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FOURTH ANNUAL
VINSON & ELKINS LLP/
HOWARD LAW JOURNAL SYMPOSIUM

Introduction

DEREK W. BLACK*

Perhaps the most striking commonality among the challenges of securing equal educational opportunities for racial and ethnic minorities today is how different these challenges are from those of the past. These challenges may not raise the same social controversies of the past, but they involve complexities that are not easily captured by traditional concepts of discrimination and equity. Even the fundamental question of how to define and identify racially disadvantaged groups has changed. Racial categories have now expanded far beyond traditional concepts of black and white. The evolution of racial categories has substantive effects that will force us to adjust our concepts and expectations of equity. Most obviously, educational diversity and affirmative action policies can easily lose their footing if they do not account for changes in the concepts of race and diversity themselves. Yet, in other areas of education, the underlying policies themselves are changing and present problems beyond the racial categories involved. For instance, federal policy in regard to students with disabilities is now as concerned with limiting the number of students who are identified with disabilities as it is with providing services; the schoolhouse has gone from a place where criminal justice was but a mere tangential issue and student discipline proceeded from the perspective of educational goals to a place where the line between the schoolhouse and jail house are no longer clear; and the affirmative obligation to provide language services has shrank from one that might include the right to bilingual education to one that explicitly prohibits it in some places.

Changes of this order make it impossible to frame questions of educational equity simply as whether minorities are receiving equal educational opportunities; whether special education students are receiving the services they need; whether a set of rules different than the criminal justice system

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should apply to searches, seizures, and punishments in schools; or whether the services provided to English Language Learner (“ELL”) students are best suited to their needs. And framing these questions in terms of race only adds further complexity because minorities in general and African Americans in particular are incredibly diverse groups,¹ within which some students fair relatively well in education and others may be regressing. The articles in this Symposium issue move away from the standard questions and implicate new and important questions. First, does speaking of African Americans and minorities in general hide the reality of today’s diversity, as well as grossly underestimate the barriers to quality education and higher education that non-immigrant, non-biracial, third-generation inner city African Americans face? If so, current diversity policies may struggle to achieve the ends for which they were originally designed.

Second, to what extent do the students served in the current special education system actually have disabilities and to what extent does the special education process label as disabilities problems that are otherwise manifestations of racial bias and educational inadequacy? Data suggests that many African Americans who are labeled as having a disability do not actually have a disability or have a disability that would not be labeled as such if the general education program were better.² Thus, the over-identification of minorities may be a function of bias in the identification system or racial inequity in the structure of education that affords African Americans as a group an inadequate education.

Third, have the constitutional standards regarding student discipline become so far removed from reality that they are meaningless in terms of today’s most vulnerable students? The Supreme Court originally premised a lower set of constitutional standards for the discipline, search, and seizure of students because it characterized schools as students’ partners who primarily sought their best interests,³ not as students’ adversaries who participated in a criminal justice system designed to punish behavior. The gradual and increased interaction between school and criminal policy has for years begged the question of whether a dual set of standards is appropriate,⁴ but it is no longer clear that the answer to this question even matters. Police are now in schools on a constant basis.⁵ Regardless of what standards are applied to police interactions with students, the bigger incursion is simply that

1. Kevin Brown, *Should Black Immigrants Be Favored Over Black Hispanics and Black Multiracials in the Higher Education Programs?*, 54 *How. L.J.* 255, 258 (2011) (noting at least three racial/ethnic groups in the traditional “Black/African/African American” category, including: Hispanics, Black Multiracials, and Black/African Americans).

2. Daniel J. Losen, *Challenging Racial Disparities: The Promise and Pitfalls of the No Child Left Behind Act’s Race-Conscious Accountability*, 47 *How. L.J.* 243, 257 (2004).

3. *See, e.g.*, *Goss v. Lopez*, 419 U.S. 565 (1975).

4. Josh Kagan, Note, *A Civics Action: Interpreting “Adequacy” in State Constitutions’ Education Clauses*, 78 *N.Y.U. L. Rev.* 2241 (2003).

5. Lisa H. Thureau & Johanna Wald, *Controlling Partners: When Law Enforcement Meets Discipline in Public Schools*, 54 *N.Y.L. Sch. L. Rev.* 977, 978 (2009-2010).

they are in schools and intricately part of the educational environment. These facts alone represent a disturbing change in the nature of the education process. And as a result, the questioning, searching, detention, punishment, and incarceration of students by police authorities has risen and will continue to rise regardless of whether those authorities are made to comply with higher standards. The toll this shift is exacting on minority students is staggering.

Similarly, with ELL students, we must ask whether federal laws provide any meaningful protection for students' core educational interests. Currently, federal law requires affirmative action to address the educational barriers stemming from language that students face,⁶ but the law has always maintained a deferential stance toward what form that affirmative action might take.⁷ That deference has been so wide that states have been almost free to disregard its responsibility altogether. So long as a school system has some basis for its action, it has mattered relatively little how well that action works or whether other alternatives are available. Moreover, given state level movements to take certain ELL programs and bilingual education off the table and the refusal of courts to intervene,⁸ it is no longer clear that students' rights are being protected.

The articles in this Symposium delve further into each of these issues and provide not only questions but answers. Professor Kevin Brown's article, *Should Black Immigrants Be Favored Over Black Hispanics and Black Multiracials in the Higher Education Programs?*, questions the benefits of the United States Department of Education's new classification and reporting regime that requires educational institutions to employ a standardized method of collecting and reporting data on racial/ethnic groups. He argues that the new system of categorization diminishes meaningful classification distinctions between certain racial/ethnic groups and indirectly leads to favorable treatment for certain groups in the college admissions process and not others—unfair treatment for which there is no legally sound basis. Professor Brown's article sets the tone for the directive of a fairer classification and reporting system and, as a first step to avoid inequity, urges admissions officers to distinguish, for instance, "Black Immigrants" from "Ascendants" in their "Black/African American" category. He suggests doing so would also better comport with the Court's legal standard for justifying the use of race and ethnicity in higher education admissions in the first place.⁹

In *Race and Response-to-Intervention in Special Education*, Angela Ciolfi and James Ryan analyze the tradeoffs involved in current legal poli-

6. Equal Educational Opportunities Act of 1974, 20 U.S.C. § 1703 (2006).

7. *See, e.g.*, *Casteneda v. Pickard*, 648 F.2d 989 (5th Cir. 1981).

8. *See, e.g.*, CAL. CONST. art. I, § 31(a) ("California Proposition 209").

9. *See Grutter v. Bollinger*, 539 U.S. 306, 343 (2003) (holding constitutional a graduate school's "narrowly tailored use of race in admissions decisions to further a compelling interest in obtaining the educational benefits that flow from a diverse student body").

cies that aim to reduce the overrepresentation of students of color in special education. In particular, Ciolfi and Ryan focus on the Response-to-Intervention (“RTI”) model, which is intended to provide a more reliable method for identifying students with learning disabilities. On one level, the model has the potential to reduce racial disproportionality in special education, but at the same time, it eliminates procedural protections that some students would otherwise have and need. Students deemed to have behavioral problems—disproportionately students of color—are often labeled as having a disability. One of the benefits of this classification is that these students are, in some circumstances, protected from certain disciplinary measures. Even if a school appropriately suspends or expels a special education student, the school still must provide special education services for the student during the time of dismissal. The RTI model, by forestalling the identification of disabilities and the rights that follow, poses the risk that minority students, who are already disproportionately disciplined, will experience even higher levels of suspensions and expulsions with no recourse. Ciolfi and Ryan’s article offers proposals that would strike a better balance between properly identifying students in need of special services and providing otherwise struggling students with sufficient protection from increasingly punitive disciplinary practices. The authors conclude that, among other measures, increasing behavioral supports in the classroom and extending disciplinary procedural protections to RTI students would allow schools to both address behavioral issues, and resist the tendency to mislabel behavior issues as disabilities without also placing those students at risk of unwarranted discipline.

Katayoon Majd’s article, *Students of the Mass Incarceration Nation*, provides a perfect analog to Ciolfi and Ryan’s article, as she takes up the issue of student punishment at the macro level, charging that student disciplinary practices have morphed from individualized educational decisions into a routinized system that funnels students into jail. In particular, she focuses on the education system’s use of punitive punishment and the alarming rates at which students of color are targeted by these methods. Majd then argues that favoring a punitive system only exacerbates the nation’s mass incarceration crisis and pushes students into a downward spiral rather than offering them the educational tools that they need to become productive members of society. Majd concludes that, if children are to escape these counterproductive punitive approaches that lead to mass incarceration, both schools and the criminal justice system must be reformed. But they cannot be reformed in silos. Rather, various constituent communities, including those in education and criminal justice, must act in concert to push for change.

This Symposium concludes with Dean Rachel Moran’s, *Equal Liberties and English Language Learners: The Special Case of Structured Immersion Initiatives*, which scrutinizes the restrictions that Structured

English Immersion (“SEI”) initiatives place on local communities’ and administrators’ ability to select effective pedagogical techniques to teach ELL students as linguistic minorities. Dean Moran argues that current SEI initiatives, which require ELL students to be overwhelmingly taught in English, also place significant burdens on the rights of ELL parents to meaningfully participate in selecting proper instructional methods for their children. Dean Moran draws important connections between mandates of equal treatment based on race and language, but reveals how the distinctions between the two have resulted in a failure of courts to appropriately protect the latter. She argues that our civil rights framework must incorporate prohibitions against language and cultural disadvantage or discrimination to the same extent it does for race.

In sum, each article in this Symposium offers solutions to the increasingly complex problem of leveling the nation’s educational opportunities. While so much has changed since *Brown v. Board of Education*,¹⁰ the basic reality of disproportionate numbers of people of color suffering under the inequalities of educational opportunity has not. Through this Symposium, the authors not only shed light on some of the educational system’s inequities, but also encourage both policymakers and average citizens to actively engage in the pursuit of equal educational opportunities for all. In closing, I would like to thank the authors for their participation and the law firm of Vinson & Elkins LLP for their sponsorship of this Symposium. Both the authors’ and the firm’s significant contributions make it possible for the *Journal* to publish meaningful work.

10. 347 U.S. 483 (1954).

Should Black Immigrants Be Favored Over Black Hispanics and Black Multiracials in the Admissions Processes of Selective Higher Education Programs?

KEVIN BROWN*

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INTRODUCTION

Since the origin of affirmative action, selective higher education institutions¹ have generally lumped all blacks² into a unified Black/African/African American category.³ However, this practice of treating all blacks alike has now changed. The Department of Education (“DOE”) issued the *Final Guidance on Maintaining, Collecting, and Reporting Racial and Ethnic Data to the United States Department of Education* (“Guidance”) in October 2007, which had a final imple-

1. Not all higher education institutions use affirmative action. Many higher education institutions have open admissions policies, or they admit any student that meets their minimum academic criteria. The term “selective higher education programs” refers to those institutions that have selective admissions policies. As a result, they must make choices among qualified applicants in determining their student bodies.

2. The term “blacks” as used in this Article is used in its current and historical sense to apply to all people in the United States with some African descent.

3. For example, almost 350 public and private colleges accepted the Common Application form and almost eighty institutions accepted the Universal College Application form for the incoming 2009-2010 freshmen class. See *First Year Application*, THE COMMON APPLICATION, https://www.universalcollegeapp.com/Library/PrintPreview/Universal_College_Application.pdf (last visited Jan. 19, 2011) (lumping all black students into a single “Black or African American” category); THE COMMON APPLICATION FOR UNDERGRADUATE COLLEGE ADMISSION, <https://www.commonapp.org/CommonApp/default.aspx> (last visited Jan. 19, 2011) (lumping all black students into a single “Black or African American (including Africa and Caribbean)” category). For a list of the 346 institutions that accepted the Common Application for the 2009/10 academic year, see *Member College and Universities*, THE COMMON APPLICATION, <https://www.commonapp.org/CommonApp/Members.aspx?p=1> (last visited Jan. 19, 2011). For a list of the institutions that accepted The Universal College Application, see *Colleges, Membership*, UNIVERSAL COLLEGE APPLICATION, <https://www.universalcollegeapp.com/index.cfm?ACT=Display&APP=APPONLINE&DSP=CollegeMembership> (last visited Nov.19, 2008).

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mentation date for the reporting school year of 2010-2011.⁴ The Guidance marked the first time that the federal government dictated the procedures that educational institutions, including selective higher education programs, must follow when collecting data on the race and ethnicity of their students and reporting it to the DOE.⁵ Previous federal regulations, such as Title IV of the Higher Education Act, required colleges and universities to report such data, but the DOE did not specify the collection procedures.⁶ This practice left higher education programs free to gather information using different methods. Such flexibility was important because it allowed higher education programs to respond more efficiently to their various local needs for racial and ethnic data about their students.⁷

Beginning with the 2010-2011 academic year, educational institutions have been required to collect racial and ethnic data using a two-question format. Under the Guidance, all educational institutions are first required to ask respondents if they are Hispanic/Latino. Second, they must provide individuals with the ability to mark one or more of the following racial categories that apply to them: (1) American Indian or Alaska Native,⁸ (2) Asian,⁹ (3) Black or African American,¹⁰ (4) Native Hawaiian or Other Pacific Islander,¹¹ and/or (5) White.¹² The Guidance requires that educational institutions report individuals who indicate that their ethnicity is Hispanic/Latino to the DOE as Hispanic/Latino, regardless of the racial categories they may select.¹³ In addition, the Guidance requires educational institutions to report

4. Final Guidance on Maintaining, Collecting, and Reporting Racial and Ethnic Data to the Department of Education, 72 Fed. Reg. 59,266, 59,267 (Oct. 19, 2007).

5. See C. Anthony Broh & Stephen D. Minicucci, Racial Identity and Government Classification: A Better Solution 1 (May 28, 2008) (unpublished manuscript) (on file with author), available at <http://www.airweb.org/webrecordings/forum2008/Broh%20and%20Minicucci%20II%20v6-1-1.pdf> (on file with the Ass'n for Institutional Research).

6. *Id.*

7. See *id.*

8. Final Guidance on Maintaining, Collecting, and Reporting Racial and Ethnic Data to the Department of Education, 72 Fed. Reg. at 59,274 (“A person having origins in any of the original peoples of North and South America (including Central America), and who maintains tribal affiliation or community attachment.”).

9. *Id.* (“A person having origins in any of the original peoples of the Far East, Southeast Asia, or the Indian subcontinent including, for example, Cambodia, China, India, Japan, Korea, Malaysia, Pakistan, the Philippine Islands, Thailand, and Vietnam.”).

10. *Id.* (“A person having origins in any of the black racial groups of Africa.”).

11. *Id.* (“A person having origins in any of the original peoples of Hawaii, Guam, Samoa, or other Pacific Islands.”).

12. *Id.* (“A person having origins in any of the original peoples of Europe, the Middle East, or North Africa.”).

13. See *id.* at 59,274, 59,276-77.

as “Two or More Races” those non-Hispanic/Latinos who mark more than one of the racial categories.¹⁴ As a result, colleges and universities now report as Hispanic/Latinos those individuals who answer “yes” to the Hispanic/Latino question and check black as one of their racial categories (“Black Hispanics”).¹⁵ Colleges and universities also must report those non-Hispanic/Latino individuals who check black and at least one other racial box (“Black Multiracials”)¹⁶ in their counts of Two or More Races, along with all other multiracial individuals. Thus, for the first time in American history, higher education programs, including selective ones, are required to separate individuals who before they would have placed in the “Black/African/African American” category into, effectively, Black Hispanics, Black Multiracials, and Black/African Americans.

The Guidance does not dictate how selective higher education programs apply affirmative action admissions policies to Black Hispanic and Black Multiracial applicants. In *Grutter v. Bollinger*, the Supreme Court specified that when selective higher education programs use race and ethnic classifications for determining admissions, they must employ an individualized admissions process.¹⁷ Nevertheless, there is little doubt that admissions officials—at least in their minds—compare the standardized tests scores and grade point averages of a particular applicant from a given racial/ethnic group to the scores and grade point averages of other applicants of the same racial/ethnic group.¹⁸ The Guidance’s new categorization requirements raise the question of whether, in their mental comparisons, admissions officials of selective higher education programs should compare Black Hispanics and Black Multiracials with Black/African Americans? Alternatively, should admissions officials compare Black Hispanics to

14. *Id.*

15. In this Article, the term “Black Hispanics” includes individuals who indicate that they are of Hispanic/Latino and black ancestry. Since the designation of racial/ethnic ancestry on educational forms is a matter of self-identification, it is possible that a black person with Hispanic/Latino ancestry as well will decide only to check the Black/African American box or only indicate that they are Hispanic/Latino. Thus, there may not be a precise alignment between Black Hispanics and those blacks with Hispanic/Latino ancestry.

16. In this Article, the term “Black Multiracials” includes a person of black ancestry who also has a non-black parent. Since the designation of racial ancestry on educational forms is a matter of self-identification, it is possible that a black person with a non-black parent may decide only to check the Black/African American box. Thus, there may not be a precise alignment between Black Multiracials and those non-Hispanic/Latinos who designate black and at least one other racial box on educational forms.

17. See *Grutter v. Bollinger*, 539 U.S. 306, 334 (2003).

18. This was one of the points that Chief Justice Rehnquist stressed in his dissenting opinion in *Grutter*. See *Grutter*, 539 U.S. at 382-86 (Rehnquist, C.J., dissenting).

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other applicants in the Hispanic/Latino category and Black Multiracials to others in the Two or More Race category? Or, should admissions officials at selective higher education programs employ a completely different method for treating the racial and ethnic identity of Black Hispanics and Black Multiracials?¹⁹

Focusing on the racial/ethnic standardized test score gaps on tests used for admissions purposes by higher education programs reveals the precarious situation the Guidance creates for both Black Hispanic and Black Multiracial applicants. The average combined SAT math, critical reading, and writing score of blacks in 2010 was 1277.²⁰ In contrast, the combined SAT scores for the various Hispanic/Latino groups were 1369 for Mexican Americans, 1363 for Puerto Ricans, and 1363 for other Latinos.²¹ American Indians and Alaskan Natives had an average combined SAT score of 1444; the average score for whites was 1580 and 1636 for Asian Americans.²² Significant racial/ethnic gaps also exist on standardized tests used to determine admissions to selective graduate programs like the GMAT, the GRE, the LSAT and the MCAT. For example, the average LSAT score for African Americans who took the test during the 2007-2008 academic year was 142.2, 146.3 for Hispanics, 148 for Mexican Americans, 148.1

19. The scope of this Article is limited to addressing the fact that the Guidance will lead to better treatment of Black Immigrants in the admissions process than that of Black Hispanics or Black Multiracials. I have argued that, due to the Guidance, now is the appropriate time for selective colleges and universities to change their admissions processes for applicants that indicate they have some black ancestry. For a detailed proposal of my recommendations, see Kevin Brown, *Change in Racial and Ethnic Classifications Is Here: Proposal to Address Race and Ethnic Ancestry of Blacks for Affirmative Action Admissions Purposes*, 31 *HAMLIN J. PUB. L. & POL'Y* 143, 149-51 (2009).

20. See COLLEGEBOARD, 2010 COLLEGE-BOUND SENIORS: TOTAL GROUP PROFILE REPORT 3 tbl.8 (2010), available at <http://professionals.collegeboard.com/profdownload/2010-total-group-profile-report-cbs.pdf>. The combined SAT scores for blacks was 1277 (critical reading: 429, math: 428, and writing: 420) out of 2400. See *id.*

21. *Id.* (stating that the combined SAT scores for Mexican Americans was 1369 (critical reading: 454, math: 467, and writing: 448); for Puerto Ricans was 1363 (critical reading: 454, math: 462, and writing: 447); and for other Latinos was 1363 (critical reading: 454, math: 462, and writing: 447)).

22. *Id.* (stating that the combined SAT scores for American Indians and Alaskan Natives was 1444 (critical reading: 485, math: 492, and writing: 467), for whites was 1580 (critical reading: 528, math: 536, and writing: 516), and for Asian Americans was 1636 (critical reading: 519, math: 591, and writing: 526)). On the ACT, blacks, graduating in the class of 2010, had a composite score of 16.9, compared to whites scoring 22.3, Asians scoring 23.4, Hispanics scoring 18.6, and Native Americans scoring 19.0. See ACT, THE CONDITION OF COLLEGE & CAREER READINESS 7 (2010), available at <http://www.act.org/research/policymakers/cccr10/pdf/ConditionofCollegeandCareerReadiness2010.pdf>.

for Native Americans, 152 for Asian Americans, and 152.6 for Caucasians.²³

Before the implementation of the Guidance, when admissions officials compared the applications of most Black Hispanics and Black Multiracials to others in their racial/ethnic group, they would have compared them to the applications in the Black/African American category. Because the test scores of those in the Black/African American category were lower than those in the various Hispanic/Latino or other racial categories, this comparison maximized the admissions prospects of Black Hispanics and, to a far greater extent, Black Multiracials. If admissions officials start to compare Black Hispanics to others in the Hispanic/Latino category, then such a comparison likely will have a negative effect on the admissions prospects of Black Hispanics when compared to pre-Guidance practices. However, a change in the comparison group of Black Multiracials may have a devastating impact on their admissions prospects to selective higher education institutions. White/Asian multiracials are likely to constitute a significant proportion of those in the Two or More Races category.²⁴ Thus, the Two or More Races applicants' average standardized test scores will be much higher than those of the Black/African American category.

The Guidance's potential impact on future admissions prospects of Black Hispanic and Black Multiracial applicants is only half of the story. The purpose of the Guidance is to "obtain more accurate information about the increasing number of students who identify with more than one race."²⁵ Therefore, the Guidance does not mandate the use by educational institutions of ethnic subcategories within the Hispanic/Latino or any of the five racial categories on forms used to gather racial and ethnic information.²⁶ As a result, by complying with the Guidance, selective higher education institutions will only gener-

23. SUSAN P. DALESSANDRO ET AL., LSAC, LSAC RESEARCH REPORT SERIES: LSAT PERFORMANCE WITH REGIONAL, GENDER, AND RACIAL/ETHNIC BREAKDOWNS: 2001–2002 THROUGH 2007–2008 TESTING YEARS 13 (2008), available at <http://www.lsacnet.org/LSACResources/Research/TR/TR-08-03.pdf>. The standard deviations of the various racial/ethnic groups were 8.4, 9.3, 8.9, 9.1, 10, and 9, respectively. *Id.*

24. The largest groups of non-Hispanic/Latino multiracials on the 2000 Census were White/American Indian and Alaskan Native (1,082,683) and White/Asian (868,395). For a listing of the largest groups in the Two or More Races category on the 2000 Census, see *infra* note 187 and accompanying text.

25. Final Guidance on Maintaining, Collecting, and Reporting Racial and Ethnic Data to the Department of Education, 72 Fed. Reg. 59,266, 59,267 (Oct. 19, 2007).

26. *Id.*

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ate internal data that allows them to separate Black Hispanics and Black Multiracials from Black/African Americans. They will not be able to determine the ethnic breakdown of blacks in the Black/African American category. In other words, the selective higher education institutions will not know how many of those included in their Black/African American category are foreign-born blacks²⁷ or United States-born blacks who have at least one foreign-born black parent. This Article refers to blacks who have at least one foreign-born black parent as “Black Immigrants.”

Even though colleges and universities have not typically separated their black students into different racial/ethnic categories, scholars and commentators have recently pointed to a growing change in the racial and ethnic make-up of blacks enrolled in America’s selective higher education programs.²⁸ For example, at a gathering of the Harvard Black Alumni in 2003, two Harvard professors noted that Black Multiracials and Black Immigrants, together, comprised two-thirds of Harvard’s black undergraduate population.²⁹ Following the “Harvard Revelation,” a 2005 article written by Ronald Roach in *Diverse Issues in Higher Education* pointed to the findings of a study of the black presence that entered twenty-eight selective colleges and universities in 1999. The study revealed that 17% of those black freshmen were Black Multiracials and 41% were either Black Multiracials or Black Immigrants.³⁰ A follow-up to this study focused solely on the

27. One of the ways that foreign-born blacks come to the United States is on student visas. The Guidance also requires educational institutions to report individuals on student visas under a separate category of foreign students. See Broh & Minicucci, *supra* note 5, at 15. The average number of Blacks/Africans who were enrolled in higher education institutions who are also on student visas in the United States from 2001 to 2006 was approximately 33,100 per year. West Indians accounted for less than half of this number with an annual amount of 14,100. However, these statistics do not include the race of the students. Most, but not all are black. Census 2000 statistics suggest, for example, that many students studying in the United States from Kenya may be of South Asian origin. Thus, foreign-born blacks on student visas make up less than fifty thousand individuals on college campuses. See Mary Mederios Kent, *Immigration and America’s Black Population*, POPULATION BULL., Dec. 2007, at 10 tbl.5, available at <http://www.prb.org/pdf/07/62.4immigration.pdf>. These foreign-born black students may be included in the counts of Black Immigrants at colleges and universities. In contrast, there were nearly 2.5 million blacks enrolled in college in 2007. See U.S. CENSUS BUREAU, U.S. CENSUS BUREAU, STATISTICAL ABSTRACT OF THE UNITED STATES: 2011, at 180 tbl.279, available at <http://www.census.gov/compendia/statab/2011/tables>.

28. Joanna Walters, ‘Any Black Student Will Do’: A Disturbing Report Shows African Americans are Being Squeezed Out of the US University Population, THE GUARDIAN, May 29, 2007, at 12, available at <http://www.guardian.co.uk/education/2007/may/29/international-educationnews.highereducation>.

29. Ronald Roach, *Drawing Upon the Diaspora*, DIVERSEEDUCATION.COM (Aug. 25, 2005), <http://diverseeducation.com/article/4558/>.

30. *Id.*

presence of Black Immigrants. That study noted that even though Black Immigrants only constituted 13% of the black eighteen and nineteen year olds, they made up 27% of black freshmen at these institutions.³¹ The percentage of Black Immigrants was actually higher at the ten most selective schools in the study, constituting 35.6% of their student bodies.³² It was even higher at the four Ivy League schools (Columbia, Princeton, University of Pennsylvania, and Yale) in the survey where they made up 40.6% of the black students enrolled.³³ According to Dr. Michael T. Nettles, Vice President for Policy Evaluation and Research at the Educational Testing Service, “If Blacks are typically 5 and 6 [%] of the population at elite colleges, then the representation of native U.S. born African-Americans might be closer to 3 [%].”³⁴ In addition, a survey of college freshmen who entered the thirty-one elite colleges and universities comprising the Consortium on Financing Higher Education in the Fall 2007, revealed that 19% of the black students were Black Multiracials and an additional 4% were Black Hispanics.³⁵ However, according to the 2000 Census counts, in 2007, only 6.3% of the black population between the ages of seventeen and twenty-one was multiracial.³⁶

While complying with the Guidance will generate data about the overrepresentation of Black Multiracials, and possibly Black Hispanics, among black students, it will not generate data about the dramatic increasing number of Black Immigrants in the student bodies of selective higher education institutions.³⁷ Yet, just like Black Multiracials, Black Immigrants are also likely to be overrepresented among black students at selective higher education programs. Like Black Multiracials, Black Immigrants tend to come from families with more parental education and higher family incomes than other blacks.³⁸ In addition, Black Immigrants, like Black Multiracials, also have at least one parent who is not a descendant from the group of blacks whose ancestral line experienced discrimination in the United States. Treat-

31. A 2006 article also discussed baseline data from the National Longitudinal Survey of Freshmen students who entered twenty-eight selective colleges and universities in 1999. See Douglas S. Massey et al., *Black Immigrants and Black Natives Attending Selective Colleges and Universities in the United States*, 113 AM. J. EDUC. 243, 245-48 (2007).

32. *Id.*

33. *Id.*

34. Roach, *supra* note 29.

35. Brown, *supra* note 19, at 147-48.

36. *Id.*

37. See *infra* notes 250-62 and accompanying text.

38. Brown, *supra* note 19, at 153-54.

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ing all black applicants alike has obscured the possible substantial underrepresentation among the black students in the student bodies of selective higher education programs of traditional blacks, those that others have termed as “third generation” or “legacy” blacks.³⁹ This Article, however, will refer to individuals with two United States-born parents who were considered black when the applicant was born, “Ascendants.”⁴⁰

In brief, the implementation of the Guidance is likely to affect the admissions prospects of four different racial/ethnic groups of black applicants to selective higher education programs: Black Hispanics, Black Multiracials, Black Immigrants, and Ascendants.⁴¹ As the impact of the Guidance unfolds, the tendency of admissions committees to compare Black Hispanic applicants to other Hispanic/Latino applicants and Black Multiracials to other applicants in the Two or More Races category will increase. These reclassifications of Black Hispanics and Black Multiracials are likely to negatively impact the admissions prospects to selective higher education programs of these groups. While Ascendants should benefit from the implementation of

39. See Angela Onwuachi-Willig, *The Admission of Legacy Blacks*, 60 VAND. L. REV. 1141, 1149 n.27 (2007). Onwuachi-Willig and others use the terms “Descendants” or “Legacy Blacks” to denote these blacks to make the connection between their ancestral lineage as descendants of blacks who were enslaved and/or segregated. *Id.*

40. This Article uses the term “Ascendants” in order to denote the historical connection between this group of blacks and the history of the ascendancy of blacks out of slavery and segregation. The ascendancy of this group of blacks not only helped to bring about affirmative action, but also made possible the dramatic increases in interracial cohabitation, mixed-race blacks, and the immigration of blacks to the United States that has occurred over the past forty-five years.

41. This Article addresses current applicants to selective higher education programs. Thus, this Article addresses a change in the racial and ethnic ancestry of blacks applying to selective higher education institutions that has occurred since the advent of affirmative action. As a result, I agree, wholeheartedly, with President Obama’s decision to indicate that he was Black/African American on his census form. See RAINIER SPENCER, *REPRODUCING RACE: THE PARADOX OF GENERATION MIX* 144 (2010). In 1961, when the President was born, interracial marriage between blacks and whites was still illegal in over twenty states and there were only fifty-one thousand black/white married couples in the country. See G. REGINALD DANIEL, *MORE THAN BLACK?: MULTIRACIAL IDENTITY AND THE NEW RACIAL ORDER* 98 (2002). The 1960 Decennial Census stated, “A person of mixed White and Negro blood was to be returned as Negro, no matter how small the percentage of Negro blood.” C. Matthew Snipp, *Racial Measurement in the American Census: Past Practices and Implications for the Future*, 29 ANN. REV. SOC. 563, 568 (2003). The use of the one-drop rule for census purposes reflected the general American ethos at the time; mixed-race black persons were not distinguishable from monoracial blacks. American society also did not distinguish foreign-born blacks, who constituted less than 1% of the black population, from native blacks. See Campbell J. Gibson & Emily Lennon, *Historical Census Statistics on the Foreign-Born Population of the United States: 1850-1990* tbl.8 (U.S. Census Bureau Population Div., Working Paper No. 29, 1999), available at <http://www.census.gov/population/www/documentation/twps0029/tab08.html> (excluding the 1960 population of Alaska and Hawaii).

the Guidance, Black Immigrants will likely benefit the most. Furthermore, the number and percentage of Black Immigrants among blacks approaching college age is likely to increase substantially in the coming years, given that the percentage of blacks that are foreign-born increased from 3.1% in 1980⁴² to 8% in 2007.⁴³ Accordingly, this Article discusses how selective higher education programs reached the situation where the implementation of the Guidance could lead to more favorable treatment of Black Immigrants than Black Hispanics and Black Multiracials. This Article also argues that admissions committees of selective higher education institutions should not provide more favorable treatment to Black Immigrants because the Guidance placed them in the Black/African American category than to Black Hispanics placed in the Hispanic/Latino category or Black Multiracials placed in the Two or More Races category.⁴⁴

Before 1970, the federal government did not attempt to standardize the collection and reporting of racial and ethnic data. However, due to changes in American discrimination law in the 1950s and 1960s, a number of federal agencies were involved in generating racial and ethnic data.⁴⁵ The need to develop consistency in the production of this data generated the first effort by the federal government to standardize the collection and reporting of this data in the 1970s. In 1978, this effort eventually produced *Statistical Policy Directive No. 15, Race and Ethnic Standards for Federal Statistics and Administrative Reporting* (“Directive 15”). Part I of this Article discusses the federal government’s efforts that led to the adoption of Directive 15.

Directive 15 provided the standards for collecting and reporting racial and ethnic data for the next twenty years. However, intense debate ensued about the categories and definitions of Directive 15, which caused the federal government to undertake a review of Direc-

42. Gibson & Lennon, *supra* note 41.

43. The Census Bureau estimated that there were 36,657,000 non-Hispanic blacks of which 2,785,000 were foreign born (or 7.6%). See ELIZABETH M. GRIECO, U.S. CENSUS BUREAU, RACE AND HISPANIC ORIGIN OF THE FOREIGN-BORN POPULATION IN THE UNITED STATES: 2007 AMERICAN COMMUNITY SURVEY REPORT 4 tbl.1 (2010), available at <http://www.census.gov/prod/2010pubs/acs-11.pdf>. In addition, 187,000 of the 677,000 Hispanic/Latinos who checked black as their only racial category were foreign-born. *Id.* Thus, the total of the single race black population, including Hispanic/Latinos, was 37,335,000 of which 2,972,000 or 7.96%. See *id.*

44. The scope of this Article is limited to discussing how the Guidance provides a competitive advantage to Black Immigrants over Black Hispanics and Black Multiracials. I have also argued that Ascendants should be treated better than Black Hispanics, Black Multiracials, and Black Immigrants in the admissions process of selective higher education institutions. See Brown, *supra* note 19, at 147-48.

45. See *infra* Part I.

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tive 15 from 1993 to 1997. In October 1997, the review culminated in the Office of Management and Budget's ("OMB") issuance of the *Revisions to the Standards for the Classification of Federal Data on Race and Ethnicity* ("1997 Revised Standards").⁴⁶ The collection and reporting of racial and ethnic data for the 2000 Census generally followed the 1997 Revised Standards. Part II of this Article discusses the adoption of the 1997 Revised Standards and concludes by reviewing the racial and ethnic data generated by the 2000 Census.

The 1997 Revised Standards required, after a transition period to review the data from the 2000 Census, that all federal programs adopt consistent standards. In accordance with this requirement, the DOE adopted the Guidance in October 2007. Data reported to the DOE pursuant to the Guidance deviates from the way the Census Bureau reported racial and ethnic data collected during the 2000 Census. The Census Bureau has the capacity to generate far more data about race and ethnicity of the American population than individual educational institutions have to generate such data about their students. The Census Bureau published data that not only included the separate racial counts of those in the Hispanic/Latino categories, but it also published counts for fifty-seven different racial combinations in the Two or More Races category. Thus, the 2000 Census data allowed for the separation of Black Hispanics from others in the Hispanic/Latino category and Black Multiracials from others in the Two or More Races category. When the DOE adopted the Guidance, however, it concluded that it was too administratively burdensome to have all educational institutions report the separate racial identities of those in the Hispanic/Latino and Two or More Races categories. Thus, educational institutions can generate internal data that provides separate counts of Black Hispanics from other Hispanic/Latinos and Black Multiracials from others in the Two or More Races category. However, in the data educational institutions report to the DOE it is not possible to obtain these separate counts. Thus, as the impact of the Guidance unfolds, selective higher education programs will tend to treat Black Hispanic applicants as Hispanic/Latinos and Black Multiracial applicants the same as it treats others in the Two or More Races category. Part III begins by discussing the process that the DOE went through and the decisions the DOE made that led to the specific pro-

46. Revisions to the Standards for the Classification of Federal Data on Race and Ethnicity, 62 Fed. Reg. 58,782 (Oct. 30, 1997), available at http://www.whitehouse.gov/omb/fedreg_1997_standards.

visions of the Guidance. It then highlights the Guidance's negative impact on the admissions prospects of Black Hispanics and Black Multiracials.

The Guidance does not require educational institutions to separate Black Immigrants from Ascendants in their counts of those in the Black/African American category. As a result, admissions committees will continue to compare Black Immigrants to applicants in the Black/African American category. This provides Black Immigrants with a competitive advantage in the admissions process of selective higher education programs when contrasted with Black Hispanics (who will be compared to other Hispanic/Latinos) and Black Multiracials (who will be compared to others in the Two or More Races category). Part IV argues that, given the justifications for the use of racial classifications in the admissions process, it is improper to provide this advantage to Black Immigrants.

I. EFFORTS TO STANDARDIZE THE COLLECTION OF
DATA ON RACE AND ETHNICITY IN THE 1970s:
ADOPTION OF DIRECTIVE 15

Until the 1960s, the primary uses of racial classifications and racial data were to exclude, segregate, and discriminate against individuals from minority groups. For example, public school officials identified black or colored schoolchildren and assigned them to separate and inferior schools. Employers and labor unions denied skilled employment to those considered black. Discriminatory practices by the real estate industry restricted blacks' residential choices. Many merchandise stores, hotels, and restaurant business operators refused to serve black customers. As late as 1960, interracial marriage between blacks and whites was still illegal in over twenty states.⁴⁷ In these states, racial classifications were used to prevent miscegenation. Proponents of these discriminatory practices used racial statistics to justify their actions. As a result, prior to the 1960s, many civil rights leaders opposed the collection of racial statistics.⁴⁸ Not surprisingly, minority groups did not participate in the decision-making processes

47. DANIEL, *supra* note 41, at 98.

48. Reynolds Farley, *Identifying with Multiple Races: A Social Movement that Succeeded But Failed?*, in *THE CHANGING TERRAIN OF RACE AND ETHNICITY* 126 (Maria Krysan & Amanda E. Lewis eds., 2004).

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that determined how to collect national statistics on race and ethnicity.⁴⁹

Supreme Court rulings in the 1950s and 1960s outlawed racial and ethnic discrimination by governmental entities. Congress also passed civil rights legislation banning racial and ethnic discrimination in the 1960s, including the 1964 Civil Rights Act, the 1965 Voting Rights Act, and the 1968 Fair Housing Act.⁵⁰ Many of the social welfare programs enacted as part of President Johnson's Great Society sought to distribute federal funds based on population counts to improve living conditions and address the problems faced by disadvantaged minority groups.⁵¹ Due to these and other developments, the need and purpose of employing racial classifications and collecting racial and ethnic data changed. Governmental entities and private institutions began to employ racial and ethnic classifications to include, rather than exclude, individuals from those previously discriminated minority groups. Enforcement of federal, state, and local civil rights statutes required accurate racial and ethnic statistics to demonstrate the existence of illegal discrimination. In addition, the logic that motivated civil rights activists viewed racism as part of a much larger system of discrimination and oppression, not simply a product of isolated actions and decisions by individuals. Statistics on various social and economic differences based on race were crucial to demonstrate the systematic nature of racial oppression. Civil rights activists also used racial statistics as the basis for generating support for new laws and policies to address the impact of discrimination.⁵² Thus, as the 1960s unfolded, government, private institutions, and advocacy groups employed racial and ethnic classifications and used racial and ethnic statistics to benefit disadvantaged minority populations.

Before the 1970s, there were no federal standards for the collection of data on race and ethnicity that applied to all federal agencies.⁵³

49. See Alice Robbin, *The Politics of Representation in the U.S. National Statistical System: Origins of Minority Population Interest Group Participation*, 27 J. GOV'T INFO. 431, 433-34 (2000).

50. The Civil Rights Act of 1964 and the Voting Rights Act of 1965 remain the primary reasons for governmental racial classifications. See RAINIER SPENCER, *SPURIOUS ISSUES: RACE AND MULTIRACIAL IDENTITY POLITICS IN THE UNITED STATES* 68 (1999).

51. See KIM WILLIAMS, *MARK ONE OR MORE: CIVIL RIGHTS IN MULTIRACIAL AMERICA* 25 (2008).

52. See Robbin, *supra* note 49, at 433-34.

53. See Katherine K. Wallman et al., *Measuring Our Nation's Diversity: Developing a Common Language for Data on Race/Ethnicity*, 90 AM. J. PUB. HEALTH 1704, 1704-07 (2000) (directing the review of the standards).

Largely because of civil rights laws enacted during the 1960s, by the early 1970s, several federal agencies began collecting racial data.⁵⁴ In 1976, Congress passed Public Law 94-311 in response to the undercount of Hispanic/Latinos on the 1970 Census. Public Law 94-311 required federal agencies to provide separate counts for the Hispanic/Latino population to remedy discrimination against those of Hispanic origin.⁵⁵ The driving force for the development of the federal standards on racial and ethnic classifications in the 1970s was “the need for comparable data to monitor equal access, in areas such as housing, education, mortgage lending, health care services, and employment opportunities, for population groups that historically had experienced discrimination and differential treatment because of race and ethnicity.”⁵⁶

The effort to standardize the collection and reporting of racial and ethnic data by the federal government originated in President Johnson’s Executive Order 11,185, issued in October 1964. The Order created the Federal Interagency Committee on Education (“FICE”).⁵⁷ The Commissioner of Education chaired the Committee and reported to the Secretary of the Department of Health, Education, and Welfare (“HEW”).

In April 1973, the FICE Subcommittee on Minority Education completed a report on higher education for Chicanos, Puerto Ricans, and American Indians. Secretary of HEW, Caspar Weinberger, was particularly interested in the part of the report pointing to the lack of useful data on racial and ethnic groups. Weinberger encouraged the implementation of two recommendations from the Subcommittee’s

54. *Id.*

55. See Joint Resolution Relating to the Publication of Economic and Social Statistics for Americans of Spanish Origin or Descent, Pub. L. No. 94-311, 90 Stat. 688 (1970); see also Final Guidance on Maintaining, Collecting, and Reporting Racial and Ethnic Data to the Department of Education, 72 Fed. Reg. 59,266, 59,270 (Oct. 19, 2007).

56. See Wallman et al., *supra* note 53. In 2003, voters in California voted on Proposition 54, which sought to ban the state from classifying individuals based on race or ethnicity and thereby collecting racial and ethnic data, unless required by federal law, for medical research and for the California Department of Fair Employment and Housing through 2014. See Sonya M. Tafoya et al., *Who Chooses to Choose Two?*, in *THE AMERICAN PEOPLE: 2000 CENSUS 349 box 2* (Richard Farley & John Haaga eds., 2005) (describing Proposition 54, which was rejected on October 7, 2003). This was the first time that voters were asked to consider banning the collection of racial and ethnic data by the state. *Id.* The measure failed 64% to 36%. *Id.* Strikingly enough, under-represented minorities were less likely to vote in favor of the measure: Blacks: 13%, Latinos: 25%, Asians: 28%, and Whites: 36%. *Id.*

57. Exec. Order No. 11,185, 29 Fed. Reg. 14,399 (1964), *revoked* by Exec. Order No. 12,553, 51 Fed. Reg. 7,237 (1986), available at <http://www.archives.gov/federal-register/executive-orders/1964.html>.

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report: “ ‘(1) coordinate development of common definitions for racial and ethnic groups; (2) instruct the Federal agencies to collect racial and ethnic enrollment and other educational data on a compatible and nonduplicative basis.’ ”⁵⁸ In June 1974, FICE created the Ad Hoc Committee on Racial and Ethnic Definitions (“Ad Hoc Committee” or “Committee”) to implement these recommendations.⁵⁹

The Ad Hoc Committee developed terms and definitions to cover the major categories of race and ethnicity that all agencies could use to meet their particular data requirements. The Committee recommended the following categories and definitions: (1) American Indian or Alaskan Native (“A person having origins in any of the original peoples of North America”); (2) Asian or Pacific Islander (“A person having origins in any of the original peoples of the Far East, Southeast Asia, or the Pacific Islands. This area includes, for example, China, Japan, Korea, the Philippine Islands, and Samoa”); (3) Black/Negro (“A person having origins in any of the black racial groups of Africa”); (4) Caucasian/White (“A person having origins in any of the original peoples of Europe, North Africa, the Middle East, or the Indian subcontinent”); and (5) Hispanic (“A person of Mexican, Puerto Rican, Cuban, Central or South American, or other Spanish culture or origin, regardless of race”).⁶⁰ The Ad Hoc Committee included those from the Indian subcontinent in its definition of Caucasians as opposed to Asians.⁶¹ The Committee expressed its belief that the term Asian should refer more to East Asians and thereby limited to Orientals, as opposed to including West Asians.⁶² In addition, the Committee noted that while individuals from the Indian subcontinent were from Asia, and some were victims of discrimination, the discrimination they faced appeared to be concentrated in specific geographical and occupational areas.⁶³

The Ad Hoc Committee considered creating an “Other” category for use principally by individuals of mixed racial backgrounds.⁶⁴ However, a majority of the Committee members opposed this because it

58. See FED. INTERAGENCY COMM. ON EDUC., ED. 121-636, REPORT OF THE AD HOC COMMITTEE ON RACIAL AND ETHNIC DEFINITIONS OF THE FEDERAL INTERAGENCY COMMITTEE ON EDUCATION 8 (1975) [hereinafter RACIAL AND ETHNIC DEFINITIONS], available at <http://www.eric.ed.gov/PDFS/ED121636.pdf>.

59. *Id.*

60. *Id.* at 9-13.

61. *Id.* at 11-13.

62. *Id.* at 10.

63. *Id.* at 12.

64. *Id.* at 17.

would complicate the surveying and add to the costs of collecting data.⁶⁵ The Committee recognized the use of an “Other” category might be appropriate when entities collecting racial and ethnic data were using a self-identification approach.⁶⁶ If an “Other” category was used, however, the respondent would also be required to specify the group with which they identify. Thus, the Ad Hoc Committee sought to provide the means to edit the responses of those who chose the “Other” category.⁶⁷ This would help to minimize the numbers in the “Other” category. When an entity used an observer identification method⁶⁸ to gather data, however, the Ad Hoc Committee viewed the “Other” category as undesirable.⁶⁹

In the spring of 1975, OMB, HEW, the Equal Employment Opportunity Committee (“EEOC”), and the General Accounting Office (“GAO”) all agreed to use the racial and ethnic categories developed by the Ad Hoc Committee on a trial basis for at least a year.⁷⁰ After the trial period, representatives from a very broad group of federal agencies including, OMB, HEW, EEOC, GAO, the Department of Justice, the Department of Labor, the Department of Housing and Urban Development, and the Census Bureau discussed their experiences. After the meeting, OMB agreed to prepare a final draft of the definitions for comment by the various federal agencies. OMB made some revisions to the categories and definitions initially adopted by the Ad Hoc Committee and proposed them for agency comment.⁷¹ OMB made two major changes. First, OMB moved individuals with an ancestry from the Indian subcontinent to the Asian category and out of the Caucasian/White category. OMB then clarified that individuals who were in the American Indian or Alaskan Native category were individuals that maintained a cultural identification through tribal affiliation or community recognition. OMB made no provision for an “Other” category.

65. *Id.*

66. *Id.* at 18.

67. *Id.*

68. Observer identification method is where the person observing the subject determines the race of the subject. Sometimes self-identification of race is impossible, for example, when filling out death certificates. In these instances observer identification is necessary.

69. RACIAL AND ETHNIC DEFINITIONS, *supra* note 58, at 18.

70. SPENCER, *supra* note 50, at 68.

71. *Id.* at 42-43.

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On May 12, 1977, the *Race and Ethnic Standards for Federal Statistics and Administrative Reporting* (“Standards”) was adopted.⁷² Effective January 1, 1980, the Standards provided the “standard classifications for record keeping, collection, and presentation of data on race and ethnicity in Federal program administrative reporting and statistical activities.”⁷³ In 1978, the Standards went through a name change and were subsequently renamed the *Statistical Policy Directive No. 15, Race and Ethnic Standards for Federal Statistics and Administrative Reporting* (“Directive 15”).⁷⁴ Directive 15 listed the following five racial/ethnic categories and definitions:

- (1) American Indian or Alaskan Native (“A person having origins in any of the original peoples of North America, and who maintains cultural identification through tribal affiliation or community recognition.”);
- (2) Asian or Pacific Islander (“A person having origins in any of the original peoples of the Far East, Southeast Asia, the Indian subcontinent, or the Pacific Islands. This area includes, for example, China, India, Japan, Korea, the Philippine Islands, and Samoa.”);
- (3) Black (“A person having origins in any of the black racial groups of Africa.”);
- (4) Hispanic (“A person of Mexican, Puerto Rican, Cuban, Central or South American or other Spanish culture or origin, regardless of race.”); and
- (5) White (“A person having origins in any of the original peoples of Europe, North Africa, or the Middle East.”).⁷⁵

Directive 15 noted that those who sought to comply with it should not construe it to limit the collection of data to its five categories. It permitted the use of subcategories within any of the basic racial/ethnic categories. However, those who used subcategories had to organize them in a way that allowed for the aggregation of the information into these basic racial/ethnic categories.⁷⁶ Directive 15 also concluded that it was preferable to collect data on race separate from ethnicity. However, it also provided a way to collect this information either separately in a two question format or in a combined one question format.

72. U.S. CENSUS BUREAU, DIRECTIVE NO. 15 RACE AND ETHNIC STANDARDS FOR FEDERAL STATISTICS AND ADMINISTRATIVE REPORTING (1977) [hereinafter DIRECTIVE 15], available at <http://wonder.cdc.gov/WONDER/help/populations/bridged-race/Directive15.html>.

73. *Id.*

74. See SPENCER, *supra* note 50, at 68 (providing additional information regarding the change of the name of Directive 15).

75. See DIRECTIVE 15, *supra* note 72.

76. *Id.*

If collected in a two question format, the minimum designations were: (1) Race, which included, “American Indian or Alaskan Native, Asian or Pacific Islander, Black, and White”; and (2) Ethnicity, which included “Hispanic origin and Not of Hispanic origin.” If collected in a one question format, then the minimum acceptable categories were as follows: “American Indian or Alaskan Native; Asian or Pacific Islander; Black, not of Hispanic origin; Hispanic; and White, not of Hispanic origin.”⁷⁷

II. ADOPTION OF THE 1997 REVISED STANDARDS

Directive 15 became the foundation of the process for collecting and reporting racial and ethnic data over the next twenty years. It not only altered the way the federal government collected and reported racial and ethnic data, but also affected the way state and local governments, as well as the private sector, collected and reported such data. However, intense debate existed about the categories and definitions of Directive 15.⁷⁸ This caused the federal government to undertake a review of Directive 15 from 1993 to 1997.⁷⁹ The review culminated in OMB issuing the 1997 Revised Standards in October 1997.⁸⁰ OMB also indicated that after a period to review the 2000 Census data, all federal programs must adopt consistent standards.⁸¹ The first section of this Part briefly discusses the need to revise Directive 15. The second section discusses the changes to the federal standards contained in the 1997 Revised Standards. The third section reviews the racial/ethnic data from the 2000 Census.

A. Need to Revise Directive 15

For the next fifteen years following the adoption of Directive 15, intense debate existed about its categories and definitions. The criticisms were the result of logical flaws in the categories and definitions,

77. *Id.*

78. *See id.*

79. *See generally* Recommendations from the Interagency Committee for the Review of the Racial and Ethnic Standards to the Office of Management and Budget Concerning Changes to the Standards for the Classification of Federal Data on Race and Ethnicity, 62 Fed. Reg. 36,874 (July 9, 1997) (indicating that since the 1990 Census, the standards established in Directive 15 no longer reflect the increasing diversity of our nation’s population that has resulted from immigration and interracial marriages).

80. *See* Revisions to the Standards for the Classification of Federal Data on Race and Ethnicity, 62 Fed. Reg. 58,782 (Oct. 30, 1997).

81. *See, e.g.*, Proposed Guidance on Maintaining, Collecting, and Reporting Data on Race and Ethnicity to the U.S. Department of Education, 71 Fed. Reg. 44,866 (Aug. 7, 2006).

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the rapidly changing nature of the American population, and the growing recognition that racial and ethnic categories were social constructs.⁸² Those who pointed to the logical flaws noted that some of the categories were racial, some were geographic, and some were cultural.⁸³ Many individuals also complained that they could not locate themselves within any of the racial and ethnic categories. The parents of some multiracial children protested against the requirement to select only one race for their children.⁸⁴ The 1990 Census generated sufficient evidence of this latter complaint. The instructions for designating race on the 1990 Census forms required individuals to check the one box that best described their race.⁸⁵ Despite these instructions, however, more than five hundred thousand people selected more than one racial category.⁸⁶

From 1993 to 1997, the federal government conducted an extensive review of the racial categories specified in Directive 15.⁸⁷ Various federal agencies created an Interagency Committee for the Review of Racial and Ethnic Standards (“Interagency Committee”) to make recommendations to OMB.⁸⁸ The Interagency Committee included representation from thirty federal agencies.⁸⁹ Numerous opportunities for public comment and public hearings were provided around the nation at various stages of the review of Directive 15.⁹⁰ The public comments helped to identify several areas of concern for the Interagency Committee to address, including the following:

Should “Hispanic” be a response option to the race question?
Should data on race and ethnicity be gathered via 2 separate questions? If yes, then what should be the sequence of these questions?
Or should data on race and ethnicity be gathered in a single question? [How should data on individuals of multiple racial heritages be classified?] Should data on Native Hawaiians continue to be classified in the Asian or Pacific Islander category? Should the min-

82. See SPENCER, *supra* note 50, at 70-73.

83. NAT'L RESEARCH COUNCIL, SPOTLIGHT ON HETEROGENEITY: THE FEDERAL STANDARDS FOR RACIAL AND ETHNIC CLASSIFICATION 37 (Barry Edmonston et al. eds., 1996) [hereinafter SPOTLIGHT], available at http://www.nap.edu/openbook.php?record_id=9060&page=R1.

84. Wallman et al., *supra* note 53, at 1704.

85. U.S. CENSUS BUREAU, MEASURING AMERICA: THE DECENNIAL CENSUSES FROM 1790-2000, at 91 (2002), available at <http://www.census.gov/prod/2002pubs/pol02marv.pdf>.

86. Wendy D. Roth, *The End of the One-Drop Rule?: Labeling of Multiracial Children in Black Inter marriages*, 20 Soc. F. 35, 38 (2005).

87. For a listing of the steps taken, see Revisions to the Standards for the Classification of Federal Data on Race and Ethnicity, 62 Fed. Reg. 58,782, 58,783-84 (Oct. 30, 1997).

88. *Id.* at 58,782.

89. *Id.*

90. See Wallman et al., *supra* note 53, at 1705.

imum set of categories for data on race and ethnicity be expanded to include other population groups?⁹¹

B. 1997 Revised Standards

After the Interagency Committee conducted an extensive evaluation of the Directive 15 categories, the Committee presented its report to OMB on July 9, 1997.⁹² With a few modifications, OMB adopted the Committee's recommendations and issued the 1997 Revised Standards.⁹³ OMB also agreed that self-identification is the preferred means of obtaining race and ethnic data.⁹⁴ However, in some situations, observer identification is more practical (e.g., completing a death certificate).⁹⁵

1. Hispanic/Latino Ethnicity Question and the Two Question Format

OMB decided to use the term "Hispanic or Latino" as opposed to "Hispanic."⁹⁶ OMB indicated that there were regional differences in the terms used.⁹⁷ In the eastern portion of the country, "Hispanic" was the commonly used term, but in the western portion "Latino" was the term commonly used.⁹⁸ OMB also adopted the following definition for "Hispanic or Latino": persons who trace their origin or descent to Mexico, Puerto Rico, Cuba, Central and South America, and other Spanish cultures.⁹⁹

The research conducted under the auspices of the Interagency Committee found that the best way to produce the most complete and accurate data on Hispanic/Latinos was to separate the Hispanic/Latino ethnic origin question from the question about race.¹⁰⁰ When respondents were asked both questions, the research indicated that it

91. *See id.*

92. *Id.* at 1708.

93. *See* Revisions to the Standards for the Classification of Federal Data on Race and Ethnicity, 62 Fed. Reg. at 58,786 (announcing that OMB adopted the recommendations of the Interagency Committee).

94. Wallman et al., *supra* note 53, at 1707.

95. *See id.*

96. Revisions to the Standards for the Classification of Federal Data on Race and Ethnicity, 62 Fed. Reg. at 58,786.

97. *Id.*

98. *Id.*

99. *Id.* at 58,789.

100. *See* Wallman et al., *supra* note 53, at 1705.

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was best to ask the Hispanic/Latino origin question first.¹⁰¹ OMB followed the conclusions of this research.¹⁰²

The main reason given for gathering data using the two question format with the Hispanic/Latino ethnicity question first, was that Hispanic/Latinos do not always identify with the American racial categories.¹⁰³ There was plenty of proof of this in the 2000 Census data. While the 1997 Revised Standards did not allow for the use of a “Some Other Race” category, the Census Bureau obtained an exemption to permit its use for the 2000 Census. The Bureau believed that many Hispanic/Latinos would mark it.¹⁰⁴ Slightly more than thirty-five million people indicated that they were Hispanic/Latino.¹⁰⁵ About 47.9% checked only the white racial box and an additional 42.2% checked only the “Some Other Race” Category.¹⁰⁶ Of those who checked the Some Other Race box on the 2000 Census, over 95% also identified themselves as Hispanic/Latino.¹⁰⁷ “Thus it is clear that reporting of [Some Other Race] is highly related to how Hispanics report in race.”¹⁰⁸

2. How to Collect Data on Individuals with Multiple Racial Heritages?

According to OMB, the most controversial and sensitive issue during discussions about revising Directive 15 dealt with how to address the classifications of individuals with parents of different races.¹⁰⁹ Groups like the Association of MultiEthnic Americans (“AMEA”), Project RACE (Reclassify All Children Equally), and A

101. *See id.*

102. *See* Revisions to the Standards for the Classification of Federal Data on Race and Ethnicity, 62 Fed. Reg. at 58,789-90.

103. *See* Wallman et al., *supra* note 53, at 1705.

104. *See* Farley, *supra* note 48, at 134 (stating that approximately one-third of those who identified with more than one race wrote their second race in a Spanish term).

105. U.S. CENSUS BUREAU, OVERVIEW OF RACE AND HISPANIC ORIGIN: CENSUS BRIEF 3 tbl.1 (2001), available at <http://www.census.gov/prod/2001pubs/cenbr01-1.pdf>.

106. JORGE DEL PINAL ET AL., U.S. CENSUS BUREAU, OVERVIEW OF RESULTS OF NEW RACE AND HISPANIC ORIGIN QUESTIONS IN CENSUS 2000, at 4 (2007), available at <http://www.census.gov/srd/papers/pdf/rsm2007-05.pdf>.

107. *Id.* (noting that about 15.4 million respondents checked just the “Some Other Race” (“SOR”) category, and 3.2 million checked SOR along with another racial category on the 2000 Census, approximately 97% of those who just checked only SOR also responded that they were Hispanic or Latino, and over 90% of those who checked SOR and another racial category also indicated that they were Hispanic or Latino); *see also* Sharon M. Lee & Barry Edmonston, *New Marriages, New Families: U.S. Racial and Hispanic Inter-marriage*, POPULATION BULL., June 2005, at 10, available at <http://www.prb.org/pdf05/60.2NewMarriages.pdf>.

108. PINAL ET AL., *supra* note 106.

109. *See* Wallman et al., *supra* note 53, at 1704.

Place for Us (“APFU”) spearheaded efforts to add a “multiracial” option to the collection of data for the 2000 Census.¹¹⁰ According to Kim Williams—who extensively studied the movement to alter the federal forms to allow individuals to mark one or more boxes—there were about thirty-five hundred adult members, excluding student groups, spread throughout the country at the height of the multiracial movement.¹¹¹ In addition, only about twenty leaders of the multiracial movement were responsible for the effort to add a multiracial category to the 2000 Census.¹¹² Williams went on to state,

Unexpectedly, I found that white, liberal, and suburban-based middle-class women (married to black men) held the leadership roles in most multiracial organizations. These white women helped to set an optimistic tone for multiracial activism; many believed that American racial polarization could be overcome by their example. Most of these women were looking for community—not for a census designation. Movement spokespeople reversed these priorities somewhat, although they parted ways after the OMB decision of 1997.¹¹³

In 1988, a number of local multiracial organizations came together to create AMEA.¹¹⁴ AMEA sought respect and recognition for multiracial and multiethnic individuals and advocated for the addition of a multiracial category on all government forms.¹¹⁵ In its first year, AMEA tried to convince the federal government to add a new category, “Other,” to the Directive 15 categories for use principally by multiracial individuals. Civil rights forces, including the EEOC and the Civil Rights Division of the Department of Justice, opposed this effort.¹¹⁶ OMB decided not to take any action and concluded that it needed to conduct or authorize more testing before it could institute such a change.¹¹⁷

110. See KERRY ANN ROCKOUEMORE & DAVID BRUNSMAN, *BEYOND BLACK: BIRACIAL IDENTITY IN AMERICA* 1–2 (2d ed. 2008); see also WILLIAMS, *supra* note 51, at 7, 9.

111. WILLIAMS, *supra* note 51, at 15.

112. *Id.*

113. *Id.* at 112.

114. See *AMEA's History*, AM. MULTIETHNIC ASS'N, <http://www.ameasite.org/history.asp> (last visited Jan. 21, 2011) (stating that AMEA was the product of an effort to provide a multiracial option on official forms, including census forms). For a comprehensive history of the movement, see Naomi Mezey, *Erasure and Recognition: The Census, Race and the National Imagination*, 97 Nw. U. L. REV. 1701, 1749–52 (2003).

115. Mezey, *supra* note 114, at 1749.

116. *Id.*

117. SPENCER, *supra* note 50, at 126.

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Susan Graham, a white woman from Marietta, Georgia, founded Project RACE in 1991.¹¹⁸ The objective of Project RACE was to get a multiracial classification on all school, employment, state, federal, local, census, and medical forms that required racial data.¹¹⁹ Susan's husband, Gordon Graham, was a black news anchor for CNN who helped to publicize the efforts of Project RACE.¹²⁰ Susan started Project RACE after she tried to find out from the Census Bureau how to report her son on the 1990 Census form.¹²¹ The Census Bureau's practice for the 1970 Census was to assign the racial identity of the father to the biracial child.¹²² The Bureau changed this practice for the 1980 and 1990 Censuses and instead shifted to a formula that ascribed the mother's racial identity to biracial individuals.¹²³ Eventually, a Census Bureau official told Susan to use her race " '[b]ecause in cases like these, we always know who the mother is and not the father.'"¹²⁴

Steve and Ruth Bryant White created APFU in 1984.¹²⁵ They created the organization after Steve, who was white, asked his minister to marry them.¹²⁶ However, since Ruth was black, the minister refused.¹²⁷ One of Steve's friends also provided him with a list of reasons for why he should not marry Ruth.¹²⁸ At the top of the list was the fact that Ruth was black.¹²⁹ The Whites started APFU to support and encourage interaction involving interracial relationships.¹³⁰ In 1990, APFU revised its mission statement to include, as a goal, working with other multiracial groups to establish a multiracial category on official forms until the elimination of all racial categories on these forms.¹³¹

Multiracial advocates generally argued that mixed-race individuals viewed themselves as multiracial rather than belonging to a single

118. WILLIAMS, *supra* note 51, at 12.

119. *Id.*

120. *Id.* at 12-13.

121. *Id.* at 12.

122. *See id.*

123. *See* DANIEL, *supra* note 41, at 290.

124. *See* WILLIAMS, *supra* note 51, at 12.

125. *History, A PLACE FOR US NAT'L*, <http://www.aplaceforusnational.com/history.html> (last visited July 18, 2009) [hereinafter *History*].

126. *Id.*

127. *Id.*

128. *Id.*

129. *Id.*

130. *Id.*

131. *See* WILLIAMS, *supra* note 51, at 12.

racial or ethnic group.¹³² A “multiracial” designation was, therefore, a better reflection of the true understanding of the multiracial person’s racial identity. These groups noted the psychological problems created for biracial children who were forced to identify with one parent more than the other.¹³³ Multiracial advocates also argued that the “one-drop rule,”¹³⁴ long-used to classify any person with any black blood as black, was inherently racist,¹³⁵ does not apply to any other racial or ethnic group in the United States, and appears to exist only in the United States.¹³⁶ The author of *The Clansman*, Thomas F. Dixon, Jr., expressed the longstanding justification for the one-drop rule.¹³⁷ In his best-selling fictional novel *The Leopard’s Spots*, Dixon wrote, “One drop of Negro blood . . . kinks the hair, flattens the nose, thickens the lip, puts out the light of intellect, and lights the fires of brutal passions.”¹³⁸

Opponents of the inclusion of a multiracial category on federal forms raised several objections. A multiracial category could confuse many respondents.¹³⁹ Lots of Americans are of mixed ancestry, including most blacks. Because of centuries of interracial mixing in the United States, experts estimate that between 75% and 90% of America’s black population have some white genes.¹⁴⁰ They place the over-all white gene frequencies of American blacks at somewhere between one-fifth and one-fourth.¹⁴¹ If respondents identified their ancestries going back many generations, then the multiracial category could prove to be very large and destabilizing. Another problem with including a multiracial category on federal forms is the potential variability of a person’s racial identity over time. Individuals who identify themselves as multiracial at one stage in life may later identify themselves in a single race or ethnic category.

132. See ROCKQUEMORE & BRUNSMA, *supra* note 110, at 3.

133. See *id.* at 19-20.

134. In sociological circles, this “One Drop Rule” is referred to as “hypodescent.” See F. JAMES DAVIS, WHO IS BLACK?: ONE NATION’S DEFINITION 56 (1991).

135. ROCKQUEMORE & BRUNSMA, *supra* note 110, at 1-17.

136. See DAVIS, *supra* note 134, at 13.

137. See THOMAS DIXON, JR. & C.D. WILLIAMS, THE CLANSMAN: AN HISTORICAL ROMANCE OF THE KU KLUX KLAN (Univ. Press of Kentucky 1970) (1905). *The Clansman* was the basis for the 1915 silent movie *Birth of a Nation*. See generally THE BIRTH OF A NATION (Epoch Film Co. 1915).

138. THOMAS DIXON, JR., THE LEOPARD’S SPOTS: A ROMANCE OF THE WHITE MAN’S BURDEN: 1865 TO 1900, at 244 (1906).

139. SPOTLIGHT, *supra* note 83, at 37-40.

140. See DAVIS, *supra* note 134, at 21.

141. *Id.*

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Another problem stems from the primary reason for racial and ethnic classifications by the federal government. Since the driving force behind the racial and ethnic classifications was the need to combat discrimination and differential treatment experienced by historically discriminated population groups,¹⁴² how should current civil rights legislation treat multiracial individuals? This concern generated other issues. Should the multiracial category be a protected class with the same legal rights to representation as the current minority categories or should all multiracial individuals be reclassified into the existing five categories? If they were reallocated, then there were other objections related to the potential controversies and difficulties associated with their reallocation.¹⁴³ If the reason to allow individuals the option of selecting a multiracial category was respect for individual self-identification, then reallocation would violate that principle. Further, if reallocation is to occur, what method should institutions employ? For example, the Tabulation Working Group of the Interagency Committee came up with eleven different ways to reallocate multiracials.¹⁴⁴ A solution to the reallocation issue would be to reject the multiracial category and allow multiracial individuals to check all the racial categories that apply. This was the solution eventually adopted.¹⁴⁵ However, if no reallocation occurred, then there would be a very large number of categories that reflected all of the different multiracial combinations, many of which with very few individuals. This would not only create a large administrative burden, but it would also create very difficult sampling issues. Categories with small numbers are far more vulnerable to inaccuracies from sampling errors than are categories with large numbers.

Beyond the above problems created by the addition of a “multiracial” category, black civil rights leaders, including Jesse Jackson, Kweisi Mfume for the Congressional Black Caucus, and the National Association for the Advancement of Colored People (“NAACP”), opposed the addition of a multiracial category.¹⁴⁶ Among the concerns black leaders expressed was that many blacks would designate them-

142. See Wallman et al., *supra* note 53, at 1704.

143. *Id.* at 1705.

144. See OFFICE OF MGMT. & BUDGET, PROVISIONAL GUIDANCE ON THE IMPLEMENTATION OF THE 1997 STANDARDS FOR FEDERAL DATA ON RACE AND ETHNICITY 90 (2001), available at <http://www.ofm.wa.gov/pop/race/omb.pdf>.

145. Revisions to the Standards for the Classification of Federal Data on Race and Ethnicity, 62 Fed. Reg. 58,782, 58,786 (Oct. 30, 1997).

146. ROCKUEMORE & BRUNSMA, *supra* note 110, at 2.

selves as multiracial in order to escape the social stigma of our society that occurs if individuals identify themselves as Black/African American.¹⁴⁷ They were also concerned about the impact on efforts to dismantle racial discrimination that would result if a multiracial category were included because the number of blacks would decrease.¹⁴⁸ They also argued that while the “one-drop rule” was a product of racism, it had become a means of mobilizing communities of color to organize against white race privilege.¹⁴⁹ Over the long centuries of struggle against racial oppression, many of the most significant leaders of the black struggle were biracial/multiracial individuals including Crispus Attucks, Halle Berry, Frederick Douglass, Lani Guiner, Prince Hall, Pinckney Benton Stewart Pinchback, Robert Smalls, Bishop Henry McNeal Turner, Booker T. Washington, and Walter White.¹⁵⁰ A number of civil rights groups, including the NAACP, the National Urban League, the Lawyer’s Committee on Civil Rights under the Law, and the Joint Center for Political and Economic Studies, signed onto the 1994 Coalition Statement (“Statement”).¹⁵¹ The Statement noted that a multiracial category may have unanticipated adverse consequences for blacks.¹⁵² The Statement went on to oppose any action by OMB that would disaggregate the current black population.¹⁵³

Multiracial organizations were undaunted by the administrative concerns created by the multiracial category and by opposition from civil rights groups. In 1994, Charles Michael Byrd, of black, white and Cherokee heritage, launched an internet website called *Interracial Voice*.¹⁵⁴ Though not a member of any established multiracial association, he organized the first multiracial solidarity march held on the Mall in Washington D.C., in July of 1996.¹⁵⁵ The stated objective of the march was to petition the federal government for a multiracial

147. *See id.*

148. *Id.*

149. *See* DANIEL, *supra* note 41, at 291; *see also* Christine B. Hickman, *The Devil and the One Drop Rule: Racial Categories, African Americans, and the U.S. Census*, 95 MICH. L. REV. 1162, 1188 (1997).

150. Kevin Brown, *Foreword: President Barack Obama Law & Policy Symposium*, 35 T. MARSHALL L. REV. 1, 7 (2009).

151. WILLIAMS, *supra* note 51, at 47.

152. *Id.*

153. *Id.*

154. *See* Charles Michael Byrd, *Archived Editorials*, INTERRACIAL VOICE, <http://www.interracialvoice.com> (last visited Dec. 27, 2010); *see also* Charles Michael Byrd, *About*, CHARLES MICHAEL BYRD (CHARUKRISHNA)’S BLOG, http://backintyme.com/cmbyrd/?page_id=2 (last visited Jan. 21, 2011).

