The Construction and Criminalization of Disability in School Incarceration

Jyoti Nanda

Abstract

This Article explores how race functions to ascribe and criminalize disability. It posits that for White students in wealthy schools, disabilities or perceived disabilities are often viewed as medical conditions and treated with care and resources. For students of color, however, the construction of disability (if it exists) may be a criminalized condition that is treated as warranting punishment and segregated classrooms, possibly leading to juvenile justice system involvement. Providing a review of the K-12 disability legal regimes, this Article maps how the process of identifying a student with a disability happens in a hyper-criminalized school setting. The Article argues that the school itself contributes to the construction and criminalization of disability and that the attribution of disability is a product of the subjectivity built into the law, heavily surveilled school environments, and biases held by teachers and administrators. For students of color, instead of a designation that attracts more resources, disability is one of the mechanisms through which they are criminalized. This Article culminates with a call for scholars and practitioners to understand the web that exists in the construction and criminalization of disabilities for Black and Latinx children and the role that schools and school actors play in this process.

About the Author

Binder Clinical Teaching Fellow and Youth and Justice Clinic Faculty Founder, UCLA School of Law. An early draft of this Article benefitted from helpful comments at the NYU School of Law Clinical Teaching Workshop and the Criminal Justice Workshop at UCLA School of Law. For comments on or conversations about this Article, the author thanks Cheryl Harris, Devon Carbado, Kimberlé Crenshaw, Scott Cummings, Beth Colgan, Harit Trivedi, Tendayi Achuime, Asli Bâli, Bob Dinerstein, Noah Zatz, Beth Ribet, Devon Rios, Vivian Wong, Dawn Yuster, Suma Peesapati, Katherine Perez, Neelum Arya, and the students in Professor Carbado's Advanced Critical Race Studies class at UCLA School of Law. Special thanks to Sunney Poyner for invaluable research and editorial suggestions as well as Alma D. Gonzalez, editor-in-chief of the Columbia Journal of Race and Law, and the Journal's editorial staff for their edits. This Article is dedicated to the author's clients, and their families, in the UCLA School of Law Youth and Justice Clinic (2014–2019).

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Introduction

Though the overrepresentation of Black[1] and Latinx[2] youth with

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1. In this Article, I use the terms African American and Black interchangeably, following the example of Kimberlé Crenshaw, who states: "I shall use 'African-American' and 'Black' interchangeably. When using 'Black,' I shall use an upper-case 'B' to reflect my view that Blacks, like Asians, Latinos, and other 'minorities,' constitute a specific cultural group and, as such, require denotation as a proper noun." Kimberlé Williams Crenshaw, Race, Reform and Retrenchment: Transformation and Legitimation in Antidiscrimination Law, 101 Harv. L. Rev. 1331, 1332 n.2 (1988). However, because the term African American "is both culturally more specific and historically more expansive than the traditional terms that narrowly categorize us as America's 'other,'" both are used in this Article. Id.

2. Following the example of the Network for Justice and to "reject the gender binary that is inherent linguistically in both 'Latino/as' and its newest form Latin@s," I use the term "Latinx" in this Article. Luz E. Herrera & Pilar Margarita Hernández Escontrías, The Network for Justice: Pursuing a Latinx Civil Rights Agenda, 21 Harv. Latinx L. Rev. 165, 165 n.1 (2018). In doing so, however, I recognize the fraught history of the limits of the terms Latino/Latina, Latinx, and Hispanic. For a fuller account of this history, see How the United States Racializes Latinos: White Hegemony and Its Consequences 9 (José A. Cobas et al. eds., 2009) ("Racialization often entails minimizing historical, cultural, and linguistic differences among peoples from the same region—including, for example, those in various Latin American countries. Such labels as 'Hispanic' typically collapse

disabilities[3] in the juvenile justice system has been often noted,[4] disability scholarship in this area has focused on the limits of special education laws and the overrepresentation or underrepresentation of children of color in certain cognizable disability categories under the Individuals with

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diverse peoples into a single overarching group . . . .").

