persist. Indeed, the disparities in school discipline data compiled in the 1970s have only worsened in school districts today.[429] Legacies of racism have long-lasting and powerful impacts when the infrastructure of discrimination remains unaddressed. Recognizing the historical roots of school pushout reveals its origins as a racial injury that has evolved, but never been eliminated. A legacy theory for understanding school pushout strengthens demands to end exclusionary discipline as a tool for maintaining white supremacy in schools today.

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[427] Ending PUSHOUT Act of 2019, H.R. 5325, 116th Cong. (2019); Improving Education by Empowering Parents, States, and Communities, 90 Fed. Reg. 13579 (Mar. 20, 2025).

[428] Gene I. Maerof, *An End of Student Suspensions Is Urged*, N.Y. TIMES, Sept. 17, 1975, at 36, https://www.nytimes.com/1975/09/17/archives/an-end-of-student-suspensions-is-urged.html ("The Children's Defense Fund called today for virtually ending the practice of suspending youngsters from school, declaring that 97 per cent of the more than one million suspensions that occur each year are not for violent or dangerous offenses.").

[429] *See* Wald & Losen, *supra* note 6, at 25-27.