155. WILLIAMS, *supra* note 51, at 68.

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category on the 2000 Census.¹⁵⁶ In 1995, multiracial activists were able to get legislation introduced in eleven different states to require the addition of a multiracial category on administrative or educational forms.¹⁵⁷ By the end of 1996, five states—Ohio, Illinois, Georgia, Indiana, and Michigan—had enacted such laws.¹⁵⁸ In the early part of 1997, Susan Graham was able to talk with Newt Gingrich, the Speaker of the House of Representatives.¹⁵⁹ Graham resided in Gingrich's congressional district and Gingrich knew of Graham because she had been instrumental in the successful effort to get a multiracial category added to Georgia state forms.¹⁶⁰ During the meeting, Gingrich embraced the effort to get a multiracial category on the census.¹⁶¹ Gingrich felt that the multiracial option was a step toward the eventual elimination of racial and ethnic categories.¹⁶²

In the end, OMB rejected a multiracial category for individuals to select.¹⁶³ However, OMB decided that when self-identification is used, those who collect racial and ethnic data for federal programs should employ a method that allows individuals to check more than one race category from a list of races provided to the respondent.¹⁶⁴ Thus, with the adoption of the 1997 Revised Standards, the federal government agreed to allow individuals to designate more than one racial category.¹⁶⁵ Not all multiracial group advocates, however, agreed that this was a significant step forward. AMEA accepted the decision to allow individuals to choose more than one racial category, but Susan Graham of Project RACE felt that this was not enough.¹⁶⁶

156. *Id.*

157. Alice Robbin, *Classifying Racial and Ethnic Group Data in the United States: The Politics of Negotiation and Accommodation*, 27 J. GOV'T INFO. 129, 142 (2000).

158. See WILLIAMS, *supra* note 51, at 68 (discussing multiracial category legislation in states).

159. Jennifer Hochschild & Traci Burch, *Contingent Public Policies and Racial Hierarchy: Lessons from Immigration and Census Policies*, in *POLITICAL CONTINGENCY: STUDYING THE UNEXPECTED, THE ACCIDENTAL, AND THE UNFORESEEN* 158-59 (Ian Shapiro & Sonu Bedi eds., 2007).

160. *Id.*

161. *Id.*

162. *Id.*

163. After the 1990 Census, experts generally estimated the multiracial population at between 4% and 6% with the highest estimate at 6.6%. See Tafoya et al., *supra* note 56, at 332. OMB's research, however, showed that less than two percent of the population would select two or more races, but the percentage of multiracials was growing. See *id.*

164. Revisions to the Standards for the Classification of Federal Data on Race and Ethnicity, 62 Fed. Reg. 58,782, 58,789 (Oct. 30, 1997).

165. *Id.*

166. See *History*, *supra* note 125; see also PROJECT RACE, <http://www.projectrace.com> (last visited Jan. 5, 2011).

Ruth and Steve White and Charles Byrd returned to their original positions of trying to get beyond racial categories altogether.¹⁶⁷

3. Modifications for the Racial Categories

The 1997 Revised Standards included five racial categories, which replaced the previous four contained in Directive 15.¹⁶⁸ A number of critics, witnesses, and groups sought to extend the categories beyond those included in Directive 15. Categories suggested included Middle Easterners/Arabs, Cape Verdeans, European Americans, German Americans and Creoles.¹⁶⁹ However, in the end, OMB agreed only to alter the “Asian and Pacific Islanders” category by removing the Pacific Islanders and combining them into a new category with Native Hawaiians.¹⁷⁰

During the Congressional testimony in 1993, Senator Daniel Akaka of Hawaii asserted on behalf of the entire Hawaii congressional delegation, Hawaii’s Governor John Waihee, Native Hawaiian organizations, and the National Coalition for an Accurate Count of Asians and Pacific Islanders that they sought a separate classification for Native Hawaiians.¹⁷¹ Akaka argued that Native Hawaiians fell through the cracks between being defined as Native Americans in many federal laws and being classified as Asians or Pacific Islanders on federal forms.¹⁷²

In addition to creating a new combined category for “Native Hawaiian or Other Pacific Islanders,” OMB made one other significant change to the definitions of the categories from those in Directive 15. OMB changed the definition of “American Indian or Alaska Native” by adding to it the “original peoples from South and Central

167. See WILLIAMS, *supra* note 51, at 93. Charles Byrd later wrote a book asserting that Krishna Consciousness was a way to get beyond the American fixation on race. See generally CHARLES MICHAEL BYRD, *THE BHAGAVAD-GITA IN BLACK AND WHITE: FROM MULATTO PRIDE TO KRISHNA CONSCIOUSNESS* (2007) (discussing how Krishna Consciousness will help Americans transcend their focus on race).

168. Revisions to the Standards for the Classification of Federal Data on Race and Ethnicity, 62 Fed. Reg. at 58,789 (Oct. 30, 1997).

169. Recommendations from the Interagency Committee for the Review of the Racial and Ethnic Standards to the Office of Management and Budget Concerning Changes to the Standards for the Classification of Federal Data on Race and Ethnicity, 62 Fed. Reg. 36,874, 36,880 (July 9, 1997).

170. Revisions to the Standards for the Classification of Federal Data on Race and Ethnicity, 62 Fed. Reg. at 58,787.

171. WILLIAMS, *supra* note 51, at 93.

172. *Id.*

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America.”¹⁷³ Thus, the five racial categories and their definitions contained in the 1997 Revised Standards are as follows: (1) American Indian or Alaska Native (“A person having origins in any of the original peoples of North and South America (including Central America), and who maintains tribal affiliation or community attachment.”); (2) Asian (“A person having origins in any of the original peoples of the Far East, Southeast Asia, or the Indian subcontinent including, for example, Cambodia, China, India, Japan, Korea, Malaysia, Pakistan, the Philippine Islands, Thailand, and Vietnam.”); (3) Black or African American (“A person having origins in any of the black racial groups of Africa.”) (4) Native Hawaiian or Other Pacific Islander (“A person having origins in any of the original peoples of Hawaii, Guam, Samoa, or other Pacific Islands.”); and (5) White (“A person having origins in any of the original peoples of Europe, the Middle East, or North Africa.”).¹⁷⁴

C. Results of the 2000 Census

The 2000 Census form generally followed the 1997 Revised Standards. However, while the 1997 Revised Standards did not allow for the use of a “Some Other Race” category, the Census Bureau obtained an exemption to permit its use for the 2000 Census.¹⁷⁵ Thus, the 2000 Census form included the five racial categories set out in the 1997 Revised Standards as well as a Some Other Race category.¹⁷⁶ It also treated the Hispanic/Latino ethnicity question separate from the question about race.¹⁷⁷

The Census Bureau compiled data in two different ways. It compiled data based solely on the Hispanic/Latino ethnicity question and solely on the question of race.¹⁷⁸ Thus, the 2000 Census counted:

Total population	281,421,906	(100.0)
Not Hispanic or Latino	246,116,088	(87.5)
Hispanic or Latino	35,305,818	(12.5) ¹⁷⁹

173. Revisions to the Standards for the Classification of Federal Data on Race and Ethnicity, 62 Fed. Reg. at 58,787.

174. *Id.* at 58,789.

175. See GRIECO, *supra* note 43.

176. *Id.*

177. *Id.* at 1.

178. *Id.* at 2.

179. See ELIZABETH M. GRIECO & RACHEL C. CASSIDY, U.S. CENSUS BUREAU, OVERVIEW OF RACE AND HISPANIC ORIGIN 2000: CENSUS 2000 BRIEF 10 tbl.10 (2001) available at <http://www.census.gov/prod/2001pubs/cenbr01-1.pdf>.

Race	Hispanic or Latino			Not Hispanic or Latino		
	Number	Percent of Hispanic population	Percent of total population	Number	Percent of non-Hispanic population	Percent of total population
Total	35,305,818	100.0	12.5	246,116,088	100.0	87.5
One Race	33,081,736	93.7	11.8	241,513,942	98.1	85.8
White	16,907,852	47.9	6.0	194,552,774	79.1	69.1
Black or African American	710,353	2.0	0.3	33,947,837	13.8	12.1
American Indian and Alaska Native	407,073	1.2	0.1	2,068,883	0.8	0.7
Asian	119,829	0.3	.	10,123,169	4.1	3.6
Native Hawaiian and Other Pacific Islander	45,326	0.1	.	353,509	0.1	0.1
Some Other Race	14,891,303	42.2	5.3	467,770	0.2	0.2
Two or More Races	2,224,082	6.3	0.8	4,602,146	1.9	1.6

The Two or More Races count included individuals who checked more than one of the broad five racial categories plus the “Some Other Race” category.¹⁸⁰ The result was that 6.8 million Americans, or about 2.4% of the population, described themselves as multiracial.¹⁸¹ However, approximately 2.8 million or 4% of those under the age of eighteen selected two or more races.¹⁸² With the five racial categories and the “Some Other Race” category, the Census Bureau reported population figures in fifty-seven different multiracial subcategories in the Two or More Races category.¹⁸³ There were fifteen unique biracial combinations, twenty three-race combinations, fifteen four-race combinations, six five-race combinations, and one combination with all six-race combinations.¹⁸⁴ The largest groups numerically were:

1. White and Some Other Race, 2,206,251 (0.78% of the total United States population and 32.32% of those who checked more than one race);
2. White and American Indian and Alaska Native 1,082,683 (0.38%, 15.86%, respectively);
3. White and Asian 868,395 (0.31%, 12.72%, respectively);
4. White and Black 784,764 (0.28%, 11.5%, respectively); and

180. NICHOLAS A. JONES & AMY SYMENS SMITH, U.S. CENSUS BUREAU, THE TWO OR MORE RACES POPULATION: 2000, CENSUS 2000 BRIEF 1 (2001), available at <http://www.census.gov/prod/2001pubs/c2kbr01-6.pdf>.

181. See *id.*

182. See *id.* at 9.

183. For a listing of the fifty-seven categories and their populations, see *United States Multi-racial Profile*, CENSUSSCOPE.ORG, http://www.census.gov/2000census/2000scope/us/print_chart_multi.html (last visited Dec. 27, 2010) [hereinafter CENSUSSCOPE].

184. See *id.*

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5. Black and Some Other Race 417,249 (0.15% 6.11%, respectively).¹⁸⁵

Fifteen of the subcategories of those who checked more than one racial box contained less than one thousand people.¹⁸⁶

III. THE GUIDANCE AND ITS IMPACT ON THE
ADMISSIONS PROSPECTS OF BLACK
HISPANICS AND BLACK MULTIRACIALS

Not only do educational institutions have to report the race and ethnicity of their student bodies to the DOE, but they also have to report the race and ethnicity of their employees to the EEOC.¹⁸⁷ The DOE repeatedly received comments from educational institutions stating they preferred that the “various Federal agencies involved in data collection all use the same aggregate categories so that the burden of implementing changes is minimized and educational institutions are not forced to provide different and/or inconsistent data on race and ethnicity to federal agencies.”¹⁸⁸ Therefore, the DOE decided to wait for the EEOC to announce its final implementation plan for complying with the reporting requirements of the 1997 Revised Standards before publishing its proposed changes.¹⁸⁹ The EEOC announced its final implementation plan in November 2005.¹⁹⁰ Subsequently the DOE published the *Proposed Guidance, on Maintaining, Collecting, and Reporting Data on Racial and Ethnicity to the U.S. Department of Education* (“Proposed Guidance”) for comment on July 31, 2006.¹⁹¹ After reviewing comments, the DOE issued the Guidance in October 2007.

In promulgating the Guidance, the DOE decided to adopt the same reporting categories for the race and ethnicity of students, which the EEOC had adopted. To have a more detailed understanding of certain reporting decisions that the DOE included in the Guidance, the first section of this Part will look at how the EEOC resolved sev-

185. *Id.*

186. *See id.*

187. *Id.* at 59,274.

188. Proposed Guidance on Maintaining, Collecting, and Reporting Data on Race and Ethnicity to the U.S. Department of Education, 71 Fed. Reg. 44,866, 44,868 (Aug. 7, 2006).

189. *Id.*

190. *See* Agency Information Collection Activities, Notice of Submission for OMB Review; Final Comment Request to the Equal Employment Opportunity Commission, 70 Fed. Reg. 71,294 (Nov. 28, 2005), available at <http://edocket.access.gpo.gov/2005/pdf/05-23359.pdf>.

191. Proposed Guidance on Maintaining, Collecting and Reporting Data on Race and Ethnicity to the U.S. Department of Education, 71 Fed. Reg. at 44,871.

eral important reporting issues. The second section of this Part will discuss the Guidance's decision not to require educational institutions to report the separate races of those in the Hispanic/Latino and Two or More Races categories. This is the key decision that will lead admissions officials to treating Black Hispanic applicants as Hispanic/Latinos and comparing Black Multiracial applicants to those in the Two or More Races category. The third section discusses the impact of the Guidance on the admissions prospects to selective higher education programs of Black Hispanics and Black Multiracials.

A. The Racial and Ethnic Reporting Standards Adopted by the EEOC

Since the late 1960s, certain private employers have had to file an annual report, called the EEO-1 report, with the EEOC. The EEOC and the Office of Federal Contract Compliance Programs ("OFCCP") jointly adopted the EEO-1 report in 1966.¹⁹² Data requested on the EEO-1 report tracks employees by race, ethnicity, sex, and job classification.¹⁹³ The EEOC uses the data to support enforcement of federal anti-discrimination laws and to analyze employment patterns.¹⁹⁴ Private employers with at least one hundred employees and federal government contractors with at least fifty employees and a contract of at least \$50,000 are required to submit an EEO-1 report to the Joint Reporting Committee, consisting of the EEOC and OFCCP, by September 30th of each year.¹⁹⁵

The EEOC published its draft revisions to the EEO-1 report for comment on June 11, 2003.¹⁹⁶ Those revisions included the EEOC's decision not to require the separate reporting of races for either the Hispanic/Latino or Two or More Races categories.¹⁹⁷ During the comment period, civil rights groups including the Mexican American Legal Defense and Education Fund, RainbowPUSH Coalition ("RainbowPUSH") and the National Asian Pacific American Legal Consortium, urged the EEOC to change its initial position and require

192. Agency Information Collection Activities, Notice of Submission for OMB Review; Final Comment Request to the Equal Employment Opportunity Commission, 70 Fed. Reg. 71,295 (Nov. 28, 2005).

193. *Id.*

194. *Id.*

195. See *EEO-1 Who Must File*, U.S. EQUAL EMP'T OPPORTUNITY COMM'N, <http://www.eeoc.gov/employers/eeo1survey/whomustfile.cfm> (last visited Dec. 22, 2010).

196. Agency Information Collection Activities, Notice of Submission for OMB Review; Final Comment Request to the Equal Employment Opportunity Commission, 70 Fed. Reg. at 71,295.

197. *Id.* at 72,296-97.

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employers to report the race of Hispanic/Latino employees.¹⁹⁸ RainbowPUSH asserted that Hispanic/Latinos of mixed heritage with African ancestry were more likely to face discrimination than Hispanic/Latinos not of mixed heritage and without African ancestry.¹⁹⁹ Other groups noted that the EEOC's procedures would artificially inflate the number of Hispanic/Latino employees since none of them are included in the Two or More Races category and deflate the number in the other racial groups.²⁰⁰

The EEOC rejected these concerns. It noted that only a small percentage of those over the age of eighteen indicated on the 2000 Census form that they were both Hispanic/Latino and a member of a racial minority group.²⁰¹ Thus, requiring employers to report the race of Hispanic/Latino employees would provide little benefit. Such reporting would also create problems for OFCCP's system for targeting contractors for compliance review.²⁰² The EEOC also noted that it was not clear that Hispanic/Latinos willingly or accurately self-identify using American racial categories when asked to do so.²⁰³

Civil rights groups also urged the EEOC to adopt more detailed reporting requirements for those in the Two or More Races category.²⁰⁴ For instance, Reverend Jesse L. Jackson, Jr. of RainbowPUSH noted that the Two or More Races category would not be meaningful for affirmative action purposes.²⁰⁵ In response to these concerns, the EEOC concluded that requiring employers to report the separate races of those in the Two or More Races category on the EEO-1 report would result in only a marginal improvement in the utility of the data. Such marginal improvement did not justify the added burden to employers and the government.²⁰⁶ The EEOC noted that only 2.4% of the respondents selected the Two or More Races category on the 2000 Census.²⁰⁷ Additionally, the EEOC indicated that adopting the Two or More Races category supported the OFCCP's use of the EEO-1 report data, since the OFCCP's statistical model for selecting contractors for compliance reviews uses aggre-

198. *Id.* at 71,296, 71,298.

199. *Id.* at 71,297.

200. *Id.*

201. *Id.*

202. *Id.*

203. *Id.*

204. *See id.* at 71,296.

205. *Id.*

206. *Id.*

207. *Id.*

gated “minority” and “nonminority” categories.²⁰⁸ OFCCP can simply incorporate the counts of those in the Two or More Races category into its minority counts and continue using its current methodology with minor adjustments.²⁰⁹

The EEOC submitted its revisions to the EEO-1 report to the OMB in November 2005.²¹⁰ OMB approved the revised EEO-1 report and employers began to use the revised survey for the reporting period beginning September 30, 2007.²¹¹

B. The Guidance Rejection of Reporting Specific Races in the Hispanic/Latino and Two More Races Category

The DOE published the Proposed Guidance for comment on July 31, 2006. After analyzing the responses received during the comment period, the DOE issued the Guidance. The DOE followed the lead of the EEOC and did not require the reporting of the specific races of those in either the Hispanic/Latino or Two or More Races category.²¹² By doing so, the DOE adopted categories identical to those used by the EEOC.

During the comment period, a number of commentators expressed concern about these decisions of the DOE. The DOE’s response to these concerns, however, sounded as if the matter was a *fait accompli*.²¹³ At least one commentator noted that the DOE should not follow the same approach as the EEOC, because their objectives for collecting data were different.²¹⁴ In response, the DOE noted that educational institutions and other recipients repeatedly indicated their preference that the various federal agencies use the same aggregate categories in order to minimize the administrative burden.²¹⁵ The DOE also stated that it was too administratively burdensome to have educational institutions throughout the country report the separate racial identities of those in the Hispanic/Latino category.²¹⁶ The DOE

208. *Id.*

209. Agency Information Collection Activities, Notice of Submission for OMB Review; Final Comment Request to the Equal Employment Opportunity Commission, 70 Fed. Reg. 71,294, 71,296 (Nov. 28, 2005).

210. *Id.* at 71,294.

211. *Id.* at 71,300.

212. Final Guidance on Maintaining, Collecting, and Reporting Racial and Ethnic Data to the Department of Education, 72 Fed. Reg. 59,266, 59,267 (Oct. 19, 2007).

213. *Id.* at 59,270-71.

214. *Id.* at 59,271.

215. *Id.*

216. *Id.* at 59,267.

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noted that if it required the reporting of racial data for the Hispanic/Latino category, then the report would require six additional categories.²¹⁷ Racial categories are often cross-tabulated with other relevant information such as an individual's sex, disability category, or educational placement, thereby increasing the categories of information even more.²¹⁸ The DOE followed similar reasoning when it rejected a suggestion that educational institutions should report all or some of the separate racial identities of those in the Two or More Races category.²¹⁹

Some commentators expressed concern that the reporting requirements of the Guidance regarding the Two or More Races category, could lead to a significant reduction in the black student population.²²⁰ The DOE responded to these concerns by stating, “[I]n most instances, the Department anticipates that the size of the [T]wo or [M]ore [R]aces category will not be large enough to cause significant shifts in student demographics.”²²¹ The DOE noted in the background information that “[i]n the 2000 Census, 2.4% of the total population (or 6.8 million people) identified themselves as belonging to two or more racial groups. For the population under [eighteen] years old, 4.0% (or 2.8 million children) selected two or more races.”²²²

The problem with these national statistics is that the small percentage of non-Hispanic whites that are multiracial (2%)²²³ obscures the much higher percentage of multiracials among the minority racial groups.²²⁴ In the 2000 Census, 4.8% of those who checked the Black category also checked another category, twice the percentage of the American population as a whole.²²⁵ In addition, as the DOE noted, the younger the person the greater the chance they are multiracial.²²⁶ Thus, from the 2000 Census, the percentage of blacks between the ages of fifteen and nineteen who were reported as Black Multiracial

217. *Id.* at 59,277.

218. *Id.*

219. *Id.* at 59,271.

220. *Id.* at 59,270.

221. *Id.*

222. *Id.* at 59,274.

223. See Tafoya et al., *supra* note 56, at 349.

224. *Id.*

225. See CENSUSSCOPE, *supra* note 183.

226. See generally *supra* text accompanying note 222.

was only 5.3%.²²⁷ However, for blacks between the ages of ten and fourteen it increased to 6.3%, for those between the ages of five and nine to 8.1%, and for those five and under it was 11.4%.²²⁸ Thus, by the time the Guidance went into effect, ten years after the 2000 Census counts, a minimum of 8.1% of blacks under the age of eighteen identified with more than one race.²²⁹

Because of the DOE's decision not to require the separate reporting of the races for those in the Hispanic/Latino or Two or More Races category, considerable information about race and ethnicity of students is lost. Unlike the 2000 Census, which generated a tabulation based on responses to the Hispanic/Latino ethnicity question and another based on responses from the race question, the Guidance does not provide the data for doing such calculations.²³⁰ In addition, since all racial combinations of Hispanic/Latinos are lumped together, it is not possible to separate the number of Black Hispanics from that of the Hispanic/Latino counts that educational institutions are required to report to the DOE. Nor is it possible to separate out Black Multiracials from all other non-Hispanic/Latino multiracials in the Two or More Races category.

C. Impact of the Guidance on Admissions Prospects of Black Hispanics and Black Multiracials

Admissions officials at selective higher education programs will have to decide if, during the admissions process, they should continue to treat Black Hispanics and Black Multiracials as Black/African Americans. I suspect that in the first few years of the implementation of the Guidance, many admissions officials may continue to treat Black Hispanics as Black/African Americans when evaluating their applications. They may also continue to compare Black Multiracial applicants to Black/African American applicants. During this initial

227. See U.S. CENSUS BUREAU, BLACK OR AFRICAN AMERICAN POPULATION, BY AGE AND SEX FOR THE UNITED STATES: 2000 tbl.3 (2002), available at <http://www.census.gov/population/www/cen2000/briefs/phc-t8/tables/tab03.pdf>. According to the 2000 Census, of the 3,093,824 individuals between the ages of fifteen and nineteen who were classified as Black or African American or Black or African American in Combination, 164,271 were classified as Black or African American in combination (164,271/3,093,824=5.3%).

228. For ages ten to fourteen the corresponding figures were 210,794, 3,332,324 (210,794/3,332,324=6.3%); for ages five to nine the corresponding figures were 285,205, 3,490,717 (285,205/3,490,717=8.1%); for under the age of five the corresponding figures were 362,073, 3,166,859 (362,073/3,166,859=11.4%). *Id.*

229. *Id.*

230. See Final Guidance on Maintaining, Collecting, and Reporting Racial and Ethnic Data to the Department of Education, 72 Fed. Reg. 59,266 (Oct. 19, 2007).

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period, when admissions officials are questioned about how many black students are enrolled in their particular educational program, they may also report the number of Black Hispanic and Black Multiracial students along with the number of Black/African American students. Thus, they may respond by saying, “We have enrolled sixteen black students, of which one is also Hispanic/Latino and four are also multiracial.”

Regardless of how admissions decisions for Black Hispanics and Black Multiracials are treated over the next few years, as time passes from the effective date of the Guidance, the tendency of admissions officials to compare Black Hispanics to others in the Hispanic/Latino category will likely increase. The tendency to compare Black Multiracials to others in the Two or More Races category will also likely increase. Scholars have long understood the concept that race is socially constructed.²³¹ Having changed the definition of all the major racial/ethnic categories, the Guidance will provide an unfolding example of the workings of this concept. As the years pass, educational institutions will become increasingly familiar with addressing the racial/ethnic reporting categories of the Guidance. In addition, the national statistics about the educational situation of various racial/ethnic groups, including high school graduation rates and college attendance rates, will be compiled from data reported to the DOE, which places Black Hispanics in the Hispanic/Latino counts and Black Multiracials in the Two or More Races counts.²³² As admissions officials come to understand that Black Hispanics and Black Multiracials no longer increase the numbers of Black/African American students, the educational institutions may come to look at these two groups in a different light.

For admissions officials to continue to treat Black Hispanics and Black Multiracials as if they were Black/African Americans would constitute a blatant application of the one-drop rule. Admissions officials would treat individuals as black even though they have expressed a different racial/ethnic identity in the admissions process. Doing this would also invoke a certain irony, particularly regarding Black Multiracials. One of the principal motivations for the adoption of the 1997 Revised Standards, which prompted the issuance of the Guidance, was the desire of multiracial groups to avoid the classification

231. *See supra* note 286-87 and accompanying text.

232. *See supra* notes 15-16 and accompanying text.

of Black Multiracials as black.²³³ Thus, if admissions officials treat Black Multiracials as Black/African American, this practice would run counter to one of the main reasons the Guidance required the reclassification of Black Multiracials into the Two or More Races category.

Admissions officials will also have to decide whether it is fair to admit a particular Black Hispanic that was compared with Black/African American applicants, because the Black Hispanic's admission could come at the expense of another Hispanic/Latino who may have higher standardized test scores. The same holds true—but to a far greater extent—for Black Multiracial applicants. Their admission could come at the expense of other multiracials reported in the Two or More Races category who could very well have standardized tests scores that are significantly higher than those of Black Multiracial applicants admitted.

As the impact of the Guidance unfolds, it will tend to standardize the redistribution of Black Hispanics and Black Multiracials into the categories it prescribes. Consequently, it will reduce the admissions prospects of Black Hispanics to selective higher educational institutions as admissions committees compare their academic credentials to others in the Hispanic/Latino category, instead of the Black/African American category. However, the unfolding of the Guidance is potentially devastating to the admissions prospects of Black Multiracials as admissions officials change their comparative group from Black/African Americans to those in the Two or More Races category.

IV. BLACK IMMIGRANTS SHOULD NOT BE TREATED BETTER THAN BLACK HISPANICS AND BLACK MULTIRACIALS

While some commentators on the Proposed Guidance suggested the addition of several other categories, including a category for “Africans” that would be different from “African American,” the DOE largely treated the issue of categories as resolved by the 1997 Revised Standards.²³⁴ As a result, by complying with the Guidance, selective higher education institutions will only generate internal data that allows them to separate Black Hispanics and Black Multiracials

233. *See supra* Part II.B.2.

234. Final Guidance on Maintaining, Collecting, and Reporting Racial and Ethnic Data to the Department of Education, 72 Fed. Reg. 59,266, 59,268 (Oct. 19, 2007) (“The issues raised by these commentators concerning additional categories or clarifications of existing categories were previously addressed by OMB when it announced its [1997 Revised Standards]”).

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from Black/African Americans. However, they will not be able to determine the ethnic breakdown of blacks in the Black/African American category.

Since Black Immigrants will be counted in the Black/African American category, admissions officials of selective higher education programs will continue to compare their academic credentials to those in the Black/African American category. This provides Black Immigrants with a competitive advantage in the admissions process over both Black Hispanics and Black Multiracials. As a result, the unfolding of the Guidance will reduce the admissions prospects of Black Hispanics and Black Multiracials and, at the same time, improve the admissions prospects of Black Immigrants. Yet, as the statistics in the introduction demonstrate, both Black Multiracials and Black Immigrants are overrepresented among blacks in colleges and universities in general, but particularly in selective higher education institutions. Census Bureau statistics indicate that the socioeconomic status of Black Hispanic students is similar to that of other African American students.²³⁵ However, like Black Multiracials, Black Immigrants tend to come from families with more parental education and higher family incomes than other blacks.²³⁶ Black Immigrants and Black Multiracials also have at least one parent who is not a descendant from the group of blacks whose ancestral line is that of blacks who experienced the history of discrimination of blacks in the United States.²³⁷ Thus, this raises the issue of whether it is right to treat Black Immigrants better than Black Hispanics and Black Multiracials in the admissions process of selective higher education institutions.

When affirmative action admissions policies began in the 1960s,²³⁸ there were only 125,000 foreign-born blacks in the country, making up only 0.7% of the black population.²³⁹ This percentage, however, has risen over eleven fold in the past fifty years, to 1.1% in 1970,²⁴⁰ to 3.1% in 1980,²⁴¹ to 4.9% in 1990,²⁴² to 6.1% in 2000,²⁴³ and

235. See JOHN R. LOGAN, HOW RACE COUNTS FOR HISPANIC AMERICANS 3-4 (2003), available at <http://mumford.albany.edu/census/BlackLatinoReport/BlackLatinoReport.pdf>.

236. Brown, *supra* note 19, at 153-54.

237. *Id.*

238. William Bowen and Derek Bok in their groundbreaking book, *The Shape of the River*, noted, "It is probably safe to say . . . that prior to 1960, no selective college or university was making determined efforts to seek out and admit substantial numbers of African Americans." WILLIAM G. BOWEN & DEREK BOK, THE SHAPE OF THE RIVER: LONG-TERM CONSEQUENCES OF CONSIDERING RACE IN COLLEGE AND UNIVERSITY ADMISSIONS 4 (1998).

239. Gibson & Lennon, *supra* note 41, at tbl.8.

240. *Id.*

to 8% in 2007.²⁴⁴ Over this period, the number of foreign-born blacks in the United States has also increased nearly twenty-four fold to almost three million.²⁴⁵ The impact of the foreign-born black population on blacks in the United States is likely to further increase in the future because foreign-born black women bore approximately one out of every six black children in 2004.²⁴⁶

In order to assert that it is wrong to favor Black Immigrants over Black Hispanics and Black Multiracials in the admissions process of selective higher education institutions, it is necessary to articulate an overarching justification of which black applicants deserve positive consideration in the admissions process and why. The starting point has to be the Supreme Court's opinion in *Grutter v. Bollinger*,²⁴⁷ since this is the decision that justifies the use of racial classifications in the admissions process. Justice O'Connor's majority opinion for the Court points to the experience of growing up as an underrepresented minority with a history of discrimination as the basis for the consideration of race and ethnicity in the admissions process.²⁴⁸ When compared to Black Hispanics or Black Multiracials, it is difficult to assert that Black Immigrants have more experience with the historical discrimination of blacks in the United States. The first section of this Part addresses the justifications for the use of racial classification in the admissions process. The second section of this Part discusses why it is wrong to provide Black Immigrants with a competitive advantage in the admissions process over Black Hispanics and Black Multiracials.

241. *Id.*

242. *Id.*

243. JESSE D. MCKINNON & CLAUDETTE E. BENNETT, U.S. CENSUS BUREAU, WE THE PEOPLE: BLACKS IN THE UNITED STATES 7 fig.5 (2005), available at <http://www.census.gov/prod/2005pubs/censf-25.pdf>.

244. See GRIECO, *supra* note 43. The Census Bureau estimated that there were 36,657,000 non-Hispanic Blacks of which 2,785,000 were foreign born (or 7.6%). In addition, 187,000 of the 677,000 Hispanic/Latinos who checked black as their only racial category were foreign-born. Thus, the total of the single race black population, including Hispanic/Latinos, was 37,334,000 of which 2,972,000 or 7.96%. *Id.*

245. See GRIECO, *supra* note 43, at 7.

246. Kent, *supra* note 27, at 4 (asserting that the figure drops to just 13% of black children if only non-Hispanic Blacks are considered).

247. 539 U.S. 306 (2003).

248. See *id.* at 337-39.

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A. Justification for the Use of Racial Classifications in the Admissions Process

In *Grutter v. Bollinger*,²⁴⁹ the Supreme Court upheld the affirmative action admissions policy of the University of Michigan Law School. The policy reaffirmed

the Law School's longstanding commitment to "one particular type of diversity," that is, "racial and ethnic diversity with special reference to the inclusion of students from groups which have been historically discriminated against, like African-Americans, Hispanics and Native Americans, who without this commitment might not be represented in our student body in meaningful numbers."²⁵⁰

Professor Richard Lempert chaired the faculty committee of the Law School, which drafted the affirmative action policy upheld in *Grutter*.²⁵¹ In his testimony during the District Court trial, Lempert noted that the policy "did not purport to remedy past discrimination, but rather to include students who may bring to the Law School a perspective different from that of members of groups which have not been the victims of such discrimination."²⁵² In the majority opinion, Justice O'Connor noted, "Just as growing up in a particular region or having particular professional experiences is likely to affect an individual's views, so too is one's own, unique experience of being a racial minority in a society, like our own, in which race unfortunately still matters."²⁵³ She also pointed out that the University of Michigan Law School did not premise the need for a critical mass of underrepresented minority students on "any belief that minority students always (or even consistently) express some characteristic minority viewpoint on any issue."²⁵⁴ Thus, the opinion endorses the use of racial classifications in the admissions process for the selection of underrepresented minorities that have *experienced* the impact of being a member of a historically discriminated group.²⁵⁵

The legacy of North American and European slavery and American foreign policy over the years had negative consequences for a

249. *Id.* at 343-44.

250. *Id.* at 316 (internal citations omitted) (quoting the University of Michigan Law School's admissions policy).

251. *Id.* at 319.

252. *Id.*

253. *Id.* at 333.

254. *Id.* (quoting Response to the Petition for Certiorari by Respondents at 30, *Grutter v. Bollinger*, 539 U.S. 306 (2003) (No. 02-241)).

255. *Id.*

number of countries where a majority of the population was black, including countries of origin of many foreign-born blacks.²⁵⁶ Nevertheless, from the very inception of affirmative action admissions policies, it was always clear that the history of discrimination that concerned proponents of affirmative action was the history that took place in the United States. After all, no one seriously contended that affirmative action in the United States was created to target the effects of oppression caused in other parts of the world, including for example, the exploitation of Koreans in Japan, the negative effects of untouchability on Dalits in India, the remnants of French Colonialism in the Caribbean, or the aftermath of British imperialism in Africa or the New World. Thus, when the University of Michigan Law School mentioned that blacks and other groups have suffered from a history of discrimination, that history related to the treatment of blacks in the United States, not the rest of the world.²⁵⁷

In order to determine which black applicants have experienced the impact of being a member of a historically discriminated group in the United States, it is necessary to understand the historical experience of discrimination of African Americans. The central feature in the historical experience of blacks in the United States is race. However, there are two different aspects of the historical discrimination against blacks. One aspect involves the victimization of race, which occurs when blacks experience discrimination and subjugation because of their race.²⁵⁸ For much of history, dominant American society viewed blacks as inferior to whites. This view helped to make the subjugation of blacks appear to be part of the normal order of things.²⁵⁹ Thus, one aspect of the experience of historical discrimination for African Americans is the experience of what it means to be

256. See Lewis R. Gordon, *Thinking Through Identities: Black Peoples, Race Labels, and Ethnic Consciousness*, in *THE OTHER AFRICAN AMERICANS: CONTEMPORARY AFRICAN AND CARIBBEAN IMMIGRANTS IN THE UNITED STATES* 83 (Yoku Shaw-Taylor & Steven A. Tuch eds., 2007) (arguing that concern about the underrepresentation of Ascendants benefitting from affirmative action is xenophobic and under appreciates the impact of the legacy of slavery on other blacks and how American foreign policy has harmed the development of Caribbean countries).

257. *Grutter v. Bollinger*, 539 U.S. 306, 319 (2003).

258. See, e.g., Vincene Verdun, *If the Shoe Fits, Wear It: An Analysis of Reparations to African Americans*, 67 *TUL. L. REV.* 597, 625-38 (1993) (outlining, in the context of reparations, the victimization of the African-American consciousness, due to the subjugation of blacks because of their race).

259. For a brief description of this history, see KEVIN BROWN, *RACE, LAW AND EDUCATION IN THE POST-DESEGREGATION ERA: FOUR PERSPECTIVES ON DESEGREGATION AND RESEGREGATION* 41-72 (2005).

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“raced” or branded as inferior.²⁶⁰ However, against the background of racial domination in the United States, the descendants of the sons and daughters of the soil of Africa developed a counter-discourse to how mainstream American society normally viewed and treated them. From this point of view, race was also the central characteristic that united blacks. This counter historical experience of being black involved the active engagement in a collective struggle against white supremacy, not the acceptance of black racial inferiority.²⁶¹ Consequently, the experience of the history of discrimination of black people in the United States is like a two-sided coin. On one side, race was—and is—the basis of the subjugation of blacks. On the other side, race was—and is—the immutable characteristic that bound blacks as a people in a constant struggle against their racial oppression. Black applicants who should receive positive consideration in the admissions process of selective higher education programs are those connected to and have experience with, both aspects of discrimination that blacks have suffered in the United States.

B. It Is Wrong to Treat Black Immigrants Better than Black Hispanics or Black Multiracials

If there is a reason to justify treating Black Immigrants better than Black Hispanics and Black Multiracials, it has to be based on the belief that Black Immigrants have a better connection with the historical discrimination of blacks in the United States. But, how can that be? With respect to foreign-born blacks who immigrate to the United States as adults (Adult Black Immigrants), it is clear that they do not have the same experience with racial discrimination in the United States as Black Hispanics or Black Multiracials that grew up in the United States. Adult Black Immigrants would have grown up in their native countries. Thus, they did not experience growing up in the United States. Even if Adult Black Immigrants know about American racism, they are not likely to be as emotionally aware of it when

260. See, e.g., MARI J. MATSUDA ET AL., WORDS THAT WOUND: CRITICAL RACE THEORY, ASSAULTIVE SPEECH, AND THE FIRST AMENDMENT 53, 61 (1993); D. Marvin Jones, *Darkness Made Visible: Law, Metaphor, and the Racial Self*, 82 GEO. L. J. 437, 439-40 (1993) (arguing that racial categories are neither objective nor natural, but ideological and constructed, by which race is not so much a category but a practice: people are raced); Charles R. Lawrence III, *If He Hollers Let Him Go: Regulating Racist Speech on Campus*, 1990 DUKE L.J. 431, 443 n.52 (1990) (citing Kendall Thomas's Comments at the Frontiers of Legal Thought Conference at Duke Law School, arguing that the status quo of institutionalized white supremacy remains even after deliberate racist actions subside).

261. For a brief description of this history, see BROWN, *supra* note 259, at 81-101.

they arrive, because there is no counterpart for it in most of their native countries.²⁶² As Eugene Robinson states in his book *Disintegration: The Splintering of Black America*, “For black immigrants from Africa and the Caribbean, the United States may be judged guilty of modern sins, but not the ancient kind that fester in the blood.”²⁶³ In addition, as John Ogbu—the Nigerian born American educated scholar—asserts, many voluntary immigrants who encounter discrimination in their chosen country may attribute the discrimination to their status as an immigrant, rather than to their race.²⁶⁴ As a result, they may discount their experience of racial discrimination and emphasize it as a product of being an immigrant.

Many in American society may also view foreign-born blacks as separate and distinct from native blacks.²⁶⁵ Some Americans may see foreign-born blacks as more polite, less hostile, more solicitous, and easier to get along with than native-born blacks.²⁶⁶ As a result, these foreign-born blacks experience less of the reality that accompanies the history of racial oppression of blacks in the United States.

Adult Black Immigrants also may not possess the same desire to fight against racism in the United States that is instilled in blacks in the United States as they grow up. These Adult Black Immigrants are likely to be more concerned with the conditions of their relatives, friends, and other people in the countries that they left, rather than the history of discrimination endured by the blacks in the United States. Thus, they may be more interested in assisting those they care about in their country of origin. There is ample proof of this concern on the part of foreign-born blacks. One of the major sources of income for many developing nations in Africa is remittances from natives living abroad.²⁶⁷ Thus, Adult Black Immigrants are far less likely to spend as much of their time engaged in the collective struggle against racial oppression in the United States than native blacks who do not share these international concerns.

262. See EUGENE ROBINSON, *DISINTEGRATION: THE SPLINTERING OF BLACK AMERICA* 188 (2010).

263. *Id.*

264. See John U. Ogbu, *Immigrant and Involuntary Minorities in Comparative Perspective*, in *MINORITY STATUS AND SCHOOLING: A COMPARATIVE STUDY OF IMMIGRANT AND INVOLUNTARY MINORITIES* 37-61 (Margaret A. Gibson & John Ogbu eds., 1991).

265. See, e.g., Malcolm Gladwell, *Black Like Them*, *NEW YORKER*, Apr. 29, 1996, at 74 (explaining why West Indians and American blacks are perceived differently).

266. *Id.*

267. See generally Devesh Kapur & John McHale, *Globalization at Work: Migration's New Payoff*, *FOREIGN POL'Y*, Nov. 1, 2003, at 48.

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Many Adult Black Immigrants come to the United States for the very same reasons that other voluntary immigrants come to America. These reasons reflect a desire to improve one's social, economic, or educational standing. As Mary Waters, in her study of West Indians in the United States pointed out, "They wanted to make a better life for themselves, and they realized they could make more money in the United States than they could back home."²⁶⁸ Thus, what justifies their sacrifice of leaving the life they knew behind is success in obtaining economic and educational advancement, not helping to overcome racial oppression in the United States.

I can also speak on the differences between foreign-born blacks and native blacks from my own experiences of traveling through the Republic of South Africa many times.²⁶⁹ In South Africa, I was a foreign-born black in a country with a history of race discrimination against blacks. While I understood the history of discrimination that black South Africans experience and sympathized with their plight, their history was not my history. The experience of their discrimination did not touch me in the deep and meaningful ways that the history of my ancestors' discrimination in the United States touches me. In the end, since black South Africans were not my people, I remained far more concerned about racism in the United States than racism in South Africa.²⁷⁰

The term "Black Immigrants" refers to both first- and second-generational blacks. There are important differences between these two generations. However, as Professor Leonard Baynes, who was born and raised in the United States by two West Indian parents, noted:

Since I grew up in this culture, I do not speak with an accent, and most people do not know that I am of Caribbean ancestry unless I tell them. However, at times, culturally I do not feel American. This should be no surprise since I am a child of immigrants. Like many other people whose parents may have emigrated here from

268. MARY C. WATERS, *BLACK IDENTITIES: WEST INDIAN IMMIGRANT DREAMS AND AMERICAN REALITIES* 331 (1999).

269. In the summer of 1997, I spent seven weeks traveling through South Africa. In the summer of 1998, I spent three weeks with the Law Faculty of the University of Witwatersrand and four weeks with the Law Faculty of the University of Capetown. In the summer of 1999 and 2000, I spent ten days on each visit, mostly in Johannesburg.

270. For a movie that portrays the experiences of African Americans who have immigrated to South Africa, see *BLACKS WITHOUT BORDERS: CHASING THE AMERICAN DREAM IN SOUTH AFRICA* (Stafford Bailey 2008), available at <http://www.blackswithoutborders.net/home.html>.

other countries, I feel that I sometimes straddle the cultures of my parents and that of their adopted home.²⁷¹

For the Black Immigrants who come of age in the United States, their experience of the history of racial discrimination is likely to be more acute than that of Adult Black Immigrants. However, like Black Multiracials, they also have at least as much ancestry that does not result from the history of discrimination of blacks in the United States as ancestry that does.

CONCLUSION

Since the origin of affirmative action, selective higher education institutions have generally lumped all blacks into a unified Black/African/African American category.²⁷² However, due to the DOE's promulgation of the Guidance, that has changed. The Guidance marks the first time that the federal government has specified how all educational institutions must collect and report data about the race and ethnicity of their students to the DOE.²⁷³ The Guidance, effectively, requires educational institutions to separate individuals who before would have been placed in the "Black/African/African American" category into the Black Hispanic, Black Multiracial, or Black/African American category.²⁷⁴ Under the Guidance, educational institutions include Black Hispanics in their counts of Hispanic/Latinos and Black Multiracials in their counts of Two or More Races.²⁷⁵ In the data reported to the DOE, Black Hispanics cannot be broken out of the totals in the Hispanic/Latino category and Black Multiracials cannot be separated from others in the Two or More Races category.²⁷⁶

Before the implementation of the Guidance, when admissions officials compared the applications of most Black Hispanics and Black Multiracials to others in their racial/ethnic group, they would have compared them to applicants in the Black/African American category. Because the scores on standardized tests used for admissions to selective higher education programs of those in the Black/African American category were lower than those in most of the various Hispanic/Latino categories or the other racial categories, this maximized the

271. See Leonard M. Baynes, *Who Is Black Enough For You? The Stories of One Black Man and His Family's Pursuit of the American Dream*, 11 GEO. IMMIGR. L.J. 97, 124 (1996).

272. See *supra* notes 1-3 and accompanying text.

273. See *supra* note 5 and accompanying text.

274. See *supra* notes 15-16 and accompanying text.

275. See *supra* notes 15-16, 20 and accompanying text.

276. See *supra* Part II.B.

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admissions prospects of Black Hispanics and, to a far greater extent, Black Multiracials. However, as admissions officials adjust to the implementation of the Guidance, they are likely to start to compare Black Hispanics to others in the Hispanic/Latino category. Such a comparison will likely have a negative effect on the admissions prospects of Black Hispanics in comparison to what they were before the implementation of the Guidance. For Black Multiracials, however, the potential impact on their admissions prospects to selective higher education institutions created by a change in their comparison group, could be devastating. Admissions officials will compare them with other multiracials in the Two or More Races category, the largest numbers of which will be White/Asian and White/Native American multiracials.

The impact that the Guidance will have on the future admissions prospects of Black Hispanic and Black Multiracial applicants is only half of the story. The Guidance does not mandate that educational institutions use ethnic subcategories.²⁷⁷ As a result, by complying with the Guidance, selective higher education institutions will not be able to determine the ethnic breakdown of blacks in the Black/African American category. In other words, they will not know how many of those included in their Black/African American category are Black Immigrants.

Even though colleges and universities have not typically divided their black students into different racial/ethnic categories, scholars and commentators have recently pointed to a growing overrepresentation of both Black Multiracials and Black Immigrants among the black students enrolled in America's selective higher education programs.²⁷⁸ Like Black Multiracials, Black Immigrants tend to come from families with more parental education and higher family incomes than other blacks. In addition, Black Immigrants, like Black Multiracials, also have at least one parent who is not a descendant from the group of blacks whose ancestral line is that of blacks that experienced the history of discrimination of blacks in the United States.

As selective higher education institutions come to grips with the reclassification by the Guidance of Black Hispanics and Black Multiracials, Black Immigrants are the ones likely to benefit the most. What is more, the number and percentage of Black Immigrants

277. *See supra* text accompanying note 26.

278. *See supra* notes 29-36 and accompanying text.

among the black student age population is likely to increase substantially for some time to come, because the percentage of foreign-blacks among the black population increased from 3.1% in 1980 to 8% in 2007.²⁷⁹ Yet, given the justifications for use of racial classifications in the admissions process articulated by the Supreme Court in its opinion in *Grutter*, admissions committees of selective higher education institutions should not provide treatment that is more favorable to Black Immigrant applicants than to Black Hispanic or Black Multiracial applicants.

279. *See supra* notes 238-44 and accompanying text.

Race and Response-to-Intervention in Special Education

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INTRODUCTION

When Congress decided in 2004 to revise the law governing special education—the Individuals with Disabilities Education Act

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(“IDEA”)—it hoped to ameliorate three related problems. First, the special education population had skyrocketed to include more than 10% of the entire student population, which led to increased costs and overwhelmed some local districts.¹ One group within that population—students found to have “specific learning disabilities” (“SLD”)—had experienced especially explosive growth and accounted for more than 40% of all students with disabilities.² Second, there was great skepticism about the way in which students were determined to have a “specific learning disability.”³ The traditional method, required by federal regulation, was to look for a discrepancy between a student’s IQ and the student’s achievement.⁴ Among other problems, many believed this was an unreliable way to diagnose a learning disability.⁵ Third, minority students, and especially African Americans, were overrepresented in special education, particularly in the “soft” disability categories of mental retardation; emotional disturbance; and specific learning disability.⁶

Congress responded to these problems by amending IDEA in two related ways. First, it encouraged the use of early intervening services (“EIS”) and even required the use of such services in districts with substantially disproportionate minority enrollment in special education.⁷ EIS is an amorphous concept, but it essentially entails pro-

1. See, e.g., THOMAS PARRISH ET AL., CTR. FOR SPECIAL EDUC. FIN., STATE SPECIAL EDUCATION FINANCE SYSTEMS, 1999-2000, PART II: SPECIAL EDUCATION REVENUES AND EXPENDITURES 5-7 (2004); Terry Jean Seligmann, *An IDEA Schools Can Use: Lessons From Special Education Legislation*, 29 FORDHAM URB. L.J. 759, 765 (2001). For more recent figures, which are similar, see DATA ACCOUNTABILITY CTR., STUDENTS AGES 6 THROUGH 21 SERVED UNDER IDEA, PART B, AS A PERCENTAGE OF POPULATION, BY DISABILITY AND STATE: FALL 2007 tbl.1-15 (2007), available at https://www.ideadata.org/TABLES31ST/AR_1-15.htm.

2. See, e.g., Mark C. Weber, *The IDEA Eligibility Mess*, 57 BUFF. L. REV. 83, 123 (2009).

3. A specific learning disability is defined in IDEA as “a disorder in one or more of the basic psychological processes involved in understanding or in using language, spoken or written,” which affects a student’s “ability to listen, think, speak, read, write, spell, or do mathematical calculations.” 20 U.S.C. § 1401(30) (West 2006 & Supp. 2010).

4. See, e.g., MATTHEW BURNS & KIMBERLY GIBBONS, IMPLEMENTING RESPONSE-TO-INTERVENTION IN ELEMENTARY AND SECONDARY SCHOOLS 2 (2008).

5. See, e.g., Alberto Restori, Frank M. Gresham & Clayton Cook, “*Old Habits Die Hard*”: Past and Current Issues Pertaining to Response-to-Intervention, 13 CAL. SCH. PSYCHOLOGIST 67 (2008).

6. See, e.g., Thomas Parrish, *Disparities in the Identification, Funding, and Provision of Special Education*, in RACIAL INEQUITY IN SPECIAL EDUCATION 15-35 (Daniel J. Losen & Gary Orfield eds., 2002). “Soft” disabilities are those that are more difficult to diagnose and require some subjective judgment, as compared to “hard” disabilities that are more easily diagnosed and objectively verifiable. Think of emotional disturbance, on the one hand, and a visual impairment, on the other.

7. These amendments are now codified at 20 U.S.C. § 1413(f) (2006) and 20 U.S.C. § 1418(d)(2)(B) (2006), respectively.

viding intensive instruction and behavioral support to students at risk of educational failure *before* they are found eligible for special education. The basic idea is to intervene early and improve instruction in the hope that doing so will, among other things, reduce the number of students found eligible for special education.⁸

Second, Congress encouraged the use of Response-to-Intervention (“RTI”) both as a diagnostic tool and as one type of EIS. RTI is an equally amorphous concept, but the basic idea behind it is that students should be given increasingly intense and tailored instruction before they are determined eligible for special education.⁹ In theory, RTI can help distinguish between those who truly have a disability and those who are receiving poor or inappropriate instruction. As a diagnostic tool, RTI was offered in the 2004 amendments as an alternative to the controversial discrepancy model for identifying students with learning disabilities.¹⁰ But it is easy to see how RTI is more than simply a means of diagnosing students with learning disabilities. It also provides services to all students at risk of failing before they are found eligible for special education. RTI is currently the most popular example of an EIS and is the focus of this Article.

Congress hoped that RTI would reduce the overall numbers of students found eligible for special education because it would separate those with actual disabilities from those who simply needed a bit more help in keeping up with the regular curriculum.¹¹ Congress also hoped that RTI, and EIS more broadly, would reduce the racial disproportionality in special education.¹² Although the mechanism by which this would occur is not completely spelled out in the amendments, the theory seems to be that referrals and eligibility determinations for special education—especially for “soft” disabilities—were too subjective and not especially accurate in general. And, in particular, they led to disproportionate and unjustified referrals and eligibil-

8. See, e.g., Weber, *supra* note 2, at 130.

9. See generally BURNS & GIBBONS, *supra* note 4, at 1 (defining RTI as “the systematic use of assessment data to most efficiently allocate resources in order to improve learning for all students”); CARA SHORES, A COMPREHENSIVE MODEL FOR RESPONSE TO INTERVENTION: INTEGRATING BEHAVIORAL AND ACADEMIC INTERVENTIONS 1 (2009) (exploring the “complimentary relationship between academic performance and behavioral functioning” in regard to RTI).

10. 20 U.S.C. § 1414(b)(6).

11. See Wendy F. Hensel, *Sharing the Short Bus: Eligibility and Identity Under the IDEA*, 58 HASTINGS L.J. 1147, 1159-63 (2007); Weber, *supra* note 2, at 125-33.

12. See, e.g., Nancy Harris-Murri, Kathleen King & Dalia Rostenberg, *Reducing Disproportionate Minority Representation in Special Education Programs for Students with Emotional Disturbances: Toward a Culturally Responsive Response to Intervention Model*, 29 EDUC. & TREATMENT OF CHILD. 779, 779-80 (2006).

ity determinations for minority students. To the extent EIS and RTI made the referral and eligibility process more objective, whatever subjective biases led to the overrepresentation of minority students would be squelched.

RTI has great potential, in theory, to improve the education for students at risk of failure, to reduce the costs of special education by reducing the number of students who need those services, and to reduce the stigma and sometimes low expectations that attach to students found eligible for special education. Indeed, RTI represents a significant shift in approaching the problem of students who are struggling. Rather than wait for students to fail and then provide special education services, RTI encourages schools to intervene earlier and to provide appropriate services to all based on their demonstrated need rather than a diagnosis of disability.¹³

At the same time, however, RTI brings some significant risks. One of the benefits of being found eligible for special education is added protection against discipline and suspension, especially for behavior that is a product of the student's disability. Among the most important of these protections is that students must continue to be provided services even if suspended from school or sent to a different school.¹⁴ Students not receiving special education services have no such right. This includes students who are receiving RTI; these students are not entitled to any of the procedural or discipline protections afforded special education students. Thus, one risk is that if EIS and RTI simply delay the time before a student is found eligible for special education or, worse, keep eligible students out of special education, those students may be trading some additional educational services for the procedural and discipline protections of special education.

This tradeoff is especially worrisome for minority students. Minority students are not overrepresented only in special education. They are also more likely than white students to be disciplined, suspended, and expelled.¹⁵ The dilemma for minority students is there-

13. See generally Douglas Fuchs, Lynn S. Fuchs & Pamela M. Stecker, *The "Blurring" of Special Education in a New Continuum of General Education Placements and Services*, 76 EXCEPTONAL CHILD 301, 301 (2010) (identifying two camps "that hold starkly different answers to questions about the nature and purpose of RTI").

14. See *infra* Part II.A.

15. Russell J. Skiba et al., *The Color of Discipline: Sources of Racial and Gender Disproportionality in School Punishment*, 34 URB. REV. 317, 317 (2002) ("The disproportionate discipline of African-American students has been extensively documented . . .").

fore especially acute: RTI might succeed in decreasing racial disproportionality when it comes to special education eligibility, but it could in turn exacerbate the existing disproportionality in discipline.

As this Article argues, one way to ameliorate this dilemma is to incorporate positive behavioral interventions into the RTI model in order to avoid problems that can result in removal from school and referral to special education. An additional way is to extend some of the procedural and discipline protections of special education to those students who receive RTI or EIS. If educational need, rather than disability, is enough to justify providing students additional academic services, need should also be sufficient to justify additional protections against unwarranted discipline and removal.¹⁶

These reforms, if adopted, might eliminate or at least reduce the worrisome tradeoff between access to academic services and protection against suspension that is a current feature of RTI. Neither these reforms nor RTI itself, however, will likely eliminate misidentification for special education generally or disproportionality in particular. RTI does not address all of the various and conflicting incentives among parents, administrators, and teachers when it comes to special education placement. Unless and until the now large gap between general and special education is eliminated, these incentives will continue to distort special education eligibility and both misidentification and disproportionality will likely continue.

I. WHAT IS RTI?

The concept of RTI has caught fire in the last decade, primarily because of its inclusion in the 2004 amendments to IDEA. Consequently, researchers, school administrators, and policymakers alike have focused increased attention on RTI. States and school districts across the country have begun, at least in theory, to follow its precepts.¹⁷ But RTI remains somewhat elusive, in part because its adoption in most places is still new and in part because the concept itself is both simple and complicated. RTI means different things to different people: pedagogical philosophy; diagnostic tool; a means to reduce the overrepresentation of minorities in special education; a re-

16. *See infra* Part III.B.

17. *See generally* Perry A. Zirkel & Lisa B. Thomas, *State Laws and Guidelines for Implementing RTI*, 43 *TEACHING EXCEPTIONAL CHILD*. 60, 60 (2010) (describing adoption and implementation of RTI and indicating that thirteen states require the use of RTI for specific learning disability identification while others encourage it through guidelines).

search tool that will allow the collection of data regarding best teaching methods. Before focusing on the relationship between race and RTI and the various tradeoffs involved in shifting toward RTI, it might be useful to explain, as clearly as possible, the origins and theory of RTI.

A. RTI and IDEA

IDEA is the primary source of legal rights and obligations regarding special education students. At its heart, the law guarantees all eligible children the right to the support and services necessary to provide a “free appropriate public education” (“FAPE”), which is implemented through an individualized education program (“IEP”) that is supposed to be tailored to the students’ needs.¹⁸ IDEA is the most recent incarnation of the landmark Education of All Handicapped Children Act of 1975 (“EHCA”), which first guaranteed students with disabilities access to public school and the right to a free appropriate public education once there.¹⁹ The EHCA represented a remarkable change from prior practice, where many disabled students were excluded from school altogether, and those admitted were often simply warehoused and provided obviously inferior services.²⁰

By 2004, however, many believed that IDEA may have been *too* successful, at least from the perspective of eligibility.²¹ The problem was no longer that students with disabilities were being locked out of public schools but that too many students were being found eligible for special education. The special education population exploded during the three decades following passage of EHCA, greatly outstripping the growth in the general student population.²² Currently, more than 10% of all students—about 6.6 million—are receiving special education services.²³

Eligibility for special education depends on whether students have one or more of any number of particular disabilities that are

18. See 20 U.S.C. §§ 1400-1491 (West 2006 & Supp. 2010).

19. Education for All Handicapped Children Act of 1975, Pub. L. No. 94-142, 89 Stat. 773 (1975) (codified as amended at 20 U.S.C. §§ 1400-1491 (West 2006 & Supp. 2010)).

20. See, e.g., Jo Ann Engelhardt, *The Education for All Handicapped Children Act: Opening the Schoolhouse Door*, 6 N.Y.U. REV. L. & SOC. CHANGE 43, 45-46 (1975).

21. See, e.g., Wade F. Horn & Douglas Tynan, *Time to Make Special Education “Special” Again*, in RETHINKING SPECIAL EDUCATION FOR A NEW CENTURY 26-30 (Chester E. Finn, Jr. et al. eds., 2001).

22. See, e.g., Hensel, *supra* note 11, at 1149.

23. See U.S. DEP’T OF EDUC., DIGEST OF EDUCATION STATISTICS, 2009, available at http://nces.ed.gov/programs/digest/D09/tables/dt09_050.asp?referrer=list.

identified in the legislation, whether the disability adversely affects their educational performance, and whether students therefore need special education and related services. The explosive growth in the special education population has not been even across disability categories but has instead occurred within just a few. In particular, the number of students identified as having specific learning disabilities has grown at an astounding rate.²⁴ In the twenty-year period between 1976 and 1996, students in this category increased by 283% to more than 2.2 million.²⁵ Today, that number is 2.5 million.²⁶ Students in this category represent nearly 45% of all students receiving special education services—a percentage that dwarfs the proportion of students in any other disability category, including mental retardation, emotional disturbance, hearing impairments, or visual impairments.²⁷

In addition to concern about overall numbers, many expressed concern about how students were found eligible for special education.²⁸ Diagnosing students with “specific learning disabilities” was the main point of concern.²⁹ Traditionally, students were identified as having a learning disability only if they underperformed relative to their ability, which was demonstrated by a discrepancy between the student’s IQ and achievement.³⁰ The discrepancy model was controversial from the start and became more so over time, as the numbers in the SLD category continued to rise. The criticisms were numerous, but the chief complaint was that the discrepancy method was unreliable.³¹ Some students who should have been eligible were excluded and some—many more—who should not have been found eligible were included.³²

Enter the 2004 amendments to IDEA and RTI. The 2004 amendments eliminated any requirement that school districts use the discrepancy model to identify students with specific learning

24. Horn & Tynan, *supra* note 21, at 28.

25. Weber, *supra* note 2, at 123.

26. See REHAB. RESEARCH & TRAINING CTR. ON DISABILITY STATS. & DEMOGRAPHICS, ANNUAL DISABILITIES STATISTICS COMPENDIUM: 2009 tbl.71 (2009), available at <http://www.disabilitycompendium.org/Compendium2009.pdf>.

27. *Id.*

28. Weber, *supra* note 2, at 123-24.

29. See *id.* at 123.

30. See, e.g., BURNS & GIBBONS, *supra* note 4, at 2.

31. Weber, *supra* note 2, at 124.

32. See, e.g., Louise Spear-Swerling, *Response to Intervention and Teacher Preparation, in EDUCATING INDIVIDUALS WITH DISABILITIES: IDEA 2004 AND BEYOND* 273, 276 (Elena L. Grigorenko ed., 2008); Restori, Gresham & Cook, *supra* note 5, at 67-78.

disabilities.³³ The amendments also authorized school districts to rely on RTI as a diagnostic tool to identify students with specific learning disabilities. In the language of the amendments, school districts were authorized to “use a process that determines if the child responds to scientific, research-based intervention as a part of the evaluation procedures.”³⁴ Together, these changes encouraged, but did not require, a shift from the discrepancy model to RTI as a diagnostic tool, though it should be emphasized that RTI is meant to be one factor among others used to determine eligibility.³⁵

Additional changes further paved the way for the use of RTI. The 2004 IDEA amendments also authorized school districts to use up to 15% of their special education funds for EIS and, as mentioned, RTI is a form of EIS.³⁶ For districts that had significant racial disparities in special education placement, spending 15% of these funds was not merely authorized but required.³⁷ In addition, the amendments made clear that a student should not be found eligible for special education if the “determinant factor” of the student’s poor achievement is poor instruction.³⁸ RTI is one method of making this determination. The regulations bolster the statutory requirements by insisting that schools document, as part of the referral process for eligibility as a student with a learning disability, that they have basically excluded other explanations for poor achievement, including poor instruction. It is hard to imagine how to meet that requirement without using RTI.³⁹

B. The Basic Theory and Mechanics of RTI

Although the current prominence of RTI stems from its inclusion in the 2004 amendments to IDEA, the concept of RTI has been discussed by researchers and policymakers for more than three decades. Like a surprising number of education reforms, RTI at one level is simply an effort to systematize common sense. The essential idea is

33. 20 U.S.C. § 1414(b)(6)(A) (2006).

34. *Id.* § 1414(b)(6)(B).

35. See generally *Questions and Answers on Response to Intervention (“RTI”) & Early Intervening Services (“EIS”)*, ED.GOV (Jan. 2007), available at http://www.spannj.org/keychanges/education_materials09/US_DOE_Q&A_on_EIS.pdf (discussing what criteria should be used to determine if a child has a specific learning disability) [hereinafter *Questions and Answers on Response to Intervention*].

36. 20 U.S.C. § 1413(f) (2006).

37. *Id.* § 1418(d)(2)(B).

38. *Id.* § 1414(b)(5)(A)-(B).

39. 34 C.F.R. § 300.309(b) (2006); see also Weber, *supra* note 2, at 131.

that all students should be given adequate instruction. Those who are not keeping up should be given extra help in small groups. If that extra help does not do the trick, they should be given even more intense and individualized assistance. Stripped of jargon, that is RTI in a nutshell.

The concept began with researchers who sought to develop ways to assist students who were struggling academically or were behaving poorly. Some came up with a standard set of interventions to be used for students having difficulty reading.⁴⁰ Others encouraged a more individualized response, targeted to the particular student's needs.⁴¹ Although the delivery of services differed, the basic idea was the same, completely obvious one: provide students at risk of failure with additional help.

RTI became linked to special education in 1982 when a National Research Council Study outlined three criteria on which special education classifications should be based.⁴² The first step is to determine that the quality of the general education is sufficient for adequate learning. If it is, the next step is to determine if the special education program can help the student succeed. The third step is to ensure that the evaluation process for special education must be valid and meaningful. Only if all three criteria were met, the report argued, should a special education placement be considered appropriate.⁴³ RTI was a natural way to meet these criteria, as it assesses how students responded to increasingly more and more specialized instruction. Those who do not respond to intermediate interventions are thought to be the ones most likely to be found eligible for special education.⁴⁴

Over the next two decades, RTI was the subject of further debate and research among academics and policymakers.⁴⁵ It received a boost in 2001 when President George W. Bush established the Commission on Excellence in Special Education to make recommenda-

40. *E.g.*, STANLEY L. DENO & PHYLLIS K. MIRKIN, U.S. DEP'T OF EDUC., ED144270, DATA-BASED PROGRAM MODIFICATION: A MANUAL (1977), available at <http://www.eric.ed.gov/PDFS/ED144270.pdf>.

41. *E.g.*, JOHN R. BERGAN, BEHAVIORAL CONSULTATION (1977).

42. *See* KIRBY A. HELLER, WAYNE H. HOLTZMAN & SAMUEL MESSICK, PLACING CHILDREN IN SPECIAL EDUCATION: A STRATEGY FOR EQUITY 4 (1982), available at http://books.nap.edu/openbook.php?record_id=9440&page=R1.

43. *Id.*

44. *See* WILLIAM N. BENDER & CARA SHORES, RESPONSE TO INTERVENTION: A PRACTICAL GUIDE FOR EVERY TEACHER 4 (2007).

45. *See id.*

tions for improving special education.⁴⁶ The Commission recommended early intervention services and it also recommended that eligibility for the specific learning disability category be changed from a discrepancy model to an RTI model.⁴⁷

At the same time, the burgeoning standards movement, which culminated in the No Child Left Behind Act of 2001 (“NCLB”),⁴⁸ added momentum to RTI. NCLB, along with amendments to IDEA, made clear that nearly all students, including most of those receiving special education services, should meet the same academic standards.⁴⁹ In setting an objective bar for achievement, NCLB and the IDEA gave schools a benchmark for measuring the progress of special education students. This, in turn, made RTI even more relevant because it gave schools a target to reach and the incentive to figure out the best way to reach that goal. By requiring nearly all students to meet the same standards, moreover, NCLB intentionally blurs the line between general education and special education. RTI, by providing services to students before determining whether they are eligible for special education, is consistent with the same idea that there should not be a sharp division between special and general education.⁵⁰

Today, RTI is being adopted and implemented by states and school districts across the country.⁵¹ But it is still in its early stages, and neither IDEA nor its regulations specify precisely how RTI should be implemented. There is no single, precise set of interventions, nor is there a single model that all states and schools have adopted.⁵² It is fair to say that, in many places, RTI is still more of a theory than an actual program.

Those caveats notwithstanding, there is some consensus among researchers regarding the basic structure of RTI. This structure is merely an elaboration of the simple explanation offered above, and it

46. See PRESIDENT’S COMM’N ON EXCELLENCE IN SPECIAL EDUC., A NEW ERA: REVITALIZING SPECIAL EDUCATION FOR CHILDREN AND THEIR FAMILIES 1 (2002), available at http://www2.ed.gov/inits/commissionsboards/whspeiaeducation/reports/images/Pres_Rep.pdf.

47. See *id.* at 25.

48. No Child Left Behind (“NCLB”), Pub. L. No. 107-110, 115 Stat. 1425 (2002).

49. NCLB gives states and school districts some leeway to exclude a small percentage of students with disabilities from their test results. *Id.*

50. See Fuchs, Fuchs & Stecker *supra* note 13, at 303-04.

51. See Zirkel & Thomas, *supra* note 17, at 61-73. In 2008, 90% of states were implementing statewide training programs in RTI. JOHN J. HOOVER ET AL., NAT’L ASS’N OF ST. DIRS. OF SPECIAL EDUC., INC., NATIONAL IMPLEMENTATION OF RESPONSE TO INTERVENTION 1 (2008), available at <http://www.nasdse.org/Portals/0/NationalImplementationofRTI-ResearchSummary.pdf>.

52. See Zirkel & Thomas, *supra* note 17, at 61-73.

consists of three tiers or steps. The first step is to ensure that all students are receiving quality instruction that is sufficient for the average student to make adequate progress. If that is not happening, so the common sense thinking goes, it is impossible to identify why any particular student might be struggling. The student might have a learning disability or the student might, like other classmates, be suffering the consequences of poor teaching.⁵³

Once it is established that the instruction is sufficient, the next step is to screen all students to identify those who are having difficulty.⁵⁴ This can be done through a combination of testing and classroom observations.⁵⁵ Those who are having trouble are then provided additional assistance in the form of small-group tutoring.⁵⁶ The assistance at this stage can be contextual and ad hoc or it can be given according to a standardized protocol, which basically means using a set of techniques that have been proven successful.⁵⁷ So far, those standardized techniques have been developed primarily in reading and also, though somewhat less so, in math.⁵⁸

Those in this second tier of instruction are monitored for a period of weeks and data are collected on the student's responsiveness to instruction. Those who succeed with this extra assistance in either the first or second tier are declared "disability-free" and returned to the general student population.⁵⁹ Those who fail move on to stage three, which entails more personalized and intense instruction. At some time right before, during, or after a period of time in Tier 3—models differ on this point—students may be evaluated for special education placement.⁶⁰ Put differently, in some models of RTI, Tier 3 *is* special education; in others, it is the last step before special education.

53. See, e.g., Amy Feiker Hollenbeck, *From IDEA to Implementation: A Discussion of Foundational and Future Responsiveness-to-Intervention Research*, 22 *LEARNING DISABILITIES RES. & PRAC.* 137, 137-38 (2007).

54. See, e.g., BENDER & SHORES, *supra* note 44, at 7-16; BURNS & GIBBONS, *supra* note 4, at 5-6; FUCHS, FUCHS & STECKER, *supra* note 13, at 302-03.

55. *Id.*

56. *Id.*

57. *Id.*

58. *Id.*

59. See Douglas Fuchs & Lynn S. Fuchs, *Introduction to Response to Intervention: What, Why, and How Valid is It?*, 41 *READING RES. Q.* 93, 95 (2006).

60. Compare, e.g., Fuchs, Fuchs & Stecker, *supra* note 13, at 303 (describing how Tier 2 teams study progress of students "to explore eligibility for Tier 3 (i.e., special education services)"), and Hollenbeck, *supra* note 53, at 138 ("Children who fail to respond sufficiently to this [second-tier] intervention enter the third tier, prompting an eligibility decision for placement in special education.") with CARA SHORES, *A COMPREHENSIVE RTI MODEL: INTEGRATING BE-*

C. Unanswered Questions

Many questions about RTI remain unanswered, which is not surprising given that RTI is still in its early stages. Details are being worked out in both theory and practice. That said, these questions are worth exploring because the answers are not obvious and in some ways call into question the plausibility of RTI as currently modeled.

To begin at the beginning, recall that Tier 1 requires high-quality instruction. “At the heart of the first tier,” says one researcher, “lies high-quality, research-based instruction for all students in the general education environment.”⁶¹ This is an admirable aspiration, and it is perfectly sensible in theory. As mentioned, it is hard to pinpoint the cause of student difficulties if the teaching is generally poor. Nevertheless, this is a challenging first step, to say the least. If RTI can only be implemented once there is “high-quality, research-based instruction”⁶² for every student, many students are going to be waiting a long time for RTI. Alternatively, where schools implement RTI before their general education system is sound, RTI will rest on a shaky foundation.

The second tier, providing more help to students who are struggling, is the crux of RTI. This is completely sensible. There are nonetheless difficult questions about this tier. Researchers and social scientists seem preoccupied with the question of whether to follow a standard protocol or problem-solving method at this tier.⁶³ A more basic question, however, concerns the standard assumption that students should stay in Tier 2 temporarily and then return to the general population, where they will receive no additional help. What is rarely spelled out is the theory underlying the assumption that a relatively short, intense academic boost will be sufficient to cure whatever ails the students in Tier 2. It is certainly not intuitive that students who succeed with additional help only need that help temporarily.