3. For this analysis, I rely on a broad definition of disability. Rachel Adams et al., Disability, in KEYWORDS FOR DISABILITY STUDIES 5, 5 (Rachel Adams et al. eds., 2015) ("Disability encompasses a broad range of bodily, cognitive, and sensory differences and capacities. It is more fluid than most other forms of identity in that it can potentially happen to anyone at any time . . . .").

4. The overrepresentation of Black and Latinx children in special education has been wildly documented in federal and state policies. But see Paul L. Morgan & George Farkas, Evidence and Implications of Racial and Ethnic Disparities in Emotional and Behavioral Disorders Identification and Treatment, 41 BEHAV. DISORDERS 122, 122 (2016) (arguing that when "controlling for individual-level academic achievement and behavior, which are known to strongly predict children's likelihood of receiving special education services," it is White children who are overrepresented in special education); Jacob Hibel et al., Who Is Placed into Special Education?, 83 SOC. EDUC. 312 (2010) (arguing the same); Paul L. Morgan & George Farkas, Are We Helping All the Children That We Are Supposed to Be Helping?, 45 EDUC. RESEARCHER 226 (2016) (arguing the same and responding to criticism).

Disabilities Education Act (IDEA).[5] Scholars have given some attention to the role played by school atmosphere and racial and cultural bias on the part of teachers[6] and administrators in the process of

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5. See, e.g., 20 U.S.C. § 1401 (2016); RACIAL INEQUITY IN SPECIAL EDUCATION (Daniel J. Losen & Gary Orfield eds., 2002); SPECIAL EDUCATION ADVOCACY (Ruth Colker & Julie K. Waterstone eds., 2011); Samuel R. Bagenstos, Educational Equality for Children with Disabilities: The 2016 Term Cases, 2017 ACS SUP. CT. REV. 17. The categories that IDEA sets out are autism, deaf-blindness, deafness, emotional disturbance, hearing impairment, intellectual disability, multiple disabilities, orthopedic impairment, other health impairment, specific learning disability, speech or language impairment, traumatic brain injury, and visual impairment (including blindness). Racial disparities exist throughout the identification process for special education services. See Press Release, U.S. Dep't of Educ., Fact Sheet: Equity in IDEA (Dec. 12, 2016), https://www.ed.gov/news/press-releases/fact-sheet-equity-idea [https://perma.cc/Y468-YUVT]. However, Black children are especially disproportionately represented in the emotional disturbance and intellectual disability categories. Memorandum from Alexa Posny, Dir., Office of Special Educ. Programs to the State Directors of Special Educ. (Apr. 24, 2007) (on file with the Columbia Journal of Race and Law).

6. See, e.g., Sigmund Tobias et al., Teacher-Student Ethnicity and Recommendations for Special Education Referrals, 74 J. EDUC. PSYCHOL. 72 (1982); cf. Lorenzo Adrian Woodson, Teacher and Student Variables Affecting Special Education Evaluation and Referral (Nov. 2017)

identifying a student with a disability.[7] However, given that disability attribution is discretionary, it is oftentimes difficult to study or even pinpoint when the process of attributing a disability to a student first occurs. Meanwhile, a robust body of literature on zero-tolerance policies in schools[8]—addressing part of what has been dubbed the "School-to-

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(unpublished Ph.D. dissertation, Walden University) (on file with the Walden Dissertations and Doctoral Studies Collection, Walden University).