The assumption here seems to be that struggling students are similar to those who have a discrete illness rather than a chronic ailment. This explains the belief that with an intense boost—akin to a dose of antibiotics—students can return to the general population. But it is not clear that this belief is justified. Students who do well in the sec-

HAVIORAL AND ACADEMIC INTERVENTIONS 12 (2009) (stating that “Tier 3 . . . provides individualized instruction to students[,] possibly through special education”).

61. Hollenbeck, *supra* note 53, at 138.

62. *See id.*

63. *See, e.g.,* Fuchs, Fuchs & Stecker, *supra* note 13, at 301-14.

ond tier may be more like those with a chronic ailment, who need more consistent and permanent assistance. This is not to suggest of course, that all students who need additional assistance are or should be eligible for special education; they may simply be slower learners, be suffering from protracted exposure to poor instruction, or have some impediment to learning that does not rise to the level of a disability. The point is simply that the second tier rests on some questionable assumptions—the most important of which is that a student who responds to more individualized instruction does *not* have a disability. Indeed, this assumption is in some tension with the underlying premise of special education, which is that students with disabilities *will* respond to more individualized instruction. RTI thus uses responsiveness to interventions as proof that students should not receive special education, when it may mean exactly the opposite.

Tier 3 may be the murkiest of all. It is not clear whether this is meant to be special education or something short of special education; as mentioned, RTI models differ on this point.⁶⁴ If Tier 3 is *not* special education, it is not clear what services students would receive in special education that they are not already receiving in the third tier.⁶⁵ What, in other words, might schools be waiting for in terms of services as between Tier 3 and special education? (This is also a question that one could ask about the difference between Tier 2 and special education, but the mystery is especially deep when it comes to Tier 3.) The risk is that Tier 3 might be used to provide all of the academic services a student would receive in special education without a determination that the student is eligible for IDEA and entitled to all of the benefits and protections of that law.

A document produced by the Virginia Department of Education highlights this risk.⁶⁶ It explains “Virginia’s ‘Response to Intervention’ Initiative.”⁶⁷ The document begins by describing RTI as a way of bridging general education and special education and as a way of responding to some of the problems with special education, including problems with eligibility determinations and the overrepresentation of

64. *See supra* Part I.B.

65. *Cf.* 34 C.F.R. § 300.39 (2006) (defining special education, in part, as specially designed and individualized instruction).

66. *See* VA. DEP’T OF EDUC., OFFICE OF STUDENT SVCS., RESPONSIVE INSTRUCTION: REFINING OUR WORK OF TEACHING ALL CHILDREN: VIRGINIA’S “RESPONSE TO INTERVENTION” INITIATIVE (2007), available at http://www.doe.virginia.gov/instruction/response_intervention/guidance/responsive_instruction.pdf [hereinafter RESPONSIVE INSTRUCTION].

67. *Id.*

some minority students in special education.⁶⁸ The remainder of the document describes the three tiers of intervention. The third tier is supposed to occur within the context of general education.⁶⁹ And it is only after students fail to thrive in Tier 3 that referral for evaluation is suggested—and even then, only conditionally suggested. As the document states, “If a student is not responding to the intense, rigorous interventions provided in Tier 3, referral for individual evaluation to determine if the child has a disability and needs special education services *would seem* warranted.”⁷⁰

The thrust of this approach is that referral for special education evaluations should be employed only when all else has failed. While this is sensible from one perspective, one can easily see how it could lead to unjustified delays in referral. Indeed, the whole issue of the relationship between RTI and evaluation for special education remains somewhat murky. The United States Department of Education has made clear that parents can request an evaluation for special education at any time, including the time during which a student is involved in an RTI program.⁷¹ Nonetheless, the school can refuse the request, leaving parents the remedy of a due process hearing before an administrative judge and ultimately a court, all of which will take time.⁷² One wonders whether schools will be more likely to deny requests for evaluation for students who have not yet completed the RTI process.

Additional questions about capacity and resources also remain unanswered. Even assuming schools have the capacity to provide high-quality instruction to all students as required under Tier 1 in the RTI model, which is an heroic assumption, it is not clear that they have the capacity to provide the more intense and individualized instruction called for in Tier 2 and Tier 3. It is also not clear that schools have the resources, given that only 15% of special education funds can be used for RTI. Whether RTI can be brought to scale without being completely watered down, therefore, remains to be seen.

68. *Id.* at 4-5.

69. *Id.* at 22.

70. *Id.* at 23 (emphasis added).

71. See *Questions and Answers on Response to Intervention*, *supra* note 35, at 6. The Office of Special Educ. Programs in the Department of Education reiterated this point in a recent memorandum to State Directors of Special Education; Melody Musgrove, Dir., Office of Special Educ. Programs, Memorandum to State Directors of Special Education (January 21, 2010) (on file with author).

72. See *Questions and Answers on Response to Intervention*, *supra* note 35.

D. RTI as Both Diagnosis and Treatment

Despite the numerous unanswered questions about RTI, two key points seem relatively clear, if underappreciated. First, RTI is not simply a diagnostic tool. It is also, and perhaps primarily, a general pedagogical approach. To be sure, the IDEA refers to RTI explicitly as a diagnostic tool to identify students with specific learning disabilities—though even there, RTI cannot be the sole criterion for determining whether a child has a disability.⁷³ But this one particular reference in the IDEA should not cause one to overlook RTI's broader purpose and function.

RTI is, at bottom, a general approach to education, especially for students at risk of failure. As the Superintendent of Public Instruction in Virginia observed in 2007, in an introduction to the Virginia Department of Education's guidance regarding RTI: "Many of us who have been studying the response to intervention literature and working on this guidance document have concluded that these three elements [of RTI]—universal screening, student progress monitoring, tiered intervention—are the basic elements of good instruction"⁷⁴ That observation seems exactly right. In a sense, RTI calls on schools to improve their general education as a means of alleviating the necessity for special education placement. This is why many view RTI as blurring the boundaries between general and special education.⁷⁵ A key assumption underlying RTI is that many students who would otherwise be placed in special education can succeed without that service, provided they are given some additional (and early) assistance.

This leads to the second related point. One of the touted benefits of RTI is a reduction in the special education population. The hope, in other words, is that running students through Tier 2 and perhaps Tier 3 will separate those students who simply need a bit more assistance from those who have a real disability. The underlying assumption is that too many students are improperly classified for special education, either because they do not actually have a disability or because, even if they would qualify as disabled, they do not need all of

73. See 34 C.F.R. § 300.307(a) (2006).

74. Letter from Billy K. Cannaday, Jr., Superintendent of Pub. Instruction, Va. Dep't of Educ., to Colleagues (Sept. 2007), in *RESPONSIVE INSTRUCTION*, *supra* note 66, at iii.

75. See, e.g., Fuchs, Fuchs & Stecker, *supra* note 13, at 301-14.

the services offered by IDEA in order to keep up with the general curriculum.⁷⁶

To date, empirical studies suggest that RTI has precisely this effect of reducing referrals for special education,⁷⁷ though these studies must be viewed with some caution as referral rates are easy to manipulate. As one scholar observed, “School district[s] can simply send the word out to teachers not to make special education referrals.”⁷⁸ Such actions would not only defeat the point of RTI, but could also constitute intentional racial discrimination if the implicit or explicit message to teachers was to stop referrals of minority students in particular. That caution notwithstanding, it seems entirely reasonable to expect that fewer students will be referred to special education in districts that implement RTI.

II. HOW WILL RTI AFFECT MINORITY STUDENTS?

As already discussed, minority students, particularly African-American students, are placed in special education in far greater proportion than their white peers.⁷⁹ They are also far more likely to be suspended and expelled.⁸⁰ RTI and EIS have the potential to reduce the racial disparity in special education identification, particularly for children with learning disabilities, and to provide needed support to struggling students without labeling them. At the same time, RTI has the potential to cause delays in identification, increase disproportionality in other disability categories, and exacerbate already pronounced disparities in student discipline rates.

A. RTI and Racial Disproportionality in Special Education

It is reasonable to believe that RTI can reduce the current overrepresentation of minority students in special education. The overall effect of RTI on disproportionality may be blunted, however, by the possibility that students who would have been identified as learning

76. One of the criticisms of RTI is that it will exclude highly intelligent students, who nonetheless have learning disabilities, from special education. *See, e.g.,* Weber, *supra* note 2, at 133. Because RTI is focused on the goal of enabling students to keep up with the general curriculum and not focused as much on the gap between a student’s potential and achievement, students who keep up with the curriculum but could do even better with special education services, might be left out of special education. *Id.*

77. *See, e.g.,* BURNS & GIBBONS, *supra* note 4, at 7-8 (discussing studies on special education).

78. Weber, *supra* note 2, at 132-33.

79. *See, e.g.,* Parrish, *supra* note 6, at 15-35.

80. Skiba et al., *The Color of Discipline*, *supra* note 15, at 317.

disabled in a pre-RTI world are identified instead under other disability classifications.

There can be little doubt that minority student overrepresentation is due to the subjective nature of some eligibility determinations. Minority students are overrepresented in the “soft” disability categories but not in the “hard” ones. African-American students, for example, are significantly more likely than white students to be diagnosed as intellectually disabled or emotionally disturbed, but they are no more likely than white students to be diagnosed as blind or deaf.⁸¹ Researchers have also ruled out poverty or other non-racial factors as the complete explanation for why racial minorities are disproportionately placed into special education; although these non-racial factors contribute to the overrepresentation, they do not explain it entirely.⁸²

RTI is meant, among other things, to make the evaluation process for special education more objective and scientific.⁸³ Before minority students are referred for special education, under RTI they would be given a chance to succeed with small-group tutoring and more personalized instruction.⁸⁴ Their progress would be monitored along the way, measured objectively where possible, and the interventions would be based on research regarding effective practices.⁸⁵ If all of these steps are taken, one would fully expect that fewer minority students would ultimately be referred to special education—indeed, there should be a disproportionate *decrease* in the number of minority students referred to special education if RTI manages to ameliorate the inaccurate, subjective judgments of school teachers and special education eligibility teams.⁸⁶

At the same time, however, it is worth recognizing that in some instances, RTI might simply shift students from one disability category to another rather than keep them out of special education altogether. RTI, after all, is designed to reduce the over-identification of students

81. See Parrish, *supra* note 6, at 24-25.

82. See *id.*; see also Losen & Orfield, *supra* note 6, at xvii-xxvi.

83. See Amanda M. VanDerHeyden & Shane R. Jimerson, *Using Response to Intervention to Enhance Outcomes for Children*, 10 CAL. SCH. PSYCHOLOGIST 21, 22-23 (2005).

84. See discussion *supra* Part I.C.

85. See *id.*

86. Some empirical evidence indicates that RTI can reduce inappropriate special education identifications for minority students and students who are limited-English proficient. See, e.g., D.M. Kamps & C.R. Greenwood, *Formulating Secondary-Level Reading Interventions*, 38 J. LEARNING DISABILITIES 500, 502-09 (2005).

with learning disabilities.⁸⁷ RTI is less targeted toward students with “soft” emotional and intellectual disabilities.

There is some precedent indicating that downward pressure on one eligibility classification causes increases in another. In 1997 and 1998, negotiations over a decades-old desegregation case in Alabama revealed significant over-representation of African-American students in the categories of intellectual and emotional disabilities as well as under-representation in the category of specific learning disability.⁸⁸ The resulting consent decree in *Lee v. Macon* required pre-referral interventions, among other things, in order to reduce the disparities in special education classifications.⁸⁹ After six years of implementation, the affected school districts saw significant reductions in African-American students classified as mentally retarded and emotionally disabled, while at the same time observing increases in African-American students classified as learning disabled.⁹⁰

Similarly, if students are not found eligible as learning disabled after undergoing RTI, but continue to manifest behavioral challenges adversely affecting educational performance, they might be referred for eligibility in other categories, the most likely of which are emotional disabilities and “other health impairments” (“OHI”) related to attention deficit hyperactivity disorder (“ADHD”).⁹¹ In order to be found eligible as a student with an emotional disability, the student must demonstrate, over a long period of time and to a marked degree, one or more deficits related to social and behavioral functioning that are not explained by intellectual, sensory, or health-related factors.⁹² “Other health impairment” is somewhat of a catchall category of chronic or acute health problems such as asthma, attention deficit disorder, and ADHD.⁹³ While the number of children served in the emotional and intellectual disability categories has gone down since 2004, the number of children served in the OHI category has in-

87. See discussion *supra* Part I.D.

88. See U.S. DEP’T OF JUSTICE, EDUCATIONAL OPPORTUNITIES DIVISION CASE SUMMARIES (2010), available at <http://www.justice.gov/crt/edo/documents/casesummary.php> [hereinafter EDUCATIONAL OPPORTUNITIES].

89. See *id.*

90. See Kathleen S. Devine, U.S. Dep’t of Just., Civil Rts. Div., Address at the Minority Issues in Special Education Conference, Alabama State-wide Special Education Agreement (1997), <http://www.parentadvocates.org/index.cfm?fuseaction=article&articleID=4096>; see also EDUCATIONAL OPPORTUNITIES, *supra* note 88.

91. 34 C.F.R. § 300.8 (2006).

92. *Id.*

93. *Id.*

creased dramatically in the same time period.⁹⁴ Although there is no research connecting these two phenomena, it is worth noting that reductions in disproportionality across the board may be hard to achieve if solutions focus on only one category of disability.

Nevertheless, given the large numbers of students identified as learning disabled, it is reasonable to expect that even with some shifts in classification, RTI and EIS generally will produce an overall reduction in overrepresentation. Whether a reduction in special education eligibility is a good or bad development is a harder question. On the one hand, special education is in theory supposed to provide the level of individualized instruction necessary to enable students to succeed. It is supposed to be provided by those trained in special education and supported by generous resources—indeed, money is supposed to be no object in special education. Special education also gives parents more opportunities to participate in educational planning than they typically have in the general education system. Delaying special education eligibility or keeping students from receiving special education services altogether, from this perspective, seems like a dubious goal.

On the other hand, the reality is that special education is far from ideal, especially for African-American students. Placement in special education for any student carries the risk of stigmatic harm and damage to self-esteem, along with the more tangible consequences that teachers may lower expectations for those students and they may be guided into alternative diploma tracks. There are additional risks for minority students. Although special education placements are supposed to be made in the least restrictive environment, African-American students in special education, particularly males, are much more likely than their white counterparts to be placed in restrictive, isolated settings apart from the general classroom.⁹⁵ Some researchers also find that they are more likely to receive inadequate or inappropriate services.⁹⁶ In short, special education is not so special for some minority students and may be positively damaging.

94. The number of students identified for learning disabilities has decreased 8% since 2004, while the number of students identified for OHI has increased 23%. NAT'L CTR. FOR EDUC. STATS., DIGEST OF EDUCATION STATISTICS: 2009 tbl.50 (2010), available at http://nces.ed.gov/programs/digest/d09/tables/dt09_050.asp?referrer=list.

95. See, e.g., Parrish, *supra* note 6, at 26-27; Hensel, *supra* note 11, at 1198-1200.

96. See, e.g., Daniel Osher, Darren Woodruff & Anthony E. Sims, *Schools Make a Difference: The Overrepresentation of African American Youth in Special Education and the Juvenile Justice System*, in RACIAL INEQUALITY IN SPECIAL EDUCATION 93-116 (Daniel J. Losen & Gary Orfield eds., 2002).

From this perspective, placement in an RTI program rather than special education may bring real benefits to African-American and other minority students. RTI is explicitly geared toward keeping students in their regular classrooms and focused on the general curriculum.⁹⁷ The intensified instruction in Tier 2 is supposed to happen in small groups but only for a short time period. In other words, the students are not meant to be isolated in a separate classroom for the entire day or even a long portion of the day. To the extent RTI enables minority students to keep up with the general curriculum while avoiding the risks and potential harms associated with special education, it is a very promising idea.

B. RTI and Racial Disproportionality in Discipline

RTI nonetheless carries some risks, especially for minority students. As mentioned, minority students, especially African-American males, are more likely to be disciplined, suspended, and expelled.⁹⁸ In addition to the possibility of increasing (or introducing) disproportionality in other disability categories, withholding IDEA's disciplinary protections means there is also a risk of increasing disproportionality in discipline referrals.

1. Discipline Protections in the IDEA

In general, schools have broad authority to discipline students. The United States Supreme Court recognizes that schools "need to be able to impose disciplinary sanctions for a wide range of unanticipated conduct disruptive of the educational process."⁹⁹ Courts in a small number of states have interpreted the fundamental right to education as a guarantee that suspended and expelled students be provided with alternative education services.¹⁰⁰ In most states, however, the school's discretion to make disciplinary decisions is generally limited only by the due process requirement that students "must be given *some* kind of notice and afforded *some* kind of hearing" before being punished.¹⁰¹

97. See 34 C.F.R. § 300.226 (2006).

98. Skiba et al., *The Color of Discipline*, *supra* note 15.

99. *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 686 (1986).

100. See, e.g., *State ex rel. G.S.*, 749 A.2d 902, 907 (N.J. Super. Ct. Ch. Div. 2000); *Cathe A. v. Doddridge Cnty. Bd. of Educ.*, 490 S.E.2d 340, 344 (W. Va. 1997). *But see* *RM v. Washakie Cnty. Sch. Dist.*, 102 P.3d 868, 874 (Wy. 2004).

101. *Goss v. Lopez*, 419 U.S. 565, 579 (1975) (emphasis added).

Race and Response-to-Intervention

There is an exception for students with disabilities. Special education students receive greater protection from suspension and expulsion than students who have not been found eligible for special education.¹⁰² In addition to the due process protections that apply to all students facing disciplinary sanctions, students eligible under IDEA receive two main benefits that other students do not: a hearing to determine whether the conduct at issue was caused by the disability and the guarantee of educational services during long-term disciplinary removals.

Students with disabilities may not be suspended or expelled for conduct that was “caused by, or had a direct and substantial relationship to” their disabilities.¹⁰³ When the school proposes to suspend a student for more than ten consecutive days, it is considered by law to be a “change in placement,”¹⁰⁴ and the school must either get the parent’s consent to the change or hold a “manifestation determination” review (“MDR”) hearing to ascertain the relationship between the child’s disability and the conduct at issue.¹⁰⁵ If the child’s conduct was “caused by, or had a direct and substantial relationship to the child’s disability,” the student may not be suspended for more than ten days and must be returned to the original educational setting.¹⁰⁶ For example, if a six-year-old child with a developmental delay and poor verbal communication skills throws a temper tantrum to communicate distress, the tantrum might be deemed directly and substantially related to the disability.

Likewise, it is considered a manifestation of the child’s disability if the conduct was “the direct result” of the school district’s failure to implement the IEP.¹⁰⁷ For example, a child’s behavior intervention plan might say that the child should be permitted to leave the classroom and go to a quieter room when he is feeling anxious or overwhelmed. If the child then acts out as a result of not being permitted to leave the classroom, the conduct might be considered the direct result of failure to implement the IEP. Again, when the behavior is a

102. See discussion *supra* Part II.A.

103. 34 C.F.R. § 300.530(e)(1)(i) (2006).

104. *Id.* § 300.536(a). A series of short-term removals constituting a pattern may also be considered a change in placement. See *id.*

105. *Id.* § 300.530(e).

106. *Id.* § 300.530(e)(1). In special circumstances related to weapons, drugs, and serious bodily injury, the student may be removed to a forty-five-day interim alternative educational setting but must still receive FAPE. *Id.* § 300.530(g).

107. *Id.* § 300.530(e)(1)(ii).

manifestation of the disability, the child must be returned to the classroom. Additionally, the school must develop or revise a behavior intervention plan to address the causes or functions of the behavior in order to minimize the risk that it happens again.¹⁰⁸

If the child's conduct is found not to be a manifestation of the disability, the child may be suspended or expelled. But the child must continue to be provided services, albeit in another setting,¹⁰⁹ that conform to the IEP and "enable the child to continue to participate in the general education curriculum."¹¹⁰ What these services actually look like will often depend on the nature and severity of the child's disability, the length of the removal and any previous removals, and the degree to which the child's performance lags behind his peers.¹¹¹ All of these protections also apply to students who have not yet been found eligible for special education if there is evidence that the school had knowledge before the behavior occurred that the child was a child with a disability.¹¹²

There are both philosophical and historical reasons for the preferential treatment when it comes to discipline. The manifestation hearing is based on the commonsense notion that children should not be punished for conduct that is outside of their control or beyond their ability to understand. But IDEA's discipline protections also grew out of a historical context in which schools used misbehavior as a pretext for excluding "hard-to-handle" students with disabilities.¹¹³ In *Mills v. Board of Education of District of Columbia*, one of the two cases that inspired Congress to enact IDEA's predecessor statute, a federal district court found that the schools had used disciplinary measures to withhold educational services from the plaintiffs—all low-income, African-American students with emotional and/or behavioral disabilities.¹¹⁴ Congress imposed restrictions on disciplinary changes

108. *Id.* § 300.530(f).

109. *Id.* § 300.101(a).

110. *Id.* § 300.530(d)(1).

111. Assistance to States for the Education of Children with Disabilities and Preschool Grants for Children with Disabilities, 71 Fed. Reg. 46,717 (Aug. 14, 2006) (highlighting comments on the final regulations).

112. 34 C.F.R. § 300.534 (2006). It is possible for advocates to use this provision to argue that placement in RTI is evidence of the school's knowledge that the child has a disability. It is not clear, however, how to reconcile the provision protecting the rights of children who are not yet found eligible with the provision clarifying that participation in early intervening services does not limit or create a right to FAPE. *See id.* § 300.226(c).

113. *Honig v. Doe*, 484 U.S. 305, 324 (1988).

114. *See Mills v. Bd. of Educ.*, 348 F. Supp. 866, 869-70 (D.D.C. 1972); *see also Honig*, 484 U.S. at 324.

in placement as a response to the fear that IDEA's substantive requirements could be avoided by simply suspending the student from school.¹¹⁵

While these discipline protections are both real and controversial, it is important to emphasize that IDEA's procedural safeguards do not immunize students with disabilities from being disciplined. They provide what some have termed a "qualified immunity."¹¹⁶ Special education students are protected primarily from some of the most injurious aspects of disciplinary removal: unfair punishment for behavior related to disability and exclusion from school with no educational services. However, they are not completely free from the constraints or consequences of school disciplinary procedures.

2. The Intervention-Suspension Tradeoff

In the last decade, school shootings and other traumatic, but isolated, episodes of school violence have led to harsher punishments and more time out of school.¹¹⁷ In 2006, 3.3 million students were suspended at least once.¹¹⁸ An additional 102,000 were expelled.¹¹⁹ In 2007-2008, schools took 767,900 serious disciplinary actions, including suspension for five days or more (76%), transfer to specialized schools (19%), and removal for the rest of the school year with no services (5%).¹²⁰ Nationally, suspension and expulsion rates are at an all-time high,¹²¹ and numerous studies have concluded that out-of-

115. See *Honig*, 484 U.S. at 325-26 n.8 ("Congress sought to prevent schools from permanently and unilaterally excluding disabled children by means of indefinite suspensions and expulsions.").

116. See MARK KELMAN & GILLIAN LESTER, *JUMPING THE QUEUE: AN INQUIRY INTO THE LEGAL TREATMENT OF STUDENTS WITH LEARNING DISABILITIES* 108 (1997).

117. See Randy Borum et al., *What Can Be Done About School Shootings? A Review of the Evidence*, 39 *EDUC. RESEARCHER* 27, 28 (2010).

118. NAT'L CTR. FOR EDUC. STATISTICS, *DIGEST OF EDUCATION STATISTICS: 2009 tbl.161* (2010), available at http://nces.ed.gov/programs/digest/d09/tables/dt09_161.asp?referrer=list. A student was only counted once even if suspended more than once. *Id.* n.1.

119. *Id.*

120. RACHEL DINKES ET AL., NAT'L CTR. FOR EDUC. & BUREAU OF JUSTICE STATISTICS, *INDICATORS OF SCHOOL CRIME AND SAFETY: 2009*, at 64 (2009), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/iscs09.pdf>.

121. NAT'L CTR. FOR EDUC. STATISTICS, *DIGEST OF EDUCATION STATISTICS: 2009 tbl.A-28-1* (2010), available at <http://nces.ed.gov/programs/coe/2009/section4/table-sdi-1.asp>; see also DANIEL J. LOSEN & RUSS SKIBA, S. POVERTY LAW CTR., *SUSPENDED EDUCATION: URBAN MIDDLE SCHOOLS IN CRISIS* (2010), available at http://www.splcenter.org/sites/default/files/downloads/publication/Suspended_Education.pdf.

school suspension disproportionately affects minority, low-income, and disabled students.¹²²

Students of color, particularly African-American males, are disciplined at greater rates and receive harsher punishments than white students demonstrating the same behavior.¹²³ They are more likely to be sent to the office, sent home via suspension or expulsion, and subjected to corporal punishment.¹²⁴ Although suspension rates have increased for all student subgroups over the last three decades, the increase has been especially dramatic for African-American students. In 1973, 6% of all African-American students of any age had been suspended at least once. In 2006, the figure was over 15%.¹²⁵ In middle schools, the African-American male suspension rate was over 28%, compared with an overall suspension rate for middle school students of 11%.¹²⁶

Special education status does not appear to ameliorate racial disparities in discipline rates. Data suggest that African-American students with disabilities are disciplined at a higher rate than other students with disabilities.¹²⁷ They are more likely than other students with disabilities to receive the harshest forms of punishment such as corporal punishment or out of school suspension.¹²⁸ For example, African-American students with disabilities in Indiana were found to be about three and a half times likelier than other students with disabilities to receive a suspension or expulsion greater than ten days.¹²⁹

African-American students are also over-represented in more restrictive educational settings such as separate classrooms or schools.

122. See Russell Skiba et al., *Are Zero Tolerance Policies Effective in the Schools? An Evidentiary Review and Recommendations*, 63 AM. PSYCHOL. ASS'N 852, 855 (2008).

123. See Russell Skiba et al., *Achieving Equity in Special Education: History, Status, and Current Challenges*, 74 EXCEPTIONAL CHILD. 264, 276 (2008) (discussing several studies).

124. *Id.* Although in 2006 African-American students made up only about 17% of the overall student population, they represented over 37% of the total suspensions. Conversely, white students made up over 56% of the overall student population, and represented only 39.1% of the total suspensions. *2006 National and State Projections*, U.S. DEP'T OF EDUC., http://ocrdata.ed.gov/Projections_2006.aspx (last visited Jan. 25, 2011).

125. See LOSEN & SKIBA, *supra* note 121, at 3.

126. See *id.* at 5.

127. Although African-American students in Indiana only make up approximately 12% of the special education population, they account for 22% of students with disabilities receiving disciplinary action. M. KAREGA RAUSCH & RUSSELL SKIBA, CTR. FOR EVALUATION & EDUC. POLICY, DISCIPLINE, DISABILITY, AND RACE: DISPROPORTIONALITY IN INDIANA SCHOOLS 2 (2006), available at http://www.ceep.indiana.edu/projects/PDF/PB_V4N10_Fall_2006_Diversity.pdf.

128. Skiba et al., *The Color of Discipline*, *supra* note 15, at 319.

129. See RAUSCH & SKIBA, *supra* note 127, at 5-6.

Sometimes these placements are made explicitly for discipline reasons—for example, African-American students with and without disabilities are more likely to be placed in alternative schools and other disciplinary programs.¹³⁰ School districts with high minority enrollments are more likely to have alternative programs than school districts with lower minority student populations, and majority minority school districts are more likely to transfer a student to an alternative program solely for disruptive behavior.¹³¹ Although alternative schools and programs vary considerably in quality, mission, and composition, scholars and advocates have raised very serious questions about the quality and segregating effects of disciplinary alternative schools.¹³²

Very often, however, students with disabilities are placed in more restrictive settings for behavioral reasons, not through the disciplinary process, but by the IEP Team.¹³³ A 2006 study by the Indiana Disproportionality Project found that “in almost all disability categories, [African-American] children were more likely than their peers with the same disability to be placed in more restrictive settings and less likely than their peers with the same disability to be served in the least restrictive environment.”¹³⁴ Thus, the study concludes, high rates of African-American students served outside of the regular classroom could not be explained by the over-representation of African-American students in disability categories that need more intensive services.¹³⁵

Similarly, researchers have found no support for the hypothesis that higher rates of disciplinary actions for African-American students are due to higher rates of misbehavior.¹³⁶ On the contrary, African-American students receive office referrals for more subjective reasons

130. See, e.g., ACLU, MISSING THE MARK: ALTERNATIVE SCHOOLS IN THE STATE OF MISSISSIPPI 26-29 (2009), available at http://www.aclu.org/files/pdfs/racialjustice/missingthemark_report.pdf.

131. See BRIAN KLEINER, REBECCA PORCH & ELIZABETH FARRIS, NAT'L CTR. FOR EDUC. STATISTICS, PUBLIC ALTERNATIVE SCHOOLS AND PROGRAMS FOR STUDENTS AT RISK OF EDUCATION FAILURE: 2000-01, at 5-6 (2002), available at <http://nces.ed.gov/pubs2002/2002004.pdf>.

132. See, e.g., Sandra Winn Tutwiler, *How Schools Fail African American Boys*, in INVISIBLE CHILDREN IN THE SOCIETY AND ITS SCHOOLS 150-51 (Sue Books ed., 2007) [hereinafter INVISIBLE CHILDREN].

133. The most common way for a student to be placed in an alternative disciplinary program is through a decision of the IEP Team. See KLEINER, PORCH & FARRIS, *supra* note 131, at 20.

134. Russell J Skiba et al., *Disparate Access: The Disproportionality of African American Students with Disabilities Across Educational Environments*, 72 EXCEPTIONAL CHILD. 411, 420 (2006).

135. See *id.*

136. Skiba et al., *The Color of Discipline*, *supra* note 15, at 322.

while there is no indication that their behavior is more serious or more disruptive.¹³⁷ Like special education eligibility, disparities in discipline rates are much more pronounced in the “soft” or subjective categories such as disrespect, excessive noise, threat, and loitering than in more objective offenses such as smoking, leaving without permission, obscene language, and vandalism.¹³⁸ Indeed, some studies have found that teachers are more likely to describe black students as “difficult to teach,” even in cases where their behavior and academic functioning show no appreciable difference from their white counterparts.¹³⁹ Racial differences in discipline rates, moreover, continue to be significant even after controlling for factors such as concentrated poverty, neighborhood crime, and low socioeconomic status.¹⁴⁰ These findings support the conclusion that disproportionality in discipline is more likely the result of teachers’ misunderstanding of cultural norms or reacting to stereotypes about African-American males as threatening or dangerous.¹⁴¹

For students with behavioral challenges, RTI poses a difficult dilemma. They can get early interventions in the regular classroom without the stigma of being labeled with a disability and without being shunted off to a segregated classroom.¹⁴² However, in return, they give up the procedural rights that come with being identified as a special education student. These procedural rights include, most significantly, some measure of protection from being unfairly disciplined for conduct that is deemed to be related to the disability, as well as the promise of educational services during any period of disciplinary removal. IDEA does not explicitly extend these procedural protections to students undergoing RTI.¹⁴³

Without the discipline protections embedded in IDEA, students can be and often are suspended and expelled without any educational services whatsoever. If RTI succeeds in reducing the number of mi-

137. *Id.* at 335.

138. *Id.* at 334.

139. Skiba et al., *Achieving Equity in Special Education*, *supra* note 123, at 275.

140. Anne Gregory et al., *The Achievement Gap and the Discipline Gap: Two Sides of the Same Coin?*, 39 *EDUC. RESEARCHER*, 59, 61 (2010).

141. Skiba et al., *The Color of Discipline*, *supra* note 15, at 336.

142. In an ideal world, IDEA’s emphasis on the least restrictive environment requires special education services to be provided in regular classrooms. Contrarily, there is plenty of evidence that minority students are served in separate classrooms at a much higher rate than white students. *See* discussion *supra* Part II.

143. *See* 34 C.F.R. § 300.226(c) (2006) (“Nothing in this section shall be construed to either limit or create a right to FAPE under Part B of the Act . . .”).

minority students in special education, it will also reduce the number of minority students protected against suspension and expulsion, which could exacerbate the already glaring disparity in suspension and expulsion rates for minority students.

One might wonder why, if IDEA makes it harder to suspend and expel students with disabilities, educators would agree to identify students with behavioral challenges. After all, it may make more sense, at least in borderline cases, to resist eligibility in order to maximize flexibility to exclude troublesome students.¹⁴⁴ There are at least two possible reasons why children with behavioral challenges are referred and found eligible in large numbers, despite the incentive to withhold special education eligibility as a way to maintain control over discipline. First, most referrals for special education are made by classroom teachers, while most discipline decisions are made by administrators. Second, far more students are identified for special education in elementary school than in middle or high school.¹⁴⁵ Thus, it is quite possible that by seeking help and/or more restrictive placements for disruptive students via special education eligibility, elementary school teachers tie the hands of future middle and high school administrators when it comes to making discipline decisions. If RTI is substituted for special education at the elementary school level, it is quite possible that the student will never be identified for special education, leaving children with behavioral challenges vulnerable to discipline in middle and high schools, where they are much more likely to be suspended.

RTI might lead to a more subtle tradeoff if it results in more students being found eligible in the categories of emotional disability or OHI. But students with emotional disabilities are at an extremely high risk of being suspended and expelled compared to other students with disabilities. In fact, almost 73% of identified emotionally disabled students report having been suspended or expelled.¹⁴⁶ Moreover, African-American students with emotional disabilities are more likely than their emotionally disabled peers to be placed in separate

144. See generally KELMAN & LESTER, *supra* note 116, at 109-10.

145. In 2008, almost two million more children were identified at ages six through eleven than ages three through five. In contrast, only 172,000 additional children were identified at ages twelve through seventeen. See DATA ACCOUNTABILITY CTR., NUMBER OF CHILDREN AND STUDENTS SERVED UNDER IDEA, PART B, BY AGE GROUP & STATE: FALL 2008 tbl.1-1 (2008), available at http://www.ideadata.org/TABLES32ND/AR_1-1.htm.

146. See RAUSCH & SKIBA, *supra* note 127, at 1.

classrooms.¹⁴⁷ Students with OHI are also over-represented in disciplinary removal, although to a lesser degree. Students with OHI account for approximately 10% of the special education population, but over 14% of the students with disabilities subject to disciplinary removal.¹⁴⁸ On balance, these students are better off than they would be without the benefit of IDEA's disciplinary protections, but special eligibility in these categories does not eliminate the risk of suspension and may increase the risk of being placed in more restrictive educational settings.¹⁴⁹

In summary, RTI may exacerbate existing racial disparities in discipline rates and representation in the category of emotional disability. Some students with behavioral challenges may be found not eligible for special education, leaving them vulnerable to suspension without education services. Others may be found eligible in other categories, such as OHI or emotional disability, where they are likely to be subjected to high rates of discipline and restrictive placements, but less vulnerable to wholesale disruptions in educational services altogether. How do we fix a system in which neither option is optimal?

III. SOLUTIONS

Short-term solutions for reducing disproportionality in special education will have to directly address the role of behavior by enacting changes in IDEA that extend the concept of RTI to behavioral interventions and provide protection from discipline to students undergoing RTI. While these measures might ameliorate disproportionality, over the long run the only way to reduce racial disproportionality in both special education and student discipline is to narrow the gap between general and special education.

A. Expand RTI to Address Behavior

Research suggests that special education referrals for African-American students are often precipitated by behavioral challenges in

147. See Skiba et al., *Disparate Access*, *supra* note 134, at 418.

148. See DATA ACCOUNTABILITY CTR., NUMBER OF CHILDREN AND STUDENTS AGES 3 THROUGH 21 WITH DISABILITIES SERVED UNDER PART B, SUBJECT TO DISCIPLINARY REMOVAL BY DISABILITY CATEGORY, TOTAL CUMULATIVE NUMBER OF DAYS REMOVED DURING SCHOOL YEAR AND STATE: 2007-08, available at http://www.ideadata.org/TABLES32ND/AR_5-3.htm; DATA ACCOUNTABILITY CTR., NUMBER OF CHILDREN & YOUTH AGES 3 THROUGH 21 SERVED UNDER IDEA, PART B, BY DISABILITY CATEGORY & STATE: 2003 tbl.E-1, available at http://www.ideadata.org/arc_toc6.asp.

149. See RAUSCH & SKIBA, *supra* note 127, at 1.

the classroom.¹⁵⁰ In 2002, the National Research Council concluded that the “lack of resources for classroom teachers to effectively manage disruptive behavior contributes to racial disparities in referral and placement.”¹⁵¹ This may be even truer in the upper grades.¹⁵² As the authors of one study observed, “[u]ntil a range of other resources that can support students with academic or social needs becomes widely available, teachers cannot be blamed for continuing to use, and perhaps overuse, one of the only reliable resources at their disposal.”¹⁵³

Although some school systems are experimenting with alternative strategies for teaching and incentivizing good behavior, most teachers have only two choices when it comes to significant disruptive behavior. They can send disruptive students to the office (where they may be sent home), or they can send them to special education. RTI asks teachers to serve students with learning problems in the regular classroom but provides few answers when those same students struggle with meeting behavioral expectations. In theory, those students may be provided with early intervening services designed to provide additional behavioral support.¹⁵⁴ However, far more resources are dedicated to training teachers how to identify, diagnose, and treat learning problems than are allocated to training teachers how to meet their students’ social and emotional needs by implementing successful behavior management and intervention techniques.¹⁵⁵

150. See Skiba et al., *Achieving Equity in Special Education*, *supra* note 123, at 277.

151. Russell Skiba, *The Context of Minority Disproportionality: Practitioner Perspectives on Special Education Referral*, 108 *TCHRS. C. REC.* 1424, 1437 (2006).

152. *Id.*

153. *Id.* at 1451.

154. See 34 C.F.R. § 300.226 (2006). A local educational agency may use up to 15% of its IDEA Part B funding

to develop and implement coordinated, early intervening services . . . for students in kindergarten through grade 12 (with a particular emphasis on students in kindergarten through grade three) who are not currently identified as needing special education or related services, but who need additional academic and behavioral support to succeed in a general education environment.

Id. § 300.226(a).

155. See James P. Comer & Robert Pianta, *Report: Schools, Teacher Ed Programs Ignore How Kids Really Learn*, *WASH. POST* (Oct. 5, 2010, 12:11 PM), <http://voices.washingtonpost.com/answer-sheet/research/report-schools-teacher-ed-prog.html>; see also JANE A. LEIBBRAND & BERNARDINE H. WATSON, NAT’L COUNCIL FOR ACCREDITATION OF TEACHER EDUC., *THE ROAD LESS TRAVELED: HOW THE DEVELOPMENTAL SCIENCES CAN PREPARE EDUCATORS TO IMPROVE STUDENT ACHIEVEMENT: POLICY RECOMMENDATIONS* (2010), available at <http://www.ncate.org/dotnetnuke/LinkClick.aspx?fileticket=gY3FtiptMSo%3D&tabid=706>. When interviewed, many teachers expressed frustration about the lack of resources for dealing with behavior problems in the classroom. See Skiba, *The Context of Minority Disproportionality*, *supra* note 151, at 1437.

If RTI is not more focused on behavioral issues, it might be less attractive for classroom teachers and less effective for students. Classroom teachers may resist RTI's call to serve students with learning and behavioral problems in the regular classroom. They might, as a result, continue to refer students to special education, thus limiting the scope of RTI and working against the goal of reducing special education referrals. Alternatively, they might include disruptive students in RTI for a short period of time but grow frustrated if the student's behavior does not improve. In that case, the teacher might simply institute discipline proceedings by sending students to the principal's office. For students in this latter group who normally would be eligible for special education, RTI may represent a regression toward the days of *Mills*, when schools could use discipline as a pretext for refusing to educate "hard-to-handle" students.

RTI can produce these unintended consequences because it largely ignores the role of behavior in the referral and placement process. RTI promises to reduce referrals caused by academic failure related to inadequate instruction. By providing academic support, it may also reduce referrals driven by behavior related to work avoidance and the child's disappointment at his own academic failure. RTI is not, however, designed to directly address challenging classroom behaviors.¹⁵⁶

In recent years, a concept similar to RTI has gained some traction, though it is not as popular as RTI. School-wide positive behavioral support ("SWPBS") is a decision-making framework that emphasizes teaching and rewarding positive behavior on a school-wide, classroom, and individual student basis.¹⁵⁷ The SWPBS model rests on the idea that the intensity of intervention should increase as the severity of the need increases.¹⁵⁸ Thus, like RTI, SWPBS has three tiers: universal, selective, and indicated. In the first tier, the school implements a "universal curriculum" in which a common set of behavioral expectations are set and taught on the theory that, by teaching and reinforcing positive behaviors, fewer students will need

156. Some scholars in recent years have advocated using RTI to diagnose emotional disabilities, see, e.g., Frank M. Gresham, *Response to Intervention: An Alternative Means of Identifying Students as Emotionally Disturbed*, 28 EDUC. & TREATMENT CHILD. 328, 331 (2005), but RTI is most often associated with academic interventions, especially in reading. See discussion *supra* Part I.B.

157. David Osher et al., *How Can We Improve School Discipline*, 39 EDUC. RESEARCHER 48, 50 (2010).

158. See *id.*

more dramatic interventions.¹⁵⁹ Once a common set of expectations is developed and taught, schools can identify students who need additional help. Those students enter Tier 2, which provides evidence-based interventions such as social skills groups, group counseling, or mentoring programs. If a student fails to respond and continues to Tier 3, the school performs a comprehensive functional behavior assessment and creates an individualized behavior intervention plan.¹⁶⁰

If RTI is good for struggling readers, SWPBS would be good for students struggling to meet classroom expectations. RTI and SWPBS are both based on the concepts of prevention, multi-tiered support, and data-based decision-making.¹⁶¹ Like RTI, SWPBS does not endorse a particular intervention, but only cautions that the intervention must be evidence-based and implemented with fidelity.

There is some evidence that SWPBS is effective in reducing discipline referrals. In one randomized trial, researchers found that students in schools implementing SWPBS were 35% less likely to receive a discipline referral.¹⁶² Other studies have found that discipline referrals can be reduced by up to 50% over a three-year implementation period.¹⁶³ Despite these results, as of October 2008, of the country's nearly one hundred thousand schools¹⁶⁴ only eight thousand were implementing some form of SWPBS.¹⁶⁵

Given its track record, IDEA ought to promote SWPBS to the same degree it promotes RTI. It stands to reason that if behavioral incidences decrease, the number of referrals to special education for behavioral reasons would also decrease. Conceivably, just as the definition of "specific learning disability" requires a finding that a child's academic deficits are not caused by inadequate instruction, the defini-

159. See Therese Sandomierski et al., *Response to Intervention and Positive Behavior Support: Brothers from Different Mothers or Sisters with Different Mistresses?*, PBIS NEWSLETTER (Positive Behav. Interventions & Supports, Eugene, Or.), June 1, 2007, at 3, available at http://www.pbis.org/pbis_newsletter/volume_4/issue2.aspx.

160. See *id.*

161. See Osher et al., *How Can We Improve School Discipline*, *supra* note 157, at 50; see also Sandomierski et al., *supra* note 159.

162. *Id.* at 51.

163. *Id.*

164. See generally CHEN-SU CHEN, NAT'L CTR. FOR EDUC. STATISTICS, NUMBERS AND TYPES OF PUBLIC ELEMENTARY AND SECONDARY SCHOOLS FROM THE COMMON CORE OF DATA: SCHOOL YEAR 2008-09, at 6 tbl.1 (Jul. 2010), available at <http://nces.ed.gov/pubs2010/2010345.pdf> (stating that there were a total of 98,706 operating schools in the United States during the 2008-2009 school year).

165. SCOTT A. SPAULDING ET AL., OSEP TECH. ASSISTANCE CTR. ON POSITIVE BEHAV. INTERVENTIONS & SUPPORTS, IMPLEMENTATION OF SCHOOL-WIDE PBIS ACROSS THE UNITED STATES (Nov. 2008), [http://www.pbis.org/evaluation/evaluation_briefs/nov_08_\(2\).aspx](http://www.pbis.org/evaluation/evaluation_briefs/nov_08_(2).aspx).

tion of “child with a disability” could include a requirement that schools provide research-based behavioral interventions before finding a child eligible. The “Findings” section of IDEA 2004 mentions providing incentives for schools to implement positive behavioral interventions and supports,¹⁶⁶ but unlike RTI, there is no requirement that the school rule out a failure to provide high quality, research-based positive behavioral interventions before finding a student eligible for behavioral reasons. Instead, IDEA takes the opposite tack, requiring positive behavioral interventions and supports only *after* a child has been found eligible.¹⁶⁷ Consequently, the two systems most adept at handling chronic behavioral problems remain the special education system and the discipline system.

B. Expand Discipline Protection to RTI-Eligible Students

Much like RTI, research-based behavioral support programs might go a long way toward reducing inappropriate referrals to special education, but only if they are implemented with fidelity. There are many reasons such programs might be difficult to implement—insufficient resources, lack of commitment from school leadership or faculty, and time constraints—but it stands to reason that a major barrier to implementation is the availability of suspension to respond to misbehavior. Suspension is an easy out. It is a lot easier and cheaper (in the short run) to send a student home than to address the source of the behavioral problems or provide educational services in an alternate setting.

There is little or no evidence, however, that suspension improves student behavior in either the short- or long-term. Data suggest that, if anything, out-of-school suspension is predictive of higher rates of future disciplinary infraction.¹⁶⁸ Moreover, students who become disengaged from school and develop disciplinary problems are more

166. See 20 U.S.C. § 1400(c)(5)(F) (LexisNexis 2006 & Supp. 2010).

167. 34 C.F.R. § 300.34 (2006). To add to the confusion surrounding behavior and eligibility, IDEA’s tautological definition of emotional disability specifically excludes children who are “socially maladjusted”—unless they also have an emotional disability. *Id.* § 300.8(c)(4)(ii). The statute never explains what “socially maladjusted” means but presumably it is intended to exclude children who misbehave for reasons other than an emotional disability. *Id.* The research suggests that there are no adequate instruments for distinguishing between social maladjustment and emotional disability, that both groups display similar behavioral characteristics, and that IDEA’s exclusionary language is largely ignored by school districts. See Virginia Costenbader & Roberta Buntaine, *Diagnostic Discrimination Between Social Maladjustment and Emotional Disturbance: An Empirical Study*, 7 J. EMOTIONAL & BEHAV. DISORDERS 2, 2 (1999).

168. See Skiba et al., *Achieving Equality in Special Education*, *supra* note 123, at 854.

likely to drop out of school altogether.¹⁶⁹ And then, where do they go? Lacking the education they need to become successful, they are likely to be looking at a future that is not only bleak for them, but also costly for the rest of us.

The premise behind RTI is that some students are inappropriately referred to special education due to lack of appropriate instruction. Congress believed that students should not be labeled with a disability just because they have not had access to good teaching.¹⁷⁰ Research indicates that high suspension rates may be related to the overall quality of school governance and negative classroom management styles.¹⁷¹ Students of color are more likely to attend schools that have a less stable teaching force, pay teachers less, and have more teachers “with less experience and expertise.”¹⁷² If that is true, why are we enthusiastic about proposing instructional solutions to academic deficits but less eager when it comes to behavioral problems? If it is unfair to refer students to special education due to poor instruction, it is similarly unfair to punish (or label) students who have the misfortune to be placed with teachers who have poor classroom management skills.

To state the obvious, in order for students to respond to either academic or behavioral suspensions, they have to be present to receive the intervention. Thus, it makes sense for students in Tiers 2 and 3 of RTI or SWPBS to receive protection from discipline similar to that afforded IDEA-eligible students.¹⁷³ For students undergoing RTI, schools might be required to ask whether the behavior at issue is directly and substantially related to the child’s academic struggles. For example, a disruptive outburst while working on a fractions worksheet from a student undergoing RTI for math may be treated differently from an act of defiance on the playground by that same student. If the child’s outburst was directly and substantially related to the child’s frustration with not knowing how to do the assignment or from the school’s failure to faithfully implement the math intervention, the child should be returned to the classroom to continue receiving

169. *Id.*

170. 20 U.S.C. § 1400 (c)(5)(F) (LexisNexis 2006 & Supp. 2010).

171. See Skiba et al., *The Color of Discipline*, *supra* note 15, at 335-37.

172. See Skiba et al., *Achieving Equity in Special Education*, *supra* note 123, at 274.

173. Extending discipline safeguards to RTI-eligible students has been proposed by others. See, e.g., Weber, *supra* note 2, at 142-43.

RTI.¹⁷⁴ In situations where the student is participating in Tier 2 or 3 intervention for behavioral reasons, one could ask whether the type of behavior is properly targeted for intervention and whether the child's behavior is a direct result of failure to implement the intervention. If so, the child should continue receiving those interventions until the behavior is addressed. In some cases, these questions may be easier to answer than others, but they are no different in kind or difficulty than the manifestation questions required to be asked when long-term suspensions are proposed for students with disabilities.

Perhaps more important, IDEA's requirement that FAPE be provided to suspended or expelled students should be extended to students targeted for academic or behavioral interventions.¹⁷⁵ This is consistent with the idea that disciplinary measures not be used as a pretext for refusing to serve struggling students. It is also consistent with the notion that students who are eligible for IDEA, but have not yet been identified, should receive the benefit of IDEA's disciplinary protections. IDEA already recognizes that students who have not yet been found eligible are entitled to the same procedural safeguards as eligible students when the school had knowledge that the student had a disability before the behavior occurred.¹⁷⁶ There is no obvious reason why this provision would not extend to students undergoing RTI or EIS, especially given that RTI is considered both an intervention and a diagnostic tool for evaluating a suspected learning disability.¹⁷⁷

Expanding disciplinary protection to students receiving pre-referral interventions would help address the tradeoff described in the previous section. Students not eligible for special education should

174. In cases where the behavior is not directly and substantially related to the child's targeted academic struggles, one might still ask whether the behavior necessitates removal from the classroom or some other consequence that does not deprive the child of instructional time.

175. See generally 34 C.F.R. § 300.101(a) (2006) ("A free appropriate public education must be available to all children residing in the State between the ages of 3 and 21, inclusive, including children with disabilities who have been suspended or expelled from school . . .").

176. See *id.* § 300.534.

177. See *id.* § 300.226. When asked during the public comment period whether schools would be deemed to have knowledge that a child was a child with a disability if the child were currently receiving early intervening services, the U.S. Department of Education responded:

A public agency will not be considered to have a basis of knowledge under § 300.534(b) merely because a child receives services under the coordinated, early intervening services in section . . . § 300.226 of these regulations. . . . We do not believe expanding the basis of knowledge provision . . . would be appropriate given the specific requirements [regarding the basis of knowledge criteria] in the Act.

Assistance to States for the Education of Children with Disabilities and Preschool Grants for Children with Disabilities, 71 Fed. Reg. 46,727 (Aug. 14, 2006). With that said, it obviously cannot be the case that a student's participation in RTI constitutes irrefutable proof that the school had *no* knowledge of a student's disability.

receive needed interventions without exposing themselves to unfair and counterproductive discipline policies.

C. Turning Two Systems into One

Extending discipline protections to RTI students is not without its own difficulties, which leads to the last topic of this Article. One problem, of course, is that extending disciplinary protections to RTI students might make RTI less attractive to teachers and administrators. If students participating in an RTI program are shielded from the effects of suspension and expulsion to the same degree as special education students, teachers and administrators may see few benefits to RTI over special education. This is especially true where a referral to special education could result in the child being removed from the classroom.

In addition, adding another category of students who have a right to educational services during removal would exacerbate the existing unfairness inherent in IDEA's disciplinary protections.¹⁷⁸ Why should students with disabilities and/or suspected disabilities be entitled to receive services during disciplinary removal and others not? All students are likely to suffer setbacks, sometimes irreparable ones, as a result of a long-term suspension or expulsion. All students are likely to benefit from educational services during a period of disciplinary removal. Most students subject to long-term or multiple suspensions have real or perceived social deficits, and very few of them are likely to learn to behave appropriately as a result of exclusion. To be clear, no one believes it is fair to punish children for behaviors that they cannot control or for actions whose nature or consequences they cannot understand or anticipate. But there is little reason to treat the child differently when the behavior is *not* a manifestation of disability, which is precisely what happens now under special education law.¹⁷⁹

This is not to say that we should remove the right to educational services during periods of disciplinary removal for students with disabilities. On the contrary, in our opinion it is counterproductive to deprive any child of educational services if the child can be educated safely in an alternative setting. We believe that schools should be required to offer educational programming to all excluded students because they all need it.

178. See KELMAN & LESTER, *supra* note 116, at 104-16.

179. See *id.* at 60-63.

Requiring schools to continue providing educational services during disciplinary removal would not, on its own, cure disproportionality in either special education or student discipline. However, it would minimize the consequences of the existing racial disparities in suspension rates. At the very least, it would prevent suspended students from sitting at home unsupervised where they are more likely to become entangled in the criminal and juvenile justice systems.¹⁸⁰ It would also eliminate the disincentive to refer students to RTI or EIS since school removal would no longer be an option for any student. Additionally, if the school has to find a way to educate all children, and cannot resort to suspension as an easy escape hatch, it may be forced to implement RTI and SWPBS with greater fidelity and determination.

What is true of discipline is true more generally. Whether special education produces the academic outcomes we desire (and can realistically expect) is a subject of great debate, the fact remains that special education status confers something of great value to students, parents, and teachers that the general education system does not: increased financial resources, including help in the classroom, a goal of individualized instruction, and increased parental participation and power to make educational decisions. Until the gap between general education and special education is reduced, the danger of misidentification will not go away.

To address disproportionality in special education, and misidentification more generally, one has to appreciate and confront the sometimes conflicting incentives facing teachers, administrators, parents, and advocates. Special education currently offers more than general education in terms of services, resources, and protection against discipline. Some of these differences between special and general education, at one level, may be justified. But they also motivate participants in the special education referral process both to push some students into special education who do not belong and to keep out others who do belong.

For younger students, a teacher's frustration with disruptive or dangerous behavior is likely to result in a special education referral, which will either bring extra help to the classroom or result in removing the challenging student to a more restrictive setting. For older

180. Johanna Wald & Daniel J. Losen, *Out of Sight: The Journey Through the School-to-Prison Pipeline*, in *INVISIBLE CHILDREN*, *supra* note 132, at 33-34.

students, the school's desire to maintain maximum flexibility in disciplining students promotes resistance to finding them eligible for special education, where the procedural protections make it more difficult to send the child home or change the child's placement. In either case, the possibility of disciplinary removal and the failure to provide real solutions to challenging behavior distorts special education referral in both directions, especially for minority students who are more likely—due to implicit bias, cultural factors, poverty, or other reasons—to be identified as behaviorally disordered.

Parents and advocates also contribute to this distortion. Though IDEA's safeguards are a far cry from disciplinary immunity, students with disabilities have far stronger rights and more opportunities for challenging the school's disciplinary decision than students who are not covered by IDEA and who, with the exception of some meager due process rights, are for the most part at the mercy of the school board's discretion. Sophisticated parents and special education advocates know that the best way to protect a student from being sent home on suspension—sometimes for a year or longer—is to obtain special education identification for the student.

The only long-term solution to the general problem of misidentification, and the more specific problem of racial disproportionality, is to reduce the gap between the two systems. Consider minority students. Currently, there are achievement, discipline, and graduation gaps between minority students and their white peers. Thus, minority students currently have disproportionate need for targeted interventions, discipline protection, and dropout prevention. One way to provide these things is to refer minority students to special education, where they have access to individualized instruction, educational services during disciplinary removal, and behavioral instruction and support. But, as discussed earlier, with special education eligibility comes potential stigma, low expectations, and the possibility of increased segregation into more restrictive settings. Another way is to provide these things in the regular education system. In other words, as long as minority students have a disproportionate need for services found only in special education, there will be disproportionate referrals to that system.

To come at the problem from the other direction, referral to special education allows classroom teachers a chance to remove students from the classroom. Suspension and expulsion allow administrators to remove students from the school building altogether, with no obliga-

tion to provide educational services. At the moment, too many minority students suffer from the ill effects of these removals. If it were both harder to remove students from the classroom and more difficult to remove students from school—especially without providing any educational services—the incentives to refer students to special education, to suspend them, or to expel them would be reduced. Reducing these incentives, in turn, should help reduce disproportionality in both special education and discipline.

Current approaches to reducing disproportionality are focused almost entirely on the referral process and on finding tools to distinguish between the educationally neglected and the truly disabled. In order to fully counteract the motivation driving over- and under-referral, general education must consider adopting some of the things that make special education special. These include offering individualized instruction to all types of learners, providing sustained interventions to students who need long-term help, increasing the parental role in educational decision-making, and rethinking suspension and expulsion for all students. RTI may offer individualized instruction to students struggling with reading and, to a lesser extent, math, but the special education system remains the only place for students to receive intensive long-term support for a whole variety of academic and behavioral difficulties.

CONCLUSION

The road to special education is paved with conflicting and often counterproductive incentives. Overworked teachers and administrators see special education as the only avenue to direct services toward struggling students or to remove them from the classroom. Stressed and anxious parents look to disability as an explanation for their children's academic or behavioral challenges in school. Desperate advocates know that the most effective way to protect a client's educational rights is to seek special education eligibility. The cumulative effect of these incentives is to drive low performing students, many of whom are children of color, into the special education system, where they can receive discipline protection and individualized instruction, but are also at risk of being segregated from their peers, subjected to a watered-down curriculum, and followed through school and perhaps beyond by a stigmatizing label.

Race and Response-to-Intervention

RTI is attractive in that it attempts to meet the needs of low performing students without sending them into the special education system. But RTI sets up a tradeoff between access to needed interventions in the regular classroom and vulnerability to disciplinary removal that is particularly acute for minority students. This tradeoff can be addressed, at least in the short run, by enhancing the role of behavioral supports in the classroom and by extending to RTI students some of the disciplinary protections afforded to special education students.

As long as there are two separate systems for educating children, however, efforts to reserve special education for the “truly disabled” will mean abandoning some struggling students to the shortcomings of the regular education system and further isolating some students with disabilities. In addition, decisions about special education eligibility, particularly for African-American students, will continue to be driven not solely or even primarily by the best interests of the students, but by the conflicting incentives of teachers, administrators, parents, and advocates to seek or avoid the unique protections provided by the special education system.

Students of the Mass Incarceration Nation

KATAYOON MAJD*

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* Criminal and Juvenile Justice Program Officer, Public Welfare Foundation. The views expressed here are my own and should not be attributed to the Public Welfare Foundation. I would like to thank Neelum Arya, Barbara Fedders, and Robert Kim for their very helpful comments and suggestions on an earlier draft of this Article. I also am grateful to Derek Black and the staff of the *Howard Law Journal* for their assistance.

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INTRODUCTION

Sometimes no one speaks the truth better than a child. Several years ago, while working as a guardian *ad litem* in the District of Columbia child welfare system, I represented Michael;¹ he was a precocious seven-year-old African-American boy who had been removed from his home, separated from his siblings, and placed in foster care after suffering serious physical abuse. I visited him at his local public elementary school one day, and as we sat in a common area talking, Michael spotted a school police officer casually walking by. Michael grabbed my arm, pointed at the officer, and exclaimed, “Look at him! That’s an officer of the law! He’s got a gun! In an elementary school! Do you see it?” I told Michael I saw. He shook his head and declared, “You gotta get me outta here . . . this is no place for a child.”

Michael’s educational experience is not unique. More than half a century after *Brown v. Board of Education*² ruled that “separate but equal” education conditions were unconstitutional, educational equity in the United States remains elusive. Since the 1970s, public schools have become more racially segregated.³ Students of color and English

1. “Michael” is not the student’s real name.

2. 347 U.S. 483 (1954).

3. See John Brittain et al., *Racial Disparities in Educational Opportunities in the United States*, 6 SEATTLE J. FOR SOC. JUST. 591, 595, 600 (2008), available at <http://www.lawyerscommittee.org/projects/admin/education/documents/files/0007.pdf> (noting that while the average white

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Language Learner⁴ students continue to experience large achievement gaps, unequal access to higher education, low graduation rates, high rates of suspension and expulsion,⁵ and unequal access to educational resources.⁶ Racial disparities also exist in special education and gifted and talented programs.⁷ A number of factors have contributed to these inequities.⁸ This Article focuses on one of these factors: the mass incarceration of people of color.

Over the last three decades, the country's criminal justice systems have punished a stunning number of people—disproportionately African-American men—and excluded them from mainstream society.⁹ Though the United States accounts for 5% of the total world population, it houses 25% of the world's prisoners.¹⁰ It does so despite enjoying historically low crimes rates.¹¹ America's obsession with

child attends a school where 77% of other students are white, the average black student attends a high school where only 30% of other students are white).

4. An English Language Learner is a “national-origin-minority student who is limited-English-proficient.” See *Developing Programs for English Language Learners: Glossary*, U.S. DEP'T OF EDUC., OFFICE FOR CIVIL RIGHTS, <http://www2.ed.gov/about/offices/list/ocr/ell/glossary.html> (last visited Dec. 27, 2010).

5. Brittain et al., *supra* note 3, at 596, 603; see also Laleh Ispahani, ACLU, *Race & Ethnicity in America: Turning a Blind Eye to Injustice* 1, 137-38 (2007), available at http://www.aclu.org/files/pdfs/humanrights/cerd_full_report.pdf (reporting that, in 2005, 58% of African-American and 54% of Latino fourth-grade students scored below the basic reading level for their grade, compared to only 36% of students overall; in 2001, the four-year high school graduation rate in school districts with a majority of students of color was 56.4% compared to 74.1% in majority white school districts; and in high-poverty school districts the graduation rate was 57.6% compared to 76% in low-poverty school districts).

6. See Daniel J. Losen, *Challenging Racial Disparities: The Promise and Pitfalls of the No Child Left Behind Act's Race Conscious Accountability*, 47 *How. L.J.* 243, 252-58 (2003); Chauncey D. Smith, Note, *Deconstructing the Pipeline: Evaluating School-to-Prison Pipeline Equal Protection Cases Through a Structural Racism Framework*, 36 *FORDHAM URB. L.J.* 1009, 1033-34 (2009).

7. 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, 1107 (2009-2010).

8. The “continued racial inequality in educational opportunities” stems from several factors including: underperforming, poorly financed schools; low teacher quality; large class sizes; inadequate facilities; school assignment policies that promote segregation; school district boundaries that are coterminous with town boundaries and local land use, zoning, and taxation powers; the practice of ability grouping and tracking which consistently places minority students in lower level classes; failure to counteract differences in socio-economic status; and lower expectations by school personnel of minority students. Brittain et al., *supra* note 3, at 596.

9. Glenn C. Loury, *Crime, Inequality & Social Justice*, *DAEDALUS*, Summer 2010, at 134, 135.

10. Glenn C. Loury & Bruce Western, *The Challenge of Mass Incarceration in America*, *DAEDALUS*, Summer 2010, at 3, 6.

11. See JENNIFER L. TRUMAN & MICHAEL R. RAND, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, *CRIMINAL VICTIMIZATION*, 2009, at 3 (2010), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/cv09.pdf> (noting that the overall violent crime rate has dropped steadily since 1994); see also HOWARD N. SNYDER & MELISSA SICKMUND, OFFICE OF JUVENILE JUSTICE

incarceration has “mystified and appalled” criminologists in other countries,¹² for “[n]ever in the civili[z]ed world have so many been locked up for so little.”¹³ Today, as Paul Butler explains, “[w]e define too many acts as crimes, punish too many people far longer than their crimes warrant, and therefore have too much incarceration.”¹⁴

In this era of mass incarceration, young people of color, especially African-American students, are vulnerable. The misguided “lock ‘em up” mentality that pervades the adult criminal justice system has also been applied to the juvenile justice system, with no recognition of the developmental differences between youth and adults or of the research that has emerged in the last fifteen years about what works—and what does not—in responding to youth misbehavior and delinquency.¹⁵ At the same time, many schools have embraced the prevailing culture of punishment, employing surveillance and social control measures that mirror those of the justice system and relying on exclusionary measures to respond to student misbehavior. And because youth have diminished rights at school and in juvenile court,¹⁶ they are often defenseless in the face of governmental overreaching. As a result, youth are being removed from school settings and treated

& DELINQUENCY PROGRAMS, JUVENILE OFFENDERS AND VICTIMS: 2006 NATIONAL REPORT, at iii (2006), available at <http://www.ojjdp.gov/ojstatbb/nr2006/downloads/NR2006.pdf> (finding that juvenile violent crime arrests have dropped consistently since 1994).

12. Sasha Abramsky, *Toxic Persons: New Research Shows Precisely How the Prison-to-Poverty Cycle Does Its Damage*, SLATE (Oct. 8, 2010, 7:34 AM), <http://www.slate.com/id/2270328/> (quoting Adam Liptak, *Inmate Count in U.S. Dwarfs Other Nations*, N.Y. TIMES, Apr. 23, 2008, at A1).

13. *Rough Justice in America: Too Many Laws, Too Many Prisoners*, ECONOMIST, July 22, 2010, at 33, available at <http://www.economist.com/node/16636027>.

14. PAUL BUTLER, LET’S GET FREE: A HIP-HOP THEORY OF JUSTICE 26 (2009).

15. See Mark Soler, Dana Shoenberg & Marc Schindler, *Juvenile Justice: Lessons for a New Era*, 16 GEO. J. ON POVERTY L. & POL’Y 483, 484, 489-97 (2009).

16. See, e.g., *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646 (1995) (upholding the constitutionality of random urinalysis for students participating in extracurricular athletics); *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675 (1986) (holding that a student’s two-day suspension from school for making a sexually suggestive speech at a school assembly did not violate the First Amendment); *New Jersey v. T.L.O.*, 469 U.S. 325 (1985) (upholding the constitutionality of a search of a student’s purse as part of an investigation of smoking at school); *Schall v. Martin*, 467 U.S. 253, 265 (1984) (holding that a state preventive detention scheme for juveniles did not violate due process because “juveniles, unlike adults, are always in some form of custody”); *McKeiver v. Pennsylvania*, 403 U.S. 528, 550 (1971) (holding there is no federal constitutional right to a jury trial in delinquency cases).

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as criminals for rather typical adolescent behaviors,¹⁷ with disastrous consequences to their educational opportunities and achievement.¹⁸

The connection between education and incarceration has been examined in the literature.¹⁹ Educational failure significantly increases an individual's risk of engaging in delinquency or crime.²⁰ In addition, a robust body of work has identified a "school-to-prison pipeline" or "schoolhouse to jailhouse track" to describe the numerous factors, including resource disparities in urban schools, inadequate educational opportunities, zero-tolerance policies,²¹ presence of law enforcement on campus, perverse incentives created by the No Child Left Behind Act's high-stakes testing regime, and denial of special education services that combine to funnel youth from the education system into the justice system.²² As United States Assistant Attorney

17. See Terrie Moffitt, *Adolescence-Limited and Life-Course-Persistent Antisocial Behavior: A Developmental Taxonomy*, 100 PSYCHOL. REV. 674, 675 (1993) (explaining that the overwhelming majority of youth who engage in delinquent behavior will desist from such behavior as they mature and that delinquency is a "normal part of teenage life").

18. See, e.g., AARON KUPCHIK, HOMEROOM SECURITY: SCHOOL DISCIPLINE IN AN AGE OF FEAR 8 (2010); DANIEL J. LOSEN & RUSSELL J. SKIBA, S. POVERTY LAW CTR., SUSPENDED EDUCATION: URBAN MIDDLE SCHOOLS IN CRISIS 11 (2010), available at http://www.splcenter.org/sites/default/files/downloads/publication/Suspended_Education.pdf; Michael P. Krezmien et al., *Juvenile Court Referrals and the Public Schools: Nature and Extent of the Practice in Five States*, 26 J. CONTEMP. CRIM. JUST. 273, 274 (2010); Russell Skiba et al., *Are Zero Tolerance Policies Effective in the Schools? An Evidentiary Review and Recommendations*, 63 AM. PSYCHOLOGIST 852, 854 (2008), available at <http://www.apa.org/pubs/info/reports/zero-tolerance.pdf>.

19. See Nkechi Taifa & Catherine Beane, *Integrative Solutions to Interrelated Issues: A Multidisciplinary Look Behind the Cycle of Incarceration*, 3 HARV. L. & POL'Y REV. 283, 289-90 (2009) ("There is considerable evidence that educational failure is a significant risk factor for delinquent or criminal behavior. Deficiencies in educational systems, destructive school discipline policies, truancy, and the seeming inability of schools to identify and service disadvantaged youth who are in need of special educational services are directly related to the cycle of incarceration.").

20. See Jessica Feerman, Marsha Levick & Ami Mody, *The School-to-Prison Pipeline . . . and Back: Obstacles and Remedies for the Re-enrollment of Adjudicated Youth*, 54 N.Y.L. SCH. L. REV. 1115, 1123 (2009-2010) (noting that youth in the juvenile justice system on average read at a level four to five years below their grade level); Taifa & Beane, *supra* note 19, at 289-90 (noting that 70% of incarcerated adults are functionally illiterate); Bruce Western & Becky Pettit, *Incarceration & Social Inequality*, DAEDALUS, Summer 2010, at 8, 18, available at http://www.mitpressjournals.org/doi/pdf/10.1162/DAED_a_00019 (explaining that state prisoners on average have achieved only a 10th grade education and about 70% have no high school diploma).

21. See Skiba et al., *supra* note 18, at 856, 860, available at <http://www.apa.org/pubs/info/reports/zero-tolerance.pdf> (defining zero tolerance as a "philosophy or policy that mandates the application of predetermined consequences, most often severe and punitive in nature, that are intended to be applied regardless of the gravity of the behavior, mitigating circumstances, or situational context").

22. See generally ADVANCEMENT PROJECT, EDUCATION ON LOCKDOWN: THE SCHOOLHOUSE TO JAILHOUSE TRACK 1, 7 (2005) [hereinafter EDUCATION ON LOCKDOWN], available at <http://www.advancementproject.org/sites/default/files/publications/finaleolrep.pdf> (outlining the increasing police presence on school campuses); CHILDREN'S DEF. FUND, AMERICA'S CRADLE

General for Civil Rights Thomas Perez recently acknowledged, “We have failed all our children—and our society—if an education becomes a pathway to prison. It is a moral imperative that education instead serves as a road to success.”²³

However, the connection between education and incarceration does not flow solely in one direction. This Article argues that the racialized and politicized criminal and juvenile justice policies that have led to the mass incarceration of people of color have also exacerbated racial disparities in education. The single-minded focus on punishment in the criminal and juvenile justice systems has impacted how schools handle certain student behaviors, with devastating consequences. Today, these two systems—the education and justice systems—have developed a “symbiotic relationship,”²⁴ effectively working together to lock out large numbers of youth of color from societal opportunity and advantage. In addition to these direct impacts on youth, mass incarceration has other ramifications for education policy. States spend significant amounts of money on corrections—money that could better be spent on education.²⁵ And schools are often not prepared to help students grapple with the host of negative impacts that are associated with having a parent or guardian locked up behind bars.

This Article argues that in order to be successful, educational equity reform efforts must be accompanied by wide scale juvenile and criminal justice reform. A window of opportunity currently exists for such wide scale reform. Crime rates are down,²⁶ and the costs of mass

TO PRISON PIPELINE (2007), available at <http://www.childrendefense.org/child-research-data-publications/data/cradle-prison-pipeline-report-2007-full-highres.pdf>; CATHERINE Y. KIM, DANIEL J. LOSEN & DAMON T. HEWITT, THE SCHOOL-TO-PRISON PIPELINE: STRUCTURING LEGAL REFORM 2010); NAACP LEGAL DEF. & EDUC. FUND, DISMANTLING THE SCHOOL TO PRISON PIPELINE (2010), available at http://naacpldf.org/files/publications/Dismantling_the_School_to_Prison_Pipeline.pdf; Johanna Wald & Daniel J. Losen, *Defining and Redirecting a School-to-Prison Pipeline*, 2003 NEW DIRECTIONS FOR YOUTH DEV. 99, at 9, 11.

23. Thomas E. Perez, Assistant Attorney Gen., U.S. Dep’t of Justice, Civil Rights Div., Address at the Civil Rights and School Discipline: Addressing Disparities to Ensure Equal Educational Opportunity Conference (Sept. 27, 2010), available at http://www.justice.gov/crt/speeches/perez_eosconf_speech.php.

24. Smith, *supra* note 6, at 1011 (citing Loïc Wacquant, *Deadly Symbiosis: When Ghetto and Prison Meet and Mesh*, 3 PUNISHMENT & SOC’Y 95, 108 (2001)).

25. See Steven Hawkins, *Mass Incarceration in America: Education vs. Incarceration*, AM. PROSPECT, Jan. 2011, at A18, available at http://www.prospect.org/cs/articles?article=education_vs_incarceration (claiming that the costs of incarceration have “claimed an increasing share of state and local government spending” and “starved essential social programs—most notably education”).

26. See U.S. DEP’T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, STATE-BY-STATE AND NATIONAL TRENDS, available at <http://bjs.ojp.usdoj.gov/dataonline/Search/Crime/State/RunCrimeS->

incarceration are becoming unsustainable.²⁷ Given the budget crises facing the states, some policymakers needing to slash spending have shown receptivity to calls for adopting more cost-effective alternatives to incarceration.²⁸ In fact, due primarily to these fiscal concerns, in 2009, for the first time in forty years, the rate of adult incarceration in state prisons nationwide retreated slightly, by 0.3%.²⁹

At this critical time, educational equity advocates—and all others concerned about social justice—should join forces with criminal and juvenile justice reformers to call for the dismantling of the mass incarceration system. Given the numerous devastating impacts that mass incarceration is having on education and social mobility within communities of color, social justice advocates would benefit from thinking more holistically and working more collaboratively across issue-specific silos to advance a common agenda for racial justice. Isolated policy reforms or lawsuits addressing only one aspect of the education or justice system without attending to the interconnections between the two systems are unlikely to fully dismantle the culture of punishment targeting students of color. If one policy problem is solved in isolation, another manifestation of the punitive drive to push youth out of schools and into the justice system is likely to arise elsewhere. By working together to advance a holistic social justice reform agenda that includes challenging mass incarceration, advocates have the greatest chance of making long-lasting progress in the fight for equity.

tatebyState.cfm (Search “United States Total” and “Number of Violent Crimes”) (providing statistics for violent and property crime rates for every year between 1960 and 2007).

27. In 2008, for example, states spent an estimated \$52 billion on corrections. When considering all levels of government, an estimated \$68 billion goes to corrections. PEW CTR. ON THE STATES, ONE IN 31: THE LONG REACH OF AMERICAN CORRECTIONS 1 (2009) [hereinafter THE LONG REACH OF AMERICAN CORRECTIONS], available at http://www.pewcenteronthestates.org/uploadedFiles/PSPP_1in31_report_FINAL_WEB_3-26-09.pdf.

28. See MARK LIPSEY ET AL., CTR. FOR JUVENILE JUSTICE REFORM, IMPROVING THE EFFECTIVENESS OF JUVENILE JUSTICE PROGRAMS: A NEW PERSPECTIVE ON EVIDENCE-BASED PRACTICE 9 (2010), available at <http://cjjr.georgetown.edu/pdfs/ebp/ebppaper.pdf> (noting that “[l]arge budget deficits have caused some states to rethink high juvenile confinement rates”); Michelle Alexander, *Obama’s Drug War*, THE NATION, Dec. 27, 2010, available at <http://www.thenation.com/article/156997/obamas-drug-war> (noting that “at least eighteen legislatures have reduced or eliminated harsh mandatory minimum sentences, and more than two dozen have restored early-release programs and offered treatment instead of incarceration for some drug offenders”); Rebecca Ruiz, *Eyes on the Prize: Our Moral and Ethical Duty to End Mass Incarceration*, AM. PROSPECT, Jan.-Feb. 2011, at A3, available at <http://www.nxtbook.com/nxtbooks/americanprospect/20110102specialreport/#/2> (explaining that the fiscal crisis has caused “even the staunchest advocates of incarceration” to consider alternatives).

29. See generally PEW CTR. ON THE STATES, PRISON COUNT 2010: STATE POPULATION DECLINES FOR THE FIRST TIME IN 38 YEARS (2010), available at http://www.pewcenteronthestates.org/uploadedFiles/Prison_Count_2010.pdf?n=880 [hereinafter PRISON COUNT 2010] (highlighting that during the same time, the number of federal inmates actually increased).

Part I of this Article provides an overview of how the United States came to incarcerate more people than any other nation in the world, despite enjoying historically low crime rates. Part I also links the politicization and racialization of crime in the public discourse to the punitive criminal and juvenile justice policies that have led to the mass incarceration of people of color, and argues that youth are uniquely vulnerable to these policies.

Part II details the impact that this punitive trend in the justice system has had on educational policies and practices. As justice systems have become more punitive, schools have responded to student behavior with measures associated with crime control. Specifically, schools are relying on exclusionary policies, such as school suspensions, expulsions, and referrals to juvenile court, rather than adopting pedagogical responses to student behavior. As a result, many students, particularly students of color, are being criminalized for fairly typical adolescent behaviors, and the focus for many schools today is on “behavior management and social control” rather than the promotion of learning, critical thinking, and educational achievement.³⁰

Part III explores two factors that make challenging the punitive treatment of youth of color by both the education and the justice systems particularly difficult. This includes the fact that youth generally have fewer rights than adults both at school and in juvenile court.³¹ In addition, the interconnected nature of the education and justice systems has created a dynamic by which challenging policies in just one system or the other is unlikely to achieve long-lasting reform.

Part IV details the numerous harms that have resulted from the collaboration between schools and courts to criminalize youth. The

30. See Pedro Noguera, *Schools, Prisons and the Social Implications of Punishment: Rethinking Disciplinary Practices*, 42 *THEORY TO PRACTICE* 341, 342 (2003), available at http://www.inmotionmagazine.com/er/pn_rethink.html; see also DANIEL J. LOSEN & RUSSELL J. SKIBA, S. POVERTY LAW CTR., *SUSPENDED EDUCATION: URBAN MIDDLE SCHOOLS IN CRISIS* 1, 11 (2010), available at http://www.splcenter.org/sites/default/files/downloads/publication/Suspended_Education.pdf (“One of the goals of public schooling is to prepare children to participate in our democracy, and become productive law-abiding citizens.”).

31. See, e.g., *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646 (1995) (upholding the constitutionality of random urinalysis for students participating in extracurricular athletics); *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675 (1986) (holding that a student’s two-day suspension from school for making a sexually suggestive speech at a school assembly did not violate the First Amendment); *New Jersey v. T.L.O.*, 469 U.S. 325 (1985) (upholding the constitutionality of a search of a student’s purse as part of an investigation of smoking at school); *Schall v. Martin*, 467 U.S. 253, 265 (1984) (holding that a state preventive detention scheme for juveniles did not violate due process because “juveniles, unlike adults, are always in some form of custody”); *McKeiver v. Pennsylvania*, 403 U.S. 528, 550 (1971) (holding there is no federal constitutional right to a jury trial in delinquency cases).

collaboration has exacerbated racial inequities in education by decreasing educational opportunities and outcomes for many students of color, limiting their employment prospects, damaging their health and psychological well-being, and impacting how they view both authority and themselves. Ultimately, these factors combine to facilitate the eventual entry of many students of color into the adult criminal justice system.

Part V describes additional negative ramifications of mass incarceration for education policy. These include the fact that outsized state corrections budgets are limiting the available state funding for education. In addition, many students have a parent or guardian who is currently—or has previously been—incarcerated, and schools are often not equipped to meet the needs of these students.

The Article concludes in Part VI by arguing that education advocates, justice system reformers, and others concerned about racial justice and equity should join forces to advance a more holistic and collaborative reform agenda that includes challenging criminal and juvenile justice policies. Such a reform effort is integral in the fight for educational equity. To help lay the groundwork for such a reform effort, this Article provides a few concrete policy recommendations that educational equity advocates and justice system reformers can pursue together. While acknowledging that the obstacles are great, this Article argues that advocates must work with the communities most impacted by mass incarceration to fundamentally change how society views issues of race, crime, and punishment.

I. THE DRIVE TO PUNISH: THE MASS INCARCERATION OF AFRICAN-AMERICANS AND OTHER PEOPLE OF COLOR

The nation's criminal and juvenile justice systems are characterized by a drive to punish.³² Over the last few decades, crime has become politicized and racialized, and this in turn has facilitated the adoption of criminal and juvenile justice laws and policies that are strikingly punitive. Despite enjoying historically low crime rates, the

32. Sacha M. Coupet, *What to Do with the Sheep in Wolf's Clothing: The Role of Rhetoric and Reality About Youth Offenders in the Constructive Dismantling of the Juvenile Justice System*, 148 U. PA. L. REV. 1303, 1306-07 (2000) (arguing that “[a] drive to punish young offenders for their supposed increasingly violent behavior has guided reform measures over the past three decades and has steered the juvenile justice system from rehabilitative to retributive aims”); see also BUTLER, *supra* note 14, at 4 (noting that the “rush to punish is out of control”).

United States has an “addiction to incarceration,”³³ according to James Bell, an expert on racial disparities in the juvenile justice system. Young African-American males have become prime targets for this societal addiction.³⁴ In fact, studies indicate that people perceive African-American youth as more mature, dangerous, and deserving of punishment than white youth, even though these perceptions are not supported by demographic data on crime rates.³⁵ The racially disparate and punitive criminal and juvenile justice policies have meant that for the first generations of African-American men coming of age in the aftermath of the civil rights movement, “the prison now looms as a significant institutional influence on [their] life chances.”³⁶

A. The Criminal Justice System

The United States is the global leader in incarceration, surpassing all other countries both in terms of total numbers and per capita rates of people behind bars.³⁷ In 2008, the nation reached a milestone; that year, the Pew Center on the States reported that one in every hundred adults was behind bars.³⁸ And when considering the several million others who are on parole or probation,³⁹ one in every thirty-one adults nationwide was under some form of correctional control.⁴⁰

The United States did not always incarcerate so many people. The number of incarcerated people skyrocketed from fewer than 350,000 people in 1972 to approximately 2.3 million people in 2009.⁴¹ This explosion in prison populations does not reflect a similar increase in crime rates, as one might expect.⁴² In fact, incarceration rates have continued to climb to their highest levels while crime rates have

33. See James Bell Calls for End to Nation’s Addiction to Incarceration at the NAACP 101st Conference in Kansas City, W. HAYWOOD BURNS INST. FOR JUV. JUST. FAIRNESS & EQUITY (Aug. 10, 2010), <http://burnsinstitute.org/article.php?id=243>.

34. See JONATHAN SIMON, GOVERNING THROUGH CRIME: HOW THE WAR ON CRIME TRANSFORMED DEMOCRACY AND CREATED A CULTURE OF FEAR 19 (2010).

35. Elizabeth S. Scott & Laurence Steinberg, *Blaming Youth*, 81 TEX. L. REV. 799, 807 (2003).

36. Western & Pettit, *supra* note 20, at 11.

37. Abramsky, *supra* note 12.

38. PRISON COUNT 2010, *supra* note 29, at 1.

39. Abramsky, *supra* note 12.

40. THE LONG REACH OF AMERICAN CORRECTIONS, *supra* note 27, at 4.

41. MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS 8 (2010).

42. See BUTLER, *supra* note 14, at 25-26 (“When crime goes up, we lock up more people. When crime goes down, we lock up more people. When the crime rate stays the same, we lock up more people.”); see also Loury, *supra* note 9, at 135 (explaining that crimes rates increased in 1970s, fell then rose again in 1980s, and increased before sharply decreasing again in the 1990s).

dropped to historic lows.⁴³ The Pew Center on States attributes the growth in prison populations to “sentencing, release and other correctional policies that determine who goes to prison and how long they stay.”⁴⁴ Specifically, mass incarceration can be linked to the War on Drugs, officially launched by President Reagan and expanded by Presidents George H.W. Bush and Bill Clinton.⁴⁵ The War on Drugs spurred the adoption of wide-scale, “tough on crime” legislation, including mandatory minimums that removed discretion in sentencing, “three strikes” laws that required up to life imprisonment for the commission of a third, typically violent felony offenses, and “truth in sentencing laws” which required offenders to serve 85% of their sentences before they can be released.⁴⁶ The mass incarceration that has resulted from these policies has been exorbitantly expensive; in 2008, for example, the costs of corrections in the country totaled an estimated \$68 billion.⁴⁷

People of color disproportionately and overwhelmingly experience the devastating impacts of these punitive policies. One in eleven African-Americans and one in twenty-seven Latinos are under some form of correctional control, compared to one in forty-five whites.⁴⁸ The statistics for young African-American men are even more shocking. One in nine African-American males between the ages of twenty and thirty-four is incarcerated,⁴⁹ and *one out of every three* young black males lives under some form of criminal justice control, whether in prison, on probation or parole, or awaiting trial.⁵⁰

An obvious explanation for these racial disparities—that different racial groups commit crimes at different rates—is not supported by the data.⁵¹ Though violent crime rates are higher for African-

43. See TRUMAN & RAND, *supra* note 11, at 3.

44. THE LONG REACH OF AMERICAN CORRECTIONS, *supra* note 27, at 4.

45. ALEXANDER, *supra* note 41, at 47-57; Marc Mauer, *Why Are Tough on Crime Policies So Popular?*, 11 STAN. L. & POL'Y REV. 9, 10 (1999) (“The inception of the war on drugs . . . led to dramatic changes in the composition of offenders in the criminal justice system.”); Loïc Wacquant, *Deadly Symbiosis: When Ghetto and Prison Meet and Mesh*, 3 PUNISHMENT & SOC'Y 95, 96 (2001).

46. Mauer, *supra* note 45, at 10-11.

47. THE LONG REACH OF AMERICAN CORRECTIONS, *supra* note 27, at 11.

48. *Id.* at 7.

49. Jennifer Gonnerman, *Slammed: Welcome to the Age of Incarceration*, MOTHER JONES, July-Aug. 2008, at 44, available at <http://motherjones.com/politics/2008/07/slammed-welcome-age-incarceration>.

50. BUTLER, *supra* note 14, at 27. Conversely, a young white man has a 6% chance of going to prison, while a young African-American man has a 32% chance of the same. *Id.*

51. Mauer, *supra* note 45, at 15 (“[T]here is much research that concludes that a significant portion of the racial disparities observed in the criminal justice system result from drug policies,

Americans, these differential rates do not explain the scale of racial disparities existing in the criminal justice system.⁵² Instead, data indicates that the disparate treatment of drug offenders is largely driving the disparities.⁵³ Even though most illegal drug users and dealers are white, three-fourths of all individuals in prison for drug offenses are people of color.⁵⁴ Studies consistently show that rates of illegal drug use and sale are very similar among different racial and ethnic groups.⁵⁵ And where studies have found differences, they have found that white youth are more likely to be involved with illegal drug dealing than people of color.⁵⁶

This racially disparate criminal justice system is all the more morally suspect given that the overreliance on incarceration undermines public safety over the long term and wreaks wide-ranging harm on communities of color.⁵⁷ Time spent in prison actually increases the likelihood an individual will commit another crime after release because it hampers one's ability to find a job, severs ties to one's family and community, negatively impacts attitudes about crime, and lessens one's respect for the law.⁵⁸ Individuals with criminal records are also routinely barred from eligibility for public benefits, food stamps, public housing, and student loans—the basic tools they need to successfully re-enter society, support themselves, and contribute meaningfully to their communities.⁵⁹ Thus, it should come as little surprise that 67.5% of inmates are rearrested within three years of release.⁶⁰

sentencing policies, and decision-making by criminal justice practitioners that disproportionately harm minorities and poor people.”).

52. See Loury, *supra* note 9, at 139.

53. *Id.* at 135.

54. ALEXANDER, *supra* note 41, at 96-97.

55. *Id.* at 97.

56. *Id.*

57. Mauer, *supra* note 45, at 13 (“The relative ineffectiveness of more and longer prison sentences in reducing crime is well known among criminologists and practitioners in the field of criminal justice.”); see also Dorothy E. Roberts, *The Social and Moral Cost of Mass Incarceration in African American Communities*, 56 STAN. L. REV. 1271, 1304-05 (2004) (arguing that “the extent of U.S. incarceration is not only morally unjustifiable, but morally repugnant”).

58. BUTLER, *supra* note 14, at 32-33 (2009) (research shows that incarceration reduces crime up to a point, after which continuing to incarcerate more people may actually increase crime); Loury, *supra* note 9, at 137.

59. Michael Pinard, *Collateral Consequences of Criminal Convictions: Confronting Issues of Race and Dignity*, 85 N.Y.U. L. REV. 457, 459-60 (2010); see also Taifa & Beane, *supra* note 19, at 283 (“[B]ecause all too often one’s life opportunities after imprisonment are abysmally limited, recidivism becomes inevitable.”).

60. See *Recidivism: Summary Findings*, U.S. DEP’T OF JUST., BUREAU OF JUST. STAT., <http://bjs.ojp.usdoj.gov/index.cfm?ty=tp&tid=17> (last visited Jan. 25, 2011) (detailing recidivism rates).

Students of the Mass Incarceration Nation

If mass incarceration fails to make us safer, diminishes the life chances of people of color, and wastes precious taxpayer dollars, why do we insist on locking up so many people? Part of the answer lies in the politicization of crime.⁶¹ As James Forman points out, “Our appetite for vengeance sometimes seems insatiable: politicians make careers out of being tough on crime, only to lose elections to those who are yet tougher.”⁶² Research has shown that public concerns about crime do not reflect actual crime rates but rather “the extent to which elites highlight these issues in political discourse.”⁶³ The media also fans the flames through sensationalistic coverage of violent crime.⁶⁴

The rest of the answer lies in the racialization of crime.⁶⁵ Crime simultaneously has been defined by—and defines—race.⁶⁶ In *The New Jim Crow: Mass Incarceration in the Age of Colorblindness*, Michelle Alexander argues that the mass incarceration of people of color is a new racial caste system that represents the “most damaging manifestation of the backlash against the Civil Rights Movement.”⁶⁷ Arguing that the War on Drugs has been waged overwhelmingly in poor communities of color,⁶⁸ Alexander makes a compelling case that, “[l]ike Jim Crow (and slavery), mass incarceration operates as a tightly networked system of laws, policies, customs, and institutions that operate collectively to ensure the subordinate status of a group defined largely by race.”⁶⁹ As Alexander explains, since the collapse

61. Mauer, *supra* note 45, at 13 (noting that crime has not always been a staple political issue, as it is today).

62. See James Forman, Jr., *Why Care About Mass Incarceration?*, 108 MICH. L. REV. 993, 993 (2010); see also BUTLER, *supra* note 14, at 38 (noting that crime policy is often driven by emotion, rather than logic); Loury, *supra* note 9, at 134 (“[D]eclarations of ‘war’ against crime (and, most noticeably, against *criminals*) are a primary means by which political aspirants now signal their bona fides to their electorates.”); Mauer, *supra* note 45, at 14 (“[W]hile rates of crime and drug use change gradually over time, public concern about these issues often shifts dramatically in relation to political initiatives.”).

63. Mauer, *supra* note 45, at 14.

64. *Id.* at 15.

65. See SIMON, *supra* note 34, at 22-23 (2010) (describing the theory that “[c]rime was first exploited by white southern politicians seeking firmer ground for resisting the Civil Rights movement and its demands. . . . Later, Republican politicians seeking to appeal to disaffected southern Democrats could use crime to implicitly signal sympathy with the resentments of those voters.”).

66. Wacquant, *supra* note 45, at 117 (describing how “the centuries-old *association of blackness with criminality*” has been solidified in the era of mass incarceration of African-Americans, which has provided a “powerful common-sense warrant for ‘using color as a proxy for dangerousness’ ”).

67. ALEXANDER, *supra* note 41, at 11.

68. *Id.* at 96-97; see also Loury, *supra* note 9, at 135.

69. ALEXANDER, *supra* note 41, at 13. Alexander defines “racial caste” as “a stigmatized racial group locked into an inferior position by law and custom.” *Id.* at 222. She argues, “[I]t is

of Jim Crow, “it is no longer socially permissible to use race, explicitly, as justification for discrimination, exclusion, or social contempt. Rather, we use our criminal justice system to associate criminality with people of color and then engage in the prejudiced practices we supposedly left behind.”⁷⁰ The fact that the discrimination is deeply embedded into our laws and policies, rather than explicitly endorsed, makes mass incarceration that much more difficult to challenge. Those in favor of the status quo can easily dismiss the incarcerated population as makers of their own fate. However, when the statistics are examined, it becomes clear that the mass incarceration problem is one of racial injustice, more than simply one of bad crime policy.

B. The Juvenile Justice System

The juvenile justice system plays an important role in supporting and perpetuating the system of mass incarceration. Originally, separate juvenile court systems were created based on the notion that youth are more amenable to rehabilitation than adults.⁷¹ The system had two goals: to protect youth from the “stigma and brutality of criminal justice” and to remedy the factors that were driving their delinquency.⁷² However, as the criminal justice system has become more punitive, the juvenile justice system has responded to youth behavior with increasingly harsher and less rehabilitative responses. As a result, the juvenile justice system casts a wide net, intervening—often unnecessarily—in the lives of many youth, predominately youth of color, and thereby increasing the chances that those youth will struggle in school and in life.⁷³

The push for more adult-like responses to juvenile crime coincided with the politicization and racialization of crime generally during the last four decades when *youth of color* became prime targets for

because drug crime is racially defined in the public consciousness that the electorate has not cared much what happens to drug criminals—at least not the way they would have cared if the criminals were understood to be white.” *Id.*

70. Michelle Alexander, *The New Jim Crow: How Mass Incarceration Turns People of Color into Second-Class Citizens*, AM. PROSPECT, Jan. 7, 2011, at A19, available at http://www.prospect.org/cs/articles?article=the_new_jim_crow.

71. See Jeffrey Fagan, *The Contradictions of Juvenile Crime & Punishment*, DAEDALUS, Summer 2010, at 43, 44.

72. *Id.* at 56.

73. See ANNIE E. CASEY FOUND., A ROAD MAP FOR JUVENILE JUSTICE REFORM 3, 10-11 (2009), available at http://www.aecf.org/~media/PublicationFiles/AEC180essay_booklet_MECH.pdf (stating that “our juvenile courts are prosecuting many youth for misconduct that was previously handled informally,” which harms youth and noting that youth who are incarcerated in the juvenile justice system will achieve less educational attainment).

society's punitive urges.⁷⁴ During the 1970s-1990s, conservative Republican politicians exploited racial divisions in the nation, advocating for certain crime and welfare policies in order to gain political advantage.⁷⁵ Racially tinged rhetoric and sensationalistic media coverage "put a black face on youth crime" and misled the public into thinking that juvenile crime was rapidly rising.⁷⁶ In the late 1980s and early 1990s, when black youth homicide rates rose,⁷⁷ some researchers predicted an impending wave of violent youth that Princeton University's John Dilulio called "super-predators."⁷⁸ "Super-predator" quickly became "a code word for young Black males."⁷⁹ In response, policy-makers called for greater punishment for youth who committed crimes.⁸⁰

Despite the hysterical predictions, the super-predators never materialized; however, a new "tough on crime" era had already taken hold. Between 1992 and 1999, almost every state and the District of Columbia passed laws that made it easier to try youth in adult courts.⁸¹ Several states also enacted mandatory minimum sentences for youth in the juvenile justice system.⁸² In the years that followed, many states amended their juvenile delinquency codes to include a greater focus on punishment, retribution, and incapacitation,⁸³ and relaxed the confidentiality protections for juvenile records, which had been a hallmark of the juvenile justice system.⁸⁴

74. Barry C. Feld, *Race, Politics, and Juvenile Justice: The Warren Court and the Conservative "Backlash"*, 87 MINN. L. REV. 1447, 1451-52 (2003).

75. *Id.* at 1451.

76. *Id.* at 1507.

77. *Id.* at 1452.

78. *Id.* at 1451-52, 1523; Soler, Shoenberg & Schindler, *supra* note 15, at 486.

79. Kenneth B. Nunn, *The End of Adolescence: The Child as Other: Race and Differential Treatment in the Juvenile Justice System*, 51 DEPAUL L. REV. 679, 712 (2002).

80. Feld, *supra* note 74, at 1506; *see also* Scott & Steinberg, *Blaming Youth*, *supra* note 35, at 807 (describing that this response to juvenile crime reflected "a moral panic, in which the media, politicians, and the public reinforce each other in an escalating pattern of alarmed reaction to a perceived social threat"). When high profile juvenile crimes, like a school shooting, occur, the media disproportionately focuses on them. As a result, "collective perceptions of the threat become distorted, as alarmed public discourse is reinforced by vivid images of the crime and the victims." *Id.*

81. NAT'L CTR. FOR JUVENILE JUSTICE DIFFERENT FROM ADULTS: AN UPDATED ANALYSIS OF JUVENILE TRANSFER AND BLENDED SENTENCING LAWS, WITH RECOMMENDATIONS FOR REFORM 5 (2008), available at www.modelsforchange.net/publications/181.

82. Fagan, *supra* note 71, at 48.

83. *Id.* at 45; Kristin Henning, *Eroding Confidentiality in Delinquency Proceedings: Should Schools and Public Housing Authorities Be Notified?*, 79 N.Y.U. L. REV. 520, 536 (2004).

84. *See* Henning, *supra* note 83.

Today, the impacts of this punitive tide are plainly evident. The reforms of the 1990s have substantially increased the numbers of incarcerated youth, both in the adult and juvenile justice systems, as well as the length of time they remain incarcerated.⁸⁵ On any given day, over one hundred thousand youth are held in correctional placements or juvenile detention facilities,⁸⁶ and an estimated four hundred thousand youth annually experience some period of incarceration in the juvenile justice system.⁸⁷ The majority of these youth do not belong there. In 2003, for example, only 24% of incarcerated youth were locked up for violent felonies,⁸⁸ and each year thousands of youth are incarcerated for status offenses (misbehaviors such as running away from home or skipping school) even though they have committed no crime whatsoever.⁸⁹

Despite the juvenile justice system's rehabilitative origins, the primary purpose of incarcerating youth in the system cannot fairly be said to be treatment, but rather punishment.⁹⁰ Incarceration actually undermines rehabilitation by interrupting family relationships, school engagement, and employment—the very factors that help protect against delinquency.⁹¹ The ineffectiveness of incarceration as a delinquency intervention is borne out in recidivism studies, which find that between 50% and 80% of incarcerated youth are rearrested within two to three years of leaving correctional facilities.⁹² Better alternatives exist. A rich body of research has documented that certain community-based programs are not only less expensive than incarceration,

85. Elizabeth S. Scott & Laurence Steinberg, *Social Welfare and Fairness in Juvenile Crime Regulation*, 71 LA. L. REV. 35, 44 (2010).

86. A ROAD MAP FOR JUVENILE JUSTICE REFORM, *supra* note 73, at 10.

87. *Id.*

88. *Id.* at 8-9.

89. See EDGAR S. CAHN, JOINT CTR. FOR POL. & ECON. STUDIES, HOW THE JUVENILE JUSTICE SYSTEM REDUCES LIFE OPTIONS OF MINORITY YOUTH 3 (2006), available at <http://www.jointcenter.org/publications1/publication-PDFs/Dellums%20PDFs/EdgarCahn.pdf> (finding that African-Americans are also more likely than other youth to be petitioned to court for a status offense and sent to an out-of-home placement).

90. Fagan, *supra* note 71, at 43.

91. BARRY HOLMAN & JASON ZIEDENBERG, JUSTICE POLICY INST., THE DANGERS OF DETENTION: THE IMPACT OF INCARCERATING YOUTH IN DETENTION AND OTHER SECURE FACILITIES 1, 2 (2006), available at http://www.justicepolicy.org/images/upload/06-11_REP_DangersOfDetention_JJ.pdf; see also C. Antoinette Clarke, *Bridging the Gap: An Interdisciplinary Approach to Juvenile Justice Policy*, 56 DEPAUL L. REV. 927, 944-45 (2007) (explaining that incarceration can disrupt positive adolescent development); Taifa & Beane, *supra* note 19, at 293-95 (describing protective factors).

92. A ROAD MAP FOR JUVENILE JUSTICE REFORM, *supra* note 73.

but also effective at reducing recidivism rates and improving education outcomes.⁹³

While the juvenile system has become more “adult-like,” it remains preferable to trying youth in the adult criminal justice system. Youth convicted in adult courts receive virtually no appropriate rehabilitative and education services and suffer the consequences of having a criminal record.⁹⁴ Yet, each year, approximately two hundred thousand youth are tried in the adult criminal justice system, mostly for nonviolent offenses, and each day, approximately seventy-five hundred youth are detained in adult jails.⁹⁵ Policies allowing youth to be tried in adult courts are likely counterproductive and harmful. A 2007 meta-analysis of research by the Centers for Disease Control and Prevention found that youth in the adult system are more likely to engage in future violence than similarly situated youth kept in the juvenile justice system.⁹⁶ The apparent ineffectiveness of these policies in reducing crime is all the more troubling given that youth in adult jails are significantly more likely to be sexually assaulted and physically abused,⁹⁷ and to commit suicide than youth in juvenile facilities.⁹⁸ According to Jeffrey Fagan, “[E]ven short-term exposure for youths to adult prisons has risks for youths and for public safety. To the extent that legislators ignored these risks, the wholesale transfer of minors to the criminal courts was a reckless experiment.”⁹⁹

93. See Scott & Steinberg, *Social Welfare and Fairness in Juvenile Crime Regulation*, *supra* note 85, at 74-80; see also FED. ADVISORY COMM. ON JUVENILE JUSTICE, ANNUAL REPORT 26 (2008), available at <http://www.facjj.org/annualreports/FACJJ%20Annual%20Report%2008.pdf> (quoting ABA’s Presidential Working Group on the Unmet Legal Needs of Children and their Families).

94. CAMPAIGN FOR YOUTH JUSTICE, JAILING JUVENILES: THE DANGERS OF INCARCERATING YOUTH IN ADULT JAILS IN AMERICA 1, 13 (2007) [hereinafter JAILING JUVENILES], available at http://www.campaignforyouthjustice.org/documents/CFYJNR_JailingJuveniles.pdf.

95. CAMPAIGN FOR YOUTH JUSTICE, KEY FACTS: YOUTH IN THE JUSTICE SYSTEM 1, 4 (2010), available at http://www.campaignforyouthjustice.org/documents/FS_KeyYouthCrimeFacts.pdf.

96. Robert Hahn et al., *Effects on Violence of Laws and Policies Facilitating the Transfer of Youth from the Juvenile to the Adult Justice System*, 56 CTRS. FOR DISEASE CONTROL & PREVENTION, No. RR-9 (Nov. 30, 2007), available at www.cdc.gov/mmwr/pdf/rr/tr5609.pdf; see also Richard E. Redding, *Juvenile Transfer Laws: An Effective Deterrent to Delinquency?*, JUV. JUST. BULL. (DOJ/Off. of Juv. Just. & Delinquency Prevention, Washington, D.C.), June 2008, at 1, available at <http://www.ncjrs.gov/pdffiles1/ojdp/220595.pdf> (finding that “the bulk of the empirical evidence suggests that transfer laws [probably] have little . . . general deterrent effect” on would-be juvenile offenders).

97. JAILING JUVENILES, *supra* note 94, at 10-11, 13.

98. *Id.* at 10-11.

99. Fagan, *supra* note 71, at 46.

Consistent with the demographic trends for adults in the criminal justice system, youth of color are also disproportionately represented in both the juvenile and criminal justice systems. Between 2002 and 2004, for example, African-Americans comprised 16% of the youth nationwide, but 28% of juvenile arrests, 30% of court referrals, 37% of detained youth, 38% of youth placed out of their home, 34% of youth waived to adult court, and 58% of youth locked in adult prisons.¹⁰⁰ Latino youth also receive disproportionately harsh treatment in delinquency cases compared to their white peers.¹⁰¹ Researchers have concluded that, “the over-representation of African-American youth in the juvenile justice system is the result of a number of direct and indirect factors that cannot be explained by differential involvement in crime alone.”¹⁰²

II. SCHOOLS AS PARTNERS IN MASS INCARCERATION: THE SURVEILLANCE, EXCLUSION, AND CRIMINALIZATION OF STUDENTS OF COLOR

Schools have—unwittingly or not—served as “accomplices” to the project of mass incarceration.¹⁰³ Even though schools remain

100. NAT'L COUNCIL ON CRIME & DELINQUENCY, AND JUSTICE FOR SOME: DIFFERENTIAL TREATMENT OF YOUTH OF COLOR IN THE JUSTICE SYSTEM 37 (2007) [hereinafter AND JUSTICE FOR SOME], available at http://www.nccd-crc.org/nccd/pubs/2007jan_justice_for_some.pdf.

101. Neelum Arya et al., *America's Invisible Children: Latino Youth and the Failure of Justice*, POL'Y BRIEF (NCLR/Campaign for Youth Just., Washington, D.C.), 2009, at 10, available at http://www.campaignforyouthjustice.org/documents/CFYJPB_InvisibleChildren.pdf; see also JOSÉ D. SAAVEDRA, NAT'L COUNCIL OF LA RAZA, JUST THE FACTS: A SNAPSHOT OF INCARCERATED YOUTH 1 (2010), available at http://issuu.com/nclr/docs/file_jj_fact_sheet?mode=embed&layout=http%3A%2F%2Fskin.issuu.com%2Fv%2Fflight%2Flayout.xml&showFlipBtn=true. Latinos make up 19% of all ten- to seventeen-year-olds, yet they represent 25% of youth who are incarcerated. See *id.*

102. Joanna M. Lee, Laurence Steinberg & Alex R. Piquero, *Ethnic Identity and Attitude Toward the Police Among African American Juvenile Offenders*, 38 J. CRIM. JUST. 781, 782 (2010); see also AND JUSTICE FOR SOME, *supra* note 100, at 21 (noting that in 2003, African-American youth comprised only 25% of youth found guilty of drug offenses, but 40% of the youth placed out of home for such offenses); PHILLIP BEATTY, AMANDA PETTERUTI & JASON ZIEDENBERG, JUSTICE POLICY INST., THE VORTEX: THE CONCENTRATED IMPACT OF DRUG IMPRISONMENT AND THE CHARACTERISTICS OF PUNITIVE COUNTIES 1, 7 (2007), available at http://www.justicepolicy.org/images/upload/07-12_REP_Vortex_AC-DP.pdf (citing a study by the Department of Justice's Office of Juvenile Justice and Delinquency Prevention that found that white youth report selling drugs at higher rates than African-American youth, but are half as likely to be arrested for drug offenses); A ROAD MAP FOR JUVENILE JUSTICE REFORM, *supra* note 73, at 9-10.

103. KUPCHIK, *supra* note 18, at 37, 40; see Wacquant, *supra* note 45, at 36, 40 (“The carceral atmosphere of schools and the constant presence of armed guards in uniform in the lobbies, corridors, cafeteria, and playground of their establishment habituates the children of the hyperghetto to the demeanor, tactics, and interactive style of the correctional officers many of them are bound to encounter shortly after their school days are over.”).

Students of the Mass Incarceration Nation

among the safest places for youth,¹⁰⁴ they have embraced many of the punitive policies of the criminal and juvenile justice systems and incorporated them into their responses to student discipline.¹⁰⁵ Specifically, schools over-rely on suspensions, expulsions, arrests, and referrals to juvenile court to punish students for violating school rules. In addition, many schools now literally resemble prisons, fully equipped with surveillance technologies and full-time law enforcement officers. Significantly, the students most impacted by these punitive school policies are similar demographically to those most likely to be entangled with the criminal justice system—that is, low-income males of color.¹⁰⁶

Though educational inequities that “mirror the outside world” may “seem normal and acceptable,”¹⁰⁷ the disproportionate exclusion of students of color and their disproportionate involvement in the justice system are not inevitable.¹⁰⁸ Quite the contrary, they stem from explicit policy choices to use crime control as the defining paradigm for education policy.¹⁰⁹ Schools undoubtedly have a right and responsibility to maintain safety and order within the educational environment, including keeping weapons and drugs off campus and protecting students from bullying and harassment. But schools have made the choice to adopt punitive, exclusionary methods similar to those used in the justice system over pedagogical ones.¹¹⁰ In fact, sociologist Loïc Wacquant has equated public schools in what he calls the “hyperghetto” to “*institutions of confinement* whose primary mission is not to educate but to ensure ‘custody and control.’ ”¹¹¹

104. See EDUCATION ON LOCKDOWN, *supra* note 22, at 11; KUPCHIK, *supra* note 18, at 15 (noting that the Centers for Disease Control reported that in 1996, there was less than a one in a million chance that a student would be killed or commit suicide in or near school; in 2005, that number was one in 3.2 million).

105. See SIMON, *supra* note 34, at 220; see also Michelle Fine et al., “Anything Can Happen with Police Around”: Urban Youth Evaluate Strategies of Surveillance in Public Places, 59 J. SOC. ISSUES 141, 145 (2003) (illustrating that low-income youth of color in urban areas “are being squeezed out of public spaces and placed under scrutiny and threat of criminalization when they are in public sites, and even at home”).

106. See Allison Ann Payne & Kelly Welch, *Racial Threat and Punitive School Discipline*, 57 SOC. PROBS. 25, 26 (2010).

107. KUPCHIK, *supra* note 18, at 33.

108. *Id.*

109. *Id.* at 22-23; see generally SIMON, *supra* note 34.

110. See Noguera, *supra* note 30, at 346 (noting school discipline practices “often bear a striking similarity to the strategies used to punish adults in society. Typically, schools rely on some form of exclusion or ostracism to control the behavior of students.”).

111. Wacquant, *supra* note 45, at 108; see also ALEXANDER, *supra* note 41, at 167.

Suspensions, expulsions, arrests, and referrals to juvenile court merely exacerbate the problems they are supposed to correct, as described below. In choosing to adopt these counterproductive policies, schools have eschewed more effective responses to student behavior. For example, research shows that an effective method for responding to student discipline is Positive Behavioral Interventions and Supports (“PBIS”),¹¹² an approach to promoting positive student behaviors that focuses on developing school-wide norms and expectations; training teachers and staff on effective classroom management techniques and the use of positive reinforcement; and providing early, individualized, and positive interventions for misconduct.¹¹³ PBIS has been shown to improve school climate, reduce disciplinary issues, improve academic engagement and achievement,¹¹⁴ decrease school arrests, improve attendance, and reduce the risk of future delinquency and drug use.¹¹⁵ In addition, restorative discipline, modeled after restorative justice interventions, are also promising; such interventions focus on addressing the needs of the victims, offenders, and the school community, rather than focusing merely on punishment of the offender.¹¹⁶

Schools’ insistence on using counterproductive and excessively punitive measures in the face of better alternatives seems illogical, but it is consistent with education theories that suggest that one’s social position determines what one is taught in school.¹¹⁷ Schools prepare students for the work force and therefore prepare students differently

112. See ADVANCEMENT PROJECT, TEST, PUNISH, AND PUSH OUT: HOW “ZERO TOLERANCE” AND HIGH-STAKES TESTING FUNNEL YOUTH INTO THE SCHOOL-TO-PRISON PIPELINE, (2010) [hereinafter TEST, PUNISH, AND PUSH OUT], available at http://www.advancementproject.org/sites/default/files/publications/rev_fin.pdf; ELIZABETH SULLIVAN & DAMEKIA MORGAN, FAMS & FRIENDS OF LA.’S INCARCERATED CHILD. & NAT’L ECON & SOC. RTS. INITIATIVE, PUSHED OUT: HARSH DISCIPLINE IN LOUISIANA SCHOOLS DENIES THE RIGHT TO EDUCATION: A FOCUS ON THE RECOVERY SCHOOL DISTRICT IN NEW ORLEANS 24-25 (2010), available at http://www.nesri.org/fact_sheets_pubs/Pushed_Out_Report.pdf.

113. SULLIVAN & MORGAN, *supra* note 112, at 24; see also N.Y.C.L. UNION & ANNEBERG INST. FOR SCH. REFORM, available at http://www.nyclu.org/files/publications/nyclu_pub_safety_with_dignity.pdf (describing examples of effective school discipline practices).

114. See OSEP CTR. ON POSITIVE BEHAV. INTERVENTIONS & SUPPORTS EFFECTIVE SCHOOL-WIDE INTERVENTIONS, WHAT IS SCHOOL-WIDE POSITIVE BEHAVIORAL INTERVENTIONS & SUPPORTS? 1 (2009), available at <http://pbis.org/common/cms/documents/WhatIsPBIS/WhatIsSWPBS.pdf>; SULLIVAN & MORGAN, *supra* note 112, at 24.

115. See S. POVERTY LAW CTR., EFFECTIVE DISCIPLINE FOR STUDENT SUCCESS: REDUCING STUDENT AND TEACHER DROPOUT RATES IN MISSISSIPPI 6 (2008), available at http://www.splcenter.org/images/dynamic/main/effective_discipline.pdf; see also Brittain et al., *supra* note 3, at 616.

116. Deborah Gordon Klehr, *Addressing the Unintended Consequences of No Child Left Behind and Zero Tolerance: Better Strategies for Safe Schools and Successful Students*, 16 GEO. J. ON POVERTY L. & POL’Y 585, 609 (2010).

117. KUPCHIK, *supra* note 18, at 32.

depending on what roles they assume each student will play in the economy. In this way, schools reproduce and reinforce the social inequities that exist in the labor market.¹¹⁸ In a nation where overwhelming numbers of African-American boys and men are incarcerated, and thereby removed from the work force altogether, the reproduction of hierarchies in schools suggests that African-American males are likely to be denied meaningful educational opportunities.¹¹⁹ Indeed, available evidence suggests that this theory is playing out in practice.

A. Zero-Tolerance Policies

Zero-tolerance policies are a prime example of the use of punitive responses for student misbehavior. Just as the politicization of juvenile crime generally led to a more punitive juvenile justice system, the politicization of school violence, specifically, prompted schools to adopt numerous mechanisms to control and punish young people,¹²⁰ including punishing youth for off-campus conduct.¹²¹ In 1994, at the height of the “tough on crime” era, the United States Congress passed the Gun-Free Schools Act requiring schools to expel for no less than one year—and refer to the justice system—students who brought firearms on campus, though the law allowed for modifications on a case-by-case basis.¹²² States ran with the “zero tolerance” concept, applying it to even non-violent offenses, such as school disruption, truancy,

118. *Id.* at 32-33.

119. *See id.* at 32-36; *see also* ALEXANDER, *supra* note 41, at 207 (describing sociologist Loïc Wacquant’s argument that mass incarceration “does not seek primarily to benefit unfairly from black labor, as earlier caste systems have, but instead views African Americans as largely irrelevant and unnecessary to the newly structured economy—an economy that is no longer driven by unskilled labor”); Paul Hirschfield, *School Surveillance in America*, in *SCHOOLS UNDER SURVEILLANCE: CULTURES OF CONTROL IN PUBLIC EDUCATION* 38, 49 (Torin Monahan & Rodolfo D. Torre eds., 2010) (“Teachers who aim to prepare students for an economic and criminal justice system that tightly monitors and subordinates them may register less opposition to more intrusive forms of school surveillance. Judged against this goal, morning rituals of submission at the metal detector may even hold some pedagogical value.”).

120. Hirschfield, *supra* note 119, at 38, 49; *see also* KUPCHIK, *supra* note 18, at 24 (“Public schools have nevertheless become a stage for the airing of public anxieties and conflicts, including racial conflicts, fear of crime, and concern over growing needs of youth.”).

121. *See* KIM, LOSEN & HEWITT, *supra* note 22, at 95 (explaining that courts have held that school officials can punish students for off-campus conduct if there is a nexus between that conduct and school activities); Skiba, Eckes & Brown, *supra* note 7, at 1084; *see also* Frank D. LoMonte, *Shrinking Tinker: Students Are “Persons” Under Our Constitution—Except When They Aren’t*, 58 AM. U. L. REV. 1323, 1325 (2009) (discussing the ability of schools to punish off-campus speech).

122. *See* 20 U.S.C. § 7151 (2006).

and refusal to obey teachers and administrators.¹²³ Schools incorporated principles of punitive criminal justice policies into their responses to student behavior,¹²⁴ including mandatory minimum sentencing (by imposing mandatory punishments for various students behaviors), three strikes laws (by mandating exclusion of students after three disciplinary violations), and the “broken windows” theory of aggressive policing for minor or trivial offenses (by attaching serious consequences to typical student misbehaviors, such as talking in class).¹²⁵

Zero-tolerance policies have significantly increased suspensions and expulsions of students even for offenses that pose little or no safety threat.¹²⁶ Students of color, along with lesbian, gay, bisexual and transgender youth,¹²⁷ students with disabilities,¹²⁸ homeless

123. Michael P. Krezmien et al., *supra* note 18, at 273-74; *see also* Skiba, Eckes & Brown, *supra* note 7, at 1084; Frances P. Solari & Julienne E.M. Balshaw, *Outlawed and Exiled: Zero Tolerance and Second Generation Race Discrimination in Public Schools*, 29 N.C. CENT. L.J. 147, 149 (2007).

124. *See, e.g.*, KUPCHIK, *supra* note 18, at 14 (“[S]chools have borrowed a variety of policies and practices from the criminal justice system.”).

125. TEST, PUNISH, AND PUSH OUT, *supra* note 112, at 1, 10; *see also* James Q. Wilson & George L. Kelling, *Broken Windows: The Police and Neighborhood Safety*, ATL. MONTHLY Mar. 1982, available at <http://www.theatlantic.com/magazine/archive/1982/03/broken-windows/4465/> (proposing the Broken Windows theory that neighborhoods where graffiti, litter, shattered glass, and other symbols of neglect exist become magnets for crime and delinquency). Commentators have argued that the Broken Windows theory of law enforcement—that police should aggressively enforce minor offenses—has had negative consequences. *See, e.g.*, K. Babe Howell, *Broken Lives from Broken Windows: The Hidden Costs of Aggressive Order-Maintenance Policing*, 33 N.Y.U. REV. L. & SOC. CHANGE 271 (2009).

126. *See* RUSSELL J. SKIBA, IND. EDUC. POLICY CTR., ZERO TOLERANCE, ZERO EVIDENCE: AN ANALYSIS OF SCHOOL DISCIPLINARY PRACTICES 19 (2000), available at <http://www.indiana.edu/~safeschl/zte.pdf>; Krezmien et al., *supra* note 18, at 274; *see also* KIM, LOSEN & HEWITT, *supra* note 22, at 2 (noting that between 1973 and 2006, for example, the percent of African-American students suspended at least once in a given year more than doubled, from 6% to 15%).

127. *See* Kathryn E.W. Himmelstein & Hannah Brückner, *Criminal-Justice and School Sanctions Against Nonheterosexual Youth: A National Longitudinal Study*, 127 PEDIATRICS 49, 55 (Jan. 2011), available at <http://pediatrics.aappublications.org/cgi/reprint/127/1/49> (concluding that nonheterosexual youth suffer disproportionate educational and criminal justice punishments that cannot be explained by more frequent illegal or transgressive behaviors); *see also* DIGNITY IN SCH. CAMPAIGN, NATIONAL RESOLUTION FOR ENDING SCHOOL PUSHOUT 1 (2009) [hereinafter NAT’L RESOLUTION FOR ENDING SCH. PUSHOUT], available at http://www.dignityinschools.org/files/DSC_National_Resolution.pdf; KATAYOON MAJD, JODY MARKSAMER & CAROLYN REYES, EQUITY PROJECT, HIDDEN INJUSTICE: LESBIAN, GAY, BISEXUAL, AND TRANSGENDER YOUTH IN JUVENILE COURTS 75-78 (2009), available at http://www.equityproject.org/pdfs/hidden_injustice.pdf.

128. *See* PETER E. LEONE ET AL., NAT’L CTR. ON EDUC., DISABILITY & JUVENILE JUSTICE, SCHOOL FAILURE, RACE, AND DISABILITY: PROMOTING POSITIVE OUTCOMES, DECREASING VULNERABILITY FOR INVOLVEMENT WITH THE JUVENILE DELINQUENCY SYSTEM 1, 3, 16 (Oct. 15, 2003), available at http://www.edjj.org/Publications/list/leone_et_al-2003.pdf; SKIBA, *supra* note 126, at 11-12; Michael P. Krezmien et al., *Suspension, Race, and Disability: Analysis of*

youth; foster youth; immigrant youth; English Language Learners; and pregnant and parenting teens, have been disproportionately impacted by these policies.¹²⁹ Extensive research findings show that African-American, Latino, and Native-American youth, in particular, are more likely to be suspended and expelled from school and to face corporal punishment.¹³⁰ For example, African-American suspension rates are three times that of white students,¹³¹ and African-American students are 3.5 times as likely to be expelled as white students.¹³²

There is no evidence that the higher rates of discipline for African-American students merely reflect more behavior problems among those students.¹³³ Even when controlling for other factors (such as misbehavior, attitudes, academic performance, parental attention, school characteristics, and socio-economic status), researchers have found that African-American students are generally disciplined more frequently and more punitively for less serious offenses than white students.¹³⁴ Furthermore, schools are significantly more likely to discipline African-American male students for subjective reasons (such as “disrespect”) than they are white or female students.¹³⁵ Moreover, those schools with greater proportions of African-American students are more likely to respond to student misbehavior with punitive measures rather than restorative responses, even when controlling for other factors such as delinquency rates, socio-economic status, gender, urbanicity, and staff training.¹³⁶ This effect is even greater when school delinquency and disorder are low.¹³⁷

Statewide Practices and Reporting, 14 J. EMOTIONAL & BEHAV. DISORDERS 217, 217-18 (2006); see also Joseph B. Tulman, *Disability and Delinquency: How Failures to Identify, Accommodate and Serve Youth with Education-Related Disabilities Leads to Their Disproportionate Representation in the Delinquency System*, 3 WHITTIER J. CHILD & FAM. ADVOC. 3, 28 (2003).

129. NAT'L RESOLUTION FOR ENDING SCH. PUSHOUT, *supra* note 127.

130. SKIBA, *supra* note 126, at 19; LOSEN & SKIBA, *supra* note 30, at 2; see also Anne Gregory, Russell J. Skiba & Pedro A. Noguera, *The Achievement Gap and the Discipline Gap: Two Sides of the Same Coin?*, 39 EDUC. RESEARCHER 59, 59-68 (2010); Solari & Balshaw, *supra* note 123, at 150 (“In Tennessee, for example, more than 38% of Latino public school students have been suspended.”).

131. LOSEN & SKIBA, *supra* note 30, at 3 (noting that the racial discipline gap in suspension rates has grown greater since the 1970s, when African Americans were twice as likely as white students be suspended).

132. NAT'L RESOLUTION FOR ENDING SCH. PUSHOUT, *supra* note 127.

133. See Russell J. Skiba et al., *The Color of Discipline: Sources of Racial and Gender Disproportionality in School Punishment*, 34 URB. REV. 317, 334-35 (2002), available at <http://www.indiana.edu/~safeschl/cod.pdf>.

134. Payne & Welch, *supra* note 106, at 28-29.

135. See *id.*

136. *Id.* at 40, 42.

137. *Id.*

It is therefore likely that these consistent racial disparities indicate systematic bias in how discipline decisions are made.¹³⁸ A Task Force of the American Psychological Association concluded that racially disproportionate discipline might be the result of inadequate classroom management training for teachers, lack of culturally competent practices, and racial stereotypes.¹³⁹ Some have also argued that the No Child Left Behind Act (which imposes sanctions on schools whose students, collectively and disaggregated by racial subgroups, do not make “adequate yearly progress” in their performance on high-stakes tests) provides an incentive to use these zero-tolerance policies to push out the students with the greatest academic needs.¹⁴⁰

B. Surveillance and Arrests of Students of Color on Campus

The clearest manifestation of the application of crime control measures to the school setting is the increasing reliance by schools on law enforcement and the juvenile courts to manage student behavior. Students face more surveillance at school than anywhere else,¹⁴¹ even though researchers have found little to no deterrent impact of police surveillance on campus.¹⁴² In fact, the Advancement Project, a civil rights organization, has argued that public school students are “outside of prison and jail inmates, perhaps the most policed group in

138. SKIBA, *supra* note 126, at 18-19; Skiba, Eckes & Brown, *supra* note 7, at 1107 (“[W]hen the primary reasons for black disciplinary over-referral are not serious, safety-threatening behaviors, but rather more subjective and interactional behaviors such as non-compliance, disrespect, and loitering, it is hard to imagine that the school system is not making some contribution to disparate outcomes in school discipline.”); *see also* KUPCHIK, *supra* note 18, at 170 (“African Americans are targeted by school actors because of some reason other than their actual misbehaviors.”).

139. Skiba et al., *supra* note 18, at 854; *see also* Solari & Balshaw, *supra* note 123, at 151 (citing Judith Browne, Daniel Losen & Johanna Wald, *Zero Tolerance: Unfair, With Little Recourse*, in ZERO TOLERANCE: CAN SUSPENSION AND EXPULSION KEEP SCHOOLS SAFE? (Russell Skiba & Gil Noam eds., 2001)).

140. *See* No Child Left Behind, 20 U.S.C. § 6311 (2006); DIGNITY IN SCHOOLS.ORG, FEDERAL POLICY, ESEA REAUTHORIZATION, AND THE SCHOOL-TO-PRISON PIPELINE 3 (2010) [hereinafter ESEA REAUTHORIZATION], available at <http://www.dignityinschools.org/content/federal-policy-esea-reauthorization-and-school-prison-pipeline> (explaining that suspension and expulsion rates have risen dramatically since No Child Left Behind was enacted); TEST, PUNISH, AND PUSH OUT, *supra* note 112, at 18; Linda Darling-Hammond, *Race, Inequality, and Educational Accountability: The Irony of ‘No Child Left Behind’*, 10 RACE ETHNICITY & EDUC. 245, 252 (2007); Deborah Gordon Klehr, *Addressing the Unintended Consequences of No Child Left Behind and Zero Tolerance: Better Strategies for Safe Schools and Successful Students*, 16 GEO. J. POVERTY L. & POL’Y 585, 602 (2010).

141. *See* KUPCHIK, *supra* note 18, at 85 (“The surveillance over students by the police is far greater than they face outside school.”).

142. Krezmien et al., *supra* note 18, at 274.

the country right now.”¹⁴³ Forty-one states require schools to report students to law enforcement for various misbehaviors on campus.¹⁴⁴ And in the last decade, the number of law enforcement officers stationed permanently on campuses, commonly referred to as school resource officers (“SROs”), has significantly increased.¹⁴⁵ The sheer scale of police presence in some urban districts is astounding. The New York Police Department’s School Safety Division is larger than the entire police force of the District of Columbia, Detroit, Boston, and Las Vegas.¹⁴⁶ Other school districts, like Los Angeles Unified School District, have established their own police departments, fully equipped with canine patrols.¹⁴⁷

Significantly, school crime rates do not seem to justify these measures. Schools remain among the safest places for youth.¹⁴⁸ For example, between 1992 and 2005, the Bureau of Justice Statistics found that annual rates of serious violent crimes were lower at school than away from school.¹⁴⁹ When acts of school violence do occur, they typically involve fistfights and very rarely involve weapons.¹⁵⁰

Perhaps not surprisingly, the increasing collaboration between schools and law enforcement and the presence of surveillance equipment has reportedly increased the number of youth referred to juvenile courts for minor misbehaviors that in the past would have likely been handled by school administrators.¹⁵¹ While data on arrests of

143. TEST, PUNISH, AND PUSH OUT, *supra* note 112, at 10.

144. LOSEN & SKIBA, *supra* note 30, at 13.

145. Lisa H. Thureau & Johanna Wald, *Controlling Partners: When Law Enforcement Meets Discipline in Public Schools*, 54 N.Y.L. SCH. L. REV. 977, 978 (2009-2010). In addition to the implementation of zero-tolerance and fear over high-profile schools shootings like that at Columbine High School in 1999, the increase in SROs can be traced to federal funding for school officers through the COPS program; *see also* TEST, PUNISH, AND PUSH OUT, *supra* note 112, at 15 (noting that between 1999 and 2005, for example, the percent of students between the ages of twelve and fifteen attending a school with a police officer or security guard increased 50%).

146. TEST, PUNISH, AND PUSH OUT, *supra* note 112, at 15.

147. *Id.*

148. *See* EDUCATION ON LOCKDOWN, *supra* note 22, at 11; KUPCHIK, *supra* note 18, at 15 (noting that the Centers for Disease Control reported that in 1996, there was a one in a million chance that a student would be killed or commit suicide in or near school; in 2005, that number was one in 3.2 million).

149. *See* RACHEL DINKES ET AL., U.S. DEP’T OF EDUC. & U.S. DEP’T OF JUSTICE, NCES 2008-021/NCJ 219553, INDICATORS OF SCHOOL CRIME AND SAFETY: 2007 6 (2007).

150. Krezmien et al., *supra* note 18, at 274.

151. Thureau & Wald, *supra* note 145, at 978; *see also* ADVANCEMENT PROJECT, OPPORTUNITIES SUSPENDED: THE DEVASTATING CONSEQUENCES OF ZERO-TOLERANCE AND SCHOOL DISCIPLINE 1, 13-15 (July 15, 2002), available at <http://www.advancementproject.org/sites/default/files/publications/opsusp.pdf>; KUPCHIK, *supra* note 18, at 85 (“[S]chool resource officers often look for ways to redefine misbehavior as criminal, even when the label doesn’t apply.”); Marsha L. Levick & Robert G. Schwartz, *Changing the Narrative: Convincing Courts to Distinguish be-*

students at school are not regularly reported,¹⁵² the available data suggest that surveillance at school is associated with more student arrests¹⁵³ and that large numbers of youth are being referred for minor, not serious, offenses.¹⁵⁴ A recent longitudinal study of SROs revealed that between 1995 and 2004, in four of five states studied, the proportion of juvenile court referrals from schools increased.¹⁵⁵ The researchers found “a strong possibility that schools are using the juvenile courts to handle school misbehavior without consideration of the negative and deleterious effects on children or the juvenile delinquency system.”¹⁵⁶

Again, students of color are disproportionately impacted. SROs are most likely to be found in schools in urban neighborhoods with high poverty,¹⁵⁷ and many schools in low-income communities of color¹⁵⁸ physically resemble prisons, with fortress-like layouts, metal detectors, video surveillance cameras, security check points, and drug-

tween Misbehavior and Criminal Conduct in School Referral Cases, 9 U.D.C. L. REV. 53 (2007); Skiba et al., *supra* note 18, at 76.

152. JOHANNA WALD & LISA THURAU, CHARLES HAMILTON HOUSTON INST. FOR RACE & JUSTICE, *FIRST DO NO HARM: HOW EDUCATORS AND POLICE CAN WORK TOGETHER MORE EFFECTIVELY TO PRESERVE SCHOOL SAFETY AND PROTECT VULNERABLE STUDENTS 2* (2010), available at <http://www.charleshamiltonhouston.org/assets/documents/news/FINAL%20Do%20No%20Harm.pdf>.

153. See ACLU OF N. CAL., *BALANCING THE SCALES OF JUSTICE: AN EXPLORATION INTO HOW LACK OF EDUCATION, EMPLOYMENT, AND HOUSING OPPORTUNITIES CONTRIBUTE TO DISPARITIES IN THE CRIMINAL JUSTICE SYSTEM* iii (2010) [hereinafter *BALANCING THE SCALES OF JUSTICE*] (explaining that students who have law enforcement presence on campus are more likely to be arrested, arrested at a young age, expelled, and suspended); CLAYTON CNTY. PUB. SCH., *BLUE RIBBON COMMISSION ON SCHOOL DISCIPLINE: EXECUTIVE REPORT 47* (2007), available at <http://www.clayton.k12.ga.us/departments/studentservices/handbooks/BlueRibbonExecutiveReport.pdf> (attributing a jump in school-referred delinquency cases in Clayton County, Georgia, from ninety in 1996 to twelve hundred in 2004 to the presence SROs at schools); ELORA MUKHERJEE, N.Y. CIV. LIB. UNION, *CRIMINALIZING THE CLASSROOM: THE OVER-POLICING OF NEW YORK CITY SCHOOLS 17-18* (March 2007), available at http://www.nyclu.org/pdfs/criminalizing_the_classroom_report.pdf.

154. See *EDUCATION ON LOCKDOWN*, *supra* note 22, at 15, 32. For example, of the 4002 students in the Houston Independent School District arrested in 2002, 17% were for minor offenses such as disruption, and 26% were for disorderly conduct. In the Chicago Public Schools in 2003, approximately 40% of these 8500 student arrests were for simple assault or battery, which typically involve minor scuffles; *TEST, PUNISH, AND PUSH OUT*, *supra* note 112, at 18 (explaining that during the 2007-2008 school year, 69% of Florida student arrests on campus were for misdemeanor offenses).

155. Krezmien et al., *supra* note 18, at 286.

156. *Id.* at 290 (noting that such practice “unduly burdens the police, the juvenile courts, and the juvenile corrections systems”).

157. Hirschfield, *supra* note 119.

158. *Id.* at 38, 49 (“[U]rban schools composed largely of minority students make up 14% of the nation’s middle and high schools yet represent 75% of the surveyed middle and high schools that scan students daily with metal detectors.”); see also *TEST, PUNISH, AND PUSH OUT*, *supra* note 112, at 16; Payne & Welch, *supra* note 106, at 28-29.

sniffing dogs.¹⁵⁹ The vague nature of many delinquent offenses also makes students of color particularly susceptible to racially disparate enforcement. For instance, African-American students are frequently punished for being insubordinate, disrespectful to authority, or threatening, all of which resemble “stereotypes of African Americans as aggressive and disorderly.”¹⁶⁰ Indeed available data suggest that students of color (as well as low-income students and students with disabilities) are often disproportionately arrested at schools¹⁶¹ even though they are not likely to commit more offenses.¹⁶²

C. The Role of Juvenile Courts in Criminalizing Students

Schools would not be able to continue having youth arrested and referred to juvenile courts if the courts were not willing to accept these cases, yet juvenile courts regularly hear cases originating from schools for offenses like “disorderly conduct” and “disturbing the peace.”¹⁶³ The vague nature of such laws allows even the most common of adolescent behaviors to be re-categorized as a crime.¹⁶⁴ As the Advancement Project points out, “fighting in the hallway becomes a ‘battery’ or even ‘aggravated battery’; swiping a classmate’s headphones can be classified as ‘theft’ or ‘robbery’; and talking back to an officer or a teacher is ‘disorderly conduct.’”¹⁶⁵ Some states have even created new categories of delinquent offenses that are specific to

159. See KUPCHIK, *supra* note 18, at 14-15 (noting that 41% of middle schools and 61% of high schools used drug-sniffing dogs at least once during 2005-2006); TEST, PUNISH, AND PUSH OUT, *supra* note 112, at 4, 16 (“In New York City, on any given day, over ninety-three thousand children—predominantly students of color—have to pass through security stations with metal detectors, bag-searches, and pat-downs administered by police personnel before getting to class.”); HIRSCHFELD, *supra* note 119, at 3 (noting that between 1999 and 2006, the percentage of schools nationwide using one or more video surveillance cameras increased from 19% to 43%).

160. See KUPCHIK, *supra* note 18, at 163, 183.

161. Thureau & Wald, *supra* note 145, at 980; see also BALANCING THE SCALES OF JUSTICE, *supra* note 153, at 6.

162. See EDUCATION ON LOCKDOWN, *supra* note 22, at 8; MUKHERJEE, *supra* note 153, at 20; Skiba, *supra* note 133 (“If anything, African-American students appear to receive more severe school punishments for less severe behavior.”); see also TEST, PUNISH, AND PUSH OUT, *supra* note 112, at 15 (explaining that, for instance, African-American students in Florida were 2½ times as likely as their white peers to be arrested and referred to the juvenile justice system in 2007-2008; that African-American students in Colorado were twice as likely, and Latino students 50% more likely, than white students to be arrested; and that in Philadelphia, African-American students were 3½ times, and Latinos were 60% more likely, to be arrested than whites).

163. EDUCATION ON LOCKDOWN, *supra* note 22, at 15.

164. See TEST, PUNISH, AND PUSH OUT, *supra* note 112, at 6.

165. *Id.* at 16.

school misconduct.¹⁶⁶ In these states, students can be prosecuted for delinquent offenses such as “disrupting classes, talking back to teachers, and loitering or trespassing on school grounds.”¹⁶⁷ At least fourteen states have laws that criminalize “disturbing schools,” which can be “interpreted so broadly as to include almost any student misbehavior.”¹⁶⁸ Treating such behaviors as criminal goes against developmental psychology research showing that during adolescence, “youth can be expected to challenge authority, whether at home, or at school, and do not consistently exercise good judgment.”¹⁶⁹ In fact, delinquent conduct is a normal part of adolescence, and most youth will “age out” of delinquency without any intervention.¹⁷⁰

Once youth become involved in the court system, they often unnecessarily penetrate to the deep end of the system. Court orders can set up youth on probation to fail.¹⁷¹ For instance, it is typical for youth who are referred to the court system for truancy to be put on probation with the condition that they attend school regularly.¹⁷² Because juvenile justice systems often lack adequate rehabilitative services,¹⁷³ the underlying reasons that drove the student to skip school in the first place might remain unaddressed. When this happens, the chances are good that the student will skip school again. This only pushes the youth deeper into the system and, in many states, can re-

166. See generally Julius Menacker & Richard Mertz, *State Legislative Responses to School Crime*, 85 EDUC. L. REP. 1 (1993) (reviewing state statutes in thirty-six states relating to school crime specifically).

167. KIM, LOSEN & HEWITT, *supra* note 22, at 122-23.

168. Thureau & Wald, *supra* note 145, at 979 n.6; see also CATHERINE Y. KIM & I. INDIA GERONIMO, ACLU, *POLICING IN SCHOOLS: DEVELOPING A GOVERNANCE DOCUMENT FOR SCHOOL RESOURCE OFFICERS IN K-12 SCHOOLS* 1, 8-9 (2009), available at http://www.aclu.org/pdfs/racialjustice/whitepaper_policingschools.pdf (noting that disturbing schools was the most common offense in South Carolina’s juvenile courts in 2007-2008).

169. LOSEN & SKIBA, *supra* note 30, at 11.

170. See Moffitt, *supra* note 17 (explaining that the majority of youth who engage in delinquent behavior will desist from such behavior as they mature); see also Scott & Steinberg, *Social Welfare and Fairness in Juvenile Crime Regulation*, *supra* note 85, at 39.

171. See Megan M. Sulok, *Extended Jurisdiction Juvenile Prosecutions: To Revoke or Not to Revoke*, 39 LOY. U. CHI. L.J. 215, 270 (2007) (“If a judge merely gives a juvenile a laundry list of probation conditions to accomplish, he is setting the juvenile up for failure.”).

172. See, e.g., BLUEPRINT FOR KY. CHILD., *REDUCING THE USE OF DETENTION FOR STATUS OFFENSES IN KENTUCKY* 8 (2009), available at www.kyouth.org/documents/09brief_StatusOffensesFinal2.pdf.

173. Peter Greenwood, *Prevention and Intervention Programs for Juvenile Offenders*, 18 FUTURE OF CHILD., no. 2, 2008 at 205, available at http://futureofchildren.org/publications/docs/18_02_09.pdf (“Only about [five] percent of the youth who could benefit from [evidence-based] programs now have the opportunity to do so. Juvenile justice options in many communities remain mired in the same old tired options of custodial care and community supervision.”).

sult in incarceration for violating the judge's order. Court involvement becomes another, high-stakes means of surveillance rather than a way to rehabilitate youth.

III. PATERNALISM, DIMINISHED RIGHTS, AND THE HYDRAULICS OF PUNISHMENT

Two factors make it particularly difficult to challenge the punitive treatment of youth of color by both the education and the justice systems.¹⁷⁴ First, youth generally have fewer rights than adults both at school and in juvenile court.¹⁷⁵ Second, the “symbiotic relationship”¹⁷⁶ that has developed between the education and justice systems has meant that challenging policies in just one system or the other is not likely to fully address the problems that have been created by mass incarceration.

A. Paternalism to Justify Diminished Rights

The longstanding paternalism towards youth under the law makes them particularly vulnerable to governmental overreaching. First, through compulsory attendance laws, the state requires that youth attend school, under threat of punishment.¹⁷⁷ Then, once at school, the state subjects these students to heavy surveillance and punitive discipline regimes, punishing them for rather typical adolescent behaviors. Though students are vulnerable to referral to the justice system, their rights in the school setting are generally diminished.¹⁷⁸ As a result of all these factors, it is arguably easy for law enforcement to use the school setting to round up youth and label them as “criminal.”

Of particular relevance is the law pertaining to students' rights in the context of school searches and interrogations. In *New Jersey v. T.L.O.*, the Supreme Court held that the Fourth Amendment prohibition on searches and seizures applies in school settings. Under *T.L.O.*, however, school personnel acting on their own initiative need

174. For a comprehensive overview of legal theories to challenge various aspects of the school to prison pipeline, see KIM, LOSEN & HEWITT, *supra* note 22.

175. *See supra* note 16.

176. Smith, *supra* note 6, at 1011 (citing Wacquant, *supra* note 45, at 108).

177. *See* NAT'L CTR. FOR SCH. ENGAGEMENT, COMPULSORY ATTENDANCE LAWS BY STATE (2003), available at <http://www.schoolengagement.org/TruancyPreventionRegistry/Admin/Resources/Resources/15.pdf>.

178. *See* Dennis D. Parker, *Discipline in Schools after Safford Unified School District #1 v. Redding*, 54 N.Y.L. SCH. L. REV. 1023, 1024 (2009-2010); Susan Stuart, *In Loco Parentis in the Public Schools: Abused, Confused, and in Need of Change*, 78 U. CIN. L. REV. 969, 969 (2010).

only have reasonable suspicion that a *school rule has been violated*, rather than meeting the stricter standard that applies to law enforcement who must have probable cause *that a crime has been committed* to conduct a search.¹⁷⁹ Thus, a school official can search a student if there are “reasonable grounds for suspecting that the search will turn up evidence that the student has violated . . . either the law or the rules of the school” and the measures used are “reasonably related to the objectives of the search and not excessively intrusive in light of the age and sex of the student and the nature of the infraction.”¹⁸⁰ In contrast, outside law enforcement who enter the school to investigate a crime and initiate a search are bound by the stricter probable cause standard and cannot “circumvent” the standard by asking school officials to conduct the search for them.¹⁸¹ Courts differ as to what standard applies to searches conducted by SROs. Several lower courts have found that SROs must only meet the reasonable suspicion standard, reasoning that SROs are more closely connected to the school than the police department, while other courts treat SROs like other law enforcement and require they meet the probable cause standard.¹⁸²

In addition, students’ rights with respect to school interrogations are also diminished. The Supreme Court has not yet addressed the applicability of *Miranda v. Arizona*¹⁸³ in the school context, although at the time of this writing the Court had decided to hear a case concerning a 13-year-old student interrogated by police at school.¹⁸⁴ State courts have found *Miranda* applies in certain school situations; some lower state courts have found that *Miranda* applies when an

179. *New Jersey v. T.L.O.*, 469 U.S. 325 (1985). *But see* Josh Kagan, *Reappraising T.L.O.’s “Special Needs” Doctrine in an Era of School-Law Enforcement*, 33 J. L. & EDUC. 291 (2004) (questioning the continued applicability of *T.L.O.* given the expansion of police presence on campuses in recent years); Paul Holland *Schooling Miranda: Policing Interrogation in the Twenty-First Century Schoolhouse*, 52 LOYOLA L. REV. 39, 41 (2006) (arguing that “modern school-policing practices have undermined *T.L.O.*’s continued vitality”).