7. See, e.g., Beth A. Ferri et al., Critical Conversations Across Race and Ability, in DisCrit: Disability Studies and Critical Race Theory in Education 213 (David C. Connor et al. eds., 2015); David S. Mandell et al., Racial/Ethnic Disparities in the Identification of Children with Autism Spectrum Disorders, 99 Am. J. Pub. Health 493 (2009). Literature in this area around disabilities in preschool children is largely relegated to how it impacts discipline. Christina Novoa & Rasheet Malik, Suspensions Are Not Support: The Disciplining of Preschoolers with Disabilities, Ctr. for Am. Progress (Jan. 17, 2018), https://www.americanprogress.org/issues/early-childhood/reports/2018/01/17/445041/suspensions-not-support [https://perma.cc/4TYM-ES47]; John Kelly, Disability, Race, and Reasons: What We Know, and Don't Know, About Disparity in School Discipline, Chron. Soc. Change (Apr. 18, 2018), https://chronicleofsocialchange.org/youth-services-insider/disability-race-reasons-know-dont-know-disparity-school-discipline [https://perma.cc/2BAM-QT5V].

8. Zero tolerance policies require school officials to apply specific, consistent, and harsh punishment—usually suspension or expulsion—when

Prison Pipeline"—has failed to squarely address how the atmosphere created by these policies negatively impacts students with disabilities directly and indirectly.[9] Specifically, fully unpacking how and why children

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students break certain rules. Under zero tolerance policies, harsh punishment applies regardless of the circumstances. For a fuller account, see DEREK W. BLACK, ENDING ZERO TOLERANCE: THE CRISIS OF ABSOLUTE SCHOOL DISCIPLINE (2016); see also David M. Ramey, The Social Structure of Criminalized and Medicalized School Discipline, 88 SOC. EDUC. 181 (2015) (discussing zero tolerance policies in schools as a form of criminalization of students); CHRISTOPHER BOCCANFUSO & MEGAN KUHFELD, CHILD TRENDS, MULTIPLE RESPONSES: EVIDENCE-BASED NONPUNITIVE ALTERNATIVES TO ZERO TOLERANCE (2011), http://www.nea.org/assets/docs/alternatives-to-zero-tolerance.pdf [https://perma.cc/LDD8–4RDL] (discussing the development of zero tolerance policies and possible solutions).

9. The Pipeline is a metaphor, developed by community activists in the 1990's as an organizing model, to capture the linear nature of this phenomenon, starting with unjustly punitive and zero tolerance school discipline policies leading to suspension, expulsion, and ultimately referral to the justice system. The Pipeline has been rightfully criticized for its limited use as a metaphor. See, e.g., DAMIEN M. SOJOYNER, FIRST STRIKE: EDUCATIONAL ENCLOSURES IN BLACK LOS ANGELES xvi (2016) ("Although community activists developed the STPP [School-to-Prison Pipeline] as an organizing model during the 1990s, the model has been wholly subsumed into the state via policy initiatives, positivist research agendas, and official government mandates. Manipulated in this manner, the framing of the STPP

of color with disabilities are overrepresented in the juvenile justice system is many times relegated to a footnote, largely because the issue is unduly complicated.[10] This Article seeks to bridge this gap by examining how, for students of color, the construction of disability (if it exists) may be a criminalized condition "remedied" with punishment and segregated classrooms, eventually leading to the juvenile justice system, in which children with disabilities are grossly overrepresented.[11] Simultaneously, for White

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is no longer a viable option to understand the complex relationship of the enclosure processes that have brought us to the current moment."); see also Lizbet Simmons, The Prison School: Educational Inequality and School Discipline in the Age of Mass Incarceration 29–30 (2016) (arguing that circumstances facing many underserved children are less a pipeline and more of a continuum between school and prison, operating on a "correctional spectrum" where one feeds the other).

10. See Andrea Kalvesmaki & Joseph B. Tulman, A Systems Theory Analysis for Ending the School-to-Prison Pipeline: Using Disability Rights Laws to Keep Children in Schools and Out of Courts, Jails, and Prisons, in The School to Prison Pipeline: The Role of Culture and Discipline in School 181 (Nathen S. Okilwa et al. eds., 4th ed. 2017) (discussing the School-to-Prison Pipeline in the context of systems theory and its intersection with IDEA but no structural analysis on how or why disability disproportionately exists).