180. *T.L.O.*, 469 U.S. at 342. *But see* *Safford Unified Sch. Dist. No. 1 v. Redding*, 129 S.Ct. 2633 (2009) (holding a strip search of a thirteen-year-old student alleged to have possessed pain killers unconstitutional).

181. *See* KIM, LOSEN & HEWITT, *supra* note 22, at 121.

182. *Id.*; *see, e.g., In re William V.*, 111 Cal. App. 4th 1464, 1469-71 (2003); *Florida v. D.S.*, 685 So. 2d 41, 43 (Fla. Dist. Ct. App. 1996); *T.S. v. Indiana*, 863 N.E.2d 362, 371, 375 (Ind. App. 2007); *People v. Dilworth*, 661 N.E.2d 310, 317 (Ill. 1996); *Commonwealth v. J.B.* 719 A.2d 1058, 1066 (Pa. Super. Ct. 1998). *But see* *Georgia v. Scott*, 630 S.E.2d 563 (Ga. Ct. App. 2006) (holding that a school resource officer is considered a law enforcement officer for Fourth Amendment purposes).

183. 384 U.S. 436 (1966).

184. *See* *J.D.B. v. North Carolina*, 131 S.Ct. 502 (2010).

SRO or police officer alone conducts a custodial interrogation.¹⁸⁵ Generally, school officials acting alone do not have to comply with *Miranda*.¹⁸⁶ Jurisdictions vary as to what the applicable law is when school personnel and law enforcement work together to interrogate a student.¹⁸⁷ Some lower courts consider whether the school administrator was acting at the behest of law enforcement, or law enforcement controlled the investigation, while others do not.¹⁸⁸

Once youth are referred to juvenile court, they also possess fewer rights than adults in criminal court. Since their inception, juvenile courts have been characterized by a paternalistic philosophy that justifies denying due process rights to youth in the name of serving their best interests.¹⁸⁹ In the 1967 case *In re Gault*, the Supreme Court held that youth have a constitutional right to counsel in delinquency cases under the Fourteenth Amendment Due Process Clause. (The Court also held that youth have the right to notice of the charges and to confront and cross-examine witnesses, as well as the privilege against

185. KIM, LOSEN & HEWITT, *supra* note 22, at 120; *see also In re Interest of C.H.*, 763 N.W.2d 708 (Neb. 2009) (holding that *Miranda* applied when law enforcement questioned student in principal's office); *In re R.H.*, 791 A.2d 331, 333-34 (Pa. 2002) (finding custodial interrogation when SRO conducted the interrogation); *In re D.A.R.*, 73 S.W.3d 505, 512-13 (Tex. App. 2002) (finding that *Miranda* applied to SRO interrogation); *see also Holland*, *supra* note 179.

186. KIM, LOSEN & HEWITT, *supra* note 22, at 118; *see, e.g., In re Navajo Cnty. Juvenile Action No. JV91000058*, 901 P.2d 1247, 1249 (Ariz. Ct. App. 1995); *People v. Pankhurst*, 848 N.E.2d 628, 636 (Ill. App. 2006); *People v. Shipp*, 239 N.E.2d 296, 298 (Ill. App. 1968); *Commonwealth v. Ira I.*, 791 N.E.2d 894, 901 (Mass. 2003); *see also Pollnow v. Glennon*, 594 F. Supp. 220, 224 (S.D.N.Y. 1984), *aff'd*, 757 F.2d 496 (2d Cir. 1985).

187. KIM, LOSEN & HEWITT, *supra* note 22, at 120; *see, e.g., M.H. v. Florida*, 851 So. 2d 233 (Fla. Dist. Ct. App. 2003) (finding that SRO's mere presence does not amount to custodial interrogation requiring *Miranda* warnings where SRO escorted a seventh grader to a school official's office, school official interrogated student, and SRO asked only one question); *In re J.C.*, 591 So. 2d 315, 316 (Fla. Dist. Ct. App. 1991) (finding no custodial interrogation in a situation in which an assistant principal questioned student in front of SRO and SRO might have asked a couple questions but SRO involvement was *de minimis*); *J.D. v. Commonwealth*, 591 S.E.2d 721, 725 (Va. Ct. App. 2004) (explaining that where SRO is present but silent while associate principal questioned student, *Miranda* warnings not required because SRO did not direct questioning and student was not in custody); *see also Peter Price, When Is a Police Officer an Officer of the Law? The Status of Police Officers in Schools*, 99 J. CRIM. L. & CRIMINOLOGY 541, 560 (2009).

188. *See KIM, LOSEN & HEWITT, supra* note 22, at 120. 22, at 120; *see, e.g., New Hampshire v. Tinkham*, 719 A.2d 580, 583-84 (N.H. 1998) (holding that *Miranda* warnings are not required where the school official is not acting as an instrument or agent of police); *see also State v. J.T.D.*, 851 So. 2d 793, 796 (Fla. Dist. Ct. App. 2003) (same); *In re Welfare of G.S.P.*, 610 N.W.2d 651 (Minn. Ct. App. 2000) (finding custodial interrogation existed where a school official and school liaison officer questioned a student together); *New Hampshire v. Heirtzler*, 789 A.2d 634 (N.H. 2002) (finding an agency relationship between school officials and law enforcement); *In re W.R.*, 675 S.E.2d 342, 344 (N.C. 2009).

189. *See Katayoon Majd & Patricia Puritz, The Cost of Justice: How Low-income Youth Continue to Pay the Price of Failing Indigent Defense Systems*, 16 GEO. J. ON POVERTY L. & POL'Y 543, 553-56 (2009).

self-incrimination.)¹⁹⁰ In practice, however, though more than four decades have passed since *Gault* was decided, youth are regularly denied effective assistance of counsel in delinquency courts across the nation.¹⁹¹ In addition, youth are sometimes coerced into pleading guilty in order to avail themselves of the services of the juvenile court system.¹⁹² The irony, of course, is that in many instances, the juvenile justice system fails to provide meaningful rehabilitative services.¹⁹³ Moreover, the Supreme Court has held there is no federal constitutional right to a jury trial in delinquency cases,¹⁹⁴ and most states deny youth a right to jury trial.¹⁹⁵ The Court has also upheld the constitutionality of preventive detention of youth in delinquency cases.¹⁹⁶

Barriers to legal remedies also exist for youth who want to challenge their exclusions from schools and referrals to juvenile court. Even though research indicates that suspensions and expulsions do not reduce school behavior problems,¹⁹⁷ courts will typically defer to schools' decisions about how to maintain a safe learning environment.¹⁹⁸ As long as schools can justify the discipline decision "by a legitimate educational interest," a student is unlikely to win a challenge to a discipline decision.¹⁹⁹ In addition, the intent standard in Equal Protection doctrine, as well as case law regarding Title VI of the Civil Rights Act of 1964, has erected a formidable barrier for youth

190. *In re Gault*, 387 U.S. 1 (1967).

191. See Patricia Puritz et al., *A Call for Justice: An Assessment of Access to Counsel and Quality of Representation in Delinquency Proceedings*, ABA JUVENILE JUSTICE CTR. 1, 3 (1995), available at <http://www.njdc.info/pdf/cfjfull.pdf> (providing a nationwide assessment of juvenile indigent defense representation); see also *Assessments*, NAT'L JUVENILE DEFENDER CTR., <http://www.njdc.info/assessments.php> (last visited Jan. 3, 2010).

192. Patricia Puritz & Katayoon Majd, *Ensuring Authentic Youth Participation in Delinquency Cases: Creating a Paradigm for Specialized Juvenile Defense Practice*, 45 FAM. CT. REV. 466, 472 (2007).

193. FED. ADVISORY COMM. ON JUVENILE JUSTICE, ANNUAL REPORT 26 (2008) [hereinafter FEDERAL ADVISORY COMM. ON JUVENILE JUSTICE], available at <http://www.facjj.org/annualreports/FACJJ%20Annual%20Report%202008.pdf> (quoting ABA's Presidential Working Group on the Unmet Legal Needs of Children and their Families); Greenwood, *supra* note 173 ("Only about [five] percent of the youth who could benefit from [evidence-based] programs now have the opportunity to do so. Juvenile justice options in many communities remain mired in the same old tired options of custodial care and community supervision.").

194. *McKeiver v. Pennsylvania*, 403 U.S. 528, 550 (1971).

195. Barry C. Feld, *The Constitutional Tension Between Apprendi and McKeiver: Sentence Enhancements Based on Delinquency Convictions and the Quality of Justice in Juvenile Courts*, 38 WAKE FOREST L. REV. 1111, 1114 (2003).

196. *Schall v. Martin*, 467 U.S. 253 (1984).

197. Skiba, Eckes & Brown, *supra* note 7, at 1074.

198. *Id.* at 1080.

199. *Id.* But see Parker, *supra* note 178, at 1027 (explaining that the recent *Redding v. Safford* decision "signals a willingness of the Court to subject decisions of school to some level of scrutiny").

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who believe that they have experienced racially discriminatory school discipline decisions and juvenile court involvement.²⁰⁰

Thus, students of color are, in many respects, at the mercy of two very powerful systems—the education and justice systems—which have chosen to adopt policies that are both counterproductive and harmful. Students are forced by law to go to school; at school, they are closely watched, searched and interrogated without the same constitutional protections afforded to adults. They are deemed criminal for even the most typical of adolescent behaviors. Once referred to juvenile court, they are likely to be denied their constitutional right to counsel and subjected to a system, rehabilitative in name, but actually quite punitive in function. And if they feel their rights have been violated, the courthouse door is often effectively shut to them. It is difficult to imagine a better system for efficiently targeting young people of color and ushering them into the mass incarceration system.

B. The Hydraulics of Punishment

The effective collaboration between the education and justice systems, both of which are characterized by a deeply engrained punitive culture, is hard to challenge piecemeal. If one avenue of punishment is shut off, it is likely that a new outlet for punishment will be created. For example, the federal Individuals with Disabilities Education Act (“IDEA”) provides rights and entitlements to youth with disabilities who are in need of special education and places certain restrictions on the suspension and expulsion of youth with special education needs.²⁰¹ In 1994, a Tennessee federal district court held that a school system violated a special education student’s rights when it referred that student to juvenile court without providing the due process protections required under IDEA when a special education student faces a “change in placement.”²⁰² In response, Congress subsequently amended the IDEA to explicitly state that schools are not prohibited from referring a student with disabilities to juvenile court.²⁰³ Although a school cannot use juvenile court referrals as a way to circum-

200. Skiba, Eckes & Brown, *supra* note 7, at 1109.

201. 20 U.S.C. § 1400 et seq. (West 2007 & Supp. 2010).

202. *Morgan v. Chris L.*, 927 F. Supp. 267, 270-271 (E.D. Tenn. 1994), *aff’d*, 106 F.3d 401 (6th Cir. 1997) (unpublished table decision), *cert. denied*, 520 U.S. 1271 (1997).

203. See 20 U.S.C. §1415(k)(6)(A) (2006); KIM, LOSEN & HEWITT, *supra* note 22, at 132-33; Dean Hill Rivkin, *Decriminalizing Students with Disabilities*, 54 N.Y.L. SCH. L. REV. 909, 935-38 (2009-10).

vent its obligations under the IDEA,²⁰⁴ commentators have noted that schools are doing just and that the 1997 IDEA amendments have led to an increased reliance on juvenile courts to handle misbehavior by students with disabilities.²⁰⁵ This example shows just how difficult it is to change—with one successful lawsuit or policy victory—a punitive culture that does not respect the individual dignity of the most disadvantaged students.²⁰⁶ Without a more holistic restructuring of the system of laws and policies that support mass incarceration, as well as a significant challenge to the racialization and politicization of crime that gave rise to the system, isolated policy wins might merely lead to the adoption of a new and different mechanism for pushing youth out of schools and into the justice system.²⁰⁷

IV. THE NEGATIVE IMPACTS OF THE PUNITIVE REGIME AT SCHOOL AND IN COURT

The adoption of criminal justice philosophies and practices by schools has had several negative impacts.²⁰⁸ It has exacerbated racial inequities in education by leading to decreased educational opportuni-

204. KIM, LOSEN & HEWITT, *supra* note 22, at 132-33; Rivkin, *supra* note 203, at 937.

205. Rivkin, *supra* note 203, at 939-40.

206. See also Lucie E. White, *To Learn and Teach: Lessons from Driefontein on Lawyering and Power*, 1988 WIS. L. REV. 699, 749 (1988) (noting the difficulty of changing “institutional structures and cultural patterns” and explaining, “a coalition of civil rights groups might succeed in getting a legislature to make housing discrimination illegal. Yet in spite of this formal victory, the actual practice of residential discrimination might persist for years. A judge might find that an agency is out of compliance with the law in its day-to-day practices toward the poor. Yet institutional and cultural factors may nonetheless prevent that judge from devising a remedy that will solve the problem.”). See generally Thomas B. Stoddard, *Bleeding Heart: Reflections on Using the Law to Make Social Change*, 72 N.Y.U. L. REV. 967, 978 (1997) (identifying four factors that must be in place in order for a new law to change culture rather than just create a new rule; these include the following: “(1) A change that is very broad or profound; (2) Public awareness of that change; (3) A general sense of the legitimacy (or validity) of the change; and (4) Overall, continuous enforcement of the change”).

207. See ALEXANDER, *supra* note 41, at 221 (“The notion that all of these reforms can be accomplished piecemeal—one at a time, through disconnected advocacy strategies—seems deeply misguided.”).

208. The American Bar Association and the American Psychological Association have taken positions against zero-tolerance policies. For information about the ABA position, see AM. BAR ASS’N, ABA JUVENILE JUSTICE POLICIES: ZERO TOLERANCE POLICY (2000), available at <http://www.abanet.org/crimjust/juvjus/zerotolreport.html>; ABA Opposes “Zero Tolerance” in Schools, ABC NEWS, <http://abcnews.go.com/US/story?id=94043&page=1> (last visited Jan. 27, 2011). For the American Psychological Association’s recommendations on zero-tolerance, see Skiba et al., *supra* note 18, 854. In addition, the National Council of Juvenile and Family Court Judges called on juvenile court judges to work with school systems to keep student misbehaviors out of courts. NAT’L COUNCIL OF JUVENILE & FAMILY COURT JUDGES, JUVENILE DELINQUENCY GUIDELINES: IMPROVING COURT PRACTICE IN JUVENILE DELINQUENCY CASES 190 (2005), available at <http://www.ncjfcj.org/images/stories/dept/ppcd/pdf/JDG/juveniledelinquencyguidelinescompressed.pdf>.

ties and more negative school climates. In addition, it has limited the employment prospects and damaged the health and psychological well-being of students, while undermining the students' respect for the law. Ultimately, these factors place youth at greater risk for future criminal justice involvement. Thus, the punitive policies of the schools and juvenile courts merely facilitate, rather than prevent, the eventual entry of many students of color into the adult criminal justice system.

A. Harms of Punitive and Exclusionary School Policies

Without addressing the issues underlying students' behaviors, school exclusion only harms students' academic and employment prospects.²⁰⁹ Exclusion from school—whether by suspension, expulsion or arrest—means youth are spending less time in class, which contributes to any educational disadvantage they are already experiencing.²¹⁰ Students who are excluded from school are more likely to perform poorly academically,²¹¹ drop out or fail to graduate on time.²¹² Schools with high suspension rates also have poorer standardized achievement test scores.²¹³

In addition, research has shown that zero-tolerance policies are counterproductive in terms of improving student behavior.²¹⁴ In fact, school exclusion policies are likely to exacerbate the very behavior problems they are supposed to address.²¹⁵ At least one study has found that measures like SROs, metal detectors, or zero-tolerance policies may actually be associated with increased levels of disorder in a school.²¹⁶ And once youth are excluded from school, they become *more* likely to enter the juvenile justice system.²¹⁷

209. KUPCHIK, *supra* note 18, at 8; LOSEN & SKIBA, *supra* note 30, at 11 (describing that exclusionary disciplinary tactics increase students' risk of education failure and drop out and do not "better prepare students for adulthood").

210. See Payne & Welch, *supra* note 106, at 41.

211. Krezmien et al., *supra* note 18, at 274.

212. Skiba et al., *supra* note 18, at 854.

213. Skiba, Eckes & Brown, *supra* note 7, at 1078.

214. Skiba et al., *supra* note 18, at 854, 857, 860.

215. KUPCHIK, *supra* note 18, at 4-9; TEST, PUNISH, AND PUSH OUT, *supra* note 112, at 17; Krezmien et al., *supra* note 18, at 274; Skiba, Eckes & Brown, *supra* note 7, at 1077 (noting that "suspension functions as a reinforcer . . . rather than as a punisher" of misbehavior).

216. Krezmien et al., *supra* note 18, at 274.

217. See Joseph C. Gagnon & Peter E. Leone, *Alternative Strategies for School Violence Prevention in NEW DIRECTIONS FOR YOUTH DEVELOPMENT* 101 (2002), available at <http://digilib.gmu.edu:8080/xmlui/bitstream/1920/277/1/alternative%2520strategies%2520for%2520school%2520violence.pdf>.

Similarly, studies show that high rates of suspensions, expulsions, and law enforcement surveillance at school are associated with less satisfactory school climates.²¹⁸ Rather than making youth feel safe, SROs seem to have the opposite effect.²¹⁹ A national study found that SROs “can contribute to a climate of anxiety and stress for both teachers and students while doing little to prevent violence.”²²⁰ Another study found that students view school police as more threatening than gang members or bullies.²²¹ The researchers explained that “[p]olice in schools may provide a psychological benefit for administrators, staff, parents, and the adult public; however, their presence may pose a psychological threat to students.”²²²

B. Harms of Juvenile Court Involvement

Referring youth to the juvenile justice system compounds the disadvantages associated with school suspensions and expulsions. For example, a first-time arrest during high school nearly doubles the odds that a youth will drop out of high school; if the arrest results in a court appearance, it nearly quadruples the odds the youth will drop out.²²³ In addition, a juvenile adjudication brings with it many collateral consequences that can follow youth into adulthood including: the denial of certain educational and employment opportunities; bars on military service, student loans, and public housing;²²⁴ sex offender registration requirements for certain offenses;²²⁵ negative immigration conse-

218. TEST, PUNISH, AND PUSH OUT, *supra* note 112, at 17; Skiba et al., *supra* note 18, at 854.

219. See TEST, PUNISH, AND PUSH OUT, *supra* note 112, at 17 (finding that 64% of New York City teachers reported that SROs rarely or never makes students feel safe, and only 6% believed that they always make students feel safe).

220. SULLIVAN & MORGAN, *supra* note 112, at 20.

221. Arrick Jackson, *Police-School Resource Officers' and Students' Perception of the Police and Offending*, 25 POLICING: AN INT'L J. OF POLICE STRATEGIES & MGMT. 631, 647 (2002).

222. *Id.*

223. Gary Sweeten, *Who Will Graduate? Disruption of High School Education by Arrest and Court Involvement*, 23 JUST. Q. 462, 473 (2006), available at http://www.masslegalservices.org/system/files/H.S.ed_and_arrest_-_ct_involvement_study_by_Sweeten.pdf.

224. Michael Pinard, *The Logistical and Ethical Difficulties of Informing Juveniles About the Collateral Consequences of Adjudications*, 6 NEV. L.J. 1111, 1114-15 (2006).

225. See *id.* at 1114; AMANDA PETTERUTI & NASTASSIA WALSH, JUSTICE POLICY INST., REGISTERING HARM: HOW SEX OFFENSE REGISTRIES FAIL YOUTH COMMUNITIES 9 (2008); see also Adam Walsh Child Protection and Safety Act of 2006, Pub. L. No. 109-248, 120 Stat. 587 (2006) (requiring certain youth convicted in criminal court or adjudicated in juvenile court to register as sex offenders).

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quences for non-citizen youth;²²⁶ and the use of adjudications to enhance sentences in future criminal cases.²²⁷

Once they enter the justice system, youth who are incarcerated rather than placed on probation face particularly devastating impacts. The quality of education that youth receive while incarcerated is typically abysmal,²²⁸ and approximately 66% of youth who leave juvenile justice facilities end up dropping out of school.²²⁹ However, the harms of incarceration extend well beyond education. Youth in detention and secure confinement facilities experience high rates of sexual abuse and a suicide rate four times greater than that of the general population.²³⁰ Once released, youth face discouraging odds. Compared with other groups of youth, incarcerated youth “will achieve less educationally, work less and for lower wages, fail more frequently to form enduring families, experience more chronic health problems (including addiction), and suffer more imprisonment.”²³¹

C. Impact on Legal Socialization

Unduly punitive responses to youth can also impact their views on the legal system, which in turn can affect their willingness to abide by society’s laws. During adolescence, youth undergo a process of legal socialization through which they develop their beliefs about the law, and negative experiences can affect their assessment of the legitimacy of the legal systems that affect them.²³² By exposing youth to severe consequences, such as juvenile court involvement for minor offenses, society merely diminishes the deterrent impact of these sanc-

226. See RANDY HERTZ ET AL., TRIAL MANUAL FOR DEFENSE ATTORNEYS IN JUVENILE COURT 276-78 (ALI-ABA, 2d ed. 2007).

227. *Id.*

228. See Peter E. Leone & Candace A. Cutting, *Appropriate Education, Juvenile Corrections, and No Child Left Behind*, 26 BEHAV. DISORDERS 260, 260 (2004) (“Historically, education programs in juvenile corrections have been underfunded and neglected by the larger education community.”); Peter E. Leone et al., *Organizing and Delivering Empirically Based Literacy Instruction to Incarcerated Youth*, 13 EXCEPTIONALITY 89, 90 (2005) (“Many correctional education programs lack the awareness and resources necessary to organize and deliver appropriate general, remedial, and special education services.”).

229. Feerman, Levick & Mody, *supra* note 20, at 1117.

230. See *Fast Facts*, NAT’L JUVENILE JUSTICE NETWORK, <http://njjn.org/fastfacts.html> (last visited Dec. 26, 2010).

231. A ROAD MAP FOR JUVENILE JUSTICE REFORM, *supra* note 73, at 1 (citing He Len Chung, Michelle Little & Laurence Steinberg, *The Transition to Adulthood for Adolescents in the Juvenile Justice System: A Developmental Perspective*, in ON YOUR OWN WITHOUT A NET: THE TRANSITION TO ADULTHOOD FOR VULNERABLE POPULATIONS 68 (D.Wayne Osgood et al. eds., 2005)).

232. Lee, Steinberg & Piquero, *supra* note 102, at 782.

tions²³³ and makes students less likely to abide by the rules set for them. Procedural justice research suggests that individuals are more likely to view law enforcement as legitimate if they feel that law enforcement treats them fairly; in addition, people who view law enforcement as legitimate are more likely to comply with the law.²³⁴ Individuals typically judge legitimacy by assessing the fairness of the decision-making process, rather than the ultimate outcome, based on factors such as whether their views were considered, authorities treated them with respect, and the decision-maker was impartial.²³⁵— These considerations are likely to be especially important to students of color since research has found that members of stigmatized groups place even more weight on procedural fairness.²³⁶

This research seems to suggest punitive policies on campus that are viewed as unfair or not “evenly applied” might lead youth to lose respect for the law,²³⁷ feel more alienated from adult society, and have a harder time transitioning to adulthood.²³⁸ Perceptions of unfairness or disrespect by law enforcement might also lead youth to disengage from the political process and might exacerbate racial tensions.²³⁹ In this way, racially disparate and excessively punitive school discipline policies can negatively impact student behavior and public safety over the long term.

D. Psychological Impacts of Labeling Students as Criminal

Perhaps one of the most damaging effects of the mass incarceration era is that the education and justice systems are teaching students

233. Price, *supra* note 187, at 560; *see also* Thureau & Wald, *supra* note 145, at 1015 (highlighting a study of SROs in Massachusetts found that “youth perceive that once they are before a judge in juvenile court, they have no incentive to behave well”).

234. Lee, Steinberg & Piquero, *supra* note 102, at 781.

235. Miriam Aroni Krinsky & Jennifer Rodriguez, *Giving a Voice to the Voiceless: Enhancing Youth Participation in Court Proceedings*, 6 NEV. L.J. 1302, 1303 (2006); *see* Jonathan D. Casper, Tom Tyler & Bonnie Fisher, *Procedural Justice in Felony Cases*, 22 LAW & SOC’Y REV. 483, 486-87, 496-98 (1988); E. Allan Lind, P. Christopher Earley & Ruth Kanfer, *Voice, Control, and Procedural Justice: Instrumental and Noninstrumental Concerns in Fairness Judgments*, 59 J. PERSONALITY & SOC. PSYCHOL. 952 (1990); Tom R. Tyler, *Procedural Justice, Legitimacy, and the Effective Rule of Law*, 30 CRIME & JUST. 283, 292-94 (2003); Tom R. Tyler, *The Psychological Consequences of Judicial Procedures: Implications for Civil Commitment Hearings*, 46 SMU L. REV. 433, 439-42 (1992); *see also* Tom R. Tyler, *What Is Procedural Justice?: Criteria Used By Citizens to Assess the Fairness of Legal Procedures*, 22 LAW & SOC’Y REV. 103, 117, 127-28 (1988).

236. Tyler, *Procedural Justice*, *supra* note 235, at 342-43.

237. KUPCHIK, *supra* note 18, at 4.

238. Fine et al., *supra* note 105, at 155.

239. *Id.*

devastating lessons about themselves.²⁴⁰ As Glenn Loury has argued, “for young African-American men, coercion is the most salient feature of their encounters with the American state.”²⁴¹ Through their policies and practices, schools are teaching many African-American students and other students of color that they are dangerous criminals, who do not belong and have little to contribute to society, and the justice system’s reaction only solidifies these damaging lessons.²⁴²

Labeling students as criminals creates a self-fulfilling prophecy.²⁴³ Students deemed by authorities to be defiant and difficult might internalize these labels and begin acting in ways that reflect the expectations society places on them.²⁴⁴ Pedro Noguera argues that those students most likely to internalize the labels are those “who are not receiving the benefits of an education. Once they know that the rewards of education—namely, acquisition of knowledge and skills and ultimately, admission to college, and access to good paying jobs—are not available to them, students have little incentive to comply with school rules.”²⁴⁵ Some African-American youth might also embrace the stigma of criminality that has been put on them by teachers and the police as “an attempt to carve out a positive identity in a society that offers them little more than scorn, contempt, and constant surveillance” even though “embracing criminality—while a natural response to the stigma—is inherently self-defeating and destructive.”²⁴⁶ Thus, by affecting how youth see themselves, the racialized punitive policies at school and in the justice system are only setting youth up to fail.

240. See Loury, *supra* note 9, at 137 (noting that punitive policies serve both instrumental and expressive goals).

241. *Id.*

242. See ALEXANDER, *supra* note 41, at 157-160 (“Practically from cradle to grave, black males in urban ghettos are treated like current or future criminals.”).

243. See Tamar R. Birckhead, *Toward a Theory of Procedural Justice for Juveniles*, 57 *BUFF. L. REV.* 1447, 1500-01 (2009); Noguera, *supra* note 30, at 343; Parker, *supra* note 178, at 1024; see also KUPCHIK, *supra* note 18, at 40 (noting that “if schools treat youth as potential criminals rather than worthy citizens, they might be weakening [the] bond” that ties individuals to their communities).

244. See Noguera, *supra* note 30, at 343.

245. *Id.* at 343.

246. ALEXANDER, *supra* note 41, at 166-67; see also BUTLER, *supra* note 14, at 131.

V. SCHOOLS AS CASUALTIES OF MASS INCARCERATION

In addition to contributing to the mass incarceration of people of color, schools are also, in some ways, casualties of it.²⁴⁷ Mass incarceration has meant that many students suffer the negative impacts of having a parent or guardian behind bars, and schools are often not prepared to understand and address their unique needs. In addition, school budgets have suffered, at least indirectly, as a result of the skyrocketing costs of corrections.

A. Students with Parents Behind Bars

The impacts of mass incarceration—which are concentrated among African-American men who have dropped out of high school—extend well beyond the individual who is imprisoned.²⁴⁸ New research by Bruce Western and Becky Pettit reveals that mass incarceration creates social inequality—the effects of which are cumulative (in that they exacerbate the disadvantage of the most marginalized men in society) and intergenerational (in that the social inequality is transmitted from one generation to the next).²⁴⁹ Parental incarceration can undermine family stability and exacerbate socioeconomic disadvantage.²⁵⁰ As such, mass incarceration merely exacerbates the very problems it is purported to control.²⁵¹ It is thus no accident that the lowest-performing schools tend to be located in communities with the highest incarceration rates.²⁵²

In particular, children stand to suffer a host of harms when their parents are incarcerated. One in every twenty-eight children (2.7 million children total) has a parent currently behind bars, and two-thirds of these children's parents are incarcerated for non-violent offenses.²⁵³ Approximately ten million children have a parent who previously has been incarcerated.²⁵⁴ In 2008, 11% of African-American children and 3.5% of Latino children had a parent who was incarcer-

247. See Nicole L. Bracy, *Circumventing the Law: Students' Rights in Schools with Police*, 26 J. CONTEMP. CRIM. JUST. 294, 296 (2010).

248. See Western & Pettit, *supra* note 20, at 11.

249. *Id.* at 18.

250. *Id.*

251. *Id.*

252. See Hawkins, *supra* note 25 (citing forthcoming research conducted by the NAACP).

253. PEW CHARITABLE TRUSTS, COLLATERAL COSTS: INCARCERATION'S EFFECT ON ECONOMIC MOBILITY 4 (2010) [hereinafter COLLATERAL COSTS], available at http://www.pewcenteronthestates.org/uploadedFiles/Collateral_Costs.pdf?n=8653.

254. Martin H. Pritikin, *Is Prison Increasing Crime?* 2008 WIS. L. REV. 1049, 1067 (2008).

ated.²⁵⁵ In contrast, 1.75% of white children had an incarcerated parent.²⁵⁶

The available research on this population of youth is cause for alarm. Children of incarcerated parents are at risk of school failure. One study of families with incarcerated mothers found that, in about 75% of these families, the children were at least one academic grade level behind,²⁵⁷ and children of incarcerated mothers were more likely to attend an alternative school because of pregnancy, truancy, or violence.²⁵⁸ In addition, 23% of children whose fathers have been in prison are suspended or expelled from school, making them almost six times as likely as their peers to face these disciplinary measures.²⁵⁹

Parental incarceration is also “a strong risk factor (and possible cause) for a range of adverse outcomes for children,” including antisocial behavior, mental health problems, drug abuse, and unemployment.²⁶⁰ Boys of incarcerated parents, in particular, are at greater risk of developmental delays and behavioral problems.²⁶¹ Researchers have also suggested that parental incarceration might cause a child to feel stigmatized at school and resentful of authority, which together can lead to the child engaging in delinquent behavior.²⁶² The link between parental incarceration and a child’s own future involvement in the juvenile and criminal justice systems is particularly striking and speaks to the intergenerational impacts of mass incarceration.²⁶³ In fact, up to 50% of youth incarcerated in the juvenile justice system have a parent who is, or has been, incarcerated.²⁶⁴ In addition, having an incarcerated parent in prison makes a child five times more likely than other children to serve time in prison.²⁶⁵

255. Western & Pettit, *supra* note 20, at 16.

256. *Id.*

257. Joseph Cudjoe & Tony A. Barringer, *More Than Mere Ripples: The Interwoven Complexity of Female Incarceration and the African-American Family*, 2 MARGINS 265, 278 (2002).

258. *Id.* at 279-80.

259. COLLATERAL COSTS, *supra* note 253, at 4 (citing a study finding that 23% of children with a father who has served time in a jail or prison have been expelled or suspended from school, compared with just 4% of children whose fathers have not been incarcerated).

260. Joseph Murray & David P. Farrington, *The Effects of Parental Imprisonment on Children*, 37 CRIME & JUST. 133, 135 (2008).

261. Western & Pettit, *supra* note 20, at 15.

262. Pritikin, *supra* note 254, at 1067.

263. Western & Pettit, *supra* note 20, at 18.

264. Pritikin, *supra* note 254, at 1067.

265. Nekima Levy-Pounds, *Can These Bones Live? A Look at the Impacts of the War on Drugs on Poor African-American Children and Families*, 7 HASTINGS RACE & POVERTY L.J. 353, 373 (2010).

Despite the multiple negative impacts that parental incarceration has on youth, many school systems are simply not equipped to identify and appropriately address the range of needs of children growing up with a parent behind bars.²⁶⁶ Thus, the unnecessary incarceration of people of color—which often is concentrated in certain geographic regions and thus in certain school districts²⁶⁷—unnecessarily makes the schools’ task of educating students more difficult and exposes youth to a range of harms that affect their educational outcomes and life chances.

B. State Spending Decisions: Corrections vs. Education

Education budgets are another casualty of mass incarceration. The United States spends an astounding \$70 billion a year on the costs of adult imprisonment, juvenile detention, and parole and probation supervision.²⁶⁸ As prison growth has exploded, the amount of money the country spends on corrections has more than quadrupled in the last twenty years.²⁶⁹ State spending on education, on the other hand, has not increased at the same rate as corrections spending.²⁷⁰ In 2008-2009, thirty-three states spent a larger proportion of their general funds (which are meant to pay for public services) on corrections than prior years; during that same time spending on K-12 and higher education decreased.²⁷¹ As Steven Hawkins of the NAACP explains, “[w]ith tens of billions of dollars in prison spending annually, states are finding that there is simply less discretionary money available to invest in education, especially in these lean economic times.”²⁷² For

266. *Id.* at 371; see also MARCY VIBOCH, VERA INST. OF JUSTICE., CHILDHOOD LOSS AND BEHAVIORAL PROBLEMS: LOOSENING THE LINKS 12 (2005), available at <http://www.vera.org/download?file=91/Childhood%2Bloss.pdf> (arguing that school officials “should be skilled at identifying and responding to misbehavior related to a loss,” such as parental incarceration, and “should develop systematic methods for of addressing loss”).

267. See Western & Pettit, *supra* note 20, at 18 (noting the spatial concentration of the impacts of incarceration).

268. Hawkins, *supra* note 25.

269. See THE LONG REACH OF AMERICAN CORRECTIONS, *supra* note 27, at 1; see also Solomon Moore, PEW CTR. FOR CHARITABLE TRUSTS (March 3, 2009), http://www.pewtrusts.org/news_room_detail.aspx?id=49802.

270. SARAH LYONS & NATSASSIA WALSH, JUSTICE POLICY INST., MONEY WELL SPENT: HOW POSITIVE SOCIAL INVESTMENTS WILL REDUCE INCARCERATION RATES, IMPROVE PUBLIC SAFETY, AND PROMOTE THE WELL-BEING OF COMMUNITIES 1, 9 (2010), available at http://justicepolicy.org/images/upload/10-09_REP_MoneyWellSpent_PS-DC-AC-JJ.pdf; THE LONG REACH OF AMERICAN CORRECTIONS, *supra* note 27, at 1 (describing that corrections spending growth outpaced budget increases of all other essential government services except Medicaid, including education).

271. Hawkins, *supra* note 25.

272. *Id.*

example, Florida, a state that spends less per capita on K-12 students than any other state, reduced its education budget by \$332 million in 2008, but increased the corrections budget by \$308 million that same year.²⁷³

In addition, choices about how to spend existing education funds are being made with crime control in mind. At a time when the quality of education many students receive is sorely inadequate, states are choosing to spend precious public education funds on policing and surveillance techniques that have been shown to be unnecessary or counterproductive rather than on resources, such as high-quality teachers, which are important for improving the quality of education students receive.²⁷⁴ As sociologist Aaron Kupchik argues, “Since most juvenile crime occurs away from school, it makes little sense to cut afterschool programs that have been repeatedly shown to reduce delinquency, or to add to the number of police officers in schools, a practice that has shown little evidence of success. And yet this is precisely what many communities in the United States have done.”²⁷⁵ Given that these measures have been shown through research to be counterproductive, money spent on these resources is simply being wasted.

VI. ADVANCING EDUCATIONAL EQUITY THROUGH A COLLABORATIVE REFORM AGENDA

Given the close connection between the education and justice systems, and the ways in which the systems impact each other, educational equity advocates would benefit from joining forces with justice system advocates to call for a holistic restructuring of the system of laws and policies that support mass incarceration. Currently, a moment of opportunity exists—created by the economic crisis and low crime rates—to advance meaningful criminal and juvenile justice reform. By working across their issue-specific silos to create a radical

273. LYONS & WALSH, *supra* note 270, at 9.

274. See generally Linda Darling-Hammond, *Teacher Quality and Student Achievement: A Review of State Policy Evidence*, EDUC. POL’Y ANALYSIS ARCHIVES, Jan. 1, 2000, at 1, available at <http://epaa.asu.edu/ojs/article/viewFile/392/515> (suggesting that state policies regarding teacher education, licensing, hiring, and professional development may make a difference in teacher qualifications and capabilities).

275. KUPCHIK, *supra* note 18, at 5; see also SULLIVAN & MORGAN, *supra* note 112, at 19 (illustrating that in 2006-2007, the New Orleans Recovery School District spent \$2100 per student on security alone); TEST, PUNISH, AND PUSH OUT, *supra* note 112, at 4 (highlighting that New York City spends more than \$221 million on police and security, which represents a 65% increase in spending since 2002).

shift in how society views issues of race, crime, and punishment, education and justice advocates have the greatest chance of promoting equity in both the education and justice systems.

A. Opportunities for Challenging the Mass Incarceration System

Despite the formidable challenges that dismantling the mass incarceration system presents, a few factors have converged to create opportunities to revamp how society handles youth who misbehave at school and those who commit crimes. First, crime rates are down,²⁷⁶ creating a more hospitable political environment for reform. Second, the costs of incarceration have become unsustainable; and given the serious budget deficits in the states, policymakers are now more willing than any other time in recent memory to consider adopting more cost-effective alternatives to incarceration for both adults and youth.²⁷⁷ (Of course, the budget deficit simultaneously serves as an obstacle to maintaining and promoting many progressive reforms, as legislators nationwide are looking for ways to cut costs and many have reduced spending for juvenile justice programs.)²⁷⁸ A third factor is the seemingly greater receptivity of courts and policymakers to acknowledge that youth are different from adults in ways that impact how society should respond to their offending behavior. Well-established developmental and brain research demonstrates that youth have diminished decision-making capacities that have significance in culpability determinations.²⁷⁹ In 2005, the United States Supreme Court relied on this research to hold in *Roper v. Simmons* that the

276. See TRUMAN & RAND, *supra* note 11 (noting that the overall violent crime rate has dropped steadily since 1994); see also SNYDER & SICKMUND, *supra* note 11 (finding that juvenile violent crime arrests have dropped consistently since 1994).

277. See LIPSEY ET AL., *supra* note 28, at 9 (“Large budget deficits have caused some states to rethink high juvenile confinement rates.”); Alexander, *supra* note 28 (“[A]t least eighteen legislatures have reduced or eliminated harsh mandatory minimum sentences, and more than two dozen have restored early-release programs and offered treatment instead of incarceration for some drug offenders.”); Ruiz, *supra* note 28 (explaining the fiscal crisis has caused “even the staunchest advocates of incarceration” to consider alternatives).

278. See NAT’L JUVENILE JUSTICE NETWORK, THE REAL COSTS AND BENEFITS OF CHANGE: FINDING OPPORTUNITIES FOR REFORM DURING DIFFICULT FISCAL TIMES 1 (2010) [hereinafter THE REAL COSTS AND BENEFITS OF CHANGE], available at http://njjn.org/media/resources/public/resource_1613.pdf (“Advocates have worked for years to achieve reform, only to see the fruit of their efforts disappear due to short-sighted funding concerns.”). For suggestions about how to advance juvenile justice reform in difficult economic times, see *id.* at 6-10.

279. See Elizabeth S. Scott & Laurence Steinberg, *Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty*, 58 AM. PSYCHOLOGIST 1009, 1014 (2003).

juvenile death penalty is unconstitutional;²⁸⁰ in 2010, the Court referenced the research again in *Graham v. Florida* to ban life without parole sentences for youth under age eighteen in non-homicide cases.²⁸¹ These cases reflect a gradual shift away from two of the harshest sentences that had been applied to youth (though the United States' imposition of life without parole sentences for youth convicted of homicide continues to make the country an outlier in the world).²⁸² Advocates are advancing developmental arguments to undo other punitive aspects of juvenile justice, with some success.²⁸³ Finally, a rich body of research also exists about “what works” in responding to juvenile crime and misbehavior.²⁸⁴ The central question is not so much how to respond effectively to youth who commit either minor or serious offenses,²⁸⁵ but rather how to convince systems to abandon failed practices and instead embrace approaches proven to work.

B. Joining Forces Across Reform Efforts

At this moment of opportunity, educational equity advocates should join forces with justice reformers to advance a holistic vision of racial equity—what Professor Gary Blasi has called “practic[ing] prin-

280. *Roper v. Simmons*, 543 U.S. 551, 567-70 (2005) (citing developmental research that, compared to adults, adolescents have diminished decision-making ability, are vulnerable to coercion from peers, and have unformed identities).

281. *Graham v. Florida*, 130 S. Ct. 2011, 2026 (2010) (noting that “developments in psychology and brain science continue to show fundamental differences between juvenile and adult minds”).

282. In many respects, the United States is out of step with international norms regarding juvenile justice. For example, the *United Nations Guidelines on the Prevention of Juvenile Delinquency* state that schools “should avoid criminalizing and penalizing a child for behaviour that does not cause serious damage to the development of the child or harm to others.” See *United Nations Guidelines on the Prevention of Juvenile Delinquency [Riyadh Guidelines]*, A/RES/45/112, Annex, P 5 (Dec. 14, 1990), available at <http://www.un.org/documents/ga/res/45/a45r112.htm>. In addition, the United Nations Convention on the Rights of the Child mandates that youth be arrested, detained, or imprisoned “only as a measure of last resort and for the shortest appropriate period of time.” United Nations Convention on the Rights of the Child, art. 37(b), available at <http://www2.ohchr.org/english/law/crc.htm>.

283. See Scott & Steinberg, *Social Welfare and Fairness in Juvenile Crime Regulation*, *supra* note 85, at 35-36 n.4 (“In the past few years, policymakers have retreated somewhat from the punitive reforms of the 1990s, often pointing to research on juveniles’ developmental immaturity.”).

284. See Soler, Shoenberg & Schindler, *supra* note 15, at 489-97.

285. See *Reforming the Juvenile Justice System to Improve Children’s Lives and Public Safety: Hearing Before the Comm. on Education and Labor*, 111th Cong. 65 (2010) (statement of Steven Teske, Clayton County J.). Clayton County Judge Steven Teske bluntly told the United States House Committee on Education and Labor that to learn what programs are effective for youth in the justice system, they can “just Google it.” See *id.*

ciplined solidarity.”²⁸⁶ There is power in numbers.²⁸⁷ By focusing exclusively on education reform or exclusively on justice reform, advocates make themselves vulnerable to “the divide and conquer strategies of the opposition.”²⁸⁸ Nowhere is this susceptibility to “divide and conquer” strategies more evident than in the criminal and juvenile justice realms.²⁸⁹ Though creative and effective advocates are working to improve the criminal and juvenile justice systems, in relation to the scale and scope of mass incarceration, surprisingly few advocates are willing to stand up for those youth and adults who find themselves entangled with the justice system.²⁹⁰ For other social justice advocates who do not focus on justice system reform, it may be tempting to ignore “troublemakers” or “bad kids” in their advocacy. By disassociating themselves with those who society labels “criminal,” advocates might be making strategic determinations about their best chances for success on any particular issue.²⁹¹ However, social justice reform efforts that marginalize those involved with the criminal and juvenile justice systems risk falling short of their goals over the long term.²⁹²

Mass incarceration is best understood as a system of racial control rather than crime control.²⁹³ Its impacts reverberate across entire communities of color. True social and racial equality cannot be attained as long as crime remains racialized in the public discourse and those most marginalized in society remain disproportionately subject

286. See Gary Blasi, *Fifty Years After Brown v. Board: Five Principles for Moving Ahead*, 11 *ASIAN L.J.* 324, 327-28 (2004).

287. See *id.*

288. *Id.* at 327 (“Those of us lucky enough to have jobs talking and writing for a living tend to develop specialties, so do most advocates and activists. We focus on housing, on health, on welfare, on juvenile justice, on workers’ rights, or on education. And then we further specialize.”).

289. See, e.g., Joseph E. Kennedy, *The Jena Six, Mass Incarceration, and the Remoralization of Civil Rights*, 44 *HARV. C.R.-C.L. L. REV.* 477, 478-80 (2009) (describing “the marginalization of criminal justice issues as core civil rights concerns” and arguing that “[d]irectly challenging racially disproportionate mass incarceration is essential to ‘remoralizing’ and reinvigorating the quest for racial justice for those most vulnerable to other forms of discrimination. The mass incarceration of African Americans is the unguarded and badly exploited flank of the movement for racial justice. Defending that flank is important to civil rights progress on any other front.”).

290. See ALEXANDER, *supra* note 41, at 212 (“[W]hat is most striking about the civil rights community’s response to the mass incarceration of people of color is the relative quiet.”); Noguera, *supra* note 30, at 349.

291. See ALEXANDER, *supra* note 41, at 214 (“Advocates have found they are more successful when they draw attention to certain types of black people (those who are easily understood by mainstream whites as ‘good’ and ‘respectable’)”).

292. *Id.* at 217 (“We must face the realities of the new caste system and embrace those who are most oppressed by it if we hope to end the new Jim Crow.”).

293. *Id.* at 225.

to the justice system. Poverty law crusaders, education equity advocates, child welfare reformers, LGBT activists, immigrants' and women's rights groups, civil rights organizations, and others who fight for social justice will have a difficult time achieving true equality for their various constituencies as long as the system of mass incarceration remains unchallenged. Only by banding together will advocates hold the greatest prospects for fundamentally changing how society treats communities of color. In Blasi's words, "[I]n solidarity there is power; in division there is inevitable defeat."²⁹⁴

C. Policy Priorities

In order to dismantle the systems' reliance on incarceration, move toward a more humane, rehabilitative approach to youth and promote a focus on prevention and positive interventions, a number of policy reforms are needed. Understanding that resources are limited, and it may be unrealistic for education advocates to develop the expertise and find the time to weigh in on all criminal and juvenile justice reform issues, below are a few concrete policy goals that lend themselves particularly well to cross-disciplinary advocacy.

At the federal level, two relevant laws are pending reauthorization. They include the No Child Left Behind Act,²⁹⁵ the federal education accountability law that imposes sanctions on schools whose students do not show yearly progress on standardized tests, and the Juvenile Justice and Delinquency Prevention Act,²⁹⁶ which sets federal requirements for state juvenile justice systems and conditions federal funding to states on compliance with those requirements.²⁹⁷ During the reauthorization process, education and juvenile justice advocates can collaborate to promote the strengthening of each of these laws in ways that will protect the rights of youth in both juvenile justice and education.²⁹⁸ Specifically, the No Child Left Behind Act should be amended to:

294. Blasi, *supra* note 286, at 328.

295. No Child Left Behind, Pub. L. No. 107-110, 115 Stat. 1425 (2002).

296. Juvenile Justice and Delinquency Prevention Act, Pub. L. No. 93-415, 88 Stat. 1109 (1974).

297. Under the Act, states receiving federal funds must abide by four core mandates, which include deinstitutionalizing status offenders, removing youth from adult jails and lock-ups with limited exceptions, requiring "sight and sound" separation in those instances in which youth are placed in adult facilities, and assessing and addressing racial disparities in the system. Juvenile Justice Delinquency Prevention Act of 1974, Pub. L. No. 93-415, 88 Stat. 1122 (1974).

298. For a more comprehensive list of recommendations regarding the reauthorization of the No Child Left Behind Act and the Juvenile Justice and Delinquency Prevention Act, see ACT 4

- Require schools to collect and report data on suspensions, expulsions, arrests, and referrals to juvenile court, disaggregated by race, ethnicity, English Language Learner status, sex, socioeconomic status, and special education status;²⁹⁹
- Create mechanisms for intervention to help schools adopt research-based responses to student behavior when disciplinary rates rise above certain levels;³⁰⁰
- Provide increased funding for schools to adopt research-based alternatives to suspensions, expulsions, and arrests of students who violate school rules or commit low-level offenses;³⁰¹ and
- Mandate collaboration between local stakeholders, including schools, law enforcement, prosecutors, defense attorneys, judges, probation officers, and others to establish procedures and programs that limit the use of juvenile courts for student misbehaviors.³⁰²

The Juvenile Justice and Delinquency Prevention Act³⁰³ should be strengthened to

- Eliminate the “valid court order exception” to the Act’s core requirement that states deinstitutionalize status offenders (or youth who commit non-criminal misbehaviors like skipping school). This exception, which allows judges to order youth incarcerated if they violate a court order, has come to “swallow the rule” in some states;³⁰⁴ and
- Provide more detailed guidance to states on how to comply with the Act’s core mandate requiring that states address “Disproportionate Minority Contact” (which refers to racial and ethnic disparities in the juvenile justice system) and hold states accountable for their efforts;³⁰⁵

JUVENILE JUSTICE, www.act4jj.org (last visited Jan. 27, 2011); ESEA REAUTHORIZATION, *supra* note 140, at 5; TEST, PUNISH, AND PUSH OUT, *supra* note 112, at 4, 8; Soler, Shoenberg & Schindler, *supra* note 15. For policy recommendations on issues related to zero-tolerance policies and school arrests, see TEST, PUNISH, AND PUSH OUT, *supra* note 112.

299. See ESEA REAUTHORIZATION, *supra* note 140, at 5.

300. *Id.*

301. *Id.*

302. *Id.*; FED. ADVISORY COMM. ON JUVENILE JUSTICE, *supra* note 193, at 13.

303. Juvenile Justice and Delinquency Prevention Act, Pub. L. No. 93-415, 88 Stat. 1109 (1974).

304. Patricia J. Arthur & Regina Waugh, *Status Offenses and the Juvenile Justice and Delinquency Prevention Act: The Exception that Swallowed the Rule*, 7 SEATTLE J. SOC. JUST. 555, 559, 560-64 (2009) (“[T]he VCO exception has resulted in the continued use of confinement as a response to status-offender behaviors, contrary to the original goal of the Act.”).

305. See W. HAYWOOD BURNS INST., ADORATION OF THE QUESTION: REFLECTIONS ON THE FAILURE TO REDUCE RACIAL & ETHNIC DISPARITIES IN THE JUVENILE JUSTICE SYSTEM 15

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- Extend the protections of the Act to youth tried in adult courts;³⁰⁶
- Expand federal funding for juvenile justice, including providing more funding incentives for states to comply with the Act and to adopt programs that are effective at intervening with youth in the justice system.³⁰⁷

At the state level, advocates should promote laws and policies that prohibit or seriously limit the use of punitive exclusionary responses to minor student misbehaviors. This includes working to:

- remove SROs from school campuses altogether;³⁰⁸
- push for the decriminalization of low-level behaviors that pose no public safety threat, such as “disturbing schools” or “talking back to teachers” and prohibit the application of vague offenses like “disorderly conduct” or “disturbing the peace” to student conduct on school campus;
- eliminate zero-tolerance policies;
- promote the use of research-based interventions that are effective at reducing school discipline problems and improving school climate, such as PBIS, and other promising approaches, like restorative justice;
- ensure that services exist to address the needs of students with incarcerated parents;
- ensure that suspensions, expulsions, and arrests can only be used where immediate safety threats exist and where no other interventions are available;
- limit the ability of schools to refer cases to juvenile court for minor offenses and ensure that juvenile court is used only for more serious offenses and only as a last resort;
- end the justice system’s overreliance on detention and incarceration by creating community-based alternatives to incarceration, grounded in research on effective programs, and reserve detention and incarceration only as a last resort and only when no alternatives exist to protect public safety; and

(2008), available at http://burnsinstitute.org/downloads/BI%20Adoration%20of%20the%20Question_2.pdf.

306. See ACT 4 JUVENILE JUSTICE, JUVENILE JUSTICE AND DELINQUENCY PREVENTION ACT (“JJJPA”) RECOMMENDATIONS AND BACKGROUND (2010), available at http://act4jj.org/media/factsheets/factsheet_56.pdf.

307. *Id.*

308. For policy recommendations related to improving the effectiveness of SROs at keeping youth out of juvenile courts, see Thureau & Wald, *supra* note 145, at 977.

- create oversight and accountability mechanisms that empower community members to regularly review data on school discipline and juvenile justice at the local level and initiate a process for providing state intervention at the local level when data suggests that schools or courts are not meeting certain agreed-upon standards.³⁰⁹

In addition, advocates should ensure that more funding is available for K-12 education by attacking the problem of bloated corrections budgets. Specifically, advocates should:

- push for the creation of state funding structures (similar to those adopted in Ohio, Illinois, and other states) that create fiscal incentives for local jurisdictions to develop more community-based prevention and intervention services rather than rely on incarcerating youth far from their homes.³¹⁰ Some of the savings realized from reducing incarceration rates can be reinvested in school programs, such as PBIS, that have been shown through research to improve school climate and educational outcomes.
- advance adult sentencing reforms, such as reducing the use of incarceration for low-level and drug offenses, prohibiting the use of incarceration for technical probation and parole violations, and reducing the terms of probation and parole after someone has served his or her sentence.³¹¹

Finally, advocates should promote effective reentry for incarcerated youth by working to:

- limit the collateral consequences of juvenile adjudications through the imposition of more stringent confidentiality protections for juvenile records;
- improve the quality of education, including special education services, and other services that youth receive while incarcerated;

309. See ESEA REAUTHORIZATION, *supra* note 140, at 5 (recommending establishment of “a process by which unusually high disciplinary rates—as well as pronounced disparities in such rates along race, gender, disability, socioeconomic status, and language lines—trigger required technical assistance and support, rather than punishment, from state and local educational agencies”).

310. For a description of various state innovations to realign and reduce spending while preserving progressive programming, see THE REAL COSTS AND BENEFITS OF CHANGE, *supra* note 278.

311. See BUTLER, *supra* note 14, at 182 (noting that one study found that these three reforms would cut the prison population in half without any harm to public safety and with significant cost-savings to the public).

- enhance reentry services for youth returning to school from correctional facilities; and
- eliminate barriers to school reenrollment for youth leaving correctional facilities, including ensuring that credits earned while incarcerated transfer to the youth's home school.³¹²

D. Shifting Public Consciousness

By joining forces to advance these policy reforms, educational equity advocates and justice system advocates can maximize their collective impact and make meaningful progress in the fight for racial justice. Policy reform alone, however, is unlikely to reverse the mass incarceration course on which we have set ourselves.³¹³ In order to significantly improve how society treats low-income communities of color, a more fundamental shift in public opinion is also needed.

Currently, the education and justice systems both bend heavily toward punishment. As long as young students of color are viewed as criminals-in-the-making by the social systems with which they have to interact daily, the likelihood remains that one repressive policy will merely be replaced with another. To sustain policy victories over the long term, even after the economy eventually rebounds and the budget incentives for reducing incarceration become less salient, it is necessary to shift society's views on crime and punishment.³¹⁴ Shifting public attitudes is critical,³¹⁵ given that the structural inequities that pervade the education and justice systems have, in many instances, come to feel normal to or expected by the public at large. Race and crime must be separated in the minds of the public.³¹⁶

Changing public consciousness requires sophisticated and dedicated work. Michelle Alexander argues that “nothing short of a major social movement” that “confront[s] squarely the critical role of race in the basic structure of our society” is needed.³¹⁷ Similarly, James Forman has argued that dismantling mass incarceration will require what Martin Luther King Jr. and his contemporaries possessed: the ability

312. ESEA REAUTHORIZATION, *supra* note 140, at 2.

313. See ALEXANDER, *supra* note 41, at 221 (“The notion that all of these reforms can be accomplished piecemeal—one at a time, through disconnected advocacy strategies—seems deeply misguided.”).

314. See *id.* at 222 (discussing the need for a fundamental shift in consciousness).

315. Stoddard, *supra* note 206, at 991.

316. See ALEXANDER, *supra* note 41, at 227 (arguing for the need for race-conscious advocacy to challenge the criminalization and demonization of black men).

317. *Id.* at 18.

to appeal to the broader public's self-interest while also making the "moral claims about segregation's fundamental inhumanity."³¹⁸ Thus, fiscal arguments about the societal costs of mass incarceration are important, but they cannot be the only arguments made in the fight to dismantle mass incarceration.³¹⁹ Advocates must not shy away from the moral arguments in their efforts to achieve equity.

Integral to such an effort to challenge the prevailing public discourse is the mobilization of communities disproportionately targeted for mass incarceration and affected by its attendant educational impacts. As Thomas Stoddard explained, "How change is made matters almost as much as what is, in the end, done."³²⁰ Advocates must work side-by-side with these communities, helping to build their voice in the movement, or else long-term success will not be achieved.³²¹ The education and justice systems must be held accountable to these communities. For far too long, these systems have intervened in the lives of many low-income children of color in the name of serving their best interests even though the interventions often caused more harm than good. In some cases, underlying this willingness to intervene is a notion that the families and communities cannot be trusted to rear the children themselves. Advocates only reinforce such stereotypes if they do not engage with and learn from the communities with the most to gain (or lose) from a movement to dismantle mass incarceration.

CONCLUSION

The goals of achieving educational equity and dismantling the system of mass incarceration in the United States are inextricably linked. Schools have adopted the punitive philosophies of and worked hand-in-hand with the justice system to perpetuate the mass incarceration of students of color. In addition, schools have suffered negative ramifications because of mass incarceration, including being ill-equipped to appropriately meet the needs of those students whose parents are behind bars and having to compete for funding in the face of skyrocketing corrections budgets. Reform movements cannot focus

318. Forman, Jr., *supra* note 62, at 1010.

319. See ALEXANDER, *supra* note 41, at 226-27 (discussing the dangers in relying on fiscal arguments to challenge mass incarceration).

320. Stoddard, *supra* note 206, at 977.

321. See ALEXANDER, *supra* note 41, at 212-14 (criticizing civil rights lawyers' insider strategy).

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on education or justice in isolation. To achieve sustainable improvements in the lives of students of color, advocates must unite with each other and join with communities to demand the end of harmful and counterproductive education and justice system policies that prioritize punishment and exclusion over education and opportunity.

Equal Liberties and English Language Learners: The Special Case of Structured Immersion Initiatives

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INTRODUCTION

Structured English Immersion (“SEI”) initiatives, which require that English language learners be taught overwhelmingly in English, prohibit teachers from using generally accepted techniques that employ a child’s native language as a bridge to acquiring English. These measures represent an unprecedented incursion on the traditional approach to making educational choices. Typically, states regulate public schools by mandating hours of instruction, teacher qualifications, subject-matter content, and accountability regimes; however, officials try not to micro-manage pedagogical methods. This reluctance re-

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flects a belief that learning is a complex process, so instructors must retain some discretion to tailor techniques to meet individual needs. Parents and students play an integral role by offering feedback on the success or failure of a school's curriculum and teaching. This ongoing dialogue ideally leads to responsive and effective instructional programs. SEI initiatives reject this framework by imposing statewide requirements that limit local flexibility. A single teaching method is prescribed for all English language learners, and few exceptions are recognized.

Although several states have passed these measures, I will focus primarily on the California statute because it has the longest history, has prompted the most extensive litigation and commentary, and is the story that I know best. In this Article, I will review the key provisions of SEI initiatives and then turn to the limits of lawsuits that have relied on a traditional civil rights approach to challenge these measures. I will suggest that equality claims rooted in analogies to race ignore unique features of language as a means of transmitting culture and values. To fully elaborate protections for English language learners and their parents, it will be important to consider liberty interests that protect a family's linguistic and cultural heritage from excessive state intrusion.

As this Article will show, even though SEI initiatives are extraordinarily prescriptive, most legal challenges to the measures have failed. This pattern reflects difficulties in analogizing language to identity traits that are deemed immutable and presumptively irrelevant to questions of government policy and individual desert. When officials allocate benefits or burdens based on a category that is considered analogous to race, courts are profoundly suspicious that the action must, by definition, be arbitrary and thus likely motivated by animus. Indeed, this kind of unfounded bias is the basis for finding a constitutional violation. Undergirding the traditional civil rights framework is an assumption that race and similar traits can be reduced to biological irrelevancies. Although this view has been questioned, it justifies the judiciary's embrace of colorblindness as a normatively neutral ideal.

Whatever the debate over colorblindness as a constitutional aspiration, it is hard to imagine how courts can be deaf to linguistic diversity. Language is far from irrelevant to the ability to participate in the educational process, and therefore attending to linguistic difference is an integral part of sound pedagogy. Yet, because courts afford consti-

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tutional protection only when they find irrational animus, the safeguards for English language learners who challenge language policy have been significantly diluted. In order to obtain relief, these students must establish an egregious abuse of discretion. Indeed, to be actionable, deficiencies in language instruction have to be grave enough to deny children a meaningful opportunity to learn.

This traditional civil rights framework ignores significant differences between language and race. Courts already have recognized the constitutive role of language in other legal contexts. In these cases, the focus is not on equality but on liberty. Judges have been steadfast in recognizing a parent's right to bring up a child free of undue governmental interference, and an integral part of this freedom is the capacity to transmit the patrimony of language and culture. These decisions raise the possibility that courts should evaluate SEI initiatives by considering both the equality and liberty interests that are implicated. In particular, public schools could be required to uphold a principle of equal liberties that would protect a linguistic minority parent's right to participate in shaping his or her child's education on the same terms as other parents do. SEI initiatives, by substantially constraining a parent's voice in instructional decisions, arguably would violate this norm of basic fairness.

I. LEGISLATING "THE ONE BEST SYSTEM" FOR ENGLISH LANGUAGE LEARNERS: THE RISE OF STRUCTURED ENGLISH IMMERSION INITIATIVES

In 1998, California voters went to the polls to pass Proposition 227, the "English for the Children" initiative.¹ The initiative requires that all English language learners be placed in SEI programs taught overwhelmingly in English; however, children can receive assistance from aides who speak the native language. After one year, students are expected to transfer to classes taught exclusively in English without receiving any further special assistance.² There are only a few exceptions to the mandate. Parents can seek waivers for children who are already proficient in English, who are ten years of age or older and would benefit from a different program of instruction, or who have special needs that are not met after a thirty-day trial period in

1. John J. Attinasi, *English Only for California Children and the Aftermath of Proposition 227*, 119 EDUC. 263, 263-83 (1998).

2. CAL. EDUC. CODE §§ 305, 306(b) (West 2010).

the SEI program.³ If the parents of more than twenty students in a single grade level seek waivers, a school can respond by offering programs that rely more heavily on native-language instruction.⁴ These can include transitional bilingual education, which uses the child's first language as a bridge to learning English, or maintenance education, which preserves a child's facility in two or more languages. Obtaining a waiver is not easy. Parents have to apply in person, and the award of waivers is not automatic.⁵ In practice, because of the wide-ranging discretion that SEI initiatives confer, school districts vary widely in the number of requests granted.⁶ Only charter schools, which are wholly exempt from the initiative's requirements, can offer alternative instructional methods without obtaining waivers.⁷

To ensure compliance with the law's provisions, parents and guardians are empowered to act as private attorneys-general and may bring suit against teachers who willfully and repeatedly make excessive use of a language other than English in SEI classes. If the litigation succeeds, teachers can be held personally liable for damages.⁸ In other situations, public school instructors enjoy immunity from charges of educational malpractice based on choices about teaching

3. *Id.* § 311.

4. *Id.* § 310.

5. *Id.*

6. See AM. INSTS. FOR RESEARCH & WESTED, EFFECTS OF THE IMPLEMENTATION OF PROPOSITION 227 ON THE EDUCATION OF ENGLISH LEARNERS, K-12, at II-15 to -18 (2006), available at http://www.wested.org/online_pubs/227Reportb.pdf; see generally Eugene E. García & Julia E. Curry-Rodríguez, *The Education of Limited English Proficient Students in California Schools: An Assessment of the Influence of Proposition 227 in Selected Districts and Schools*, 24 BILINGUAL RES. J. 15 (2000) (examining select findings from one district's implementation of Proposition 227 and determining how teachers react when confronted with competing pedagogical demands).

7. EDUC. § 47605 (West 2010); see Kirsten Gullixson, *California Proposition 227: An Examination of the Legal, Educational, and Practical Issues Surrounding the New Law*, 17 LAW & INEQ. 505, 530-31 (1999).

8. EDUC. § 320 (West 2010). For a description of the impact of this provision on teachers, see Patricia Gándara, *In the Aftermath of the Storm: English Learners in the Post-227 Era*, 24 BILINGUAL RES. J. 1 (2000) (describing how numerous educational reforms and limited data prevent drawing conclusions about the independent effects of Proposition 227); Anita Tijerina Revilla & Jolynn Asato, *The Implementation of Proposition 227 in California Schools: A Critical Analysis of the Effect on Teacher Beliefs and Classroom Practices*, 35 EQUITY & EXCELLENCE EDUC. 108, 108 (2002), available at <http://www.u.arizona.edu/~rgolden/Implementing227calif.pdf>; Tom Stritikus & Eugene E. García, *Education of Limited English Proficient Students in California Schools: An Assessment of the Influence of Proposition 227 on Selected Teachers and Classrooms*, 24 BILINGUAL RES. J. 75 (2000), available at http://education.washington.edu/areas/ci/profiles/Stritikus/BRJ_24.pdf (revealing that the nature of Proposition 227 implementation has a great deal to do with teacher's pedagogical commitments).

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methodology. In *Peter W. v. San Francisco Unified School District*,⁹ the First Appellate District of the California Court of Appeal made clear that it did not want to sit as a super-school board that evaluates complex judgments about how children learn and how they should be taught.¹⁰ The court observed that “classroom methodology affords no readily acceptable standards of care, or cause, or injury. The science of pedagogy itself is fraught with different and conflicting theories of how or what a child should be taught, and any layman might—and commonly does—have his own emphatic views on the subject.”¹¹ With respect to SEI programs, however, judges must make just this sort of fraught pedagogical judgment whenever a parent or guardian lodges a complaint that too little English is being used in the classroom.

Proposition 227’s passage initially prompted speculation that courts might recognize educational malpractice claims more generally; however, a teacher’s liability for excessive use of a language other than English in SEI programs remains unique in California public education law.¹² Given the pervasive lack of remedies for educational harms that a student may suffer, the breadth of the private right of action under Proposition 227 is especially striking. Peter W. had no right to sue because he graduated from high school as a functional illiterate, but parents of English-speaking children can seek Draconian sanctions against teachers and administrators, even when their own children are not in an SEI program.¹³

Proposition 227 is an amendment to the California Education Code rather than a state constitutional provision, but the SEI mandate is protected by special barriers to repeal or amend it. Like other initiatives, this one can be overturned by another statewide referendum.¹⁴ If reformers do not want to go back to the ballot box, the legislative options are limited. The state assembly and senate cannot alter Proposition 227 by a simple majority vote; instead, a

9. *Peter W. v. San Francisco Unified Sch. Dist.*, 131 Cal. Rptr. 854 (Ct. App. 1976) (affirming dismissal of a high school graduate’s claim against the school district for alleged negligence and intentional misrepresentation for “depriv[ing] him of basic academic skills”).

10. *Id.* at 861.

11. *Id.* at 860-61.

12. See Todd A. DeMitchell & Terri A. DeMitchell, *Statutes and Standards: Has the Door to Educational Malpractice Been Opened?*, 2003 BYU EDUC. & L.J. 485, 507-10 (2003).

13. The right of the parent of any child to sue teachers or administrators for non-compliance is even clearer under Arizona’s SEI law. ARIZ. REV. STAT. § 15-754 (LexisNexis 2010).

14. CAL. CONST. art. II, § 10(c).

supermajority of two-thirds is necessary.¹⁵ The effort to lock in a particular method of instruction for the foreseeable future, regardless of intervening developments in educational research, is an unprecedented step—one that has not been taken with respect to other aspects of the state curriculum.¹⁶ As a matter of state school policy, then, the SEI mandate imposes some unusual burdens with its cumbersome waiver requirements, the chilling prospect of personal liability for teachers and administrators, and a series of roadblocks to seeking change through the political process. All of these features reinforce the rigidity of the state's centralized mandate on teaching methodology.

Proposition 227 was the first SEI initiative but not the last. Following California's example, voters in Arizona approved a similar measure in 2001, and voters in Massachusetts did so in 2002.¹⁷ These initiatives closely resemble one another and all are a way to legislate "the one best system" for teaching children English. Educational historian David Tyack used this term in another context to describe the rise of regulation, consolidation, and professionalization of urban school systems in the late 1800s and early 1900s. Faced with student populations that included newly arrived immigrants, school officials wanted to free themselves from the strictures of lay governance used in small, homogeneous rural areas.¹⁸ Convinced that educators knew what was best for immigrant students, big-city school officials pursued standardization and centralized control that would entrench professional values and training.¹⁹

15. CAL. EDUC. CODE § 335 (West 2010); see Valeria G. v. Wilson, 12 F. Supp. 2d 1007, 1025 (N.D. Cal. 1998), *aff'd sub nom.* Valeria G. v. Davis, 307 F.3d 1036 (9th Cir. 2002). As with other bills approved by the legislature, the law also would have to be signed by the governor. Because the provision would have to receive a two-thirds vote in each house, a gubernatorial veto presumably could be overridden.

16. See Elizabeth T. Bangs, *Who Should Decide What Is Best for California's LEP Students? Proposition 227, Structural Equal Protection, and Local Decision-Making Power*, 11 LA RAZA L.J. 113, 125 (2000).

17. See Charu A. Chandrasekhar, *The Bay State Buries Bilingualism: Advocacy Lessons from Bilingual Education's Recent Defeat in Massachusetts*, 24 CHICANO-LATINO L. REV. 43, 43-44 (2003); Lisa B. Ross, *Learning the Language: An Examination of the Use of Voter Initiatives to Make Language Education Policy*, 82 N.Y.U. L. REV. 1510, 1518-19 (2007); William Ryan, *The Unz Initiatives and the Abolition of Bilingual Education*, 43 B.C. L. REV. 487, 505-06 (2002); Mary Ann Zehr, *Colorado Extends Bilingual Education, but Massachusetts Voters Reject It*, EDUC. WK., Nov. 13, 2002, at 22, available at 2002 WLNR 5634995.

18. See generally DAVID B. TYACK, *THE ONE BEST SYSTEM: A HISTORY OF AMERICAN URBAN EDUCATION* 21-27 (1974) (describing how professional educators sought to introduce "a one best system" for rural schooling in the late nineteenth and early twentieth centuries as immigrants, industrialization, and urbanism entered country life).

19. *Id.* at 39-59, 68-77.

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Although SEI measures impose a uniform teaching method, they draw on very different ideological commitments than the movement toward professionalization that Tyack described. Through popular initiatives, lay voters not only have usurped local control with a state-wide mandate, but also have divested educators of the authority to make expert pedagogical judgments. The electorate has shown little faith in the ability of either educators or parents to make sound decisions about the instruction of English language learners. Perhaps voters harbor growing fears that language policy has become embroiled in highly polarized identity politics—ones that tempt teachers and administrators alike to succumb to linguistic minorities' single-minded demands for native-language instruction.²⁰

In the 1960s, centralized control and standardization came under attack when minority parents in urban areas grew disenchanted with professional authority. As Tyack notes:

[M]any members of outcast groups demanded community control by their own people in place of the traditional corporate model of governance which sought to rise above “interest groups”; they substituted self-determination as a goal instead of assimilation; they rejected “equality” if that meant Anglo-conformity, sameness, and familiar failure in the “one best system.”²¹

Reflecting this disenchantment, the community control movement became a prominent feature of urban school politics. By the 1980s, local organizing efforts had stalled in part because of intense and divisive confrontations with teachers' unions. These acrimonious battles reinforced an image of minority groups in pursuit of a dubious agenda of identity politics at the expense of educational professionalism.²² Not surprisingly, in light of this checkered history, SEI initiatives have shown little, if any, faith in the promise of self-determination for linguistic minority communities.

As community control lost its political traction, market-oriented proponents of school choice offered a new way to think about parental freedom to direct a child's education. In pressing for charter schools and voucher programs, advocates of choice insisted that parents, particularly in low-income communities of color, should be at liberty to vote with their feet by removing children from failing public

20. See Rachel F. Moran, *Bilingual Education as a Status Conflict*, 75 CAL. L. REV. 321, 341-55 (1987).

21. TYACK, *supra* note 18, at 284.

22. See DIANE RAVITCH, *THE GREAT SCHOOL WARS: NEW YORK CITY, 1805-1973: A HISTORY OF THE PUBLIC SCHOOLS AS BATTLEFIELD OF SOCIAL CHANGE* 391-94 (1974).

schools.²³ Although the choice movement remains highly influential today, SEI initiatives have opted for strong, centralized control that dramatically limits parents' options unless they can afford private alternatives. Charter schools continue to offer a range of programs, but the vast majority of public schools are bound to employ a single pedagogical method for teaching English language learners. The initiatives, in effect, have enacted a curricular monopoly that constrains the autonomy of school administrators, teachers, parents, students, and community members alike.

II. RACE, LANGUAGE, AND THE LIMITS OF NON-DISCRIMINATION LAW

Nearly every legal challenge to provisions in SEI initiatives has been framed in the language of non-discrimination. This is hardly surprising because language rights jurisprudence is rooted in a paradigm of equality designed to overcome racial isolation and subordination. The high-water mark for this approach came with *Brown v. Board of Education*,²⁴ which struck down state-mandated segregation as unconstitutional.²⁵ Congress in turn enacted the Civil Rights Act of 1964²⁶ to enforce *Brown's* mandate and dismantle segregation.²⁷ So strong are the civil rights parallels that *Lau v. Nichols*,²⁸ the Supreme Court's leading decision on language and access to instruction, is sometimes referred to as the *Brown v. Board of Education* for English language learners.²⁹ In *Lau*, a group of Chinese-speaking students sued the San Francisco Unified School District, alleging that they were denied any special assistance to overcome language barriers created by an English-language curriculum. The students' attorney explicitly invoked desegregation law as the foundation for defining equal educational opportunity. In particular, he made two key arguments: that *Brown* had recognized a constitutional right to education because of the fun-

23. See Robert C. Bulman & David L. Kirp, *The Shifting Politics of School Choice*, in *SCHOOL CHOICE AND SOCIAL CONTROVERSY: POLITICS, POLICY, AND LAW* 36 (Stephen D. Sugarman & Frank R. Kemerer eds., 1999).

24. *Brown v. Bd. of Educ.*, 347 U.S. 483, 495 (1954).

25. *Id.* at 493-95.

26. Pub. L. No. 88-352, 78 Stat. 241 (1964) (codified at 42 U.S.C. § 2000d et seq. (2006)).

27. See Rosa Castro Feinberg, *Brown and Lau: Seeking the Common Ground*, in 96 *TCHRS C. REC.* 775 (1995).

28. *Lau v. Nichols*, 414 U.S. 563 (1974).

29. See John Vail & Jane Perkins, *Chipping at the Core of Justice*, 40 *TRIAL* 28 (2004); Cynthia Gorney, *Bilingual Education's Dilemmas Persist*, *WASH. POST*, July 7, 1985, at A1, available at LEXIS (search for source).

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damental importance of schools in preparing children for work and citizenship and that the Office for Civil Rights (“OCR”) had extended the non-discrimination principle under Title VI of the Civil Rights Act of 1964 to children who did not speak English, at least where language served as a proxy for race, ethnicity, or national origin.³⁰

Although both claims were inspired by *Brown*, they proceeded on distinct theories of inclusion. The argument for a right to education grew out of the Court’s observation that education had become “the most important function of state and local governments” and that “it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education.”³¹ Without a proper educational foundation, children would become captives of ignorance, unable to develop mature identities as workers and citizens. The Court’s language seemed to suggest that the freedom of all children to flourish as adults depended on a constitutionally protected right to equal educational opportunity.

By contrast, Title VI mandated that “[n]o 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.”³² In 1970, the OCR interpreted this provision to cover language when it served as a proxy for race, ethnicity, or national origin and was used to perpetuate discriminatory practices. According to the OCR memorandum, “[w]here inability to speak and understand the English language excludes national origin-minority group children from effective participation in the educational program offered by a school district, the district must take affirmative steps to rectify the language deficiency in order to open its instructional program to these students.”³³

The principle of non-discrimination under Title VI was aimed at making race, ethnicity, and national origin irrelevant to the services that children receive in public schools.³⁴ Embedded in this analysis was an assumption that these traits are accidents of birth that have

30. See Rachel F. Moran, *The Story of Lau v. Nichols: Breaking the Silence in Chinatown*, in *EDUCATION LAW STORIES* 111, 118-20 (Michael A. Olivas & Ronna Greff Schneider eds., 2007).

31. *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954).

32. Title VI of the Civil Rights Act of 1964 § 601, 42 U.S.C. § 2000d (2006).

33. Office for Civil Rights, *Identification of Discrimination and Denial of Services on the Basis of National Origin*, 35 Fed. Reg. 11,595 (July 18, 1970).

34. See *supra* notes 31-32.

nothing to do with merit or desert.³⁵ As a result, curricular policy should be neutral with respect to language just as student assignment policies should be with respect to race. The OCR's conclusion that forms of discrimination based on language and race are interchangeable was consistent with the Supreme Court's jurisprudence following *Brown*. In cases after *Brown* and leading up to *Lau*, the Court had repeatedly refused to recognize any distinctions among racial, ethnic, and national origin groups in lawsuits that raised questions about trade-offs between busing and bilingual education.³⁶ In San Francisco, students and their parents opposed a desegregation plan that removed children from Chinatown and prevented them from enrolling in programs that would address their special linguistic and cultural needs.³⁷ In Denver, Latino students and their parents raised similar objections to a busing plan that interfered with bilingual-bicultural instruction.³⁸ In both cases, linguistic minorities argued that they had a right to recognition of their unique identity and heritage and therefore deserved protection from the assimilative impact of desegregation.

The Court uniformly rebuffed demands to temper court-ordered school integration in deference to linguistic and cultural autonomy. The Court already had disregarded liberty claims of whites who insisted that forced busing infringed on the freedom to associate with those of their own choosing, that is, other whites.³⁹ These associational freedom arguments were equated with thinly-veiled racism. The Court subsumed the demands of Chinese and Latino parents within this existing debate over white resistance, which had been framed as the defining conflict between liberty and equality interests.⁴⁰ According to the Justices, race could be a mark of wrongful discrimination and subordination but not of an autonomously chosen set of cultural commitments.⁴¹ Chinese and Latino parents who

35. Rachel F. Moran, *Rethinking Race, Equality, and Liberty: The Unfulfilled Promise of Parents Involved*, 69 OHIO ST. L.J. 1321, 1336-38 (2008).

36. See, e.g., *Guey Heung Lee v. Johnson*, 404 U.S. 1215 (1971); see also *Keyes v. Sch. Dist. No. 1*, 413 U.S. 189 (1973).

37. *Guey Heung Lee*, 404 U.S. at 1217-18; see Moran, *The Story of Lau v. Nichols*, *supra* note 30, at 115-16.

38. Rachel F. Moran, *Courts and the Construction of Racial and Ethnic Identity: Public Law Litigation in the Denver Schools*, in *LEGAL CULTURE AND THE LEGAL PROFESSION* 153, 155-65 (Lawrence M. Friedman & Harry N. Scheiber eds., 1996).

39. See Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 33-34 (1959).

40. See *Guey Heung Lee*, 404 U.S. at 1216 (“*Brown v. Board of Education* was not written for blacks alone.”).

41. Moran, *The Story of Lau v. Nichols*, *supra* note 30, at 113, 115-16.

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thought otherwise were characterized as victims of a false consciousness, which aligned them with white opponents of integration, when the Court already had concluded that, as racial and ethnic minorities, their interests were aligned with those of blacks. In reaching these results, the Justices emphasized that Jim Crow had come to Chinatown and the barrio, and so would desegregation.⁴²

This approach left no room to recognize demands for linguistic and cultural freedom; those interests were trumped by the imperative of rectifying intentional racial discrimination. In *Lau*, the Court preserved its exclusive focus on equality concerns by invoking the OCR's 1970 memorandum. The Court concluded that language could be a proxy for race, ethnicity, or national origin and that a principle of non-discrimination required that special assistance of some kind be provided to Chinese-speaking students.⁴³ By declining to consider what a liberty interest in education might mean for English language learners, the Court once again avoided the question of how public schooling affects linguistic and cultural autonomy.

The Court's reluctance to take on this issue was reinforced by a civil rights setback one year before *Lau* was decided. In *San Antonio Independent School District v. Rodriguez*,⁴⁴ a school finance case, the Justices retreated from any notion that the Constitution guarantees equal educational opportunity.⁴⁵ The decision cast serious doubt on the view that children have a fundamental right to an education because of its central place in preparing them for work and citizenship. The Court did leave open the possibility that a minimum level of access to education might be protected, but this analytical move shifted any constitutional guarantee from a promise of full inclusion to perhaps a shield against absolute deprivation.⁴⁶

When the Court agreed to hear *Lau*, the attorney for the Chinese-speaking students believed that the Justices might use the San Francisco school district's denial of any special language assistance to illustrate the unconstitutional affront of an absolute educational deprivation.⁴⁷ Rather than reach this claim, however, the Justices relied

42. See *Keyes v. Sch. Dist. No. 1*, 413 U.S. 189, 197 (1973); *Guey Heung Lee*, 404 U.S. at 1215-16; see also Moran, *The Story of Lau v. Nichols*, *supra* note 30, at 116.

43. *Lau v. Nichols*, 414 U.S. 563, 566-69 (1974).

44. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973), *reh'g denied*, 411 U.S. 959 (1973).

45. See *id.* at 29-39.

46. See *id.* at 23-24.

47. See Moran, *The Story of Lau v. Nichols*, *supra* note 30, at 130.

on the requirement of meaningful access set forth in the OCR's 1970 memorandum.⁴⁸ The memorandum, though framed as an interpretation of a non-discrimination principle, in fact reflected a reorientation from equality to minimum access in federal civil rights policy.⁴⁹ The OCR's interpretation guaranteed students meaningful but not equal or full participation. This access principle gave schools considerable leeway to develop programs because teaching methods had to be credible, not optimal, ways to include English language learners.⁵⁰ In light of the disagreement among experts about the educational effectiveness of various pedagogical approaches, both the OCR and the *Lau* Court remained agnostic as to remedies. Schools were free to rely on intensive English instruction as well as transitional or maintenance bilingual education programs.⁵¹ In the wake of the Court's decision, the OCR adopted guidelines favoring programs that made some use of a child's native language. The guidelines were designed to give *Lau* real remedial force, but they proved to be short-lived.⁵² Indeed, one critic of the Court's opinion likened the absence of any enforcement provisions to the reliance on "all deliberate speed" to temporize in desegregation cases.⁵³

Congress codified the *Lau* decision by enacting the Equal Educational Opportunities Act ("EEOA") of 1974.⁵⁴ Ironically, although the Court had rebuffed efforts to use bilingual education to temper desegregation remedies, the Nixon Administration introduced the EEOA as anti-busing legislation and characterized special programs for English language learners as alternatives to full-scale integration.⁵⁵ Like the OCR memorandum and *Lau*, the EEOA prohibited instructional programs that in effect excluded English language learners but did not specify any particular remedies.⁵⁶ Because the EEOA did not require proof of discriminatory intent but only an exclusionary impact, the law became critically important in establishing discrimination

48. *Lau*, 414 U.S. at 567-69.

49. *See id.* at 570 (Stewart, J., concurring) (describing how a child must be "exclude[d] . . . from effective participation in the educational program" to have a cause of action); *see also* Office for Civil Rights, Identification of Discrimination and Denial of Services on the Basis of National Origin, 35 Fed. Reg. 11,595 (July 18, 1970).

50. *See* Rachel F. Moran, *The Politics of Discretion: Federal Intervention in Bilingual Education*, 76 CAL. L. REV. 1249, 1267 (1988).

51. *See id.*

52. *See id.* at 1249, 1280-83, 1293-96.

53. Moran, *The Story of Lau v. Nichols*, *supra* note 30, at 135.

54. Equal Educational Opportunities Act of 1974, 20 U.S.C. § 1703(f) (2006).

55. *See* Moran, *The Politics of Discretion*, *supra* note 50, at 1271-72.

56. *See id.* at 1272.

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against English language learners.⁵⁷ Of particular importance, the legislation included a private right of action so that dissatisfied parents and students could sue in federal court.⁵⁸

In *Castaneda v. Pickard*,⁵⁹ the Fifth Circuit Court of Appeals adopted an influential three-part test to evaluate compliance with the EEOA's requirements. First, a school's program had to be based on a sound educational theory. When experts disagreed, the court's job was not to choose among competing theories but to assure that the one used by a school district was endorsed by some educators or was at least "a legitimate experimental strategy."⁶⁰ Next, a school had to implement its program in a reasonable way by "follow[ing] through with practices, resources and personnel necessary to transform the theory into reality."⁶¹ Finally, a school had to make reasonable efforts to monitor the program and to modify it as necessary. Teachers and administrators did not enjoy a perpetual license to operate a program that failed even if it was appropriate when adopted.⁶²

The *Castaneda* test further reinforced the shift from equal educational opportunity to minimum access. Reformers often complained that schools sacrificed instruction in general academic subjects to ensure that linguistic minority students acquired English as rapidly as possible.⁶³ As a result, once mainstreamed, English language learners were poorly prepared to compete with their native-English-speaking peers in content areas.⁶⁴ Despite these complaints, the programs satisfied civil rights laws that sought to avoid the stigma of educational deprivation, rather than to achieve the promise of full inclusion.⁶⁵ Because of the focus on minimum access, the *Castaneda* test turned entirely on standards specific to programs for English language learners. There was no requirement that their opportunities be comparable to those enjoyed by native English speakers. Ironically, then, a principle of universal equality modeled on *Brown* ultimately led to a standard

57. See *id.* at 1271; Rachel F. Moran, *Undone by Law: The Uncertain Legacy of Lau v. Nichols*, 16 LA RAZA L.J. 1, 6-7 (2005).

58. See Moran, *The Politics of Discretion*, *supra* note 50, at 1298.

59. *Castaneda v. Pickard*, 648 F.2d 989, 1009-10 (5th Cir. 1981).

60. *Id.* at 1009.

61. *Id.* at 1010.

62. *Id.*

63. See *id.*

64. See Stephen Krashen, *Proposition 227 and Skyrocketing Test Scores: An Urban Legend from California*, 62 EDUC. LEADERSHIP 37, 39 (2004-2005); María S. Quezada et al., *How the Reform Agenda Shortchanges English Learners*, 57 EDUC. LEADERSHIP 57, 58-59 (1999-2000).

65. Moran, *The Story of Lau v. Nichols*, *supra* note 30, at 134.

of minimum access that was narrowly particular to linguistic minority students.

Advocacy on behalf of English language learners reflected the underlying transformation of *Brown's* legacy. By 1981, the federal courts increasingly were invoking a rhetoric of colorblindness to retreat from school desegregation cases, leaving many schools racially isolated and educationally at risk.⁶⁶ Because judges attributed continuing patterns of segregation to private choices about housing rather than to state action, court-ordered busing came to an end and students often found themselves in re-segregated schools.⁶⁷ Faced with a discourse of racial equality that was ever more inefficient in getting legal results, advocates began to demand at least minimum access and a meaningful opportunity to learn for all students. Claims on behalf of English language learners mirrored these developments.

In 2009, the Supreme Court returned to the question of legal protections for English language learners for the first time since *Lau*. In *Horne v. Flores*,⁶⁸ the Justices endorsed the shift from a principle of equal opportunity to one of minimal access. Students and parents had filed suit, challenging the Nogales, Arizona school district's program for linguistic minority children.⁶⁹ A federal district court held that the instructional efforts did not comply with the EEOA because incremental funding allocated to the students' special needs bore no clear relationship to the actual funding necessary to implement the program.⁷⁰ After years of wrangling over the appropriate level of financial support, members of the state legislature and the school superintendent sought relief from the district court's order on the ground that there had been material changes in the factual and legal circumstances in the case.⁷¹ These changes included the adoption of structured English immersion as the state's method for teaching English language learners; enactment of the No Child Left Behind Act,⁷² which emphasizes outcome measures rather than educational inputs; structural and management reforms in the Nogales school district; and increased overall education funding.⁷³

66. See, e.g., *Pasadena Bd. of Educ. v. Spangler*, 427 U.S. 424, 435-37 (1976).

67. *Freeman v. Pitts*, 503 U.S. 467, 494-95 (1992).

68. *Horne v. Flores*, 129 S. Ct. 2579 (2009).

69. *Id.* at 2589.

70. *Id.* at 2589-90.

71. *Id.* at 2590-92.

72. No Child Left Behind ("NCLB"), Pub. L. No. 107-110, 115 Stat. 1425 (2002).

73. *Horne*, 129 S. Ct. at 2600.

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In finding that the lower court's order should be lifted, a majority of the Court made clear that the EEOA mandates neither equal inputs nor equal outcomes. The Justices concluded that because "there is documented, academic support for the view that SEI is significantly more effective than bilingual education," the district court needed to revisit its original conclusions.⁷⁴ The Court suggested that Nogales officials' implementation of this new instructional method might have vitiated earlier concerns about the need for increased funding.⁷⁵ The Justices went on to note that the EEOA does not require any particular level of funding for implementation because the law's "ultimate focus is on the quality of educational programming and services provided to students, not the amount of money spent on them."⁷⁶ As a consequence, the district court need not concern itself with whether reforms made better use of existing funds or whether they enhanced available funding.

If an input as critical as money was not a basis for measuring compliance with the EEOA, then it became imperative to determine what constitutes quality programming. However, the Court did not recognize a robust role for outcome measures either. The majority observed that the No Child Left Behind Act represents "a dramatic shift in federal education policy . . . by granting state and local officials flexibility to develop and implement educational programs that address local needs, while holding them accountable for the results."⁷⁷ Nonetheless, the Court refused to consider achievement gaps between English language learners and their peers, as measured by the state's accountability testing regime, in assessing compliance with the EEOA. According to the majority, the gaps might be due to variables other than the quality of the programs, but, in any event, "the EEOA requires 'appropriate action' to remove language barriers, . . . not the equalization of results between native and nonnative speakers on tests administered in English."⁷⁸ In the Court's view, then, inputs could not be reliably linked to quality of instruction, and disparities in outputs standing alone were not a matter of congressional concern.

Horne is the latest in a string of disappointments for attorneys advocating on behalf of English language learners. When states

74. *Id.* at 2601.

75. *See id.* at 2601-02.

76. *Id.* at 2604.

77. *Id.* at 2601.

78. *Id.* at 2605.

passed SEI measures, litigators challenged the provisions by invoking federal non-discrimination provisions like Title VI and the EEOA. A race-based model for addressing language rights that had yielded early success in *Lau* led to disappointments in these cases because the approach could produce victories only when used to attack stark deprivations of educational access. In *Lau*, the linguistic isolation associated with a total neglect of Chinese-speaking students' needs resembled the harms experienced by black students forced to attend segregated schools. The analogy was less helpful, however, when used to attack choices about what sort of special assistance to provide under SEI initiatives. A concept of meaningful access did not mandate perfect equality or full participation; and in deference to pedagogical uncertainties, the Court, the OCR, and Congress were reluctant to police curricular decision-making.

In *Valeria G. v. Wilson*,⁷⁹ for example, a federal district court applied the *Castaneda* test to reject a claim that Proposition 227 inevitably would discriminate against English language learners because it was based on a flawed pedagogical theory. The court found that there was at least some legitimate authority for the proposition that SEI effectively promotes English acquisition, so the measure was not discriminatory on its face.⁸⁰ Because schools had not yet implemented any SEI classes, there was no way to gauge how well the approach would work in practice. Litigators, therefore, had to wait until programs were operational and then gather evidence that English language learners were deprived of meaningful access to the curriculum. These case-by-case challenges would not invalidate the statewide mandate but instead could reform only faulty implementation in specific school districts.⁸¹

The limits of non-discrimination law in addressing SEI initiatives derive in part from unresolved differences about the significance of race on the one hand and language on the other. When the *Lau* Court recognized that language can be a proxy for race, ethnicity, and national origin and thus a basis for discrimination, the Justices did not address the distinctive role that language plays in forging identity and marking culture. In fact, the Court tried to build on equal protection jurisprudence that has treated colorblindness as the normative ideal

79. *Valeria G. v. Wilson*, 12 F. Supp. 2d 1007 (N.D. Cal. 1998), *aff'd sub nom. Valeria G. v. Davis*, 307 F.3d 1036 (9th Cir. 2002).

80. *Wilson*, 12 F. Supp. 2d at 1018-19.

81. *Id.* at 1020-21.

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for government officials.⁸² Whatever the prospects for colorblindness,⁸³ the government cannot be deaf to language. Officials must communicate with constituents, and the choice of language says a great deal about a nation's identity as a people. Neutrality—at least when defined as indifference—is an impossible aspiration because language in truth is relevant to law and policy.⁸⁴

SEI initiatives squarely present the problems of defining a neutral policy by analogizing language to race. Is an exclusive focus on English-acquisition an appropriate way to forge a sense of national solidarity and to advance a child's upward mobility in an English-speaking society? Or are these efforts inequitable because they fail to capitalize on a child's native-language abilities and to respect a child's linguistic and cultural heritage? The Court's equal protection jurisprudence has not been well-suited to addressing these questions. Faced with SEI initiatives that explicitly reject linguistic and cultural pluralism in favor of intense assimilation, federal courts have focused on whether the programs deprive linguistic minority students of a meaningful education. As it turns out, the rhetoric of equality, transmuted into minimum access, offers little protection to English language learners and their parents, even if SEI measures convert the narrowest accommodation of linguistic difference into a rigid official policy.

III. EQUAL LIBERTIES AND PARENTAL RIGHTS OF PARTICIPATION

To rethink legal strategies for challenging SEI statutes, advocates first must acknowledge that language is centrally relevant to questions of fairness and cannot be treated as an irrelevancy or mere accident of birth. In the United States, there is no official language at the national level, but English is clearly the dominant tongue.⁸⁵ In addition, some states like California have declared English the official lan-

82. See Reva B. Siegel, *Equality Talk: Antisubordination and Anticlassification Values in Constitutional Struggles over Brown*, 117 HARV. L. REV. 1470, 1500-32 (2004).

83. See generally Neil Gotanda, *A Critique of "Our Constitution is Color-Blind"*, 44 STAN. L. REV. 1 (1991) (describing multiple meanings of the Court's references to color-blind constitutionalism and questioning whether this rhetoric advances equality and combats subordination).

84. Alan Patten & Will Kymlicka, *Introduction to LANGUAGE RIGHTS AND POLITICAL THEORY* 1, 32-33 (Alan Patten & Will Kymlicka eds., 2003).

85. *Id.* at 17-18.

guage.⁸⁶ Under these circumstances, political theorist Will Kymlicka points out:

[T]here is no way to have a complete “separation of state and ethnicity.” In various ways, the ideal of “benign neglect” is a myth. Government decisions on languages, internal boundaries, public holidays, and state symbols unavoidably involve recognizing, accommodating, and supporting the needs and identities of particular ethnic and national groups. Nor is there any reason to regret this fact. . . . The only question is how to ensure that these unavoidable forms of support for particular ethnic and national groups are provided fairly—that is, how to ensure that they do not privilege some groups and disadvantage others.⁸⁷

Given the dominant status of the English language, principles of non-discrimination operate to ensure some accommodation of non- or limited-English speakers when an English-only policy proves unduly exclusionary.⁸⁸

In the public schools, accommodation has been limited to ensuring meaningful access to the curriculum. There are several reasons why a minimum access principle might appeal to policy-makers, despite its limitations in promoting full inclusion of English language learners. The preference for modest accommodation of individual students’ needs probably reflects a deep-seated resistance to group rights in the American tradition. For advocates of nation-building, promoting English as the common language is a way to foster solidarity and loyalty. According to this view, any official recognition of linguistic pluralism raises the specter of “another Quebec,” a country divided by language and driven by competition among ethnic groups.⁸⁹ Liberal theorists argue that minimal accommodation preserves the welfare of children who otherwise might become captives of their parents’ linguistic and cultural agendas. If children are forced to serve as conservators of linguistic and cultural traditions, their ability to develop as individuals will be unduly constrained.⁹⁰ Utilitarians contend that because English is the language of upward mobility, en-

86. CAL. CONST. art. III, § 6.

87. WILL KYMLICKA, *MULTICULTURAL CITIZENSHIP: A LIBERAL THEORY OF MINORITY RIGHTS* 115 (1995).

88. Ruth Rubio-Marin, *Language Rights: Exploring the Competing Rationales*, in *LANGUAGE RIGHTS AND POLITICAL THEORY* 52, 63-67 (Alan Patten & Will Kymlicka eds., 2003).

89. Stephen J. Solarz, *Official English: A Concession to Nativism*, in *LANGUAGE LOYALTIES: A SOURCE BOOK ON THE OFFICIAL ENGLISH CONTROVERSY* 124, 124 (James Crawford ed., 1992).

90. Patten & Kymlicka, *supra* note 84, at 46-48.

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couraging its acquisition is the best way to turn children into autonomous adults fully prepared to make choices about work and citizenship. A focus on English-acquisition is characterized as an efficient way to advance an interest in individual success regardless of group-based demands for recognition and resources.⁹¹

Though resistant to any reified system of group rights and recognition, American law has regularly rejected government practices that entrench group subordination. Principles of fairness and dignity counsel that no individual, by dint of “the tribal stigma of race, nation, and religion,”⁹² should be treated as a lesser being, one not capable of acting as “a respected and responsible participant in community public life.”⁹³ Instead, each person should be entitled to equal liberties, which stem not only from equal protection law but also from the due process clause. As constitutional scholar Kenneth L. Karst explains:

[T]he right of equal citizenship usually is realized in the name of the Equal Protection Clause. But, it has also found notable expression in substantive liberties protected by the Due Process Clause. Three decades ago, it was possible to see some of the interactions between the amendment’s two doctrinal strands. Fundamental interests, for equal protection purposes, were largely defined around the same vital liberties as those protected by the Due Process Clause.⁹⁴

Consonances between equality claims and substantive liberties were certainly evident in the Court’s landmark desegregation decisions. *Brown v. Board of Education*⁹⁵ garners the most attention, but a companion case ordered the District of Columbia to integrate its schools as well.⁹⁶ Because the District of Columbia was not a state, it fell outside the scope of the Fourteenth Amendment’s equal protection guarantee.⁹⁷ The Court, however, found that the Fifth Amendment’s due process clause similarly prohibited laws mandating racial segregation in the public schools.⁹⁸ Arbitrary discrimination could not

91. *Id.* at 38-39, 46.

92. ERVING GOFFMAN, *STIGMA: NOTES ON THE MANAGEMENT OF SPOILED IDENTITY* 4 (1963).

93. Kenneth L. Karst, *The Liberties of Equal Citizens: Groups and the Due Process Clause*, 55 *UCLA L. REV.* 99, 102 (2007).

94. *Id.* at 99.

95. *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

96. *Bolling v. Sharpe*, 347 U.S. 497 (1954).

97. *Id.* at 499.

98. *Id.* at 500-01.

be used to deprive black children of the freedom to learn and to flourish.⁹⁹

Bolling v. Sharpe establishes the principle that the due process clause encompasses equality concerns. In addition, due process has long been a means of protecting other cherished liberty interests, including the fundamental right to transmit one's linguistic and cultural heritage. In the early 1900s, some states prohibited instruction in languages other than English in private as well as public schools as a way to promote Americanization. The measures were prompted by nativist fears, particularly during World War I, and enforcement targeted suspect groups like German speakers.¹⁰⁰ In striking down the statutes, the Court emphasized that liberty was more than freedom from bodily restraint and, among other things, included a right to "establish a home and bring up children."¹⁰¹ The government could not deny parents the right to use private schools to transmit their language and culture to sons and daughters in order "to foster a homogeneous people."¹⁰²

The Justices reaffirmed the constitutional vitality of these parental rights in the early 1970s. In *Wisconsin v. Yoder*,¹⁰³ Amish families wanted to keep their children out of public high schools and instead teach them the ways of a separate society.¹⁰⁴ Relying on the parents' rights to preserve their faith and to transmit values related to a unique way of life, the Court held that Wisconsin could not enforce its compulsory education law—at least where secondary school students were concerned.¹⁰⁵ The *Yoder* decision concluded that the parents' right to direct a child's upbringing, including instruction in religious values, had "a high place in our society."¹⁰⁶ As a result, due process operated as "a charter of the rights of parents" in this area.¹⁰⁷ To assuage fears that children would become captives of parents' wishes, the Court noted that the Amish students already had received a basic eighth

99. *Id.* at 499-500.

100. *See, e.g.*, *Farrington v. Tokushige*, 273 U.S. 284 (1927); *Pierce v. Soc'y of Sisters*, 268 U.S. 510 (1925); *Meyer v. Nebraska*, 262 U.S. 390 (1923); *Bartels v. Iowa*, 262 U.S. 404 (1923).

101. *Meyer*, 262 U.S. at 399.

102. *Id.* at 402.

103. *Wisconsin v. Yoder*, 406 U.S. 205 (1972).

104. *Id.* at 207-13.

105. *Id.* at 234.

106. *Id.* at 214.

107. *Id.* at 233.

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grade education that would enable them to participate in the general society if they wished.¹⁰⁸

Neither the cases on language rights in the 1920s nor *Yoder* addressed parental prerogatives in the public schools. The decisions in the 1920s emphasized the power to opt out by offering children private alternatives. *Yoder*, however, began to consider whether parental interests must be accommodated in public schools. If they could not be, then parents and their children might be exempted from compulsory education laws. One way to sharpen the analysis in *Yoder* is to consider how parental interests in liberty and equality should be weighed when school policy affects the socialization of children from traditionally disadvantaged groups. *Bolling v. Sharpe* makes clear that the due process clause, with its tradition of equal liberties, can reach discrimination in the public schools. If freedoms are arbitrarily denied based on a stigmatized group identity, then individuals are wrongly divested of the respect they deserve and the chance to participate in community life on equal terms. In other contexts, the Court has recognized that liberties must be exercised on an equal basis in public schools when constitutionally protected identity traits are at issue. In particular, religious student organizations have been granted equal access to public school facilities and funding. Except as necessary to maintain the boundary between Church and State, educational administrators cannot deny a sectarian group recognition simply to distance a public school from religious messages. Given that a fundamental right of free speech is at stake, state officials must be evenhanded in setting the terms of participation for student groups.¹⁰⁹

Comparable arguments about the equal liberties of linguistic minority parents can be made. Legal scholar Cristina Rodríguez contends that SEI initiatives “affect a basic liberty interest” because of parents’ profound interest in cultural transmission.”¹¹⁰ She notes that this right has traditionally been limited to protecting “against state encroachment on family life” but argues that the due process guarantee should extend to “accord[ing] parents of LEP [limited English

108. *Id.* at 216-17, 222-26.

109. *See, e.g.,* *Rosenberger v. Rector & Visitors*, 515 U.S. 819, 842-46 (1995) (holding that the University did not have to “deny eligibility to [sectarian] student publications because of their viewpoint”); *Bd. of Educ. v. Mergens*, 496 U.S. 226, 248-53 (1990) (holding that the school violated the Equal Access Act by prohibiting a Christian club from meeting on the basis of religion in an open forum); *Widmar v. Vincent*, 454 U.S. 263, 273-75 (1981) (holding that it was unconstitutional to exclude religious groups from the school’s open forum policy).

110. Cristina M. Rodríguez, *Language and Participation*, 94 CAL. L. REV. 687, 762 (2006).

proficient] students the same power over language education given other parents in the same context.”¹¹¹ Despite Rodríguez’s admonition, litigators continue to focus exclusively on non-discrimination arguments rooted in equal protection law. In fact, the rare challenges to SEI statutes based on some sort of autonomy claim have been largely unsuccessful. However, these lawsuits did not make parental freedom and due process the centerpiece of the argument, nor did they link this liberty interest to equal protection. As a result, the cases did not identify the cumulative burdens on equal liberties that SEI initiatives inflict. Because equality jurisprudence has largely eclipsed a concern with liberty interests, no one has laid out a complete account of the special hardships that SEI initiatives impose on linguistic minority parents. Nor has anyone pointed out how these constraints depart from express commitments to parental participation in the public schools.¹¹²

Several cases illustrate the limits of autonomy-based challenges to SEI initiatives to date. For example, in *Valeria G. v. Wilson*,¹¹³ English language learners and their parents argued that California’s structured immersion initiative wrongly divested local communities of the authority to decide matters of pedagogy. In particular, the lawsuit claimed that:

Proposition 227 denies [linguistic minority students and their parents] the equal opportunity to secure future legislation for programs that will be beneficial to them. . . . Proposition 227 elevates the decision making process to a higher level of government than would otherwise be required; that is, . . . Proposition 227 places higher burdens upon [students and parents] in seeking future changes by the state legislature, the state Board of Education, and local school boards. The reason is that . . . Proposition 227 can be amended only upon approval by the electorate, or by a statute passed by a two-thirds vote by each house of the legislature and signed by the governor.¹¹⁴

The district court agreed that “Proposition 227 goes further than most legislation which has reached the courts, in that it requires for its change either approval by the state’s electorate or a two-thirds major-

111. *Id.*

112. See CAL. EDUC. CODE § 44261.2 (West 2010) (adopting standards and requirements to ensure parental participation within schools); *California State Board of Education Policy No. 89-01*, CAL. DEPT OF EDUC. (Sept. 1994), <http://www.cde.ca.gov/be/ms/po/policy89-01-sep1994.asp>.

113. *Valeria G. v. Wilson*, 12 F. Supp. 2d 1007, 1024 (N.D. Cal. 1998), *aff’d sub nom.* *Valeria G. v. Davis*, 307 F.3d 1036 (9th Cir. 2002).

114. *Wilson*, 12 F. Supp. 2d at 1024.

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ity of the legislature.”¹¹⁵ Nonetheless, the court upheld the provision by arguing that “the impediment is to plaintiffs obtaining a bilingual education system. As stated, there is no constitutional right to bilingual education.”¹¹⁶ The judge therefore reasoned that “the voters of California were free to reject bilingual education.”¹¹⁷

On appeal, the Ninth Circuit agreed, dismissing the contention that the ballot initiative was motivated by racial animus simply because the English language learner population was “predominantly Hispanic/Latino, and . . . [the] proponents of Proposition 227 specifically identified this racial group during the initiative’s campaign.”¹¹⁸ According to the Ninth Circuit, “the purpose and function of California’s bilingual education program was and is to improve education, and not to remedy racial discrimination,” so “the reallocation of political authority at issue in Proposition 227 operated solely to address an educational issue, *not* a racial one.”¹¹⁹ In rejecting arguments based on racial inequality, *Valeria G.* treated the ballot measure as a matter of pure pedagogical policy. Consistent with earlier decisions, neither the district court nor the court of appeals would intervene unless children were being deprived of any meaningful education, for example, because the theory behind SEI programs was pedagogically unsound.

This type of analysis totally ignores the ways in which SEI programs undermine the equal liberties of linguistic minority parents. Extraordinary restrictions on voice presume that linguistic minorities cannot be trusted to exercise sound judgment about pedagogy, a perception that unequally burdens their ability to direct their children’s upbringing. Protecting participatory rights for parents is not the same as guaranteeing bilingual education, a right expressly rejected in *Valeria G.* Instead, under an equal liberties framework, the Constitution guarantees that no parent from a disadvantaged racial, ethnic, or national origin group will be singled out for special barriers to gaining respect for family values in the public schools. Proposition 227 arguably violates this principle because it divests linguistic minority parents of a chance to influence policy in local school districts, while it simultaneously imposes significant obstacles to seeking statewide reform.

115. *Id.*

116. *Id.*

117. *Id.* at 1025.

118. *Davis*, 307 F.3d at 1042.

119. *Id.* at 1041. For a vigorous critique of this view, see Bangs, *supra* note 16, at 150-66.

These cumulative political burdens show little regard for the equal liberties of parents of English language learners.¹²⁰

Nor do these obstacles exhaust the unique restrictions on parental participation imposed by Proposition 227. Although SEI initiatives sometimes have been justified as a way to return power to parents, courts have not carefully interrogated this assertion. In *McLaughlin v. State Board of Education*,¹²¹ for example, several school districts brought suit alleging that they could petition the state board of education to seek exemptions from the SEI mandate under a standard procedure set forth in the California Education Code.¹²² This process did not require that the school district receive parental requests before seeking a waiver.¹²³ The California court of appeals rejected the districts' argument, noting that "voters were promised passage of Proposition 227 would establish an LEP [limited English proficient] method of instruction which would heavily favor use of English only, and would bestow the bilingual education 'choice' to parents only."¹²⁴ The court went on to observe that "the substance of the ballot arguments leads unwaveringly to the conclusion that voters believed Proposition 227 would ensure school districts could not escape the obligation to provide English language public education for LEP students in the absence of parental waivers."¹²⁵

The *McLaughlin* court portrayed Proposition 227 as a measure that is highly deferential to parents and ignored the ways in which it has disempowered them. For one thing, parents must comply with a cumbersome waiver process that requires them to come to school and apply in person. In the application, parents must demonstrate that their children meet the specific conditions for a waiver set forth in the initiative, and, even then, the grant of a waiver is not automatic. Though school districts cannot independently seek a waiver from the state board of education, they can deny parental waiver requests without any statutory provisions for state oversight or a formal means of appeal. If parents of fewer than twenty children seek waivers, the

120. See Edward M. Olivos & Alberto M. Ochoa, *Reframing Due Process and Institutional Inertia: A Case Study of an Urban School District*, 41 EQUITY & EXCELLENCE EDUC. 279, 279 (2008) (examining "the impact institutional inertia plays, within the backdrop of an educational reform movement, in thwarting the educational choices of ELs and their parents' rights to make pedagogical decisions" on behalf of their children).

121. *McLaughlin v. State Bd. of Educ.*, 75 Cal. App. 4th 196 (1999).

122. CAL. EDUC. CODE § 33050 (West 2010).

123. *McLaughlin*, 75 Cal. App. 4th at 206-08.

124. *Id.* at 218.

125. *Id.* at 218-19.

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school district cannot initiate a special program even if there are sufficient resources and the political will to do so. In all of these respects, the waiver provision in Proposition 227 burdens the exercise of parental autonomy in ways left unaddressed in the *McLaughlin* case.

Nor are the limits on seeking political reform or school waivers the only statutory obstacles that linguistic minority parents face. Any parent worried about too much native-language instruction in an SEI program can seek decisive remedies that are unavailable to a linguistic minority parent concerned about too little native-language instruction. California courts have confronted the provision creating a private right of action under Proposition 227, but again, the implications for parental choice were totally overlooked. In *California Teachers Association v. Davis*,¹²⁶ teachers and educational administrators challenged Proposition 227's authorization for any parent or legal guardian to sue a school board member, elected official, teacher, or administrator who "willfully and repeatedly" fails to provide instruction overwhelmingly in English.¹²⁷ An educator who violates the provision can be held personally liable for damages and attorney's fees.¹²⁸ School personnel argued that the provision intrudes on their First Amendment right of free speech because the threat of liability hampers the ability to make pedagogical choices.¹²⁹ Teachers and administrators also contended that the requirement to teach "overwhelmingly" in English was so vague that they lacked adequate notice about when a particular instructional approach would subject them to liability.¹³⁰ Both the federal district court and the court of appeals rejected these arguments.¹³¹ According to the decisions, teachers had limited free speech rights in the classroom because state officials could regulate instruction.¹³² In particular, California could assert a legitimate interest in promoting English-acquisition.¹³³ In addition, Proposition 227 was not unduly vague because a violation had to be repeated and willful to trigger liability.¹³⁴

126. *Cal. Teachers Ass'n v. Davis*, 64 F. Supp. 2d 945 (C.D. Cal. 1999), *aff'd sub nom.* *Cal. Teachers Ass'n v. Bd. of Educ.*, 271 F.3d 1141 (9th Cir. 2001).

127. *Id.* at 948.

128. CAL. EDUC. CODE § 320 (West 2010).

129. *See Cal. Teachers Ass'n*, 64 F. Supp. 2d at 948-49.

130. *Id.* at 954-56.

131. *Id.*; *Bd. of Educ.*, 271 F.3d at 1148-55.

132. *Cal. Teachers Ass'n*, 64 F. Supp. 2d at 953; *Bd. of Educ.*, 271 F.3d at 1148-50.

133. *Bd. of Educ.*, 271 F.3d at 1154.

134. *Id.* at 1148, 1154-55.

The *California Teachers Association* lawsuit focused on teachers' and administrators' academic freedom, so the decision paid no attention to the impact on linguistic minority parents. In fact, Proposition 227 establishes two very different legal regimes for parents concerned about SEI programs. Anyone who believes that a teacher makes too little use of English can bring a private right of action, seek damages and attorney's fees, and collect them from the personal assets of school board members, principals, superintendents, and classroom instructors. A parent concerned that there is too little use of a child's native language, by contrast, must seek a waiver. If the waiver is denied, for whatever reason, Proposition 227 makes no provision for review of the decision.¹³⁵ The parent then has the option to sue under the EEOA, but the lawsuit will succeed only if a federal court concludes that the SEI method deprives students of meaningful access to the curriculum. Should the parent succeed in showing this sort of egregious deficiency, there will be no liability for damages nor will any particular remedy, such as increased use of native-language instruction, be mandated. In short, Proposition 227 offers decisive legal remedies when a parent demands the overwhelming use of English but offers no comparable relief for parents seeking the appropriate use of a child's native language. Any parent can invoke the law to promote the state's general interest in the use of English, but parents of English language learners cannot protect their children from educational harms—at least until those harms are so acute that their children are deprived of a meaningful opportunity to learn. This framework so disproportionately burdens the participatory rights of parents of English language learners that the norm of equal liberties is violated.

Valeria G., McLaughlin, and Davis each examined a particular burden that the SEI statute in California imposes on the autonomy of students, parents, teachers, and schools. To make a compelling case that the equal liberties of parents of English language learners have been infringed, however, litigators should identify the cumulative impact of each of these restrictions on the freedom to participate in decisions about a child's education. The catalogue of burdens is impressive. As already mentioned, linguistic minority parents face unparalleled obstacles if they seek to change a child's placement through the waiver process. Moreover, the implementation of the program

135. See *English Learners in California Frequently Asked Questions*, CAL. DEPT OF EDUC. (Aug. 21, 2006), <http://www.cde.ca.gov/sp/el/er/documents/elfaq.doc>.

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can be challenged by any parent or legal guardian who contends that teachers and administrators have failed to use enough English. If parents of English language learners are dissatisfied with SEI classes because they make insufficient use of the native language, there are substantial barriers to pursuing local or statewide reform. If the parents go to court, federal law requires that they demonstrate that their children are being denied even minimum access to the curriculum. If parents lobby for change through the political process, they must either convince the general electorate or two-thirds of the legislature that a new law is warranted.

Because SEI initiatives uniquely constrain parental freedom to advocate on behalf of English language learners, the measures send a message that parents from distinct linguistic and cultural backgrounds are suspect, untrustworthy, and incapable of making appropriate choices about their children's education. As a result, the initiatives offend a principle of equal liberties by denying linguistic minority parents the opportunity to participate in shaping their children's education on the same terms as other parents do.

CONCLUSION

For decades, advocates have defined legal protections for linguistic minority students by drawing analogies to a principle of non-discrimination based on race. In response, courts have characterized language, like race, as an irrelevant accident of birth in determining what equal treatment means. Language, however, cannot be immaterial to educational decisions insofar as it plays a central role in the transmission of identity and heritage. Because language matters, it is essential that parents of English language learners have a fair opportunity to express their culture and values in the public schools. Under a principle of equal liberties, no state government should be permitted to single out a particular group of parents, marked by race, ethnicity, or national origin, and then impose on those parents uniquely onerous obstacles to participation in making decisions about their children's education. Because SEI initiatives prevent linguistic minorities from engaging in these decisions on the same terms as other parents do, the provisions violate the constitutional imperative that linguistic minorities, like all Americans, be both free and equal before the law.

CLARENCE CLYDE FERGUSON, JR. ANNUAL LECTURE

Civil Rights in 2011 and Beyond

THOMAS E. PEREZ*

Thank you, Dean Schmoke, for inviting me here today. It is a great honor to be here at Howard University School of Law to discuss the work of the Civil Rights Division (“the Division”) at the United States Department of Justice (“the Justice Department”). So much of the work we do every day to protect and defend the civil rights of individuals across the country is possible only because of the foundation that was laid here at Howard. The list of notable Howard alumni and faculty is a who’s who of the civil rights movement: from Thurgood Marshall and Charles Hamilton Houston, who laid the groundwork for progress that continues today, to the likes of Clyde Ferguson; Dean Schmoke; Professor Patrice Simms of the environmental justice movement; my friend Isiah Leggett, who has blazed trails for people of color in my home county; and Professor Aderson Francois, who played a key role in the Obama transition.

Those notorious precedent-setting decisions that dismantled legal segregation piece by piece in our country were the result of theorizing and strategizing that took place right here by Charles Hamilton Houston and the many brilliant lawyers who worked with him and learned from him. Houston set out to prove that separate was inherently unequal, and he built an infrastructure here at Howard that he knew would be necessary to lead the fight. Howard trained a generation of lawyers who forever changed the legal landscape in this country and

* Assistant Attorney General, United States Department of Justice, Civil Rights Division. Assistant Attorney General Perez was the distinguished guest speaker at the 2011 Clarence Clyde Ferguson, Jr. Lecture. He gave these remarks at the Howard University School of Law on January 20, 2011.

who made it possible for the great progress we see today. And the legacy continues today with all of you.

I am also particularly pleased to be here just after we have celebrated the life and legacy of Dr. Martin Luther King, Jr. I have often said that every day is Martin Luther King Day in the Civil Rights Division. His life's work, along with many of his peers, led to some of our most cherished laws—laws that finally, nearly two hundred years after our nation's founding, ensured that *all* individuals would have access to the great promise of equal justice and equal opportunity. As the enforcers of those laws, the Civil Rights Division is literally tasked with protecting and advancing Dr. King's legacy.

This job has taken me to all corners of the country, and in the course of my travels, I have frequently encountered people who wonder why, in 2011, we still need a Civil Rights Division. Like all of us, they are proud of the progress we've made as a nation. They see an African-American President and an African-American Attorney General. They see a growing number of women and minorities serving in Congress. They see an African-American and a Latina on the Supreme Court. And they assume that these great symbols of progress mean that the journey toward equal opportunity and equal justice is complete. And so they ask: "Why, in 2011, do we still need a Civil Rights Division?"

The question makes me think of the words of Dr. King when he spoke from the steps of the Lincoln Memorial nearly fifty years ago. He said:

When the architects of our republic wrote the magnificent words of the Constitution and the Declaration of Independence, they were signing a promissory note to which every American was to fall heir. This note was a promise that all men, yes black men as well as white men, would be guaranteed the unalienable rights of life, liberty, and the pursuit of happiness.¹

He went on to say:

It is obvious today that America has defaulted on this promissory note insofar as her citizens of color are concerned. . . . But we refuse to believe that the bank of justice is bankrupt. We refuse to believe that there are insufficient funds in the great vaults of opportunity of this nation. So we have come to cash this check—a check that will

1. Dr. Martin Luther King, Jr., Address at March on Washington: I Have a Dream (Aug. 28, 1963), available at http://mlk-kpp01.stanford.edu/index.php/encyclopedia/documentsentry/doc_august_28_1963_i_have_a_dream/.

give us upon demand the riches of freedom and the security of justice. We have also come to this hallowed spot to remind America of the fierce urgency of now.²

He spoke these words in 1963—the Civil Rights Act³ had not yet passed. The Voting Rights Act⁴ had not yet passed. The Fair Housing Act⁵ had not yet passed. There was no Title IX;⁶ no Americans with Disabilities Act.⁷ It was more than a century and a half after the Constitution was adopted, and our nation’s leaders were only just coming around to face the truth that equal justice was still out of reach for so many. They were just beginning to acknowledge that our nation had, indeed, failed to live up to its promise.

At the prodding of Dr. King and so many other great, selfless leaders, they acted. And ours is undeniably a better nation for it. But in many ways, the words that Dr. King spoke that day in Washington still ring true. We now have many of the legal mechanisms necessary to fight discrimination and protect the rights guaranteed by the Constitution. Yet, for so many of our neighbors, true equal opportunity and equal justice remain just out of reach. Far too many of our brothers and sisters still live in the shadows of life.

And this is why, in 2011, we still need a Civil Rights Division. Our critical mission has three basic principles:

- We expand opportunity and access for all people—the opportunity to learn, the opportunity to earn, the opportunity to live where one chooses, the opportunity to move up the economic ladder, and the opportunity to realize one’s highest and best use.
- We ensure that the fundamental infrastructure of democracy is in place by protecting the right to vote and by ensuring that communities have effective and democratically accountable policing.
- We protect the most vulnerable among us so that they can move out of the shadows and into the sunshine by ensuring they can live in their communities free from fear of exploita-

2. *Id.*

3. Civil Rights Act of 1964, 42 U.S.C. §§ 2000a-2000h-6 (West 2006 & Supp. 2010).

4. Voting Rights Act of 1965, 42 U.S.C. §§ 1971, 1973-1973bb-1 (2006).

5. Fair Housing Act, 42 U.S.C. §§ 3601-3619 (2006).

6. Title IX of the Education and Amendments Act of 1972, 20 U.S.C. §§ 1681-1688 (2006).

7. Americans with Disabilities Act of 1990, 42 U.S.C. § 12101 et seq. (West 2006 & Supp. 2010).

tion, discrimination, and violence. We give meaning to the words of Hubert Humphrey, who said,

[T]he moral test of government is how that government treats those who are in the dawn of life, the children; those who are in the twilight of life, the elderly; and those who are in the shadows of life⁸

Operating under these principles, we work every day to carry forward the legacy of heroes like Dr. King and Charles Hamilton Houston. Our job is to enforce the nation's civil rights laws—all of the laws—and to do so independently and evenhandedly.

We continue to fight for equal opportunity in education so that all children can receive the quality education to which they have a right. Last spring, the Division reached a settlement with a Louisiana school district to resolve the fact that the district did not offer a single Advanced Placement (“AP”) class at its high school that was 100% African-American. *Not a single AP class.* About 83% of the district's student body is African-American, and about 12% of its students are white. The district has two high schools—one that is 100% African-American and one that is about 56% African-American. And yet the 100% African-American school had only five gifted and honors courses, compared to more than seventy AP, gifted, and honors courses at the school attended by nearly all of the district's white students. Such differences were determined unconstitutional more than *five decades ago* in perhaps the most well known Supreme Court ruling in our nation's history,⁹ and yet we still struggle to create truly equal educational environments for all students. We need a Civil Rights Division to ensure equal educational opportunity.

Particularly as our nation recovers from the housing and foreclosure crisis, we are working to ensure that all individuals have equal access to credit—a fundamental building block of wealth—and the American Dream. We created a dedicated fair lending unit to determine where discrimination occurred in the years leading up to the crisis and to ensure such practices do not occur in the future.

Last year, the Division reached the largest monetary settlement in a fair lending case in the Division's history. The case involved two subsidiaries of AIG. We had discovered that the brokers the compa-

8. See Hubert Humphrey, Remarks at the Dedication of the Hubert H. Humphrey Building (Nov. 1, 1977), available at 123 Cong. Rec. 37,287 (1977).

9. See generally *Brown v. Bd. of Educ.*, 347 U.S. 483, 495 (1954) (holding that segregation in public schools is “a denial of the equal protection of the laws”).

nies had partnered with had been charging African-American borrowers higher fees on wholesale loans in areas across the country. The explosion in subprime lending and the subsequent foreclosure crisis has threatened the stability of communities of color at far greater rates than their white counterparts, and we will continue to work to combat such discrimination. In bringing this case, we used the disparate impact theory, which is a critical tool in our law enforcement arsenal, a tool that has been accepted unanimously by the courts, and a tool that the career staff was discouraged from using in cases of this nature for many years but that we've dusted off and are using again.

We recently saw reports that employment discrimination complaints have gone up in the recession, and we continue to work to ensure that every individual is judged by employers based on the content of their character and their qualifications, and not because of the color of their skin, or because of their gender, or because of the country from which they come, or any other irrelevant factor.

We challenged New York City's use of two written examinations for hiring entry-level firefighters, which we argued had a disparate impact on African-American and Hispanic applicants. At the time the Civil Rights Division filed our lawsuit, barely 7% of firefighters in New York were black or Latino, even though minorities make up nearly 50% of the qualified pool of candidates. This was actually a *lower* percentage of African-Americans and Hispanics than worked for the New York City Fire Department ("FDNY") in 1972. A federal judge concluded that the fire department's policies had been discriminatory. In fact, the court ruled that the practices constituted discrimination not only under a disparate impact theory, but also that the practices constituted intentional discrimination. We continue to work to ensure that the city develops hiring policies that give all applicants a fair shot.

We continue, in 2011, to see a need for enforcement of the landmark Voting Rights Act of 1965. Last fall we reached a settlement with Cuyahoga County, Ohio, to protect the voting rights of Spanish-speaking Puerto Rican voters. Despite federal requirements, the county failed to offer adequate language assistance to its substantial Puerto Rican population—more than six thousand of whom are of voting age with limited English proficiency. The agreement the Division reached ensures access to bilingual ballots and other assistance so that members of the local Puerto Rican community can exercise their most fundamental civil right—the right to vote. We are preparing for

the next round of Congressional redistricting and will work vigilantly and independently to ensure the effective enforcement of the Voting Rights Act throughout that process.

Hate crimes, the result of intolerance and misplaced fear, remain all too prevalent in communities across the country. Take, for example, the two men who pleaded guilty to burning a predominantly African-American church in Springfield, Massachusetts, after Barack Obama won the Presidential election.¹⁰ Or take the Pennsylvania men who, in October 2010, were found guilty of hate crimes charges for the fatal beating of a Mexican immigrant, during which they shouted racial epithets and told him he didn't belong in their town.¹¹ We also saw a father and son team in South Carolina who, with a friend, pleaded guilty to chasing an African-American man from a convenience store and threatening him with a chainsaw, and then attacking others who tried to help the victim.¹² Regrettably, we have also seen a spike in hate-fueled violence directed at Muslim communities.

These crimes not only hurt victims and their families—they also tear apart entire communities. They are eerily similar to incidents we read about in our history books. And they have no place on the front pages of our newspapers. We have ramped up efforts to combat hate crimes, and we are working hard to implement the Matthew Shepard and James Byrd, Jr., Hate Crimes Prevention Act.¹³ Passed in 2009 and championed by the late Senator Ted Kennedy, the law allows us to prosecute hate crimes committed because of a person's sexual orientation, gender identity, or disability. The law is remarkable not only because of the new protections it provides, but also because it marks the first time that the words, "lesbian, gay, bisexual, and transgender"

10. See Press Release, U.S. Attorney's Off. for the D. of Mass., Springfield Man Pleads Guilty to Church Arson (June 16, 2010) (on file with author), available at <http://www.justice.gov/usao/ma/Press%20Office%20%20Press%20Release%20Files/June2010/HaskellPleaPR.html>; Stephanie Barry, *Thomas Gleason Becomes 2nd Man to Admit Setting Fire to Springfield Church Hours After Barack Obama's Presidential Victory*, MASSLIVE.COM (June 22, 2010, 9:47 PM), http://www.masslive.com/news/index.ssf/2010/06/thomas_gleason_becomes_2nd_man.html.

11. See 2 *Found Guilty of Hate Crimes Related to Death of Immigrant*, CNN (Oct. 14, 2010), http://articles.cnn.com/2010-10-14/justice/pennsylvania.hate.crime_1_moyer-and-hayes-tammy-piekarsky-crystal-dillman?_s=PM:CRIME.

12. See Press Release, U.S. Dep't of Just., Three South Carolina Men Plead Guilty to Federal Civil Rights and Carjacking Charges (Dec. 7, 2009) (on file with author), available at <http://www.justice.gov/opa/pr/2009/April/09-crt-411.html>.

13. Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act, Pub. L. No. 111-84, 123 Stat. 2835 (2010) (codified in scattered sections of 18 U.S.C. and 42 U.S.C.).

appear in the United States Code.¹⁴ We recently indicted the first defendants under the new law, which provides us with critical new tools to combat hate-fueled violence.

In 2011, civil rights enforcement is not only about protecting those whose rights have been denied because of their race, religion, ethnicity, or gender. It is also about people with disabilities, the LGBT community, and other segments of our population that too often find themselves hidden in the shadows.

Last summer we celebrated the twentieth anniversary of the Americans with Disabilities Act,¹⁵ and we continue to work hard to ensure that individuals with disabilities can enjoy the things in life that so many of us take for granted. We have stepped up our efforts to combat the illegal but all too common practice of unnecessarily institutionalizing people with disabilities when they could be appropriately provided services in their communities. More than a decade ago, the Supreme Court, in its landmark *Olmstead* decision,¹⁶ determined this practice was unconstitutional; and the Civil Rights Division is working to enforce that decision for the thousands of people who have not yet realized its promise. A comprehensive settlement agreement with the state of Georgia that was reached last October will serve as a model for this work going forward as we continue to work to ensure that states fulfill their obligations.

We have advocated to have the words “lesbian, gay, bisexual, and transgender” appear in federal law for a second time, testifying in support of the Employment Non-Discrimination Act,¹⁷ which would provide federal protections against employment discrimination for LGBT individuals, protections that many people assume already exist.

We will continue to work to advance the rights of LGBT individuals, and, in the meantime, use our existing authorities to combat discrimination where we can. Last spring, we sought to intervene in the case of an openly gay teenager from Mohawk, New York. For two and a half years, the student was a victim of severe and pervasive student-on-student harassment because he failed to conform to gender stereotypes. From 2007 until 2009, the harassment escalated from derogatory name-calling to physical threats and violence. The student’s

14. *Id.*

15. Americans with Disabilities Act of 1990, 42 U.S.C. § 12101 et seq. (West 2006 & Supp. 2010).

16. *See Olmstead v. L.C.*, 527 U.S. 581, 607 (1999).

17. Non-Discrimination Act, H.R. 3017, 111th Cong. (2010).

grades suffered. He had multiple absences because he did not feel safe at school, and he dropped one of his favorite courses to avoid one of his harassers.

The school district had knowledge of the harassment, and the complaint alleged that the school district was deliberately indifferent in its failure to take action—neither fully investigating the allegations, nor following its anti-harassment policies and procedures. The failure to address and prevent this kind of bullying from occurring violates Title IX of the Civil Rights Act of 1964,¹⁸ which prohibits violations of students' constitutional right to be free of harassment in school. But it also reinforces intolerant and hateful behavior by allowing it to go unpunished. Recently, we have seen the dire consequences of unrelenting harassment and bullying, and we must as a nation do a better job of teaching our children to respect the differences of their peers.

In the Civil Rights Division, we have great respect for law enforcement officers around the country, but it is our responsibility to hold law enforcement accountable when they abuse their power and violate the public trust. The Division in the last year, for example, has worked to prosecute criminal cases involving the New Orleans Police Department (“NOPD” or “Department”), including several that involved police shootings in the wake of Hurricane Katrina.

Last spring, the city's new mayor, Mitch Landrieu, invited the Division to conduct a pattern or practice investigation of the NOPD. In his letter to the Division, Mayor Landrieu wrote that “nothing short of a complete transformation [of the New Orleans Police Department] is necessary and essential to ensure safety for the citizens of New Orleans.” Shortly thereafter, we notified Mayor Landrieu that the Division would begin an independent, comprehensive review of the Department under our pattern or practice enforcement authority. The investigation is examining allegations of excessive force, unconstitutional searches and seizures, racial profiling, failures to provide adequate police services to particular neighborhoods, and related misconduct. The investigation, like previous similar investigations in other cities, has the potential to lead to comprehensive reform of the Department's policies and operations, and to a better relationship between the NOPD and the residents of the city it aims to protect—a critical component of effective policing in any community. Working with a wide range of stakeholders, I am confident that we can craft a

18. Civil Rights Act of 1964, 42 U.S.C. §§ 2000a-2000h-6 (West 2006 & Supp. 2010).

comprehensive blueprint for reforming the NOPD that will reduce crime, ensure respect for the Constitution, and enhance public confidence in law enforcement. The NOPD investigation is one of several we are conducting around the country.

We are also working to avoid falling into the trap of believing that we either protect our national security and safe streets *or* we protect civil rights. We can and must do both. We cannot allow the ongoing backlash that came in the wake of the September 11, 2001 attacks to deprive individuals of their rights under the law. Last year, the Civil Rights Division notified the state of Oregon that we were investigating whether a law banning school teachers from wearing religious garb¹⁹ violated the Civil Rights Act of 1964. The law, which had been on the books since 1923—originally an attempt to target Catholic nuns—was reaffirmed in July 2009. After the Civil Rights Division began its investigation, the state legislature passed and the governor signed a law repealing the ban,²⁰ ensuring that teachers will no longer be prohibited from wearing religious dress—often a requirement of their religion.

And last summer, the Justice Department challenged Arizona's SB 1070,²¹ which would allow law enforcement in that state to inquire about a person's immigration status if, in the context of another stop, they have "reasonable suspicion" that the person is undocumented. We filed suit based on the Justice Department's belief that the law conflicts with the federal government's role in setting and enforcing immigration policy. We also believe the law could have dangerous ramifications, leading to the harassment of foreign visitors and legal residents. The court granted a preliminary injunction to block key provisions of that law, and we believe the court ruled correctly.

All of these examples demonstrate the ongoing need to expand equal opportunity, to protect individuals from discrimination and hate-fueled violence, and to continue to work to reinforce the infrastructure of our democracy. In the Civil Rights Division, we are reminded every day that we have come a long way in the journey for equal justice, but we have a long way to go.

I have been heartened by President Obama's commitment to advancing the cause of civil rights—a commitment he has demonstrated

19. OR. REV. STAT. § 342.650, *repealed* by Or. Laws Spec. Sess. 2010.

20. Or. Laws Spec. Sess. 2010 (OR. REV. STAT. § 342.650).

21. S.B. 1070, 49th Leg., 2d Reg. Sess. (Az. 2010).

not only through words, but also through deeds. He has used his power and the great bully pulpit that comes with it to advocate for policies that fill the gaps where our laws fall short.

- The first piece of legislation that he signed into law was the Lily Ledbetter Fair Pay Act of 2009,²² ensuring that women subjected to pay discrimination will not be denied their day in court on a technicality.
- Shortly thereafter, he signed a critical law to expand the State Children's Health Insurance Program,²³ ensuring that more low-income children will not be denied health care because their families can't afford insurance. This expansion assists children of all races, but it is particularly critical for African-American and Latino children, who are disproportionately represented in the ranks of our nation's uninsured. As Dr. King himself said, "Of all the forms of inequality, injustice in health care is the most shocking and inhumane."²⁴
- The President put the weight of his Administration behind the effort to pass the Shepard-Byrd Hate Crimes Prevention Act²⁵ that I mentioned before, ensuring that hate-fueled violence directed at LGBT individuals and individuals with disabilities will not go unpunished.
- He worked with military leaders and with Congress to secure the repeal of Don't Ask Don't Tell²⁶—a long-outdated policy that made second-class citizens of our LGBT brothers and sisters who were willing to make the ultimate sacrifice for our country. When we talk about opportunity, which is the ultimate goal of advancing civil rights, we are talking not only about the opportunity to live, learn, and earn on a level playing field, but also the opportunity to serve one's nation with honor and dignity.

President Obama also demonstrated his commitment to aggressive and persistent civil rights enforcement by providing the Civil

22. Lily Ledbetter Fair Pay Act of 2009, 42 U.S.C. § 2000a (West 2006 & Supp. 2010).

23. Children's Health Insurance Program Reauthorization Act of 2009, Pub. L. No. 111-3, 123 Stat. 8 (2010).

24. Dr. Martin Luther King, Jr., Remarks at the Second National Convention of the Medical Committee for Human Rights (Mar. 25, 1966), *available at* <http://www.standupforhealthcare.org/blog/martin-luther-king-jr-a-civil-rights-icon-s-thoughts-on-health-care>.

25. Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act, Pub. L. No. 111-84, 123 Stat. 2835 (2010) (codified in scattered sections of 18 U.S.C. and 42 U.S.C.).

26. 10 U.S.C. § 654 (West Supp. 2010).

Rights Division with the budget support necessary to carry out our critical mission. Budgets are moral documents and are the most transparent way for the president to indicate his priorities. President Obama and Attorney General Holder have made clear their commitment to civil rights, and we in the Civil Rights Division are grateful for their support. Because, while we've made great progress, challenges remain.

This summer we will celebrate the fiftieth anniversary of the Freedom Rides.²⁷ We will celebrate the progress made by the many individuals who put their lives on the line as they boarded those buses in pursuit of equal rights. And we will honor their fortitude by continuing to fight for equal justice.

Last year I had the honor of traveling to Greensboro to mark the fiftieth anniversary of the Greensboro Sit-In,²⁸ when four college students sat down at a lunch counter to stand up for their rights. Their seemingly mundane actions that day sparked a nationwide movement that led to very real progress. We should honor their courage by continuing the fight for equal access and opportunity.

This week in the Justice Department we will celebrate the fiftieth anniversary of the swearing in of Robert F. Kennedy as the Attorney General of the United States. We celebrate Kennedy because of his legacy of a strong commitment to justice at a volatile time in our nation's history. We celebrate the Justice Department's work under his leadership to enforce the laws of the land that forbid segregation and discrimination. We should honor his legacy and the legacy of his colleagues and contemporaries by continuing the fight for civil rights.

We have much progress to celebrate. But too many among us still wait for this nation to fulfill its promise. In 2011, as we celebrate our great progress, we must turn and face the challenges that still lie ahead. And as we do so as a nation, I am here to encourage you to consider a career in public service. I have been fortunate in my career to witness firsthand how the law can be used to make the promise of this nation a reality for individuals and for entire communities. I love

27. See generally RAYMOND ARSENAULT, *FREEDOM RIDES: 1961 AND THE STRUGGLE FOR RACIAL JUSTICE* (providing an overview of the 1961 pilgrimage of black and white volunteers to Mississippi and Alabama to fight segregation in the transit system).

28. See generally Marvin Sykes, *Woolworth Made Target for Demonstration Here*, GREENSBORO REC., Feb. 2, 1960, at B1, available at <http://www.sitins.com/2feb1960.pdf> (detailing a seminal civil rights event when black college students were denied service, but remained seated, at a Woolworth counter).

my job because I know that every day at work for me means I get to play a small part in fulfilling the promise of equal justice.

On the night before Dr. Martin Luther King, Jr. was gunned down in Memphis, he spoke of the struggle that had brought him there. He spoke of the deplorable conditions in which African-American sanitation workers had been forced to work and of the need for unity to help them overcome their burden. He said, "The question is not, 'If I stop to help this man in need, what will happen to me?' 'If I do not stop to help the sanitation workers, what will happen to them?' That's the question."²⁹

And today, we must ask ourselves the same question: What will happen to our brothers and sisters if we do not stop to help them? Whatever path you choose in your careers, I hope you will remember that those of us who practice law have a responsibility to help advance justice. As my parents taught me, and as my faith and most of the religious traditions in this world believe, if you want to get into heaven, you better have letters of reference from poor people.

As lawyers, you will be in a unique position to advance access to justice. I hope that you will consider how you can use your legal knowledge to advance the cause of civil rights. Thank you.

29. Martin Luther King, Jr., Remarks at the Mason Temple in Memphis, Tennessee (Apr. 3, 1968), *available at* <http://www.mlkonline.net/promised.html>.

COMMENT

Freezing Terrorism Assets: Increasing International Cooperation by Observing Procedural Due Process

SAMEER HOSSAIN*

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INTRODUCTION

In September 2008, after years of litigation that received global attention, the European Court of Justice (“ECJ”) overruled a lower court’s judgment that froze Saudi businessman Yassin Kadi’s assets due to his alleged support of terrorist organizations.¹ The ECJ determined that the inability of Mr. Kadi to see the evidence against him—let alone challenge that evidence in a meaningful way—violated a number of fundamental rights recognized by the European Union, including the right to be heard and the right to property.² Although a major victory for Mr. Kadi, who denied having any ties to or supporting terrorism, this decision created a rift between the United Nations (“UN”) and its member states.

Mr. Kadi was listed under a UN Security Council resolution that requires countries to block the financial assets of alleged terrorism financiers and restrict their international travel.³ In addition to ruling that Mr. Kadi’s assets should be unfrozen, the ECJ held that a European Union law that enforced the UN resolution violated fundamental human rights that the European Union observed as a community. By overruling regional legislation that implemented a UN resolution, the ECJ’s holding amounts to a derogation of binding international law,⁴ even though the ECJ did not directly challenge the UN resolution. This raises the issue of whether individual UN member states

1. Craig Whitlock, *Terrorism Financing Blacklists at Risk*, WASH. POST, Nov. 2, 2008, at A01, available at <http://www.washingtonpost.com/wp-dyn/content/article/2008/11/01/AR2008110102214.html>.

2. Joined Cases C-402/05 P & C-415/05 P, *Yassin Abdullah Kadi v. Council of the European Union*, 2008 E.C.R. ¶¶ 353, 371, available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62005J0402:EN:HTML>.

3. Jack Goldsmith & Eric Posner, *Does Europe Believe in International Law?*, WALL ST. J., Nov. 28, 2008, at A15, available at LEXIS (search “Wall Street Journal” for article name).

4. Kalyani Munshani, *The Essence of Terrorist Finance: An Empirical Study of the U.N. Sanctions Committee and the U.N. Consolidated List*, 2010 MICH. ST. J. INT’L L. 229, 244 (2010) (stating that under Chapter VII of the UN Charter, UN member states “do not possess any discretionary rights. They must comply with the terms of the Council resolutions as they stand.”).

can opt out of implementing their international obligations under UN resolutions if the member state determines that the UN resolution conflicts with domestic or regional laws.⁵ Considering that the human rights upheld by the ECJ in Mr. Kadi's case originated from human rights norms found in the UN Charter,⁶ what caused this potential breakdown in international law? The answer lies in recent developments in national security law at the domestic level in the United States.

In the aftermath of the September 11, 2001 ("9/11"), terrorist attacks in New York and Washington, D.C., the United States Government ("USG") implemented numerous policies and laws to improve national security. To maximize its success, the USG cast a very wide net in the financial crackdown on global terrorists.⁷ Domestically, the USG made it illegal for any individual or organization to provide material support to a designated terrorist organization.⁸ Internationally, the USG provided names of suspected terrorists or terrorism financiers to the UN Security Council so that the international community could block terrorism assets worldwide.⁹

Given that international terrorists need money to conduct their operations, cutting off their finances would seem to be an effective way to curtail their illegal activities. However, casting a wide net in the process inevitably results in unintended consequences.¹⁰ For ex-

5. In particular, the decision in the *Kadi* case juxtaposed the European Union's human rights laws with the provisions of a European law implementing the UN's terrorism blacklist. *Yassin Abdullah Kadi*, 2008 E.C.R. ¶ 353. The European Court of Justice found that implementing the blacklist violated the European Union's adherence to fundamental human rights norms and could therefore not be upheld:

[T]he [*Kadi*] case presented a direct confrontation between the U.N. system of international security and peace, with its aspirations to general applicability and universal normative force, and the EU system, situated somewhere between an international organization and a constitutional polity. All this occurred in the context of an individual's claim that a significant violation of his rights had been committed at the interplay between the two.

Grainne de Burca, *The European Court of Justice and International Legal Order After Kadi*, 51 HARV. INT'L L.J. 1, 5 (2010).

6. The right to a fair trial is established in the Universal Declaration of Human Rights. See Universal Declaration of Human Rights, G.A. Res. 217A (III), U.N. Doc A/810, at 71 (Dec. 10, 1948) ("Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal . . .").

7. See generally *CDI Factsheet: Anti-Terrorist Finance Measures*, CTR. FOR DEF. INFO. (Oct. 25, 2002), <http://www.cdi.org/terrorism/finance-pr.cfm> (listing all of the domestic and international legislation put into effect after the 9/11 attacks to block global terrorism-related funds).

8. See 18 U.S.C. §§ 2339A-B (West 2006 & Supp. 2010).

9. See Munshani, *supra* note 4, at 254 (stating that the USG supplied the majority of four hundred names on the UN's consolidated list).

10. See Nina J. Crimm, *The Moral Hazard of Anti-Terrorism Financing Measures: A Potential to Compromise Civil Societies and National Interests*, 43 WAKE FOREST L. REV. 577, 603

ample, people engaging in illicit activities may become more secretive to avoid detection by law enforcement.¹¹ If banks and governments are prohibited from facilitating the financial transactions of terrorists, and this becomes effective, terrorists are likely to go further underground to avoid detection and remain viable.¹² As a result, the laws and the courts will likely be limited to individuals and organizations that are either openly or peripherally involved with providing funds to terrorism, but not necessarily those that do so clandestinely.¹³ This suggests that although legal measures to block terrorism funds that are provided openly are necessary, they are not sufficient to effectively dismantle terrorism financing.

In addition to concerns about the effectiveness of the terrorism finance measures, there are significant concerns about their legitimacy. As individuals are deprived of their property and liberty, an important legal issue arises: whether there are adequate due process protections in place. Domestically, civil rights organizations claim that there is a lack of due process in the designation of individuals and organizations as terrorism financiers.¹⁴ According to the American Civil Liberties Union, the laws prohibiting material support for terrorism “empower the Department of Treasury to seize the assets of charitable organizations with no notice and on the basis of secret evidence, and contain inadequate procedures for challenging designations.”¹⁵ Muslim charities are particularly affected since the majority of their operations involve providing financial assistance to the needy domestically and abroad.¹⁶ When these charities become the focus of a counterterrorism investigation or criminal prosecution, publicity about their alleged connections to terrorism have a chilling effect on

(2008) (describing the expansive measures President Bush took against charities and non-governmental organizations that could be susceptible to terrorist exploitation, particularly by terrorist groups that had dual militant and charitable functions).

11. See David Cohen, Assistant Sec’y for Terrorist Financing, U.S. Dep’t of Treasury, Address at the Council on Foreign Relations: Tackling Terrorist Financing (Jan. 28, 2010), available at http://www.cfr.org/publication/21339/tackling_terrorist_financing.html.

12. See Leslie Macmillan, *The Terrorist Financing Fallacy: Think a Lack of Money Will Stop Groups Like al-Qaeda? Not Likely*, TUFTS J. (Mar. 3, 2010), http://tuftsjournal.tufts.edu/2010/03_1/features/04/ (arguing that instead of financially crippling global organizations like al-Qaida, anti-terrorism financing legislation will likely cause such groups to go further underground and use alternative sources of funding, often involving illegal means).

13. *Id.*

14. ACLU, BLOCKING FAITH, FREEZING CHARITY: CHILLING MUSLIM CHARITABLE GIVING IN THE “WAR ON TERRORISM FINANCING” 10 (2009), available at <http://www.aclu.org/files/pdfs/humanrights/blockingfaith.pdf> [hereinafter BLOCKING FAITH, FREEZING CHARITY].

15. *Id.* at 10.

16. *Id.* at 8.

potential donors who do not want to be associated with a charity that may have such connections.¹⁷

Internationally, human rights organizations also raise a due process concern, and European courts have indicated that implementing a UN-mandated terrorism financing blacklist without giving individuals an opportunity to challenge their inclusion on the list is contrary to international human rights norms.¹⁸ The main issue is that the international community does not necessarily know why an organization or individual was initially identified by the USG as a terrorism financier, a designation that is subsequently enforced internationally under UN Security Council resolutions.¹⁹ European countries now face a dilemma between upholding their obligations under the UN Charter and simultaneously abiding by domestic human rights laws.²⁰ These countries propose that if a terrorism blacklist is to be implemented there must be a way to challenge the designation and have designated individuals' cases reviewed by the UN.²¹ Short of that, the recent trend in European courts increasingly challenging the legitimacy of the UN blacklist as it stands could threaten global efforts to block assets that in fact fund terrorism.

This Comment argues that observing due process domestically will make the USG's approach to freezing terrorism assets more transparent, which, in turn, would likely facilitate greater international cooperation to effectively block terrorism funding worldwide. Part I provides an overview of the terrorism finance blacklisting process under U.S. and international laws, including a discussion of the absence of procedural due process in each. Part II examines the implications on global security resulting from a breakdown in international law over freezing terrorism assets. Part III argues that the solution to this problem begins with observing procedural due process domestically and internationally. This Comment concludes by emphasizing

17. *Id.* at 13 (indicating that as Muslim charities in America have come under USG investigation for links to terrorism, many American Muslims fear giving to Muslim charities in general in case donors are retroactively punished for giving money to a charity found guilty of ties to terrorism, even though the donation was made in good faith prior to the conviction).

18. See Whitlock, *supra* note 1, at A01. In addition to citing to the decision in the *Kadi* case, the article references concerns of courts in Britain and France that upholding the UN blacklist violates fundamental rights recognized under domestic laws. *Id.*

19. *Id.* ("People named to the U.N. blacklist cannot examine the evidence against them . . . and are not granted an automatic right of appeal.")

20. *Id.*

21. David Crawford, *UN Approves Appeals over Terrorism Blacklist*, GLOBAL POL'Y FORUM (Dec. 21, 2006), <http://www.globalpolicy.org/component/content/article/202-sanctions/41741.html>.

that the rule of law and international security go hand in hand and that observing procedural due process in blocking terrorism assets can serve as an example for the overall international effort to counter global terrorism.

I. TERRORISM ASSET FREEZING LAWS AND THE LACK OF DUE PROCESS PROTECTIONS

This section outlines how the USG identifies and sanctions individuals and organizations that allegedly fund terrorism, how that list is then passed on to the international community to be enforced, and how this process currently lacks procedural due process protections. Identifying where due process protections are specifically absent will provide insight into how the process may need to be modified to simultaneously protect individual rights and society's security interests.

A. Overview of Terrorism Finance Laws

1. U.S. Laws

The USG's approach to blocking terrorism assets is to identify the source of funding to a terrorist group and require domestic financial institutions to freeze the accounts immediately upon public identification of that source.²² Under the Immigration and National Security Act, the Secretary of State has the authority to designate an organization as a Foreign Terrorist Organization ("FTO").²³ To be designated as an FTO, an organization must be foreign, it must engage in acts of terrorism, and its terrorist activities must pose a threat to U.S. national security.²⁴ Once an organization is designated by the Secretary of State as an FTO, its name is then passed to the Department of Treasury, which is responsible for blocking its assets.²⁵ If the organization is located within the United States, the Department of

22. See 8 U.S.C. § 1189(a)(2)(C) (2006); see also Sahar Aziz, *The Laws on Providing Material Support to Terrorist Organizations: The Erosion of Constitutional Rights or a Legitimate Tool for Preventing Terrorism?*, 9 TEX. J. C.L. & C.R. 45, 55 (2003).

23. 8 U.S.C. § 1189(a)(2)(C) (2006).

24. *Id.* § 1189(a)(1). Under 22 U.S.C. § 2656f(d)(2) (2006), terrorism is defined as "premeditated, politically motivated violence perpetrated against noncombatant targets by subnational groups or clandestine agents."

25. *Id.* § 1189(a)(2)(C). The statute describes the implications of blocking or freezing one's assets: Upon notification under ¶ (2)(A)(i), the Secretary of the Treasury may require United States financial institutions possessing or controlling any assets of any foreign organization included in the notification to block all financial transactions involving those assets until further directive from either the Secretary of the Treasury, Act of Congress, or order of court. *Id.*

Treasury freezes the FTO's financial assets in the U.S. and prevents anyone within the U.S. from contributing money to the FTO.²⁶

The President derives the authority to protect national security from Article II of the United States Constitution, which defines the President's authority as Commander in Chief and the Executive branch's exclusive authority in conducting the foreign affairs of the U.S.²⁷ In *Youngstown Sheet & Tube Co. v. Sawyer*, the Supreme Court held that the President should be given broad latitude and discretion when dealing with foreign affairs, and with respect to domestic affairs, and that when "the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate."²⁸

Here, the Executive branch relies upon constitutional and congressional authority to block the assets of an FTO, specifically through Executive Order No. 13,224 ("E.O. 13,224"), the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), and the International Economic Emergency Powers Act ("IEEPA").²⁹ Under E.O. 13,244, the President—acting in consultation with the Secretary of State, Secretary of Treasury, and Attorney General—blocks the property of foreign persons that are a threat to national security and prohibits U.S. persons from making donations to such designees.³⁰ The United States Treasury Department's Office of Foreign Assets Control ("OFAC") maintains the Specially Designated Nationals List, which identifies all the individuals and entities whose financial assets are blocked by the U.S. Government.³¹ The AEDPA outlines the specific procedures under which the Secretary of State notifies Congress and the Treasury Department about newly designated FTOs.³² The IEEPA is specific to times of war and national emergency under which

26. BLOCKING FAITH, FREEZING CHARITY, *supra* note 14, at 7.

27. See U.S. CONST. art. II, § 2 ("The President shall be commander in chief of the Army and Navy of the United States, and of the militia of the several states, when called into the actual service of the United States.").

28. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (U.S. 1952).

29. See International Economic Emergency Powers Act ("IEEPA"), 50 U.S.C. §§ 1701-1707 (West 2006 & Supp. 2010); Antiterrorism and Effective Death Penalty Act ("AEDPA"), Pub. L. No. 104-132, § 302(a), 110 Stat. 1248 (1996); Exec. Order No. 13,224, 3 C.F.R. 785 (2001), *reprinted in* 50 U.S.C. § 1701 (2006).

30. See Exec. Order No. 13,224, 3 C.F.R. 785 (2001), *reprinted in* 50 U.S.C. § 1701 (2006).

31. *About, Terrorism and Financial Intelligence: Office of Foreign Assets Control*, U.S. DEP'T OF THE TREASURY, <http://www.treas.gov/offices/enforcement/ofac> (last visited Feb. 6, 2011).

32. See 8 U.S.C. § 1189 (2006).

the President can freeze the assets of individuals or organizations that are engaged in “hostilities or attacks against the United States.”³³ The President invoked this authority under E.O. 13,224 after 9/11.³⁴

Once an organization is designated as an FTO, groups and individuals can be criminally prosecuted for supporting the FTO.³⁵ Under 18 U.S.C. § 2339B, anyone who “knowingly provides material support or resources” to an FTO can be fined and jailed up to fifteen years, and up to life if such support results in death.³⁶ The term “material support” includes giving any property or financial assistance.³⁷ Thus, the two-step process under U.S. domestic law involves freezing assets of a designated FTO and criminally sanctioning anyone who supports the FTO thereafter.

2. International Laws

At the international level, the USG is seeking to gain worldwide cooperation in blocking terrorism assets, primarily through the assistance of the UN. Beginning in 1999, the UN passed a series of resolutions to quickly freeze the assets of terrorist organizations and anyone providing financial assistance to them.³⁸ The UN Security Council maintains a Consolidated List that identifies the terrorist organizations and individuals and their financiers.³⁹ Under Article 25 of the UN Charter, all member states are required to carry out the decisions of the UN Security Council.⁴⁰ Under Article 48, decisions made by the UN Security Council to maintain international peace and security

33. See *Aziz*, *supra* note 22, at 54 (describing the origin and application of IEEPA, particularly its extensive use after 9/11 to block the assets of U.S.-based Islamic charities).

34. *Id.*

35. In *Holder v. Humanitarian Law Project*, the Supreme Court addressed the issue of providing nonviolent support to designated terrorist groups, holding that the Executive branch and Congress “have adequately substantiated their determination that prohibiting material support in the form of training, expert advice, personnel, and services to foreign terrorist groups serves the Government’s interest in preventing terrorism.” 130 S. Ct. 2705, 2711 (2010). The Court said that independent advocacy is protected by the First Amendment, which involves speech that is not controlled by a foreign terrorist organization. *Id.*

36. 18 U.S.C. § 2339B (West 2006 & Supp. 2010).

37. *Id.* § 2339A(a)(b)(1).

38. See *Munshani*, *supra* note 4, at 230 (describing UN Security Council resolutions 1267, 1333, 1363, 1617, and 1730, which encompass the UN Security Council’s approach to blocking financial support to terrorists).

39. *Id.* at 232 (stating that the Consolidated List is formulated by the UN al-Qaida/Taliban Sanctions Committee and designates “individuals and entities as terrorists or as financiers of terrorism”).

40. U.N. Charter art. 25 (“The Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter.”).

shall be carried out by member states.⁴¹ Furthermore, under Article 103 of the UN Charter, if there is a conflict between an obligation under the UN Charter and any other international obligation, the UN Charter prevails.⁴²

The USG influences the international order by providing its list of FTOs to the UN Security Council to include in its Consolidated List, to which any UN member state can contribute.⁴³ Unless another member of the Security Council objects, every UN member is then required to freeze the assets and prevent the travel of such individuals.⁴⁴ The UN member states accomplish this by widely disseminating the information to all relevant financial institutions and law enforcement authorities within their borders.⁴⁵

Under UN Security Council resolutions, the assets of more than five hundred individuals have been frozen.⁴⁶ The resolutions have a worldwide effect by preventing the movement of individuals in addition to freezing all of their public and private financial assets.⁴⁷ There are a number of individuals who assert that they were added to the UN list by their respective governments for purely political reasons and not because of any ties to terrorism.⁴⁸ Given the designation process, this political motivation argument seems possible since govern-

41. *Id.* at art. 48, para. 1.

42. *Id.* at art. 103 (“In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.”).

43. See Whitlock, *supra* note 1, at A01 (stating that most of the 503 names on the UN blacklist were suggested by the United States and now enforced by the UN); see also *Senator Marty Explains Opposition to Blacklist*, SWISSINFO.CH (Dec. 21, 2010), http://www.swissinfo.ch/eng/politics/foreign_affairs/Senator_Marty_explains_opposition_to_blacklists.html?cid=29075590 (“Any state belonging to the Security Council has no problem in adding a name. All it has to do is to tell the sanctions committee [which consists of the 15 Security Council members] that such and such an individual supports al-Qaida or some other terrorist network, but doesn’t have to provide any proof.”).

44. See Whitlock, *supra* note 1, at A01.

45. See Munshani, *supra* note 4, at 245-46.

46. See Whitlock, *supra* note 1, at A01.

47. *Id.*; see also *Senator Marty Explains Opposition to Blacklist*, *supra* note 43 (Swiss Senator Marty explains that once individuals’ assets are frozen, they can no longer “have a credit card or any bank accounts, and are no longer allowed to pursue gainful employment. You are given only what is strictly enough to live on. Nor can you travel outside the country where you live. There is no time limit placed on these restrictions. For some people, this means economic ruin.”).

48. See Whitlock, *supra* note 1, at A01 (noting that after Britain refused to freeze the assets of a Saudi dissident living in exile in London, Saudi Arabia succeeded in persuading the UN to add the dissident to the blacklist under Resolution 1267 by alleging terrorism connections); David Crawford, *The Black Hole of a U.N. Blacklist: Terrorism Suspects Are Stripped of Assets Without Hearings or the Right to Appeal*, WALL ST. J., Oct. 2, 2006, at A6, available at LEXIS (search “Wall Street Journal” for article name).

ments provide the names of individuals and organizations to the Security Council with only a brief description of why they are considered supporters of terrorist organizations.⁴⁹

B. Lack of Procedural Due Process Protections Domestically and Internationally

Both the USG FTO designation process under domestic laws and the UN's asset-freezing requirement fail to provide designated entities notice before their assets are frozen and deny designees an opportunity to challenge the evidence against them.⁵⁰ Under U.S. constitutional law, the right to receive notice before being deprived of property and the right to have a hearing to offer counter-evidence against charges are considered procedural aspects of the right to due process under the Fifth Amendment of the Constitution.⁵¹ Similarly, under international law, the right to be heard and the right to be secure in one's property are considered fundamental rights.⁵² This subsection provides an overview of the laws and case law that illustrate the procedural due process dilemma with respect to freezing alleged terrorism assets.

1. Procedural Due Process Concerns Under the FTO Designation Process

Although the AEDPA and IEEPA have not been held to be facially unconstitutional by federal courts, several cases indicate that there may be constitutional rights at risk in the implementation of these laws, including procedural due process violations.⁵³ The Due Process Clause of the Fifth Amendment of the United States Consti-

49. See Whitlock, *supra* note 1, at A01.

50. See BLOCKING FAITH, FREEZING CHARITY, *supra* note 14, at 10 (“[T]he Department of Treasury [can] seize the assets of charitable organizations with no notice and on the basis of secret evidence, and contain inadequate procedures for challenging designations.”); see also *Senator Marty Explains Opposition to Blacklist*, *supra* note 43 (“The person finds [himself] on the list, without being informed or given a chance to put their case. They cannot find out the details of the accusation against them, which are declared to be state secrets, nor can they appeal to an independent authority to defend themselves.”).

51. *United States v. Salerno*, 481 U.S. 739, 746 (1987) (“When government action depriving a person of life, liberty, or property survives substantive due process scrutiny, it must still be implemented in a fair manner. This requirement has traditionally been referred to as ‘procedural’ due process.” (internal citation omitted)).

52. See *Joined Cases C-402/05 P & C-415/05 P, Yassin Abdullah Kadi v. Council of the European Union*, 2008 E.C.R. ¶¶ 353, 371, available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62005J0402:EN:HTML>.

53. *Aziz*, *supra* note 22, at 68.

tution requires that “[n]o person shall . . . be deprived of life, liberty, or property, without due process of law.”⁵⁴ The procedural aspects of due process address the manner in which the federal government deprives an individual’s life, liberty, or property, requiring that the process be fair.⁵⁵ Procedural due process protections require that an individual receive notice and a hearing prior to being deprived of his or her property.⁵⁶

Under the AEDPA, the individual receives notice of his or her assets being frozen when the Secretary of State publishes the designation in the Federal Register, which is when the asset-freezing goes into effect.⁵⁷ Judicial review is available no later than thirty days post-designation and is based solely on the administrative record.⁵⁸ Therefore, the procedural due process norm of according an individual notice and a hearing *prior* to being deprived of property are not upheld by the AEDPA. Similarly, the IEEPA does not provide notice or a hearing to an FTO prior to designation.⁵⁹ The President identifies a group or individual as a threat during a time of emergency and this is also done through the Federal Register.⁶⁰ Under the IEEPA, the courts give deference to the President as his actions fall within his constitutional authority over foreign affairs and national security.⁶¹

Procedural due process is not observed in the FTO process because there are foreign entities allegedly engaged in terrorist activities, which may not receive the same type of judicial review as U.S. persons deprived of property, but the courts still consider allegations of Fifth Amendment violations.⁶² In general, courts apply a three-part test to determine whether the due process clause applies to a foreign person or entity: “(1) whether the person or entity has a constitutional presence in the United States; (2) whether government action deprived the person or entity of a constitutionally protected interest; and

54. U.S. CONST. amend. V.

55. *Salerno*, 481 U.S. at 746.

56. *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 542 (1985).

57. 8 U.S.C. § 1189(a)(2)(A)(ii) (2006) (stating the Secretary of State provides notice to the general public via the Federal Register after seven days of notifying the requisite members of congress under clause (i)).

58. *Id.* § 1189(c)(1)-(2).

59. *Aziz*, *supra* note 22, at 54.

60. *Id.*

61. *Id.*

62. *Id.* at 68.

(3) whether the procedural protections provided by the government, if any, were constitutionally sufficient.”⁶³

In *KindHearts for Charitable Humanitarian Development, Inc. v. Geithner*,⁶⁴ the court engaged in a due process analysis in a material support for terrorism case. The plaintiff Muslim charitable organization alleged that the government violated its procedural due process rights by failing to provide notice and a hearing prior to freezing its assets.⁶⁵ In February 2006, OFAC blocked the organization’s assets pending an investigation under IEEPA, even though it was not designated an FTO.⁶⁶ The court held that under the Fifth Amendment, the OFAC’s “blocking order failed to provide [KindHearts with] the two fundamental requirements of due process: meaningful notice and [an] opportunity to be heard.”⁶⁷ The case turned on the fact that after the assets were blocked, the government provided very little information as to why the organization was being investigated, besides stating that the government had the authority to do so under IEEPA.⁶⁸ This was a violation under IEEPA itself, which requires notification by publishing the designation in the Federal Register when the assets are frozen, but here, the assets were frozen before any actual designation.⁶⁹ IEEPA was not held facially unconstitutional since it allows for judicial review based on the circumstances, so a court may review whether procedural due process may apply in a case, as it did here.⁷⁰

In a subsequent opinion, the judge ruled on the appropriate remedies for the violations of KindHearts’ constitutional rights.⁷¹ First, the court held that in response to a Fourth Amendment violation of failing to secure a warrant prior to a seizure of KindHearts’ assets, the “government must instead show that, at the time of the original seizure, it had probable cause—that is, a reasonable ground—to be-

63. *Id.* at 62 (internal quotations omitted).

64. *See* *KindHearts for Charitable Humanitarian Dev., Inc. v. Geithner* (*KindHearts I*), 647 F. Supp. 2d 857, 897 (N.D. Ohio 2009).

65. *Id.*

66. *Id.* at 865.

67. *Id.* at 897.

68. *Id.* at 901-02 (“OFAC’s invitation to KindHearts to send a letter in response to the blocking notice did not add to KindHearts’ understanding of the reasons and basis for the government’s actions. The government did not offer access to the unclassified administrative record, any part of the documents and property seized during execution of the search warrants, or funds to pay attorney fees.”).

69. *Id.*

70. *Id.* at 899 (indicating that so long as the Executive can act constitutionally under IEEPA, the statute is not unconstitutional on its face).

71. *KindHearts for Charitable Humanitarian Dev., Inc. v. Geithner* (*KindHearts II*), 710 F. Supp. 2d 637 (N.D. Ohio 2010).

lieve that KindHearts, specifically, was subject to designation under E.O. 13224 § 1.”⁷² The court further specified that a post-hoc judicial finding of the probable cause would remedy the Fourth Amendment violation.⁷³ Next, in response to the Fifth Amendment due process violations of failing to provide notice and an opportunity to be heard, the court suggested having an *ex parte, in camera* meeting with the government to determine which classified information, if provided to KindHearts, would serve as adequate notice.⁷⁴ This could be done by either declassifying the information, providing an unclassified summary, or requiring KindHearts’ counsel to obtain a security clearance.⁷⁵ Once they receive adequate notice by obtaining the necessary information, KindHearts would then be provided an opportunity to be heard by being able to respond to these documents.⁷⁶ This most recent holding established that under the facts of the *KindHearts* case, an organization under investigation for material support to terrorism has the right to receive notice and be heard, albeit after its assets have been frozen.

Although the *KindHearts* court held that procedural due process was violated, the holding in the case is the exception. In the cases against many other Muslim charitable groups, including the Global Relief Foundation, al-Haramain, and Holy Land Foundation, the courts held that due process was not violated when AEDPA and IEEPA provisions were followed.⁷⁷ As described earlier, prior notice and hearing are not provided for in the statutes, so procedural due process is not guaranteed when property is deprived under these laws, and it is therefore largely in the courts’ discretion to determine whether due process applies.

2. The UN Blacklisting Procedure Fails to Provide Due Process Protections

At the international level, the current approach to blocking terrorism assets conflicts with fundamental human rights guaranteed to all individuals. The Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights are the United

72. *Id.* at 652.

73. *Id.*

74. *Id.* at 659.

75. *Id.*

76. *Id.*

77. See BLOCKING FAITH, FREEZING CHARITY, *supra* note 14, at 52, 61.

Nations' primary instruments of international law establishing fundamental human rights.⁷⁸ These norms were interpreted in light of the obligation of member states to abide by UN Security Council resolutions under the UN Charter in the *Kadi* case.

In *Kadi*, the ECJ looked at rights similar to those protected under the U.S. Constitution's Due Process Clause, namely the right to prior notice and the right to be heard with regards to the deprivation of property.⁷⁹ In Mr. Kadi's case, he appealed a lower court decision that held that UN law must be upheld unless there is a violation of a peremptory norm of international law, which, according to the lower court, Mr. Kadi did not establish.⁸⁰ The freezing of funds was considered a temporary rather than permanent deprivation of property. Furthermore, the lower court held that in Mr. Kadi's case, there is "no mandatory rule of public international law [that] requires a prior hearing."⁸¹ Based on its understanding of the supremacy of UN laws, the lower court denied Mr. Kadi's claims.

The ECJ took a different approach, focusing on the fundamental rights of individuals. The ECJ cited Article 6 and 13 of the European Convention on Human Rights and Article 47 of the Charter of the fundamental rights of the European Union, which established the principle of effective judicial protection.⁸² The ECJ held that this principle was violated in Mr. Kadi's case since he was not informed of the evidence against him and therefore unable to seek legal remedy for deprivation of his property.⁸³ This is similar to the United States Supreme Court's holding in *Loudermill*, which established the right to be heard under the Due Process Clause, except that the ECJ has referred to it as a fundamental right established under European law.⁸⁴

The *Kadi* decision, just like *KindHearts*, is a new holding that diverts from the norm. Although there have been some objections in the international community to the designation of individuals and

78. Michael J. Perry, *The Idea of Human Rights and the Matter of Rights-Talk*, 28 SUFFOLK U. L. REV. 587, 589 (1994).

79. See Joined Cases C-402/05 P & C-415/05 P, Yassin Abdullah Kadi v. Council of the European Union, 2008 E.C.R. ¶¶ 353, 371, available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62005J0402:EN:HTML>.

80. *Id.* ¶ 89.

81. *Id.* ¶ 96; see also *id.* ¶ 94.

82. *Id.* ¶ 8 (explaining that based on this protection, the listed person has the right to know why they are having their assets frozen so that they have an opportunity to be heard and defend his or her rights).

83. *Id.* ¶ 9.

84. See *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 542 (1985); see also *Yassin Abdullah Kadi*, 2008 E.C.R. ¶ 9.

freezing of their assets under the UN Security Council resolutions without notice or hearings, this is the first case to actually challenge the UN law.⁸⁵ The UN's asset-freezing resolutions are still in effect and it is yet to be seen what the impact of *Kadi* is on whether individual European countries abide by UN law or domestic law.

II. NEGATIVE CONSEQUENCES FOR GLOBAL SECURITY

This section identifies why international cooperation is essential in effectively blocking the funding of terrorism activities worldwide. Without the support of important allies, the USG would be required to unilaterally block all terrorism funds around the world that pose a threat to U.S. national security. As a result, facilitating greater international cooperation is in the national security interest of the USG.

A. The Importance of International Cooperation

In his inaugural address, President Obama addressed the importance of international cooperation in general, and with respect to international security specifically. He boldly stated, "America is a friend of each nation, and every man, woman and child who seeks a future of peace and dignity," followed by the acknowledgment that "we can meet those new threats that demand even greater effort, even greater cooperation and understanding between nations."⁸⁶ This suggests that the President considers international cooperation as the means through which to address security challenges. Furthermore, the President indicated the context in which this cooperation would be pursued: "[a]s for our common defense, we reject as false the choice between our safety and our ideals. Our Founding Fathers . . . drafted a charter to assure the rule of law and the rights of man. . . . Those ideals still light the world, and we will not give them up for expedience's sake."⁸⁷ This second part speaks to the United States Constitution and the President clearly stated that the ideals contained therein would guide security policy and decisions. Thus, the current administration's stated commitment to international cooperation and the rule of law to achieve international security strongly suggests that it would uphold the Constitution's Due Process Clause, when applicable, in terrorism cases.

85. See Whitlock, *supra* note 1, at A01.

86. President Barack Obama, Inaugural Address (Jan. 20, 2009), available at <http://www.whitehouse.gov/blog/inaugural-address/>.

87. *Id.*

The feasibility of upholding the rule of law is an important factor in determining the course of action to address terrorism issues. On January 22, 2009, two days after taking the oath of office, President Obama signed an executive order to permanently close the Guantanamo Bay detention center “as soon as practicable, and no later than [one] year from the date of this order.”⁸⁸ More than two years later, Guantanamo Bay continues to house foreign terrorism detainees that are awaiting trial, despite the President’s clear intention to close the facility, due to a number of political hurdles, one of them being members of Congress being opposed to housing the detainees in the United States.⁸⁹ Additionally, even though President Obama expressed an intent to try every detainee under the law as quickly as possible, a number of factors arose after reviewing each individual case, and President Obama acknowledged that some detainees could neither be tried nor released because they continued to pose a risk to national security.⁹⁰ As a result, even the strongest stated interest in upholding the rule of law can be superseded by political realities and legitimate security concerns.

On the issue of terrorism finance laws and Muslim charitable organizations, President Obama acknowledged the importance of making it feasible for Muslims to practice charitable giving in accordance with their faith. In a June 2009 speech to the Muslim world from Cairo, Egypt, President Obama said, “[I]n the United States, rules on charitable giving have made it harder for Muslims to fulfill their religious obligation. That’s why I’m committed to working with American Muslims to ensure that they can fulfill [Islamic charity].”⁹¹ Muslim organizations have since called upon the Obama administration to live up to this commitment and ensure that when Muslims donate to Is-

88. Exec. Order No. 13,492, 74 Fed. Reg. 4897 (Jan. 22, 2009).

89. Peter Finn & Sandhya Somashekhar, *Obama Bows on Settling Detainees: Administration Gives up on Bringing Cleared Inmates to U.S., Officials Say*, WASH. POST, June 12, 2009, at A1, available at <http://www.washingtonpost.com/wp-dyn/content/article/2009/06/11/AR2009061101210.html> (quoting members of Congress who described bringing Guantanamo Bay detainees to the United States as a matter of national security and would not approve of any plans to do so).

90. Press Release, White House, Remarks by the President on National Security (May 21, 2009) (on file with author), available at http://www.whitehouse.gov/the_press_office/Remarks-by-the-President-On-National-Security-5-21-09/ (“[T]here may be a number of people who cannot be prosecuted for past crimes, in some cases because evidence may be tainted, but who nonetheless pose a threat to the security of the United States.”).

91. Press Release, White House, Remarks by the President on A New Beginning (June 4, 2009) (on file with author), available at <http://www.whitehouse.gov/the-press-office/remarks-president-cairo-university-6-04-09>.

lamic causes to fulfill their obligatory charity requirements, that they are not prosecuted for inadvertently giving to organizations that are subsequently investigated for links to terrorism.⁹²

In addition to the current administration's commitment to international cooperation and the rule of law, the George W. Bush administration had a similar approach in its initial response to 9/11. The first part of the response entailed a military campaign in Afghanistan. Unlike the preemptive attack to overthrow Saddam Hussein in Iraq, the military campaign to oust the Taliban for providing safe haven to al-Qaida involved a U.S.-led international coalition that cooperated with Afghan soldiers.⁹³ The international goodwill towards the United States was very high at the time, which facilitated the cooperation, but became very low during the lead up to the invasion of Iraq in 2003.⁹⁴ Although international cooperation was not always the primary means through which the Bush administration conducted its international approach to counterterrorism, the initial reaction to 9/11 suggests that the preferred means is through international cooperation.

With respect to freezing terrorism assets, there is evidence to suggest that international cooperation is effective in undermining terrorism activities, as seen with the defeat of the Liberation Tigers of Tamil Eelam ("LTTE") of Sri Lanka. The leading separatist rebel group in Sri Lanka since 1976, the LTTE was an armed group responsible for prolonged civil conflict until its defeat by the Sri Lankan military in 2009.⁹⁵ In 1997, the USG designated the LTTE as an FTO under the AEDPA, and this was followed by similar action by U.S. allies Britain, Canada, and Australia, in addition to actions already taken by India and Sri Lanka.⁹⁶ This collective approach led to the depletion of funds from the Sri Lankan diaspora in North America, Europe, and Asia to the LTTE, and significantly hampered the military activities of the LTTE. As a result, the LTTE began participating in peace negoti-

92. *Call the White House! Urge the President to Uphold His Promise to Protect Zakat!*, MUSLIM ADVOCES. (June 4, 2010), http://www.muslimadvocates.org/latest/charity_update/american_muslims_ask_president.html.

93. Michael R. Gordon, *A Nation Challenged: The Future; Key Players Confer at U.N. On a Post-Taliban Regime*, N.Y. TIMES, Nov. 12, 2001, at B4, available at <http://www.nytimes.com/2001/11/12/international/12STRA.html>.

94. Philip H. Gordon, *Obama's Foreign Policy Options*, BROOKINGS INST. (Sept./Oct. 2008), http://www.brookings.edu/articles/2008/09_obama_gordon.aspx.

95. *Sri Lanka Rebels Concede Defeat*, VOICE OF AM. NEWS (May 17, 2009), <http://www1.voanews.com/english/news/a-13-2009-05-17-voa11-68644392.html>.

96. *In the Spotlight: Liberation Tigers of Tamil Eelam*, CTR. FOR DEF. INFO. (Apr. 26, 2002), <http://www.cdi.org/terrorism/ltte.cfm>.

ations with the Sri Lankan government.⁹⁷ The successful international effort to dry up the LTTE's financial resources in the years leading to its defeat suggests that international cooperation can be successful in undermining a security threat.

It is clear that there is a significant and essential role for international cooperation in the USG's efforts to counter global terrorism.⁹⁸ At the very least, it would ensure that the USG does not have to independently investigate and prosecute every potential financial contribution to a terrorist organization around the world that could be a threat to national and international security. President Obama has expressed his intent to facilitate greater international cooperation and to uphold the rule of law. President Bush relied on international cooperation to defeat the Taliban in Afghanistan. Finally, the role of international cooperation in depleting the funds of the LTTE in Sri Lanka suggests that cooperation on this issue can help facilitate its ultimate objective of defeating an FTO. Therefore, the LTTE example strengthens the case for seeking greater international cooperation to block the funds for terrorism activities.

B. The International Terrorism Asset-Freezing Regime Is at Risk

The *Kadi* case is indicative of a larger break in Europe from UN law on the issue of terrorism financing. The ECJ's holding in *Kadi* upheld individual rights over international law governing international peace and security.⁹⁹ The ECJ's reasoning reflected growing international discontent over the U.S. method of nominating individuals to the UN for the international financial blacklist, which prevents any external review in order to protect intelligence sources.¹⁰⁰ The Council of Europe, a regional human rights governmental entity, recently said the UN blacklist was "totally arbitrary" and lacked credibility.¹⁰¹ As a further indication of the breakdown in international cooperation:

European prosecutors have dropped criminal investigations of several accused al-Qaeda financiers targeted by the U.N. sanctions af-

97. *Id.*

98. See NAT'L COMM'N ON TERRORIST ATTACKS UPON THE U.S., TERRORIST FINANCING STAFF MONOGRAPH 5 (2004), available at http://www.9-11commission.gov/staff_statements/911_TerrFin_Ch1.pdf [hereinafter 9/11 COMM'N REPORT] (stating that prior to 9/11, the FBI was unable to turn terrorism financing cases into criminal prosecutions in part due to the lack of international cooperation).

99. See de Burca, *supra* note 5, at 5.

100. Laura K. Donohue, *Anti-Terrorist Finance in the United Kingdom and United States*, 27 MICH. J. INT'L L. 303, 308 (2006).

101. See Whitlock, *supra* note 1, at A01.

ter failing to find evidence that would stand up in court. But the United Nations has refused to remove all but one of those individuals from its blacklist, saying that it still thinks they are supporters of terrorism.¹⁰²

If UN member states, especially the USG's European allies, fail to uphold the asset-freezing approach to terrorism initiated by the USG, the financial approach to counterterrorism begins to fall apart.¹⁰³

The *Kadi* case is therefore indicative of broader legal and political pushback to the international asset-freezing regime. The UN relies on member states to implement laws to uphold its resolutions.¹⁰⁴ The ECJ held in *Kadi* that the regional European law implementing the UN asset-freezing resolutions violated regional human rights norms, thus challenging the overarching UN resolution.¹⁰⁵ This legal challenge came as many countries were starting to question the designation of individuals to the UN Consolidated List. In the aftermath of 9/11, the USG submitted almost four hundred names, most of which were adopted by the UN without much debate.¹⁰⁶ In the years following, the legal challenges based on lack of due process and fairness claims brought before European courts have eroded much of the goodwill towards the United States that initially prompted the international community to enforce the Consolidated List.¹⁰⁷

In response to the growing international discontent and pushback, the UN has taken some initiative to resolve concerns over the blacklist. Currently, there is an effort for the UN to take more responsibility for designating individuals as terrorism financiers and freezing their assets and banning their international travel.¹⁰⁸ In 2006, while Denmark was the President of the UN Security Council, it initiated a process by which designated individuals could appeal their statuses and free their assets.¹⁰⁹ The appeals process falls short of fully observing due process since it does not allow the individuals to face

102. *Id.*

103. *Id.*

104. See Munshani, *supra* note 4, at 247 (indicating that 169 of 192 UN members states incorporated the UN Security Council's Consolidated List into their domestic regulatory systems).

105. Albert Posch, *The Kadi Case: Rethinking the Relationship Between EU Law and International Law?*, 15 COLUM. J. EUR. L. ONLINE 1, 4 (2009) (stating that the ECJ's decision to overrule the local legislation implementing the UN Security Council legislation could potentially jeopardize the international system in which UN Charter obligations are binding on member states).

106. Munshani, *supra* note 4, at 254.

107. See *id.*

108. Crawford, *supra* note 21.

109. *Id.*

the evidence against them, it just allows the UN to review the cases.¹¹⁰ The ultimate decision lies with the countries that designated them as terrorism financiers and their opinion of the current threat posed by those individuals.¹¹¹

More recently, in 2009, the UN appointed an ombudsman to review each and every case of the more than five hundred individuals listed as providing funds to al-Qaida or the Taliban.¹¹² The fact that the list is composed of names of deceased people and defunct organizations demonstrates that it is outdated.¹¹³ Reviewing every entry will provide an opportunity to refresh the list with accurate information.¹¹⁴ The hope is that a closer look will also encourage more countries to comply with the list.¹¹⁵ The appointment of an ombudsman also provides the listed individuals with a person to approach to inquire about their statuses.¹¹⁶ For the first time since the list was implemented, the individuals will be able to present their cases in full and ask to be delisted.¹¹⁷ The ombudsman's findings will be provided to the UN Security Council, which will have the ability to remove names from the list only by consensus.¹¹⁸

Recent developments indicate a major shift in how the UN is handling the FTO financiers' blacklisting, but it falls short of providing due process rights to designees. Under the current framework, the introduction of an ombudsman is likely to encourage more international cooperation, but it still does not address the due process concern highlighted in *Kadi*, namely the inability of individuals to assert their fundamental right to a hearing and to protect their property.¹¹⁹ As a result, the ECJ holding in *Kadi* still remains a challenge to the

110. *Id.*

111. *Id.*; see also Donohue, *supra* note 100, at 426 (describing the potential for abuse by states that have an al-Qaida presence in their territory but use blacklisting to stifle political dissent, which is commonplace in countries such as Egypt, Syria, Sudan, and Pakistan).

112. Peter S. Green, *Terror Suspects Get Ombudsman in UN Sanctions*, BLOOMBERG NEWS (Dec. 17, 2009), <http://www.bloomberg.com/apps/news?pid=20601110&sid=aUua.gINM90A>.

113. *Id.*

114. *Id.*

115. *Id.* ("The UN Security Council approved changes . . . that the U.S. and other countries fighting Islamist terrorists say will make it easier to persuade governments and courts around the world to seize assets, block travel and prevent arms trafficking by supporters of the groups.").

116. *Id.*

117. *Id.*

118. *Id.*

119. See Joined Cases C-402/05 P & C-415/05 P, *Yassin Abdullah Kadi v. Council of the European Union*, 2008 E.C.R. ¶¶ 353, 371, available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62005J0402:EN:HTML>; *supra* note 2 and accompanying text.

international order pertaining to the obligation of UN member states to abide by UN law.

III. RECOMMENDATION: OBSERVE PROCEDURAL DUE PROCESS TO IMPROVE INTERNATIONAL COOPERATION

Thus far, this Comment has identified three main issues regarding the blocking of global terrorism assets. First, there is a lack of procedural due process in the USG and UN approach to terrorism blacklisting since designated individuals do not receive notice and a hearing prior to being denied access to their property.¹²⁰ Second, the USG prefers international cooperation on addressing global terrorism, as expressed by both presidential administrations dealing with this issue since 9/11, and cooperating on blocking terrorism financing specifically can be effective, as seen with the LTTE in Sri Lanka.¹²¹ Third, international cooperation is at risk on this issue, as seen in the ECJ's holding in the *Kadi* case and the UN's efforts to modify the blacklisting process in response to human rights concerns expressed by UN member states.¹²² This Comment now argues that observing procedural due process domestically, namely the right to receive notice and have a hearing prior to being deprived of property, would remove one of the major obstacles to seeking greater cooperation on this issue.

A. The Need to Improve Existing Laws

There is an acknowledgment even within the USG that the asset-freezing process needs to be improved. The National Commission on Terrorist Attacks Upon the United States (the 9/11 Commission) stated in its report on terrorism financing that the measures taken under IEEPA raise civil liberties concerns and that the organizations under investigation have raised due process concerns.¹²³ Although *KindHearts* is a minority opinion among the federal cases on the issue, it remains valid law and it identified a violation of procedural due process when the designated Muslim charity was not given proper notice, which the government is now required to do after the assets are

120. *See supra* Part I.

121. *See supra* Part II.

122. *Id.*

123. 9/11 COMM'N REPORT, *supra* note 98, at 11 n.4 (indicating that the central issue in the domestic terrorism financing lawsuits is "whether, based on the nature and quality of the evidence involved, and the threat of likely harm, the government appropriately exercised those powers against U.S. persons").

frozen.¹²⁴ Thus, if the government still has a responsibility under the Constitution to observe due process when applicable, then the relevant laws, namely the AEDPA and IEEPA, should explicitly protect due process rights.

Furthermore, the similarities in the international concerns about freezing assets suggest that observing procedural due process domestically would have broader implications. The court in *Kadi* held that taking property without providing advance notice and without a hearing to contest the evidence against the terrorism financier designee was a violation of fundamental human rights.¹²⁵ These were the same issues brought by the plaintiff in *KindHearts*, which the court also upheld,¹²⁶ although the court subsequently held that an opportunity to be heard could be satisfied after the assets are frozen.¹²⁷ Due to a common concern over similar rights, protecting those rights would likely resolve that particular obstacle to gaining broader cooperation on blocking terrorism funds. There are certain practical concerns involved with providing a suspect individual or organization with notice and hearing prior to freezing their assets, but those can be resolved by taking adequate precautions.¹²⁸

B. Providing Notice of Asset-Freezing

One of the USG's stated concerns with providing notice before blocking terrorism assets is that the alleged terrorism financier will immediately disperse their assets, thus defeating the purpose of the block.¹²⁹ To address this concern, one possible solution is to provide instructions with the notice as to how the suspect funds are to be handled while an organization is being investigated. For example, OFAC

124. *KindHearts I*, 647 F. Supp. 2d 857, 883 (N.D. Ohio 2009) (holding that the government did not provide any exigent circumstances requiring it to block the organization's funds without a warrant, such as by showing that the organization would use the funds unlawfully if they received advance notice). See also *KindHearts II*, 710 F. Supp. 2d 637, 659 (N.D. Ohio 2010).

125. See Joined Cases C-402/05 P & C-415/05 P, Yassin Abdullah Kadi v. Council of the European Union, 2008 E.C.R. ¶¶ 353, 371, available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62005J0402:EN:HTML>; *supra* note 2 and accompanying text.

126. *KindHearts I*, 647 F. Supp. at 907-08 (“OFAC has failed to provide a meaningful hearing. . . . OFAC did not provide timely or sufficient notice to enable *KindHearts* to prepare an effective challenge.”).

127. *KindHearts II*, 710 F. Supp. 2d at 659.

128. See *infra* Part III.B-D.

129. See *KindHearts I*, 647 F. Supp. 2d at 883. “[OFAC’s] notice also explained *KindHearts* did not receive prior notice of OFAC’s determination to block [*KindHearts*] assets pending investigation because it could have transferred its funds and assets, thus rendering the sanctions ineffectual.” *Id.*

can serve notice on an organization that, in addition to containing information with respect to the terrorism related charges, instructs the organization to cease and desist all suspect activity, such as dispersing funds to organizations that the USG has identified as terrorist organizations.¹³⁰ This, however, would not definitively prevent an organization from giving away its funds, which is necessary to prevent further aid to terrorists, but it would make it explicitly illegal to do so. The organization would be under notice that it is being investigated, the authorities can monitor all financial transactions, and if there are any violations, the assets can then be frozen. If the assets are frozen under these circumstances, the organization has already received notice, and therefore the USG has given the organization its constitutional right to receive notice under the Due Process Clause.¹³¹ For the legitimate charities that come under government scrutiny due to inadvertent disbursement of donations to terrorist organizations, this process would provide a fair opportunity to correct the situation, comply with government regulations, and do so without being branded a terrorism supporter.¹³² Additionally, it would not unnecessarily jeopardize the contributions made by donors in good faith, which would happen if the charity's funds are frozen indefinitely pending investigation. As a result, this proposal addresses the USG's reluctance to provide prior notice due to the ability of illicit organizations to immediately disburse funds in order to avoid confiscation. This proposal also helps avoid the irreversible harm done to legitimate charities when their assets are frozen without providing them an opportunity to resolve any inadvertent, but improper use of funds.

C. Protecting Classified Information

The ability of the USG to protect classified intelligence information could be compromised by providing an opportunity to have a hearing before freezing the assets of an entity. To assert the strongest possible defense in a criminal case, the defendant would need to see the evidence against him or her and directly challenge it.¹³³ The USG

130. See BLOCKING FAITH, FREEZING CHARITY, *supra* note 14, at 21 (describing as a possible solution that the Secretary of State inform a charity to cease and desist suspect donations and give it time to remedy any problems before freezing assets).

131. See *supra* note 50 and accompanying text.

132. See *supra* note 68 and accompanying text.

133. The Confrontation Clause of the Sixth Amendment of the United States Constitution provides that “[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be informed of the nature and cause of the accusation [and] to be confronted with the witnesses against him.”

often relies on classified intelligence information to build its terrorism cases.¹³⁴ To prevent future acts of terrorism, the USG cannot disclose the information, even if it is critical to the defense of the defendant in the current case.¹³⁵ Without knowing the specifics of the accusation and being unable to cross-examine the prosecution on the undisclosed information, the defendant is denied an important opportunity to mount an effective defense against criminal charges.¹³⁶ Thus, even though the USG may have a valid reason to avoid a hearing in a terrorism financing case, it leads to several concerns with respect to the defendants' constitutional rights, such as the potential violation of procedural due process protections.

One possible solution to this dilemma is to provide the defense attorney access to the classified intelligence information necessary to the defense's case. The Classified Information Procedures Act ("CIPA"), enacted in 1980, was intended to relieve the government of the dilemma of choosing between releasing classified national security information or dropping the case against a criminal defendant altogether.¹³⁷ The concern was that a criminal defendant who had knowledge of classified national security information could disclose it to the public during a criminal trial.¹³⁸ To avoid this, the prosecution had to choose between pursuing the case at the risk of having the information disclosed or drop the case to avoid such disclosure.¹³⁹ CIPA provides for a mechanism under which the USG can request the court to review the classified information prior to disclosure and file a motion

U.S. CONST. amend. VI. Here, by not being privy to the nature of the charges because they are classified and not being able to cross-examine the prosecution on the same grounds, the Sixth Amendment right of the criminal defendant is being subverted.

134. Nikiforos Mathews, *Beyond Interrogations: An Analysis of the Protection Under the Military Commissions Act of 2006 of Technical Classified Sources, Methods and Activities Employed in the Global War on Terror*, 192 MIL. L. REV. 81, 83 (2007) (stating that prosecution of terrorism cases requires the use of sensitive intelligence information as evidence, and due to the ongoing nature of the terrorism activity, the disclosure of the means by which the evidence was procured would compromise its utility).

135. *Id.*

136. *Id.*

137. See James Nicholas Boeving, *The Right to Be Present Before Military Commissions and Federal Courts: Protecting National Security in an Age of Classified Information*, 30 HARV. J.L. & PUB. POL'Y 463, 546 (2007) ("The primary purpose of CIPA was to prevent a defendant from disclosing classified information during trial because doing so would reveal the information to the public at large."); see generally Classified Information Procedures Act ("CIPA"), Pub. L. No. 96-456, 94 Stat. 2025 (codified at 18 U.S.C. app. 3 (2000)). On motion, the government can request the court to review the classified information *in camera* and determine whether the information can remain protected or must be disclosed in some form in accordance with the defendant's constitutional rights. Boeving, *supra*, at 544-45.

138. Boeving, *supra* note 137, at 546.

139. *Id.* at 545.

for a protective order as necessary to protect vital national security information that should not be disclosed.¹⁴⁰ Alternative methods of proceeding with the case are available, such as providing a summary of the classified information in question without disclosing the sensitive information.¹⁴¹ These measures allow for a trial to proceed under broader constitutional standards, such as a criminal defendant's right to a trial, even when classified national security information is involved.

Although CIPA was primarily intended to enable prosecutors to proceed in cases where *defendants* had access to classified information that they could disclose, the statute has also been applied in terrorism cases in which the *government* holds the information that the defendant needs in order to proceed with the defense. Section 4 of CIPA permits the court to review the classified information in the government's possession and determine if it is relevant to the defense's case.¹⁴² If the court determines that the classified information is material and relevant to the defense, it may order the government to disclose the information or provide a summary "if such a substitute would provide the defendant with substantially the same ability to make his defense as would the disclosure."¹⁴³ In *KindHearts*, the organization requested the classified information that formed the basis of the government's reason to freeze KindHeart's assets.¹⁴⁴ After the government refused, KindHearts made a formal request under CIPA to have the relevant information declassified, which the government did, but the court held that it had done so after unnecessary delay.¹⁴⁵ Thus, CIPA is a legitimate tool to aid the defense in its case when the government has relevant and material classified information in terrorism cases.

140. § 3, 94 Stat. at 2025.

141. *Id.* § 4.

142. Ellen Yaroshefsky, *Lawyers' Ethics in an Adversary System: Secret Evidence is Slowly Eroding the Adversary System: CIPA and FISA in the Courts*, 34 HOFSTRA L. REV. 1063, 1068 (2006) ("Where the government possesses classified, potentially relevant information, section 4 of CIPA permits it to present such information *ex parte, in camera* to the trial court for a determination as to whether the documents are discoverable.").

143. *Id.* at 1069. To review classified information, the defense attorney must have a government-issued security clearance. *Id.* at 1070.

144. *KindHearts I*, 647 F. Supp. 2d 857, 903 (N.D. Ohio 2009).

145. *Id.* at 904 (stating that even after the disclosure of classified information, "KindHearts remains largely uninformed about the basis for the government's actions. To the extent that it has become usefully informed, that information came only after long, unexplained and inexplicable delay and following multiple requests for information.").

Under this recommendation, it is apparent that the USG has the option to provide notice and a hearing to FTOs prior to freezing their assets. Thus, the question arises as to why the government would not do so already. The USG is likely aware of the option to prohibit an organization from utilizing its funds in an improper way once the USG provides notice. The USG is also likely aware that CIPA can be used to hold hearings in terrorism financing cases, since it has already done so. One likely explanation is that the USG wants to keep all its options open with regards to terrorism cases, particularly those that involve ongoing terrorist activities. This would explain why AEDPA and IEEPA do not have specific language requiring the government to observe procedural due process in terrorism cases.¹⁴⁶ The court in *KindHearts* held that this omission did not make the legislation facially invalid since it allows for judicial review based on the circumstances. Accordingly, rather than prohibiting the observance of procedural due process, the statute allows the court to review and decide whether procedural due process should apply in a case.¹⁴⁷ This Comment recommends that instead of leaving it open for the court to decide, both the AEDPA and IEEPA should require that when feasible, notice and a hearing should be provided prior to freezing an individual's or organization's assets. The option of providing notice to cease and desist funding suspect organizations and the ability of the defense attorney to see classified information under CIPA should specifically be included in the legislation. This would resolve the procedural due process concerns at the heart of terrorism financing litigation.

D. Domestic Observance of Procedural Due Process Likely to Improve International Cooperation

Given that the international community is not informed of the USG's decisions behind designating an individual or organization as a terrorism financier, if the international community knows that the designees received notice and had an opportunity to be heard in court prior to their assets being frozen, it is likely that they will comply with freezing those assets.¹⁴⁸ The majority of the designees on the UN

146. See *supra* note 59 and accompanying text.

147. See *supra* note 70 and accompanying text (indicating that so long as the Executive can act constitutionally under IEEPA, the statute is not unconstitutional on its face).

148. See *supra* Part II.B (arguing that the human rights body considering the designation process arbitrary may no longer believe so if procedural due process is observed by the USG); Joined Cases C-402/05 P & C-415/05 P, *Yassin Abdullah Kadi v. Council of the European Union*, 2008 E.C.R. ¶¶ 353, 371, available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?>

blacklist are recommended by the USG, so the international community is largely concerned with how the USG designates individuals.¹⁴⁹ Therefore, requiring a substantial recognition of procedural due process has worldwide implications for the USG in its efforts to block global terrorism funds.

There are also concerns of how other countries designate individuals, and there is evidence to suggest that non-democratic societies do so solely to silence political dissidents.¹⁵⁰ However, these individuals are in the minority of the total designees, so international cooperation does not necessarily hinge on this problem, but it should also be resolved.¹⁵¹ This may be addressed by the recent steps taken by the UN to provide a hearing to individuals challenging their designations, since they will be able to assert that their governments have no evidence of their links to terrorism.¹⁵² Thus, the problem of arbitrary designation by governments other than the USG can be brought to the UN's attention under this newly adopted process.¹⁵³

Another important contribution of observing due process domestically is that it may reduce the chances of a larger breakdown in international law. As noted earlier, UN member states are required under the UN Charter to uphold the rules passed by the UN Security Council.¹⁵⁴ After the *Kadi* case, which held that the inability to receive notice and a hearing prior to having assets frozen violates fundamental human rights, European Union member states are no longer required to uphold the European law implementing the UN blacklist since it violates human rights, despite the obligation to enforce the UN Consolidated List under the UN Charter.¹⁵⁵ Again, given that the majority of designated individuals, including Mr. Kadi, were added at the behest of the USG, implementing procedural due process in the

uri=CELEX:62005J0402:EN:HTML (holding that lack of notice and hearing constitutes a denial of fundamental human rights).

149. See Whitlock, *supra* note 1, at A01 (“Most of the names were added at the urging of the United States, according to U.S. and U.N. officials.”).

150. See *supra* note 48.

151. See Whitlock, *supra* note 1, at A01.

152. See *supra* note 112 and accompanying text (discussing the UN's appointment of an ombudsman to review every case).

153. *Id.*

154. See *supra* note 6 (discussing the relevant sections of the UN charter pertaining to obligations of member states).

155. See *supra* note 5 (discussing the *Kadi* case's significance, namely that individual rights superseded international obligations to overall peace and security in this case).

U.S. would provide an opportunity to preempt international concerns about violating fundamental human rights.¹⁵⁶

It may also be the case that if the USG takes the initiative to observe procedural due process, countries that are trying to enforce the Consolidated List will follow and take similar steps to ensure the rights of their citizens are protected, particularly in democratic societies. Thus, it is likely that if the USG were to observe more robust procedural due process requirements in the homeland, then this posture could result in an improvement in the international rule of law, partly by convincing European allies that international human rights standards of providing notice and an opportunity to be heard are protected when an individual's assets are frozen by the USG.

Assuming that the potential benefits of observing procedural due process domestically that are identified in this Comment are attainable, the advantages are likely to outweigh potential disadvantages. Even though the purpose of the USG's counterterrorism policies and legislation is to prevent grave and immediate threats to national security,¹⁵⁷ an opportunity to improve overall cooperation on this issue by making certain short-term sacrifices¹⁵⁸ would likely be worth the risk. If the USG does not turn to international cooperation to face the threat of terrorism financing, it would have to independently provide all the resources, including money and manpower, to address this threat around the world. Greater international cooperation would not only reduce that burden, but it would likely increase the quantity and quality of efforts dedicated to this task, which would in turn increase effectiveness. Therefore, even though providing notice and hearing prior to freezing a potential terrorism financier's assets could result in some funds going towards terrorist activities, whether intentionally or inadvertently, a more cohesive collective effort to prevent that from happening would likely be a more effective approach. Thus, it is strategically beneficial for the USG to observe procedural due process in terrorism financing cases, which is likely to result in greater tactical success against terrorists worldwide.

156. See Whitlock, *supra* note 1, at A01.

157. See WHITE HOUSE, THE NATIONAL SECURITY STRATEGY OF THE UNITED STATES OF AMERICA, at i-iii (2002), available at http://www.whitehouse.gov/sites/default/files/rss_viewer/national_security_strategy.pdf.

158. Providing classified national security information to defense counsel may be considered one such sacrifice. The risk of disclosing to the general public is ensured under CIPA protections. See *supra* note 129.

CONCLUSION

The issue of whether procedural due process applies in terrorism financing cases is a question of the feasibility of the rule of law with respect to protecting U.S. national security. This Comment set forth the argument that upholding the rule of law is conducive to improving domestic and international security. Specifically, it outlined how providing notice and an opportunity to be heard to suspected terrorism financiers prior to freezing their assets would protect the rights of defendants under the U.S. Constitution and international law. This Comment then explained how this would promote international cooperation on the issue of blocking global terrorism funds and likely make the process more effective. The argument could serve as a model for other areas of law pertaining to the global efforts to prevent terrorism.

There are similarities between the due process concerns raised in U.S. and European courts regarding terrorism financing cases. As seen in the *KindHearts* and *Kadi* cases, the current USG and UN approaches to blocking individuals' and organizations' assets do not protect the right to receive notice and a hearing prior to having the assets in question frozen. The goals of the U.S. and UN laws are also the same, which is to prevent terrorism by blocking the funds of terrorists and their supporters. Given that the USG provided the majority of the names to the UN blacklist, the U.S. process to identify FTOs has a direct and major influence on the UN's approach to tackling terrorism financing worldwide. As a result, it is likely that if procedural due process is observed in the U.S., the rights of many individuals on the UN blacklist will also be protected. Since international cooperation is hindered by the lack of due process in naming individuals to the UN blacklist, observance of procedural due process in the U.S. will therefore have the potential to relieve international concerns, and in turn, help facilitate greater international cooperation.

International cooperation on blocking terrorism financing is beneficial to the USG for two main reasons. First, greater international cooperation would mean that the USG has to expend fewer resources independently to address the issue worldwide and can simultaneously benefit from the collective effort to resolve the problem. Second, international cooperation on blocking terrorism financing to defeat militant groups has been effective in the past, as exemplified with the demise of the LTTE in Sri Lanka. Therefore, it is imperative that the

USG pursue greater international cooperation on this issue, namely by observing procedural due process in terrorism financing cases.

Although there are risks involved in providing due process in terrorism cases, certain legal precautions are available to minimize those risks. To prevent funds from being disbursed to potential terrorist organizations upon identifying a group as a suspect terrorism financier, the USG can issue an order to cease and desist such disbursements along with the notice that the group is being investigated. The group can be closely monitored to ensure that it complies with this order and have its assets frozen thereafter for noncompliance. This would satisfy the notice requirement of the Due Process Clause. In order to protect classified national security information from being disclosed to the public, which would harm ongoing counterterrorism operations, the procedures under CIPA can be used to prevent such disclosures. Only the defense attorney that has a USG security clearance will be able to access the information to prepare the defense and would be obligated under the law to prevent any further disclosure. This would protect the alleged financier's right to a hearing under the Due Process Clause. These two precautions are currently available to the USG and should be explicitly mentioned in the terrorism financing laws, in addition to explicit protections of constitutional due process rights.

If these recommendations are implemented, international cooperation is likely to improve. The UN has already taken measures to address human rights concerns about the blacklisting process. If the USG provides due process protections, other countries may have an incentive to do the same, particularly democratic societies that are unable to do so because of restrictions imposed by the USG's approach. If any states are abusing the blacklisting process, the availability of the UN ombudsman can help reduce that problem. As a result, the recent trend in European courts and human rights organizations increasingly challenging UN laws will likely be reversed.

The recommended approach in this Comment can have broader implications for global efforts to prevent terrorism. Observing procedural due process to block funds to terrorism activities is a nonviolent and likely effective way to significantly hinder future terrorist activities. The USG and international community should continue to explore all the ways in which the rule of law can be used to strengthen international security. This Comment hopes to shed light on how that is possible in the realm of terrorism financing specifically.

NOTE

Prosecutor v. Lubanga: How the International Criminal Court Failed the Women and Girls of the Congo

K'SHAANI O. SMITH*

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INTRODUCTION

“The United Nations calls [the Democratic Republic of] Congo the rape capital of the world and says hundreds of thousands of women have been raped in the past decade.”¹ Though there is widespread knowledge of the sexual violence occurring in the Democratic Republic of Congo (“DRC”), not much has been done to prevent the harms being committed. “As a result, rape has become trivialised and has increased throughout the country, even in areas where [economic and social] conditions are relatively stable.”²

In an attempt to facilitate the Congolese criminal justice system, the International Criminal Court (“ICC”) has intervened to prosecute some of the primary perpetrators.³ In the seminal case *Prosecutor v. Lubanga*,⁴ the ICC tried the former leader of the Union of Congolese Patriots (“UPC”), Colonel Thomas Lubanga Dyilo (“Lubanga”), for conscripting and enlisting children into his army.⁵ Lubanga allegedly authorized and instructed his soldiers to commit rapes throughout the Congo as a means of terrorizing the people in the country and enlisted girl soldiers in his militia to serve as sex slaves.⁶ However, he has not been charged with rape or sexual slavery.⁷ Judicial efforts addressing the sexual abuse endured by the women and girls of the Congo have not been effective.⁸ This Note analyzes the ICC case *Prosecutor v.*

1. Jeffrey Gettleman, *Clinton Presents Plan to Fight Sexual Violence in Congo*, N.Y. TIMES, Aug. 12, 2009, at A8, available at <http://www.nytimes.com/2009/08/12/world/africa/12diplo.html>. This quote illustrates the worldwide knowledge of the systematic rapes occurring in the Congo due to the wartime conflicts, yet the Prosecutor of the International Criminal Court (“ICC”) has failed to bring any sexually-based crimes against Colonel Thomas Lubanga Dyilo (“Lubanga”), who is the former militia leader of the Union of Congolese Patriots (“UCP”).

2. INT’L FED’N FOR HUMAN RIGHTS, DEMOCRATIC REPUBLIC OF CONGO (DRC): “BREAKING THE CYCLE OF IMPUNITY” 8 (2008) [hereinafter *BREAKING THE CYCLE OF IMPUNITY*], available at <http://www.fidh.org/IMG/pdf/DRCsexualcrimeseng2008.pdf>.

3. *Id.* at 9.

4. See generally *Prosecutor v. Lubanga*, Case No. ICC-01/04-01/06, Decision on Confirmation of Charges (Jan. 29, 2007), <http://www.icc-cpi.int/iccdocs/doc/doc266175.pdf> (noting that is the first case brought in the ICC).

5. *Id.* ¶ 8-11.

6. See Suzan M. Pritchett, Note, *Entrenched Hegemony, Efficient Procedure, or Selective Justice?: An Inquiry into Charges for Gender-Based Violence at the International Criminal Court*, 17 TRANSNAT’L L. & CONTEMP. PROBS. 265, 286 (2008) (citing *Prosecutor v. Lubanga*, Case No. ICC-01/04-01/06, Arrest Warrant, ¶ 4 (Feb. 10, 2006)).

7. *Id.*

8. See *BREAKING THE CYCLE OF IMPUNITY*, *supra* note 2, at 12.

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*Lubanga*⁹ and addresses the prosecutor's failure to bring charges of rape and other sexual crimes in the trial, the possible psychological effects this failure may have on the victims, and the ethical issues the prosecutor may face.

Apart from their physical injuries, the victims (both women and girls) and potential victims of sexual crimes will suffer negative psychological effects because (1) there is no punishment for the crimes committed against them, and (2) the sexual crimes will likely continue due to the lack of deterrence.¹⁰ The prosecutor of the ICC abused his prosecutorial discretion and likely violated his duty to do justice because he failed to include charges of rape and other sexually-based crimes in his case against Lubanga. Therefore, guidelines should be created to direct prosecutors in the ICC for future trials based on similar incidents within the DRC and other countries.

Part I of this Note provides a brief factual background of the events occurring in the DRC, the *Prosecutor v. Lubanga* case, and the current proceedings¹¹ of the trial, including the late inclusion of a sexual slavery charge brought by the victims' legal counsel. Part II explores both the legal and ethical requirements that prosecutors must meet when exercising their discretion in charging the offender and highlights the prosecutor's abuse of discretion in the *Lubanga* case. Part III explains the psychological effect that charges generally have on any victim, particularly victims of sexually-based crimes, and the possible psychological effects that the prosecutor's charging decision may have on Congolese women and girls. Part III also discusses the symbolic value that charges have for victims in criminal trials and the reasons that the prosecutor should have taken the interests of the victims into account when making charges against Lubanga. Part IV explores the rise of the Victims' Rights Movement, both in the United States and internationally, in order to demonstrate the proper integration of victims' interests into the prosecutor's exercise of his discretion when making charges. Part V proposes guidelines that the prosecutors of the ICC should follow when bringing charges in future cases of a similar nature. These guidelines combine the interests of the victims with the prosecutor's duty to do justice so that he may properly exercise his discretion. Finally, this Note concludes by asserting that when

9. See *Prosecutor v. Lubanga*, Case No. ICC-01/04-01/06, Decision on Confirmation of Charges (Jan. 29, 2007), <http://www.icc-cpi.int/iccdocs/doc/doc266175.pdf>.

10. See *infra* Part III.B.

11. "Current proceedings" includes trial information up to October 2010.

the prosecutor failed to incorporate the interests of the Congolese women and girls when issuing his indictment against Lubanga, he violated his prosecutorial discretion and strengthened the impunity that sexual criminals in the country may enjoy. Therefore, the prosecutor should follow the guidelines provided in this Note in future cases involving sexual violence.

PART I: BACKGROUND OF *PROSECUTOR V. LUBANGA*

“Since 1998, more than three million people have lost their lives in the conflict that has raged in the eastern regions of the DRC. Commonly referred to as ‘Africa’s First World War,’ the conflict in the DRC has had devastating consequences for both the country’s development and its people.”¹² The war in the DRC has become the deadliest conflict since World War II.¹³ In fact, the amount of lives lost in the conflict outnumbers the recent deaths in Iraq, Afghanistan, and Darfur combined.¹⁴ The fighting began in the DRC when the genocide of Rwanda crossed the Congolese border, causing the Congolese army, foreign-backed rebels, and domestic militias to battle for control of the country.¹⁵ Amidst the carnage, there appeared to be another war festering within the country—a war against women. The women and girls of the DRC have been raped, tortured, and mutilated.¹⁶ Though rape is not often considered a consequence of war,¹⁷ combatant armies throughout the DRC are systematically using sexual abuse to weaken communities, instill fear and intimidation, and obtain control.¹⁸

In light of the constant warfare, the rule of law in the DRC has substantially deteriorated.¹⁹ The criminal justice system has been

12. Pritchett, *supra* note 6, at 266.

13. *60 Minutes: War Against Women: The Use of Rape as a Weapon in Congo’s Civil War* (CBS television broadcast Jan. 13, 2008) [hereinafter *60 Minutes: War Against Women*], available at <http://www.cbsnews.com/stories/2008/01/11/60minutes/main3701249.shtml?tag=contentMain;contentBody>.

14. *Id.*

15. *Id.*

16. See *60 Minutes: War Against Women*, *supra* note 13; see generally JOANNE CSETE & JULIANE KPPENBERG, HUMAN RIGHTS WATCH, *THE WAR WITHIN THE WAR: SEXUAL VIOLENCE AGAINST WOMEN AND GIRLS IN EASTERN CONGO* (2002) [hereinafter *THE WAR WITHIN THE WAR*].

17. See Susana SáCouto & Katherine Cleary, *The Importance of Effective Investigation of Sexual Violence and Gender-Based Crimes at the International Criminal Court*, 17 AM. U. J. GENDER SOC. POL’Y & L. 337, 347 (2009) (stating that rapes committed by soldiers in wartime were historically considered incidental).

18. See *60 Minutes: War Against Women*, *supra* note 13.

19. Pritchett, *supra* note 6, at 267.

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weakened by the unstable power allocation within the country, causing a rise in the level of impunity enjoyed by various criminal perpetrators—particularly those who commit sexual violence against the women and girls of the Congo.²⁰ In 2008, the Human Rights Watch reported that combatants had raped about ten thousand women and girls due to the DRC conflict,²¹ and this number increases daily.²² However, the International Federation for Human Rights notes that it is impossible to accurately estimate the number of victims of sexual violence in the DRC because many women do not report the rapes.²³ Nonetheless, it is clear that the assaults have reached a massive scale in both frequency and brutality.²⁴

Within the Congolese culture, women are considered representatives of their communities.²⁵ Many militias fighting within the country use this cultural perspective as a means of terrorizing the people in these communities, particularly the more rural populations, which tend to be the most vulnerable.²⁶ In doing so, they abuse the women regardless of age within each community by raping them, ravaging their bodies, and in some cases murdering them in front of their husbands, children, or parents.²⁷ As scholar Susan M. Pritchett stated:

Women, their bodies, their sexuality, and their gender-specific vulnerabilities have been used, with impunity, as weapons of war. Human rights organizations have extensively reported that soldiers have abused women and girls “as a part of their effort to win and maintain control over civilians and the territory they inhabited.”²⁸

Although the Congolese government attempted to promulgate laws proscribing sexual violence, the laws have not been enforced, and the women and girls of the DRC still go unprotected.²⁹ Most victims do not report these crimes for fear of being shunned by their families

20. *See id.*; BREAKING THE CYCLE OF IMPUNITY, *supra* note 2, at 7, 10.

21. Pritchett, *supra* note 6, at 267 (citing HUMAN RIGHTS WATCH, BRIEFING PAPER, DEMOCRATIC REPUBLIC OF THE CONGO: CONFRONTING IMPUNITY (2004)).

22. *See 60 Minutes: War Against Women*, *supra* note 13 (stating that the number of women and girls receiving treatment for sexual assault will steadily increase).

23. BREAKING THE CYCLE OF IMPUNITY, *supra* note 2, at 8.

24. *Id.*

25. THE WAR WITHIN THE WAR, *supra* note 16, at 23.

26. *Id.*

27. *See id.* at 54-56.

28. Pritchett, *supra* note 6, at 267 (citing THE WAR WITHIN THE WAR, *supra* note 16, at 23). Some victims find themselves rejected by their husbands or families, and thus face serious economic hardships. BREAKING THE CYCLE OF IMPUNITY, *supra* note 2, at 9. Given the socio-economic disparity between men and women in the Congo, crimes committed against women usually go unreported.

29. *See* BREAKING THE CYCLE OF IMPUNITY, *supra* note 2, at 10.

and communities, and because they know the perpetrator will likely go unpunished.³⁰ The victims that do report the crimes have difficulty obtaining a fair outcome because they must surmount various obstacles generated by the Congolese criminal justice system, including high legal costs, unexecuted legal arrest warrants, and the ability for the accused to negotiate their freedom with the police, despite the severity of their crime.³¹ Furthermore, when a conviction is obtained, the perpetrator usually receives a very light sentence or escapes from prison.³² The sexual violators take advantage of the high level of impunity and continue to commit the crimes against other women and girls in the territory because they know that they will not be punished for their acts. However, the prosecutor of the ICC's entry into the DRC to investigate criminal behavior symbolized the beginning of the end of this impunity.

Upon entering the DRC, the prosecutor opened two investigations into the most serious crimes being committed, which led to the capture and arrest of three warlords suspected of war crimes.³³ One of the warlords was Lubanga.³⁴ Lubanga was the first person to be tried in the ICC and the trial symbolized an acknowledgement by the international community that there had been serious crimes against the people of the DRC.³⁵ The deputy prosecutor of the ICC believed that the perpetrators of the sexually-based crimes must know that they will be punished and that justice is an important factor in ending the cycle of violence against women in the DRC.³⁶ However, Lubanga was only charged with recruiting, conscripting, and using child soldiers to fight in the inter-ethnic conflict in the Ituri region of the DRC during 2002 and 2003.³⁷

30. *Id.* at 9; see *THE WAR WITHIN THE WAR*, *supra* note 16, at 64.

31. *BREAKING THE CYCLE OF IMPUNITY*, *supra* note 2, at 10.

32. *Id.* at 11. Those released on bail never reappear for trial. *Id.* The police encourage the victims to reach an out of court settlement with the rapists. *Id.* In fact, the male heads of the households "settle" the crimes outside of the court by requiring rapists to either pay them for committing the rape or marry the victim. *THE WAR WITHIN THE WAR*, *supra* note 16, at 20.

33. *BREAKING THE CYCLE OF IMPUNITY*, *supra* note 2, at 12.

34. *Id.*

35. See Pritchett, *supra* note 6, at 269.

36. *BREAKING THE CYCLE OF IMPUNITY*, *supra* note 2, at 12; see also Dianne Luping, *Investigation and Prosecution of Sexual and Gender-Based Crimes Before the International Criminal Court*, 17 AM. U. J. GENDER SOC. POL'Y & L. 431, 433 (2009) (discussing the deputy prosecutor's understanding of the need to address the crimes being committed against women and girls in the Congo).

37. See *Prosecutor v. Lubanga*, Case No. ICC-01/04-01/06, Decision on Confirmation of Charges, ¶ 9 (Jan. 29, 2007), <http://www.icc-cpi.int/iccdocs/doc/doc266175.pdf>.

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Under the jurisdiction of the ICC, Lubanga was arrested on March 17, 2006, and transferred to The Hague.³⁸ The Rome Statute provides that the ICC will have jurisdiction over serious crimes that are the concern of the international community.³⁹ “Serious crimes” include war crimes, crimes against humanity, genocide, and crimes of aggression.⁴⁰ His trial began January 26, 2008, and the prosecution rested its case on July 14, 2009.⁴¹

After the prosecutor rested, the victims’ attorneys raised allegations of sexual slavery and cruel and unusual punishment.⁴² The court ruled that additional charges could be brought as long as they were based on existing evidence or facts that emerged at trial.⁴³ Since young female soldiers testified, facts emerged that they were used as sex slaves.⁴⁴ Both the prosecution and defense appealed the trial court’s ruling.⁴⁵ The prosecution, however, stated that it was willing to proceed with the original charges.⁴⁶ The defense, on the other hand, maintained its objection stating that they were unable to continue with the trial without knowledge of the charges brought against the accused.⁴⁷ The defense’s case was delayed while the appeals board determined whether the victims’ charges should have been added.⁴⁸ The court affirmed the additional charges brought by the victims and allowed them to testify to the atrocities they suffered.⁴⁹ The victims discussed their enlistment in the militia and the girl soldiers

38. Pritchett, *supra* note 6, at 268-69 (citing Public Statement, Amnesty Int’l, Democratic Republic of the Congo: International Criminal Court’s First Arrest Must be Followed by Others Throughout the Country, AI Index AFR 62/008/2006 (Mar. 20, 2006), available at http://www.iccnw.org/documents/AI_DRCWarrant_20Mar06.pdf).

39. Rome Statute of the International Criminal Court, art. 5, para. 1, July 17, 1998, U.N. Doc. A/CONF. 183/9.

40. *Id.* art. 5, para. 1(a)-(d). Lubanga’s crime of enlisting and conscripting children is considered a war crime under the Rome Statute. *Id.* art. 8, para. 2(b)(xxvi).

41. Rachel Irwin, *Lubanga Defense Case Delayed*, THE LUBANGA TRIAL AT THE INT’L CRIM. CT. (Oct. 14, 2009), <http://www.lubangatrial.org/2009/10/14/lubanga-defense-case-delayed>.

42. *See id.*

43. Rachel Irwin, *Latest News: Lubanga Trial Transformed by Victims*, THE LUBANGA TRIAL AT THE INT’L CRIM. CT. (Sept. 4, 2009), <http://www.lubangatrial.org/2009/09/04/latest-news-lubanga-trial-transformed-by-victims/>.

44. *See id.*

45. *Id.*

46. Irwin, *Lubanga Defense Case Delayed*, *supra* note 41.

47. *Id.*

48. *Id.*

49. Wairagala Wakabi, *Lubanga Trial: Victims Recount UPC Brutality, Seek Reparations*, THE LUBANGA TRIAL AT THE INT’L CRIM. CT. (Jan. 15, 2010), <http://www.lubangatrial.org/2010/01/15/lubanga-trial-victims-recount-upc-brutality-seek-reparations>.

discussed their subjection to sexual slavery.⁵⁰ In sum, 103 victims participated in the trial.⁵¹

Since the prosecutors of the ICC are aware that the Congolese courts are unable to try the perpetrators of the sexual crimes, it is important that their indictment against warlords like Lubanga include charges of sexual violence, such as rape and sexual slavery, so long as there is sufficient evidence to support the charges.⁵² Though the ICC is not supposed to prosecute every crime committed in any given country, it is supposed to investigate the most serious crimes.⁵³ By failing to include rape or sexual slavery charges in the indictment when the victims participating in the trial could have attested to the criminal acts, the prosecutor seemed to fail to recognize the seriousness of the crimes, depriving several hundred thousand victims of justice.

Despite the prosecutor's awareness of the severe sexual violence occurring in the DRC and the high level of impunity, he embarked on a prosecutorial strategy that disregarded the plight of the women and girls in the country.⁵⁴ Though the prosecutor has the discretion to bring about the charges he or she reasonably believes will be most supported by the evidence gathered in the investigation, there is also an underlying duty to do justice. Excluding serious sexually-based crimes from the indictment against Lubanga was not only a tactical misstep on the prosecutor's part, but also a colossal failure in adhering to his duty to do justice for the women and girls of the DRC.

50. *Id.*

51. *Id.*

52. See *BREAKING THE CYCLE OF IMPUNITY*, *supra* note 2, at 12 (discussing the importance of the ICC's involvement in prosecuting crimes occurring in the Congo); see also Pritchett, *supra* note 6, at 287 (discussing the evidentiary threshold for trying certain charges).

53. *BREAKING THE CYCLE OF IMPUNITY*, *supra* note 2, at 12; SáCouto & Cleary, *supra* note 17, at 343; see Rome Statute of the International Criminal Court, *supra* note 39, art. 5 (stating that the jurisdiction of the ICC is limited to the most serious crimes in the international community).

54. See Pritchett, *supra* note 6, at 286-87 (stating that the prosecutor had knowledge of the systematic sexual violence occurring in the Congo). *But see* SáCouto & Cleary, *supra* note 17, at 346 (stating that a reason for the exclusion of charges of sexual violence in the *Lubanga* trial may have been a lack of sufficient evidence).

PART II: THE PROSECUTOR'S EXERCISE OF DISCRETION
IN LUBANGA AND ADHERENCE TO THE DUTY
TO DO JUSTICE

In any criminal trial, whether in the United States or internationally, the prosecutor is given the responsibility of determining the charges to be brought against a defendant. This responsibility requires both his prosecutorial discretion and duty to do justice.⁵⁵ In his or her determination of appropriate charges, the prosecutor should balance his or her relatively unyielding power to decide which charges to prosecute with his civic oath to society to ensure that justice is properly served.⁵⁶ Customarily, within the international context of criminal law, prosecutors' discretion is limited in that they must bring about any charge when there is evidence to reasonably support it.⁵⁷ However, in the ICC, the prosecutor's discretion and duties are a hybrid of the traditional practices of the American and international criminal systems. In the ICC, the prosecutor must adhere to his duty to "do justice for the international community,"⁵⁸ but has the ability to determine which charges he wishes to prosecute with the limited supervision of the Pre-Trial Chamber of the ICC.⁵⁹

55. Bruce A. Green, *Prosecutors' Professional Independence: Reflections on Garcetti v. Ceballos*, CRIM. JUST., Summer 2007, at 4 (citing STANDARDS RELATING TO THE PROSECUTION FUNCTION 3-1.2(b)-(c)).

56. In the United States, "the term 'prosecutorial discretion' refers to the fact that under American law, government prosecuting attorneys have nearly absolute and unreviewable power to choose whether or not to bring criminal charges, and what charges to bring, in cases where the evidence would justify charges." Gerard E. Lynch, *Prosecution: Prosecutorial Discretion—Varieties of Discretion, Subjects of Prosecutorial Discretion, Standards of Prosecutorial Judgment, Controlling Prosecutorial Discretion*, JRANK, <http://law.jrank.org/pages/1870/Prosecution-Prosecutorial-Discretion.html> (last visited Feb. 17, 2011). Although American prosecutors are not required to bring about every charge for which there is evidence, there are ethical rules adopted by some courts and other governing bodies that discuss which choices a prosecutor should make when exercising discretion. See Bruce A. Green, *Why Should Prosecutors "Seek Justice"?*, 26 FORDHAM URB. L.J. 607, 619 (1999). However, a violation of these ethical rules typically does not subject the prosecutor to any type of sanction or penalty. *Id.*

57. Lynch, *supra* note 57. Some countries in Europe and Latin America adhere to the principle of "mandatory prosecution," and maintain that prosecutors have a duty to bring any charge that is supported by evidence developed by the police or presented by citizens; however, "[t]he extent to which that principle is actually followed in practice in these countries has been controversial." *See id.*

58. CODE OF PROFESSIONAL CONDUCT FOR PROSECUTORS OF THE INT'L CRIMINAL COURT art. 7, cl. 4 (Proposed Official Draft 2004).

59. See Rome Statute of the International Criminal Court, *supra* note 39, art. 61, para. 7(c)(ii) (granting the Pre-Trial Chamber the ability to require the prosecutor to consider amending a charge if the evidence submitted appears to establish a different crime within the jurisdiction of the Court).

One of the purposes of creating the ICC was to end impunity.⁶⁰ Most perpetrators of gross human rights violations are not punished by either national or international criminal systems.⁶¹ To end this impunity, it was necessary to create a permanent court⁶² because “[i]mpunity not only encourages the recurrence of abuses against human dignity, but also strips human rights and humanitarian law of their deterrent effect.”⁶³ The prosecutor of the ICC must also adhere to this purpose when issuing an indictment and trying a case. In exploring the ICC’s prosecutorial discretion, the Pre-Trial Chamber’s power of checks and balances and the prosecutor’s strategy in *Lubanga*, it becomes evident that the prosecutor failed to meet the underlying purpose of the court when he made his charging decision in the case, despite his awareness of the sexual violence and high level of impunity in the DRC.⁶⁴

A. Prosecutorial Discretion in the ICC

In making the decision to charge, the prosecutor may consider the extent of harm caused by the offense and the offender.⁶⁵ The seriousness of the crime and the extent of the injury to the victim are not incorporated in the prosecutorial standards of practice⁶⁶ but are significant factors that should influence the charging decision. However, international law customarily requires prosecutors to bring charges concerning any act amounting to war crimes.⁶⁷ If the prosecutor is able to gather sufficient evidence during the initial investigation to support a variety of crimes enumerated within the Rome Statute’s ju-

60. See *BREAKING THE CYCLE OF IMPUNITY*, *supra* note 2, at 12 (stating that the ICC is a strong symbol in the fight against impunity).

61. See Pritchett, *supra* note 6, at 297-98 (discussing the difficulty many national and international systems have when prosecuting sexually-based crimes).

62. *Id.* at 296-97. See generally YOUNG S. KIM, *THE LAW OF THE INTERNATIONAL CRIMINAL COURT* (2007) (discussing the purpose for creating the court).

63. Jelana Pejic, *Creating a Permanent International Criminal Court: The Obstacles to Independence and Effectiveness*, 29 COLUM. HUM. RTS. L. REV. 291, 292 (1998).

64. Pritchett, *supra* note 6, at 288 (noting that the nongovernmental organization Women’s Initiatives for Gender Justice directly informed the prosecutor of the evidence of sexual violence it gathered).

65. See *BREAKING THE CYCLE OF IMPUNITY*, *supra* note 2, at 12 (noting that the ICC attempts to prosecute the most serious crimes that occur in the country).

66. See Green, *supra* note 56, at 616-17 (discussing that the standards of practice set by the American Bar Association address ethical issues with regard to a prosecutor’s standard of practice).

67. Lynch, *supra* note 57.

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risdiction,⁶⁸ then charges for all such crimes customarily are included in the indictment. Yet, the prosecutor in *Lubanga* failed to adhere to this custom.

Though the Code of Professional Conduct for Prosecutors of the ICC has enumerated a few specific ethical obligations for the prosecutor to follow, the list is not exhaustive. Rather, there are no specific guidelines for the prosecutor to abide by in determining whether he or she is adhering to the duty to do justice.⁶⁹ Theoretically, the duty requires that the prosecutor reach his charge decision in a neutral manner, ensuring that his behavior has no partisan influence.⁷⁰ The duty is not particularized to a specific victim or set of victims; instead, it must be directed toward the entire constituency.⁷¹ For the prosecutors of the ICC, the constituency is compiled of all of the jurisdictions that have accepted the Rome Statute and invite the ICC into their jurisdiction for investigation.⁷² Therefore, in *Prosecutor v. Lubanga*, the prosecutor's duty is not just to the child soldiers who were allegedly enlisted into Lubanga's militia (the actual victims in the trial), but to all the people of the DRC. In particular, the prosecutor of the ICC must recognize the women and girls of the DRC in the charging decision.⁷³

The DRC requested that the prosecutor conduct an investigation of "any crimes within the jurisdiction of the [c]ourt allegedly committed anywhere in the territory of the DRC since the entry into force of

68. Rome Statute of the International Criminal Court, *supra* note 39, art. 54, para. 1 (stating that the prosecutor must conduct an effective investigation of all facts and evidence relevant to crimes under the statute).

69. CODE OF PROFESSIONAL CONDUCT FOR PROSECUTORS OF THE INT'L CRIMINAL COURT art. 7, cl. 4 (Proposed Official Draft 2004).

70. Bennett L. Gershman, *Prosecutorial Ethics and Victims' Rights: The Prosecutor's Duty of Neutrality*, 9 LEWIS & CLARK L. REV. 559, 562 (2005). Conversely, some scholars believe that doing justice only requires that the prosecutor strive for "adversarially valid results." See Green, *supra* note 56, at 629 ("Accordingly, at least in the trial context, 'doing justice' means neither disinterested advocacy nor a responsibility for achieving 'accurate outcomes' or 'factually correct results' (i.e., for protecting against the conviction of innocent defendants). It requires only that prosecutors 'strive for adversarially valid results,' that is, results that are the product of an adversary process that has not broken down."). However, one must realize that such an interpretation only applies to the duty to do justice during trial, not in the pre-trial phase. *Id.*

71. Gershman, *supra* note 71, at 562.

72. Rome Statute of the International Criminal Court, *supra* note 39, art. 11, 12.

73. See Pritchett, *supra* note 6, at 280 (quoting Rome Statute of the International Criminal Court, *supra* note 39, art. 54, para. 1(b)). Article 54(1)(b) of the Rome Statute requires a prosecutor to take appropriate measures to investigate and prosecute crimes within the jurisdiction of the ICC and take into account the nature of crimes that involve sexual violence or violence against children. Rome Statute of the International Criminal Court, *supra* note 39, art. 54, para. 1(b).

the Rome Statute on [July 1, 2002].”⁷⁴ Given the generality of the request, the investigation would include crimes of sexual violence “that fall within the crimes against humanity and war crimes provisions of the Rome Statute,” which include rape and sexual slavery.⁷⁵ This request also would require that the prosecutor investigate crimes of sexual violence thoroughly and in good faith.⁷⁶

However, after the referral, the prosecutor issued an arrest warrant for Lubanga on February 10, 2006, including only a charge of enlistment and conscription of children in his militia.⁷⁷ These charges were negligible given the substantial evidence submitted by non-governmental organizations (“NGOs”) and human rights groups supporting accusations of murder, torture, and sexual violence.⁷⁸ The warrant only placed criminal responsibility on Lubanga for enlisting and conscripting child soldiers in violation of Article 25(3)(a) of the Rome Statute, but did not recognize the evidence given in regard to sexual violence.⁷⁹ The significance of this inadequate warrant demonstrates the prosecutor’s neglectful omission of the many enumerated sexually-based crimes, despite his acknowledgment that both sides’ militias systematically committed crimes of sexual violence as a weapon of war throughout the war.⁸⁰

“[T]he Rome Statute provides the most comprehensive and explicit list of sexual violence and gender-based crimes under the jurisdiction of any international criminal court,”⁸¹ so it is presumed that the prosecutor would utilize such an extensive list and bring as many charges as possible against the alleged criminal. The statute was the first to specifically enumerate crimes of sexual violence as forms of genocide, crimes against humanity, and war crimes.⁸² Article 68(1) of the Rome Statute states that the ICC must respond appropriately “to protect the safety, physical and psychological well-being, dignity, and

74. Pritchett, *supra* note 6, at 286 (quoting Prosecutor v. Lubanga, Case No. ICC-01/04-01/06, Request Submitted Pursuant to Rule 103(1) of the Rules of Procedure and Evidence ICC-01/04-01/06-403 (Sept. 7, 2006)); *see also* Rome Statute of the International Criminal Court, *supra* note 39, art. 13, para. (a); *id.* art. 14.

75. Pritchett, *supra* note 6, at 286.

76. *Id.* at 286.

77. *Id.* at 286-87.

78. *Id.*

79. Prosecutor v. Lubanga, Case No. ICC-01/04-01/06, Decision on Confirmation of Charges, ¶ 9 (Jan. 29, 2007), <http://www.icc-cpi.int/iccdocs/doc/doc266175.pdf>.

80. Pritchett, *supra* note 6, at 286-87.

81. Luping, *supra* note 36, at 454.

82. *Id.* These crimes could occur in both international and non-international armed conflicts, including the regional war occurring in the DRC. *Id.*

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privacy of victims and witnesses.”⁸³ The court is required to consider all relevant factors including gender and the nature of the crime, particularly where the crime involves sexual violence or violence against children.⁸⁴ Given these stipulations, the prosecutor in *Lubanga* should have assessed the accusations of rape and sexual slavery that were allegedly committed by UPC and other militias involved in conflict in the DRC when making his charge decision in the case. The prosecutor had a court-appointed duty to protect the well-being of the Congolese women and girls, but utterly failed to adhere to it.

However, commentators have stated that there are inherent difficulties in prosecuting sexual crimes because, historically, they have not been viewed as crimes consequential to war.⁸⁵ Usually, these crimes are seen as a “ ‘detour, a deviation, or the acts of renegade soldiers . . . pegged to private wrongs and . . . [thus] not really the subject of international humanitarian law.’ ”⁸⁶ Therefore, despite the enumerated list of sexually-based crimes in the Rome Statute, the prosecutor likely adopted the historical view of the crimes and refused to include them in an indictment, despite the wealth of evidence provided to him in support of the crimes.⁸⁷ Though this may be traditional, adopting such an approach is ill-advised because it continues the practice of failing to provide justice to female victims of sexual violence, thereby increasing the amount of impunity already enjoyed by the perpetrators and inhibiting the utilitarian goal of deterrence.⁸⁸

Furthermore, sexual violence in the context of war conflicts is often methodically encouraged, tolerated, or systematically authorized, even if not officially ordered.⁸⁹ “Yet, when left unpunished by those in positions of authority, sexual violence can quickly become a vital means of waging war,”⁹⁰ as is the case in the DRC. For these

83. Rome Statute of the International Criminal Court, *supra* note 39, art. 68, para. 1.

84. *Id.*

85. SáCouto & Cleary, *supra* note 17, at 347 (quoting Patricia Viseur Sellers, *Individual(s) Liability for Collective Sexual Violence*, in *GENDER AND HUMAN RIGHTS* 153, 190 (Karen Knop ed., 2004)).

86. *Id.*

87. See Pritchett, *supra* note 6, at 289-90. It has been concluded by some NGOs that the prosecutor’s failure to include the crimes of sexual violence in the indictment was due to his ineffective investigations and possible lack of commitment to prosecuting those crimes. *Id.* at 288.

88. The utilitarian-deterrence theory is “the legal theory that a person should be punished only if the punishment benefits society—that is, only if the punishment would help to deter future harmful conduct.” *BLACK’S LAW DICTIONARY* 1986 (9th ed. 2009).

89. SáCouto & Cleary, *supra* note 17, at 347-48.

90. *Id.* at 348.

reasons, the prosecutor must take heed of his or her strong position of power in deterring this behavior. By punishing the leader of a militia for commissioning the crimes committed by those lower on the chain of command, the actual perpetrators will understand that the reign of impunity is ending because their seemingly all-powerful leader has been vanquished.

Yet and still, the absence of explicit orders from the militia leader in cases involving sexual violence often makes it difficult for prosecutors to link the defendant with the crime.⁹¹ Also, there has always been an intrinsic difficulty in proving the existence of sexual abuse in any criminal court.⁹² Instead of adhering to the proscribed duty of a prosecutor in the ICC, in *Lubanga*, the prosecutor instead implemented what looks like a streamlined strategy.⁹³ Under Article 54, the prosecutor must “take appropriate measures to ensure the effective investigation and prosecution of crimes within the jurisdiction of the [c]ourt.”⁹⁴ However, the statute gives the prosecutor discretion to choose the scope and direction of the investigations.⁹⁵ For the *Lubanga* case, “a streamlined indictment means that rather than exercising prosecutorial patience and trying all charges for which evidence exists, including crimes of [sexual] violence, the [p]rosecutor instead has . . . [only included] the limited charges relating to child soldiers in order to expedite the case.”⁹⁶

Although the difficulties in prosecuting sexual crimes are not too overwhelming, these cases continue to include prosecutorial omissions and “a tendency on the part of the judges to require that the prosecution meet higher evidentiary standards in these cases than in other types of cases.”⁹⁷ However, in the interest of successfully prosecuting any defendant in a criminal trial, the prosecutor strategically seeks to create the most solid case possible.⁹⁸ Since sexual crimes are so troublesome, perhaps the prosecutor may have chosen not to include them

91. *Id.*

92. See Donald Dripps, *After Rape Law: Will the Turn to Consent Normalize the Prosecution of Sexual Assault?*, 41 AKRON L. REV. 957, 966 (2008) (stating the rape convictions rates are the lowest for any serious felony).

93. Pritchett, *supra* note 6, at 291-92 (stating that the prosecutor of the ICC tends to use streamlined indictments in other cases brought before the court).

94. Rome Statute of the International Criminal Court, *supra* note 39, art. 54, para. (1)(b); Pritchett, *supra* note 6, at 291.

95. See Pritchett, *supra* note 6, at 291.

96. *Id.* at 292.

97. SáCouto & Cleary, *supra* note 17, at 348.

98. See Pritchett, *supra* note 6, at 291.

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in the indictment, in hopes of securing a solid conviction.⁹⁹ However, this would seem to be an abuse of his or her discretion and a violation of the duty to do justice. The prosecutor in *Lubanga* employed this type of strategic decision, but, in doing so, he failed to meet his customary duty to do justice. Such an action rises to an abuse of his discretion in bringing appropriate charges against Lubanga. Therefore, the Pre-Trial Chamber should have employed its power of checks and balances and required that the prosecutor follow the ethical guidelines in place to ensure that the women and girls of the DRC were adequately represented.

B. Pre-Trial Chamber of the ICC's Check on the Prosecutor's Discretionary Power

To fully understand the duty of an ICC prosecutor when deciding which charges to bring, one must understand the relatively bureaucratic process of the entire court system. The ICC has a Pre-Trial Chamber ("Chamber"), which has the task of checking the prosecutor's discretion when bringing charges.¹⁰⁰ However, in *Lubanga*, the Chamber confirmed the final charges of "enlisting and conscripting children under the age of fifteen years and using them to participate" in the war.¹⁰¹ Instead of checking the prosecutor's discretion and ensuring that all charges were included in the indictment, as is customarily required, the Chamber allowed the limited amount of charges to proceed to trial.¹⁰² This failure on both the prosecutor and the Chamber's part silenced the struggle of women and girls in the DRC once again. The national government of the Congo made no successful efforts toward resolving the rapes and sexual violence these women and girls endure.¹⁰³ The more powerful ICC has similarly made no rea-

99. See *id.* at 292 (stating that streamlined prosecutorial strategies abandon charges of sexual violence for crimes that are "easier" to prove).

100. See Rome Statute of the International Criminal Court, *supra* note 39, art. 61, para. 7(c)(ii) (granting the Pre-Trial Chamber the ability to require the prosecutor to amend a charge because the evidence submitted appears to establish a different crime within the jurisdiction of the Court).

101. *Lubanga Case*, COAL. FOR THE INT'L CRIM. CT., <http://www.iccnw.org/?mod=drctimeline&id=1> (providing a timeline of the *Lubanga* trial) (last visited Feb. 17, 2011). "In an Article 61 hearing, the Pre-Trial Chamber "determine[s] whether there is sufficient evidence to establish substantial grounds to believe that the person committed each of the crimes charged." Pritchett, *supra* note 6, at 294. The chamber can "solicit information from outside organizations, victims, and witnesses" when determining the sufficiency of final charges at the pre-trial hearing stage. *Id.*

102. *Lubanga Case*, *supra* note 101.

103. See *BREAKING THE CYCLE OF IMPUNITY*, *supra* note 2, at 7.

sonable efforts to address these atrocities. The failures increased the anxiety and fear that the females of the DRC experience daily and strengthened the impunity that the perpetrators enjoy.¹⁰⁴ It was not until the Chamber allowed the victims participating in the trial to bring their own charges of sexual slavery that the court actually recognized the sexual violence being committed at the hands of Lubanga.¹⁰⁵

According to Rule 103 of the ICC Rules of Procedure and Evidence, the Chamber can “for the proper determination of the case, invite or grant leave to a State, organization or person to submit, in writing or orally, any observation on any issue that the Chamber deems appropriate.”¹⁰⁶ However, in the case of *Lubanga*, the Chamber prevented the participation of an international women’s rights organization as amicus curiae under the rule by narrowly interpreting the word “case.”¹⁰⁷ Although the organization found evidence of sexual violence occurring systematically under the authority of Lubanga, the Chamber did not allow that information to be used to support the addition of rape or sexual slavery charges under war crimes or crimes against humanity.¹⁰⁸ Rather than allowing observations to be submitted in relation to *any* charge the court could have brought against Lubanga, the Chamber interpreted the word “case” under Rule 103 to allow for observations only in relation to the *current* charges, i.e., the enlistment and conscription of child soldiers.¹⁰⁹

The Chamber’s narrow interpretation of “case” greatly limited the Chamber’s power of review and gave the prosecutor the ability to abuse his discretion, thereby setting a precedent that severely limits the possibility of prosecuting crimes of sexual violence at the ICC. Since NGOs have been advocating for the successful prosecution of sexually-based crimes in international courts, their inability to inform the chamber of Lubanga’s involvement in the sexual violence occurring in the DRC in effect takes away one of the only checks on the prosecutor’s discretion.¹¹⁰ The organizations could have provided the

104. *See id.* at 6, 9.

105. *See Irwin, Latest News: Lubanga Trial Transformed by Victims, supra* note 43. This demonstrates that the prosecutor was more invested in his limited indictment so that he would be able to try the case more easily. He did not demonstrate his commitment towards reaching justice for the victims in the trial and in the DRC generally.

106. RULES OF PROCEDURE AND EVIDENCE OF THE INTERNATIONAL CRIMINAL COURT R. 103(1) (2002).

107. Pritchett, *supra* note 6, at 294.

108. *See id.* at 291.

109. *Id.* at 290-91.

110. *Id.* at 294-95.

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Chamber with more information than what the prosecutor provides,¹¹¹ allowing the Chamber to make a more thorough assessment as to the adequacy of the charges included in the indictment. The Chamber is not truly allowing outside entities to help the prosecutors with their observations, though one of the major defects in the international criminal justice system involves the extreme lack of resources prosecutors have in conducting investigations.¹¹² It is rather counterintuitive.

In addition, Article 61(7)(c) gives the Chamber the ability to amend the charges in an indictment.¹¹³ However, if adequate information is not provided to the Chamber, it will fail to exercise its power to amend the indictment. Therefore, the prosecutor would be given full discretion to decide whether to bring any charges reflecting sexual violence. This is demonstrated by the Chamber's initial decision not to amend the charges to reflect substantial evidence of sexual crimes.¹¹⁴ Instead, the victims had to bring their own charges of sexual slavery, but they did not bring charges of rape.¹¹⁵ Such action on the part of the Chamber gives the impression that it will not use Article 61 in future cases against other Congolese militia leaders to ensure a proper exercise of justice for the Congolese women and girls. In future cases, particularly ones against other Congolese militia leaders, the prosecutor will be able to bring any charge that he or she feels is best strategically, rather than what is best for the people of the Congo. Hopefully, the victims in the case will be able to petition to add charges that truly reflect the atrocities experienced by the women and girls in the DRC.

Despite the Chamber's addition of sexual slavery charges in *Lubanga*, it could have interpreted Article 61(7)(c) as allowing it to suspend the trial and require that the prosecutor "provid[e] further evidence or [conduct] further investigation with respect to a particular charge."¹¹⁶ In future cases similar to *Lubanga*, where there is substantial evidence of sexual crimes, but such crimes have not been included in the prosecutor's indictment, the Chamber should exercise its power

111. See SáCouto & Cleary, *supra* note 17, at 347-48 (discussing the difficulty prosecutors have in finding evidence in cases involving crimes of sexual violence).

112. See *id.*

113. Rome Statute of the International Criminal Court, *supra* note 39, art. 61, para. 7(c).

114. See Pritchett, *supra* note 6, at 286 (noting the evidence provided by the Women's Initiative).

115. Irwin, *Lubanga Defense Case Delayed*, *supra* note 41.

116. Pritchett, *supra* note 6, at 295.

under Article 61 to “send the [p]rosecutor back to the field to uncover evidence in support of crimes that are related to the original charge.”¹¹⁷ If such action had occurred in *Lubanga*, charges of rape and sexual slavery would have been included without the independent effort of the already traumatized victims. Instead, the prosecutor would have been sent back to the DRC to conduct further investigations as to the sexual violence occurring in the country and he would have used the information provided by the NGOs.¹¹⁸

Additionally, the Chamber should have used Article 61(7)(c)(ii) to amend the charges because “the evidence submitted appear[ed] to establish a different crime within the jurisdiction of the [c]ourt.”¹¹⁹ This provision would have allowed the Chamber to add charges of rape and sexual slavery in the *Lubanga* case because the evidence provided by victims who served as girl soldiers in Lubanga’s militia provided evidence of both conscription of children and systemic sexual violence.¹²⁰ The Chamber failed to properly exercise this power to check the prosecutor’s discretion by allowing the indictment to go to trial without including the charges. This resulted in a delay in the trial, and possibly compromised the prosecutor’s ability to adequately try the sexual slavery charge later added by the victims.¹²¹

In a case where the prosecutor fails to exercise his or her duty to prosecute sexual crimes, the Rome Statute must be interpreted in a way that ensures that the Chamber exercises its power of checks and balances over the prosecutor’s discretionary power. Otherwise, the prosecutor has unsupervised control over the most important aspect of the trial and the way that the Rome Statute and the ICC will be implemented in the future. The prosecutor must take his or her duties

117. *Id.*; see Rome Statute of the International Criminal Court, *supra* note 39, art. 61, para. 7(c)(i).

118. Since investigations have been difficult for the prosecutors of the ICC to perform due to the limited budget, the prosecutor would likely use the plethora of information provided by organizations like the Women’s Initiative to lighten its load. For example, in *Lubanga*, NGOs have reported widely that most female children who have been conscripted as child soldiers also have suffered severe amounts of trauma and sexual violence. Pritchett, *supra* note 6, at 300-01. “A broad interpretation of 61(7)(c)(i) by the Pre-Trial Chamber would have allowed for an adjournment of the hearing in order to consider these charges in light of the particular charge of conscripting and enlisting child soldiers.” *Id.* at 295.

119. Rome Statute of the International Criminal Court, *supra* note 39, art. 61, para. 7(c)(ii).

120. See Wakabi, *supra* note 49.

121. Irwin, *Lubanga Defense Case Delayed*, *supra* note 41; Pritchett, *supra* note 6, at 296 (“If interpreted to mean that hearings can be adjourned to enlarge or add charges, this provision would allow for charges of sexual violence to be added to initial charges determined by the Prosecutor in cases where evidence clearly supports crimes of sexual violence under the Rome Statute.”)

seriously and understand that by interjecting the ICC into a purely national war situation, it has taken a large bulk of retributive responsibility from the national government and judicial system. The ICC becomes the beacon of justice that the citizens look to for fairness. Without understanding the magnitude of such an undertaking, the prosecutor will act carelessly and negatively affect a nation of people just by neglecting to include a charge in an indictment.

Due to the advancement of victims' rights internationally, the prosecutor of the ICC has a duty to properly represent the interests of the victims. Those interests include the psychological effect the crimes and the charges in the indictment would have on victims' ability to cope with the harms committed against them. When bringing charges, the prosecutor has the ability to exercise discretion in determining which charges to include. This is dependent on the amount of evidence there is to support the charges. However, when there is ample evidence of war crimes, the prosecutor has the customary duty to do justice and bring all of the charges that reflect the war crimes committed by the defendant.

PART III: EFFECT OF THE PROSECUTOR'S EXERCISE OF DISCRETION IN THE *LUBANGA* TRIAL ON CONGOLESE WOMEN AND GIRLS

The prosecutor's exercise of discretion when deciding which charge to include in an indictment affects not only his or her ability to adequately try the case, but also the lives of the alleged perpetrator's victims. The charges have both a psychological and a symbolic effect on the victims. Particularly in cases of sexual violence, the victims suffer a great degree of psychological trauma; but when they come forward to report the crime, they have made a leap towards finding closure and coping with the experience.¹²² However, when the prosecutor brings charges that do not properly reflect their experience, they are not able to find that closure they seek, and they feel that their struggle has been ignored.¹²³ Throughout the *Lubanga* trial, many women spoke about the sexual violence they endured at the hands of the militia terrorizing the DRC,¹²⁴ but the prosecutor ignored their accounts. He only brought charges concerning the enlisting and con-

122. See *BREAKING THE CYCLE OF IMPUNITY*, *supra* note 2, at 6, 7, 9.

123. Pritchett, *supra* note 6, at 300-01.

124. *60 Minutes: War Against Women*, *supra* note 13.

scripting of children in the militia.¹²⁵ Even when the girl soldiers recounted the rapes and sexual slavery they endured while serving in the militia, the prosecutor continued to ignore their pleas for assistance as he objected to their request for the addition of sexual slavery charges.¹²⁶

The prosecutor must realize that by ignoring the torturous experience of the Congolese women and girls, he has created a negative psychological and symbolic effect on them.¹²⁷ The potential occurrence of these effects must be a primary factor in the prosecutor's decision to make the indictment to ensure that the ICC is not causing further damage because its underlying purpose is to end impunity and ensure justice for the constituents in the DRC.¹²⁸

A. Psychological Effects That Charges Have on Victims

In addition to the legal importance of bringing appropriate charges against an alleged culprit, the prosecutor in any criminal court should take into account the social and psychological importance of these charges. In any legal system where the government prosecutes a defendant for the crimes he or she has committed, the prosecutor is responsible for determining the appropriate charges to bring by the use of his or her discretion.¹²⁹ This responsibility not only affects the legal system, but it affects the victims of the alleged crimes. When a wrong has been committed, the victims must cope with the physical violation as well as the mental damage it has caused.¹³⁰ By bringing about appropriate charges, the victims are more apt to deal with the physical violation (in that the culprit will be deterred from committing the crime again) and the mental stress (in that the victim knows that her voice has been heard and she no longer has to live in fear that the culprit will violate her again).¹³¹ In fact, "there is mounting evidence that 'having a voice may improve victims' mental condition and wel-

125. Prosecutor v. Lubanga, Case No. ICC-01/04-01/06, Decision on Confirmation of Charges, ¶ 9 (Jan. 29, 2007), <http://www.icc-cpi.int/iccdocs/doc/doc266175.pdf>.

126. Irwin, *Latest News: Lubanga Trial Transformed by Victims*, *supra* note 43.

127. See Pritchett, *supra* note 6, at 300-02.

128. CODE OF PROFESSIONAL CONDUCT FOR PROSECUTORS OF THE INT'L CRIMINAL COURT art. 7, cl. 4 (Proposed Official Draft 2004); Gershman, *supra* note 71, at 562.

129. Lynch, *supra* note 57.

130. Erin Ann O'Hara, *Victim Participation in the Criminal Process*, 13 J.L. & POL'Y 229, 234-35 (2005).

131. See *Id.* at 234, 240 (discussing victims' desire for retribution, validation from society, and their potential mental anxiety).

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fare.’ For some victims, making a statement helps restore balance between themselves and the offenders.”¹³²

Experts have found that failure to incorporate the interests of a victim in a criminal proceeding can “ ‘result in increased feelings of inequity on the part of victims, with a corresponding increase in crime-related psychological harm.’ ”¹³³ Particularly, victims of rape and sexual assault tend to suffer from a form of post-traumatic stress disorder (“PTSD”).¹³⁴ “PTSD is a mental health disorder primarily characterized by chronic anxiety, depression and flashbacks which develop after experiencing significant trauma such as combat, natural disaster or violent crime victimization,” (e.g., rape).¹³⁵ A national study once reported that about one-third of all rape victims develop what is called “Rape-related Posttraumatic Stress Disorder” (“RR-PTSD”) at some point in their lives.¹³⁶ Victims often suffer from other emotional and psychological effects than post-traumatic stress, including anxiety, insomnia, depression, and social withdrawal.¹³⁷ By issuing charges against those who committed them, the victim is able to cope, knowing that the assailant may not be able to hurt her again.¹³⁸

The women and girls in the Congo who have been raped and sexually violated are psychologically stigmatized not only because of the actual crime, but also because they become outcasts in their families and communities.¹³⁹ Their families and husbands may remove them from their homes, blame them for being raped, or accuse them of consenting to the intercourse.¹⁴⁰ This causes the women to attempt to hide the rapes, hence the low rate of rape charges being brought lo-

132. *Id.* at 244.

133. *Id.*

134. *Sexual Assault*, NAT’L CTR. FOR VICTIMS OF CRIME, <http://www.ncvc.org/ncvc/main.aspx?dbName=documentViewer&DocumentID=32369> (last visited Feb. 17, 2011).

135. *Id.*

136. *See id.* (“RR-PTSD is diagnosed by a mental health professional when the biological, psychological, and social effects of trauma are severe enough to have impaired a survivor’s social and occupational functioning.” (citation omitted)).

137. *Id.* The effects can be psychological, emotional, as well as physical. *Id.*

138. *See id.* (“In addition, many sexual assault survivors report that choosing to follow through with prosecution contributes to a feeling of accomplishment and empowerment because they are attempting to protect themselves and others in the community from being victimized. Many victims also report the attempt to put their assailant(s) in jail allows for a feeling of closure, enabling them to put the assault behind them.”); O’Hara, *supra* note 131, at 243 (discussing the retributive value that the criminal system plays in the victim’s ability to cope).

139. *BREAKING THE CYCLE OF IMPUNITY*, *supra* note 2, at 6 (“Women and girls who have been raped and otherwise sexually abused have been psychologically damaged as well as physically injured by these crimes, and many will never recover.”).

140. *Id.*

cally in the Congo.¹⁴¹ Being ashamed and further humiliated by their families and communities lends to their psychological trauma.¹⁴² In fact,

[a] significant number of women and girls have become pregnant as a result of being raped and an unknown number have been infected with HIV, dramatically altering their future lives, livelihoods, and prospects. Other family and community members may also be psychologically or physically affected as a result of sexual violence against women and girls.¹⁴³

The women and girls of the Congo would like to bring charges against their assailants, but they do not feel that there would be any benefit to them.¹⁴⁴ There is a high level of impunity in the Congo, especially concerning sexual crimes.¹⁴⁵ The perpetrators of these crimes benefit from almost absolute impunity, contributing to the trivialization of rape, which is increasing throughout the country.¹⁴⁶ Due to the relatively infantile legal system in the Congo, the assailants can easily retaliate against the victims, lending to the victims' anxiety that the rape will occur again.¹⁴⁷ The DRC national justice system "has never been independent and has never had the resources necessary to investigate and prosecute criminals and to ensure that court decisions are implemented."¹⁴⁸ Although the President of the DRC promulgated two laws prohibiting sexual violence, they remain almost entirely unenforced.¹⁴⁹ Despite these limitations, some sexual crime suspects were convicted, but received very light sentences.¹⁵⁰ "Alarming numbers manage to escape from prison, whilst victims and witnesses are not given protection."¹⁵¹ Therefore, women fear for their

141. BREAKING THE CYCLE OF IMPUNITY, *supra* note 2, at 6. However, as previously stated, there are a number of reasons for the low number of rapes reported. See *supra* Part I.

142. BREAKING THE CYCLE OF IMPUNITY, *supra* note 2, at 6; THE WAR WITHIN THE WAR, *supra* note 16, at 63 (discussing the humiliation women and girls faced after informing their families and communities of the rapes).

143. THE WAR WITHIN THE WAR, *supra* note 16, at 63.

144. *Id.* at 78.

145. BREAKING THE CYCLE OF IMPUNITY, *supra* note 2, at 5; see *supra* Part I.

146. BREAKING THE CYCLE OF IMPUNITY, *supra* note 2, at 5.

147. See *id.* at 8 (noting the ease that sexual assaulters have in evading legal consequences for their actions and the high level of threats to victims who have reported the crimes); *60 Minutes: War Against Women*, *supra* note 13 (stating that people literally get away with rape and murder due to the weak criminal justice system in the Congo).

148. BREAKING THE CYCLE OF IMPUNITY, *supra* note 2, at 7.

149. *Id.*

150. *Id.* at 8.

151. *Id.*

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lives. Additionally, the legal system benefits those with money; most victims are impoverished, causing most cases to be dropped.¹⁵²

Due to the traumatic experience victims suffer, especially rape victims, the charges brought against the defendants should reflect the harms they suffer. Before Lubanga was charged, both victims and human rights advocates had great hope that he would be charged with sexually-based crimes, such as rape and sexual slavery.¹⁵³ Yet, despite the fact that the international community is aware of the systematic rape implemented in the Congo by Lubanga and other militia leaders, the prosecutor of the ICC failed to address any crimes specifically committed against the women in the country.¹⁵⁴

The women and girls' families and communities have ostracized them.¹⁵⁵ Having charges brought that reflect the crimes committed against them may help them cope with the stigmatization they face as victims. The psychological effects that rape victims feel will likely be found in the victims in the Congo.¹⁵⁶ The prosecutor should have had these potential effects in mind when deciding which charges to bring against Lubanga. Had he done so, the original indictment would have included rape and sexual slavery charges.

B. Symbolic Importance of Charges for Victims

Though charges brought in criminal trials are indicative of the crimes committed by defendants, they also connote a symbolic value for the victims who seek retribution for the harm done to them.¹⁵⁷ There are several symbolic effects that adequate charges can have on victims, including the integrity of the legal system, trust in the prosecutor's abilities, and their value to the legal system and governing body.¹⁵⁸ These effects are evident when determining the reasons behind many victims' decision not to report a crime. This failure to report crimes has a direct link to the prosecutor's responsibility to achieve justice for his constituents because if the prosecutor is una-

152. *See id.* at 7 (stating that victims have the obstacle of high legal costs when seeking to press charges); *THE WAR WITHIN THE WAR*, *supra* note 16, at 64 (stating that once the victim have been abandoned by their families because of the rapes, they are left impoverished).

153. Pritchett, *supra* note 6, at 285.

154. Prosecutor v. Lubanga, Case No. ICC-01/04-01/06, Decision on Confirmation of Charges, ¶ 9 (Jan. 29, 2007), <http://www.icc-cpi.int/iccdocs/doc/doc266175.pdf>.

155. *THE WAR WITHIN THE WAR*, *supra* note 16, at 63.

156. *60 Minutes: War Against Women*, *supra* note 13 (stating that one could see the psychological pain in the victims' faces).

157. O'Hara, *supra* note 131, at 243.

158. *Id.* at 244.

ware of the crimes being committed, then he cannot effectively prevent the future commission of the crimes. However, in a cyclical fashion, the prosecutor's inadequate use of discretion in making charges is partially the reason why many victims do not come forward in the first place.¹⁵⁹ The prosecutor in *Lubanga* could have ended the cycle by properly including rape and sexual slavery charges in his indictment, but instead he contributed to the cycle with his indifference toward the struggle of the women and girls of the DRC.

Given the weakened status of the Congolese government and court system, it is clear that its integrity has been substantially debilitated as well.¹⁶⁰ There is also a high level of impunity and gender bias within the country, contributing to the legal system's lack of integrity.¹⁶¹ Due to decades of war in the DRC, the legal system is no longer able to properly investigate and prosecute any crimes, let alone the difficult cases of sexual violence.¹⁶² Furthermore, since women are considered second-class citizens,¹⁶³ the Congolese legal system has made little effort to provide protection for women who actually bring cases of sexual violence.¹⁶⁴ Since the cases generally are made public, the victims rightfully fear for their safety.¹⁶⁵ Public announcement of the cases lead to families and communities outcasting the victims and subjecting them to more violence by the perpetrator.¹⁶⁶

Based on the history of the country and its lack of female leadership in the government, it seems clear that the Congolese government does not value women's interests.¹⁶⁷ The women and girls justifiably

159. *See id.* (“[P]oor treatment by the State’s representatives can cause the victim to believe that she lacks the support of her community.”).

160. *BREAKING THE CYCLE OF IMPUNITY*, *supra* note 2, at 7.

161. *Id.*; *THE WAR WITHIN THE WAR*, *supra* note 16, at 20.

162. *BREAKING THE CYCLE OF IMPUNITY*, *supra* note 2, at 7.

163. *THE WAR WITHIN THE WAR*, *supra* note 16, at 20.

164. *See* *BREAKING THE CYCLE OF IMPUNITY*, *supra* note 2, at 8 (stating that there is a high risk of reprisals against the victims and witnesses in rape cases).

165. *Id.*; Pritchett, *supra* note 6, at 301 (“One lawyer described the problem, saying ‘[u]nprotected victims, terrified by the threat of reprisal, are often reluctant to press charges against their attackers and when they do, understaffed, poorly paid, and ill-trained prosecutors lack the legal basis to bring such cases to court.’ ”).

166. *BREAKING THE CYCLE OF IMPUNITY*, *supra* note 2, at 8.

167. Furthermore, the domestic legal system is filled with gender bias and is unable to overcome the social relations which dictate women's customary place as second-class citizens. Women hold few leadership positions in civil society or political office. Gender discrimination is reflected in customary legal practice, and under customary law rape can be resolved if the perpetrator marries the victim. Under Congolese penal code, married women must have their husbands' permission to initiate judicial action. Pritchett, *supra* note 6, at 301-02. For instance, if a Congolese soldier raped a married woman, she would have to request permission from her husband to press charges. However, by requesting this required permission, she would have to divulge the details of the rape, risking the possi-

lack faith in the country's ability and willingness to prosecute crimes committed against them.¹⁶⁸ Therefore, they instead relied on the efforts of the ICC to defend their rights.

Since women are considered second-class citizens in the DRC, the laws of the country do not properly represent their interests.¹⁶⁹ For that reason, the prosecutor's failure further exacerbates their low status in the international community. The women already sense the high level of impunity for the perpetrators within the laws of their country, but the prosecutor's failure emphasizes this impunity because the women's interests are not even represented in the more sophisticated legal system. If the ICC does not even recognize their plight enough to address it in such a publicized trial, then who is going to respect the concerns of these women in an even more localized arena?

PART IV: VICTIMS' RIGHTS MOVEMENT—CALLING
FOR THE INCLUSION OF VICTIMS' INTERESTS IN THE
PROSECUTOR'S EXERCISE OF DISCRETION

Victims' rights movement in the United States and abroad indicate that, while victims are not parties in criminal cases, their interests are valued and should influence the trial.¹⁷⁰ However, the international movement labels the Rome Statute of the ICC as a strong example of victim's integration in the criminal justice system.¹⁷¹ Yet, the prosecutor of the ICC failed to take note of the movements in other parts of the world and the revolutionary spirit of the Rome Statute and incorporate them in his decision when bringing charges against Lubanga.

bility of being abandoned by her husband and family, and thereby leaving her impoverished. Because of the commonplace occurrence of scenarios such as this, many women do not tell anyone about the rape. *THE WAR WITHIN THE WAR*, *supra* note 16, at 63-66 (recounting several instances where victims did not inform others of their assault). These gender-biased practices serve to reinforce the importance of trying crimes of sexual violence before the ICC.

168. *THE WAR WITHIN THE WAR*, *supra* note 16, at 78.

169. *See id.* at 82 (noting that many Congolese laws are contrary to international women's rights laws).

170. *See* O'Hara, *supra* note 131, at 230-31.

171. *See* Mugambi Jouet, *Reconciling the Conflicting Rights of Victims and Defendants at the International Criminal Court*, 26 *ST. LOUIS U. PUB. L. REV.* 249, 249 (2007).

A. Victims' Rights Movement in the United States

In the United States, the Victims' Rights Movement was created by a need to include the interests of victims in criminal trials.¹⁷² The view that the criminal justice system was more concerned with protecting criminal defendants than the public fueled the perceived need for federal legislation mandating the inclusion of victims' interests in criminal trials.¹⁷³

For instance, the criminal justice system in the United States does not include the victim as a party in the trial.¹⁷⁴ Actually, the crime is considered to be against the public, whether it is federal or state.¹⁷⁵ The crime is not only experienced by the individual victim, but also society as a whole.¹⁷⁶ Since protecting society is seemingly more important than protecting just one person, the individual victim is not included in the criminal proceedings beyond participation as a witness.¹⁷⁷ As a result, the victims' needs and interests are ignored because the bigger picture calls for deterrence and retribution to society as a whole.

Many victims never have an opportunity to meet with the prosecutors in their cases and those who do very often report that they do not feel as though their concerns were taken into account. The vast majority of criminal cases end with plea agreements, and yet victims often are not informed that their cases have been resolved. Victim notice is similarly lacking with regard to bond releases and parole grants. Until recent advocacy efforts enabled the submission of victim impact statements, many victims were denied the opportunity to speak to the court about either the extent of their suffering or their views about the appropriate punishment of the offenders.¹⁷⁸

Continuing to prosecute criminal trials in such a manner has left many victims feeling powerless and overlooked, having their interests overshadowed by the government's desire to close cases as quickly as

172. See generally O'Hara, *supra* note 131, at 229-31 (focusing on the history of the victim's rights movement).

173. See generally *id.* at 230-33 (discussing that scholars are concerned for the rights of defendants).

174. *Id.* at 239.

175. *Id.*

176. *Id.*

177. O'Hara, *supra* note 131, at 239-40; Jouet, *supra* note 172, at 254; Elisabeth Baumgartner, *Aspects of Victim Participation in the Proceedings of the International Criminal Court*, 90 INT'L REV. RED CROSS 409, 409 (2008), available at www.icrc.org/eng/assets/files/other/irrc-870_baumgartner.pdf.

178. O'Hara, *supra* note 131, at 239-40.

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possible.¹⁷⁹ To counter this resentment for the criminal justice system, many states have created victims' rights laws.¹⁸⁰ While some states have their own version of victims' rights laws, the proposal for a federal Victims' Rights Amendment has been presented to Congress.¹⁸¹ This legislation would require that prosecutors keep in touch with the victims throughout the trial.¹⁸² The prosecutor of the ICC, particularly in *Lubanga*, should emulate such an interest in victims' needs because, without the ICC, the crimes and atrocities occurring in the DRC would not be tried at all.¹⁸³

B. International Victims' Rights Movement

There has been a rise of similar victims' rights movements internationally.¹⁸⁴ Such recognition of victims' rights can be found within the Rome Statute of the ICC, which allows victims to participate in the trial.¹⁸⁵ The Rome Statute has a codified "victim standing rule," which states that "[w]here the personal interests of the victims are

179. *See id.* at 244.

180. *See, e.g., Issues: Constitutional Amendments*, NAT'L CTR. FOR VICTIMS OF CRIME, http://www.ncvc.org/ncvc/main.aspx?dbID=db_Amendments128 (last visited Feb. 17, 2011) (stating that thirty-two states have amended their constitutions to include the interest of crime victims).

181. *See id.*

182. *See* O'Hara, *supra* note 131, at 230-31. However, nothing in the Act will provide grounds for the victim to challenge a charging decision or a conviction, obtain a stay of trial, or compel a new trial; nor will it give rise to a claim for damages against the United States, a state, a political subdivision, or a public official.

183. Though many people feel that victims deserve the right to be a part of the criminal proceedings, others believe that doing so would jeopardize the efficiency of the criminal system. One scholar expressed this sentiment by stating:

[A] slow but insidious trend in national consciousness and criminal justice policy away from the liberal policies of the Warren Court, with its concern for the rights of defendants . . . toward a far more reactionary (in the truest sense of the word), often even bloodthirsty, concern for the 'rights' of 'victims' to revenge and punishment of the most extreme kind. . . . Beneath the compelling emotion that informs the demands of victims, there is all too often an ugly and irrational cry for blood that smacks of mob violence and vigilante justice.

Id. at 232. The victims' interests are not solely based on meeting the legal requirements that reach a justified remedy. Their interests are more vengeful. They are unable to assess the crimes objectively due to their inherent personal attachment to the outcome of the trial. Though victims can make civil cases against the perpetrator, this means of retribution is "hollow" and an inappropriate means of obtaining retribution or revenge for the crime(s) committed against them. Furthermore, victim's involvement in the criminal trial process is unfair to defendants and can undermine prosecutorial efforts. Having victims constantly involved in the proceedings would distract the prosecutor and derail the entire trial. *See id.* at 232-33.

184. *See generally* M. Cherif Bassiouni, *International Recognition of Victims' Rights*, 6 HUM. RTS. L. REV. 203, 205 (2006) (discussing the symbolic integration of international human rights law and international criminal law).

185. Rome Statute of the International Criminal Court, *supra* note 39, art. 68, para. 3; *see* CODE OF PROFESSIONAL CONDUCT FOR PROSECUTORS OF THE INT'L CRIMINAL COURT art. 11, cl. 3 (Proposed Official Draft 2004) (requiring the prosecutor to consider the views of the victims).

affected, the [ICC] shall permit their views and concerns to be presented and considered at stages of the proceedings determined to be appropriate by the [c]ourt.”¹⁸⁶ The rule stems from the continental European legal systems, which grant victims extensive rights and limit the government prosecutor’s ability to control a criminal case.¹⁸⁷ For instance, if a prosecutor decides not to investigate or prosecute a case, the victims can appeal the decision to a higher public authority that may require that the case be tried.¹⁸⁸

Victims of crimes covered by the jurisdiction of the Rome Statute, such as war crimes and crimes against humanity, have several important needs, including seeing the culprit get retribution so long as punishment is reasonable, and obtaining closure and truth.¹⁸⁹ By participating in the ICC proceedings, the victims can satisfy these needs and alleviate some of their suffering.¹⁹⁰

The growth of victims’ rights in the international criminal justice systems is a new development. Victims had no right to participate in the prior international criminal courts created by the global community, such as the International Criminal Tribunal for Rwanda, the In-

186. Rome Statute of the International Criminal Court, *supra* note 39, art. 68, para. 3.

187. See Jouet, *supra* note 172, at 253. These legal systems allow victims of crimes to integrate their civil claims against the defendant in one trial, making the proceeding more advantageous for the victims. Some courts allow the victim to serve as a private prosecutor so that he or she may prove the defendant’s guilt without having to depend on the government prosecutors. *Id.* at 254.

188. *Id.* at 255.

189. *Id.* at 250. Other needs include receiving financial compensation for their harms and having a forum to speak and be heard. *Id.*

190. Similarly, with the U.S. Victim’s Rights Movement, there is also opposition to providing rights to victims internationally. For similar reasons as stated above regarding the movement in the U.S., there has been much opposition to providing victims with rights in the international arena. The difference, however, lies in the fact that victims have already been provided with some sort of standing to participate in international criminal trials. One scholar named a couple underlying problems to allowing victims to participate in criminal trials:

First, a prosecutor and a victim’s counsel may not have the same theory of the case, which would lead them to make inconsistent arguments and undermine the prosecutor’s ability to secure a conviction. Second, even if they have the same theory, they may disagree over the proper trial strategy, including the wisdom of introducing evidence of debatable probative value, the respective strengths and weaknesses of a particular line of witness questioning, whether it is necessary to call a potentially tricky witness altogether, etc.

Jouet, *supra* note 172, at 275. This sort of distraction could prolong the trial and cause significant damage to the prosecutor’s ability to present its case. “[S]ince prosecutors may feel concerned that victim participation will jeopardize their ability to convict defendants, it is conceivable that they will object to victims questioning witnesses, introducing evidence, or even participating in a trial altogether before sentencing.” *Id.* at 276. Additionally, victim participation can make a judge’s job more difficult because they are responsible for ensuring that the prosecution runs smoothly and according to schedule. *Id.* at 277. Introducing victims into the proceedings would only further complicate the trial, making them harder to manage.

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ternational Criminal Tribunal for Yugoslavia, and the Special Court for Sierra Leone.¹⁹¹ Accordingly, given this newfound concern for the victims' interests, nations must "respect, ensure respect for and enforce international human rights and humanitarian law norms contained in treaties to which they are a State Party, in customary international law or in domestic law."¹⁹² The requirements also include a country's duty to prevent crimes, investigate them, punish the culprits, provide victims with equal and effective access to justice, and provide for reparation to the victims.¹⁹³

As the world moves toward recognizing victims' rights and the symbolic value of bringing charges, the prosecutor in *Lubanga* should have inquired into the charges that would properly address all of the transgressions that Lubanga caused his many victims, particularly the female victims. In fact, well before Lubanga was formally charged, the ICC prosecutor strongly opposed the court's grant of applications by victims to participate both in the proceedings and the investigation.¹⁹⁴ The prosecutor attempted to argue that the victims' participation would jeopardize the integrity and objectivity of the investigation; however, the court found that the prosecutor failed to present concrete evidence and allowed the victims to be involved in a "very limited" system of victim participation that essentially relie[d] on a 'case-by-case' evaluation."¹⁹⁵ The ICC's later decision to include the victims' participation in the trial and further include their charges of sexual slavery and cruel and unusual punishment, despite the prosecutor's objection,¹⁹⁶ can be considered a victory for victims' rights.

191. *Id.* at 250.

192. *See* Bassiouni, *supra* note 185, at 204.

193. *Id.*

194. *See* Jouet, *supra* note 172, at 260. The court developed four requirements that any victim must meet in order for their participation application to be granted: the applicants must be natural persons, have suffered harm, allege crimes covered by the ICC jurisdiction, and show a causal link between the alleged crimes and the harm. *Id.* As long as the victims present grounds to believe that these four requirements have been met, then the Pre-Trial Chamber will allow the victims to participate in the proceedings.

195. *Id.* Much to the prosecutor's relief, the Chamber subsequently rejected the victim's applications to participate in the proceedings after the charges were brought against Lubanga, finding that the victims failed to demonstrate a causal link between the crimes charged and the harm suffered. *Id.* at 261. This may be because the charges brought dealt solely with conscription of children, and did not include rape or sexual slavery.

196. Irwin, *Lubanga Defense Case Delayed*, *supra* note 41.

PART V: ANALYSIS AND PROPOSED
PROSECUTORIAL GUIDELINES

The prosecutor in *Lubanga* failed to properly use his prosecutorial discretion in bringing appropriate charges against Lubanga. There was evidence that Lubanga committed the war crimes of rape and sexual slavery.¹⁹⁷ The Rome Statute requires that all charges amounting to war crimes be brought by the prosecutor when there is sufficient evidence to reasonably support them, and in the international context, all such crimes are customarily brought.¹⁹⁸ Therefore, the prosecutor failed to adhere to his duty, and this failure will likely have a negative effect on the women and girls in the DRC.

In the international context, in situations where the investigations reveal evidence of rape and other sexual crimes amounting to war crimes, the prosecutor of the ICC has the duty to prosecute all of those crimes.¹⁹⁹ However, in these situations, the resources available to the prosecutor are scarce and some charges are dropped.²⁰⁰ Usually, the sexually-based crimes are dropped in favor of other serious crimes, crimes that are more easily proven (such as murder or genocide).²⁰¹ This exclusion of sexual crimes sends a message of impunity to the perpetrators and indifference to the victims. While there may be strategic legal reasons for excluding certain charges,²⁰² the prosecutor should be cognizant of the effects of this exclusion on the victims and on the country the prosecutor has entered.

Since the ICC was not created to adjudicate all international crimes committed in any given country, the prosecution's strategy tends to involve the execution of very targeted investigations and trials, which only involve a small selection of the crimes committed in a certain region in a given time period.²⁰³ In addition, the prosecutor only embarks on the prosecution of a very limited number of criminals, usually those bearing the greatest responsibility, such as mi-

197. See *supra* Part II.

198. See *id.*

199. See *id.*

200. See SáCouto & Cleary, *supra* note 17, at 348; see also Pritchett, *supra* note 6, at 291-92 (discussing the prosecutor's streamlined strategy).

201. See SáCouto & Cleary, *supra* note 17, at 348.

202. The prosecutor was unable to find sufficient evidence of sexual crimes that would link the individual perpetrator to Lubanga. See Pritchett, *supra* note 6, at 293. Therefore, the prosecutor decided to suspend investigation of those crimes and proceed with an indictment regarding enlisting and conscripting children in his militia. *Id.*

203. BREAKING THE CYCLE OF IMPUNITY, *supra* note 2, at 12.

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litia leaders.²⁰⁴ Though it remains the immediate responsibility of the Congolese courts to prosecute perpetrators of human rights violations,²⁰⁵ the Congolese judicial system is severely underdeveloped and has further deteriorated due to the wartime conflicts that have occurred over a number of years.²⁰⁶ To place the weight of such a widespread epidemic on that limited judicial system is not fair to the women and girls in the Congo. A government that treats its women and girls like second-class citizens and perpetuates inherent sexism and double standards has fallen short. Requiring victimized women and girls to further depend on a system that only exacerbates their constantly overlooked plight will diminish their hope of obtaining legal recognition of the wrongs committed against them. The impunity will increase, and the women and girls will continue to spiral downwards physically and psychologically.

Therefore, guidelines should be created for the prosecutor of the ICC to follow when investigating crimes of a similar nature to that of *Lubanga*. The fragility of the victims of sexual crimes should be taken into account when investigations are executed, indictments are created, and trials are prosecuted. First, the prosecutor should implement appropriate measures of investigation to ensure that the crimes within the jurisdiction of the ICC can be brought against the defendant, particularly sexually-based crimes. Ordinarily, criminal investigations occur after a completed crime has been discovered.²⁰⁷ The investigator knows what crime has been committed because the results of the crime are visible.²⁰⁸ Therefore, the main focus would be on discovering who committed the crime and collecting evidence in support of the person's guilt. Even in an international context, the investigation should occur in a similar fashion.

Although the Rome Statute enumerates rape and sexual slavery as war crimes and crimes against humanity, the prosecutor must effectively investigate these crimes to ensure that they are properly tried in

204. *Id.* at 9.

205. *Id.* (“[T]he Congolese justice system is failing. It is therefore essential that the systematic inclusion of crimes of sexual violence, where there is sufficient evidence of such crimes, amongst the charges retained is part of the prosecution strategy of the Office of the Prosecutor of the ICC.”).

206. *See supra* Parts I & II.

207. *See generally* SáCouto & Cleary, *supra* note 17, at 343-53 (discussing the procedure for conducting investigations).

208. *See id.*

the court.²⁰⁹ In *Lubanga*, the prosecutor attempts to justify the exclusion of rape and sexual slavery charges with a lack of evidence.²¹⁰ However, if he had conducted a sufficient investigation, he would have been able to support such charges with the required evidence. For instance, the evidence provided by the girl soldiers in support of the enlistment and conscription violations would have also supported charges of sexual slavery and rape, but the prosecutor failed to properly investigate their statements and obtain appropriate evidence.

While the court's limited resources are an important factor when evaluating the sufficiency of the investigation, the Rome Statute allows other entities to provide observations they have gathered in support of the case.²¹¹ Instead of taking advantage of this useful mechanism, the prosecutor ignored the findings brought forward by the NGOs supporting evidence of rape and sexual slavery. Since the ICC will be trying two other militia leaders from the DRC, the prosecutor should implement investigatory measures that will provide enough evidence to support the sexual crimes that the international community knows the defendants have committed. The DRC is considered the rape capital of the world for a reason—rape has been used as a weapon of war.²¹² It is time that someone is held responsible for this atrocity.

Second, the prosecutor should abandon the streamlined strategy of indictment and adopt an approach that is more centered on the interest of justice. The streamlined approach ignores the needs of the victims. The crimes systematically committed by Lubanga have caused psychological, emotional, and physical harm to the women and girls of the DRC.²¹³ By streamlining the indictment, the prosecutor is ignoring these harms in exchange for a simplified trial. Though the enlistment and conscription of children in a militia is a serious offense, there are other serious offenses that have been overlooked.²¹⁴ As his-

209. Rome Statute of the International Criminal Court, *supra* note 39, art. 7 para. 1(g); *id.* art. 8 para. (2)(e)(vi); *id.* art. 53 para. 1.

210. Pritchett, *supra* note 6, at 293 (noting that the prosecutor chose to suspend investigation of the sexual violence charges).

211. *See supra* Part II.

212. *See* Gettleman, *supra* note 1 (stating that the DRC is the rape capital of the world); *THE WAR WITHIN THE WAR*, *supra* note 16, at 1 (noting that sexual violence is used as a weapon of war in the DRC conflict).

213. *See supra* Part III.A.

214. *See* Prosecutor v. Lubanga, Case No. ICC-01/04-01/06, Decision on Confirmation of Charges, ¶ 9 (Jan. 29, 2007), <http://www.icc-cpi.int/iccdocs/doc/doc266175.pdf> (including only charges of enlisting and conscripting child soldiers, but excluding rape and sexual slavery charges).

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tory has dictated, the interests of women have been sidelined yet again.²¹⁵

Sexually-based crimes like rape and sexual slavery are difficult to prove regardless of the context.²¹⁶ Yet, instead of shying away from such charges in hopes of simply obtaining a conviction for any crime, the prosecutor should bring as many charges as he or she has sufficient evidence to include in an indictment. There may be a greater chance of convicting the defendant of some crime and the victims will feel valued even if the prosecution is unsuccessful. The streamlined approach sends a message to the people of the DRC: the needs of women and girls are not significant and rapists can continue to violate these females without repercussion.

Third, the prosecutor should increase the number of investigators sent into a country to gather sufficient evidence of each crime. Since sexually based crimes like rape and sexual slavery are more difficult to prove, the more evidence that can be gathered, the more likely the defendant will be convicted for such crimes. Increasing the resources dedicated to investigating and uncovering crimes of sexual violence will allow charges for rape and sexual slavery to be added to other crimes in the indictment prior to a pre-trial hearing. Thorough and well-informed investigations will support a connection between those in leadership positions of armed forces and the crimes committed. While it is more likely that the individual rapist can be convicted, such a criminal trial would not be held in the ICC because it would not amount to a war crime or crime against humanity. Instead, there must be enough evidence to demonstrate the systemic nature of the rapes and sexual slavery to link the militia leader that organized and authorized the criminal activity. This would allow the crime to fall into the Rome Statute's jurisdiction.

Fourth, the prosecutor should also pursue those further down the chain of command so that those who are actually committing the crimes will be punished for these wrongs. This will demonstrate that such behavior will no longer be tolerated and the impunity that was once enjoyed by such culprits will end. Though punishing the leader of the militia may have a symbolic effect on the victims, punishing the actual rapists would protect the victims in their communities and deter other men from committing the same crime. Therefore, the prosecu-

215. See SáCouto & Cleary, *supra* note 17, at 347 (stating that, historically, rape has not been considered a consequence of war).

216. *Id.* at 348.

tor should seek to add the actual rapists to the indictment. Hopefully, in the end, the use of rape as a weapon of war will become less commonplace and occur less often in the Congo.

CONCLUSION

Prosecutors of the ICC have a duty to do justice for the victims and bring charges that accurately reflect the crimes committed by the defendant. Instead of simply trying to find any way to convict the defendant, the prosecutor should attempt to prosecute each defendant for all of the crimes he has committed, including rape, sexual slavery, and cruel and unusual treatment. The prosecutor in the *Lubanga* likely abused his discretion when he failed to make charges of rape or sexual slavery in the case despite the ample evidence provided to him that such rapes had systematically occurred.

The prosecutor should have also taken into account the psychological effects and symbolic importance that bringing charges would have had for victims when he indicted Lubanga. Had he done so, the women and girls of the DRC may have finally felt that the crimes committed against them are of importance in the international community and the impunity for perpetrators would come to an end. The proposed guidelines include the victims' interests, and the prosecutor should follow these guidelines when bringing charges in similar cases.

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