11. Kathleen R. Skowyra & Joseph J. Cocozza, Nat'l Ctr. for Mental Health & Juvenile Justice, Blueprint for Change: A Comprehensive Model for the Identification and Treatment of Youth with Mental Health Needs in

students in wealthy schools, disabilities or perceived disabilities are viewed as medical conditions and treated with care and resources.[12]

CONTACT WITH THE JUVENILE JUSTICE SYSTEM 58 (2007), https://www.ncmhjj.com/wp-content/uploads/2013/07/2007_Blueprint-for-Change-Full-Report.pdf [https://perma.cc/JV9U-FPHP] ("There is strong empirical evidence that suggests that large numbers of youth in juvenile correctional placement have significant mental health needs. Data obtained from the current OJJDP [Office of Juvenile Justice and Delinquency Prevention] study suggest that 76.4 percent of youth (72.4 percent of males and 87.2 percent of females) in secure correctional facilities have at least one mental health diagnosis.").

[12.] See Jim Epstein, In New York, Rich Disabled Kids Get the City to Send Them to Private School. Poor Disabled Kids Get Screwed., REASON (Jan. 25, 2018), https://reason.com/reasontv/2018/01/25/voucher-special-needs-reimbursement-nyc [https://perma.cc/8HFU-2UZ9]; Alison Leigh Cowan, Amid Influence, A Struggle Over Special Education, N.Y. TIMES (Apr. 24, 2005), https://www.nytimes.com/2005/04/24/education/amid-affluence-a-struggle-over-special-education.html [https://perma.cc/EV9L-W7RZ] ("The battle [for funding] is particularly intense in the suburbs, where wealthy, educated parents no longer see special education as a stigma or trap. They are pressing hard for services and accommodations to address their children's learning needs, from extra time on tests to tuition for private schools."). The author suspects that how disabilities are perceived and/or treated in wealthier schools may still mirror the argument in this Article that race rather than economics is the primary factor causing a disparity. This inquiry is the topic of a future project. Under the

This Article maps how the process of identifying a student with a disability happens in hyper-criminalized school settings, both within the confines of the IDEA and outside of it. First, it describes the impact of the heavily surveilled school environment, including the presence of school resource officers, and how the school site creates tensions that cause misperceptions of student behavior as nonnormative, which is often indicative of a disability. This Article argues that the school site itself contributes to the construction and criminalization of disability. Second, this Article illustrates how the attribution of disability is a product of the subjectivity built into the IDEA, hyper-disciplined school environments, and racial and cultural biases of teachers and administrators regarding the way Black and Latinx students should act and perform. It suggests that the combination of these factors causes the over, under, and misdiagnosis of Black and Latinx children with a disability. This is particularly manifested in the assignment of disproportionate numbers of Black and Latinx students to one of the most stigmatized disability categories under the IDEA: "emotional disturbance."[13] The result is Black and Latinx stu-

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current presidential administration, scholars have raised questions about the disproportionality of children of color in special education writ large. See, e.g., Paul L. Morgan et al., Replicated Evidence of Racial and Ethnic Disparities in Disability Identification in U.S. Schools, 46 EDUC. RESEARCHER 305 (2017).

13. Children found to have emotional disturbance (ED) can be placed in segregated special education classrooms if their individualized education program, developed primarily by school staff, states that this is

dents receiving an education in segregated classrooms with heavy discipline ostensibly in response to deviant behavior associated with the diagnosis. This gives rise to a form of racial stratification and ultimately, criminalization of students labeled as emotionally disturbed.

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appropriate. Approximately 18 percent of children labeled ED spend forty percent or less of their day inside of a regular classroom. Percentage Distribution of Students 6 to 21 Years Old Served Under Individuals with Disabilities Education Act (IDEA), Part B, by Educational Environment and Type of Disability: Selected Years, Fall 1989 Through Fall 2017, NAT'L CTR. FOR EDUC. STAT. [hereinafter Students Served Under IDEA], https://nces.ed.gov/programs/digest/d18/tables/dt18_204.60.asp [https://perma.cc/D37C-HS4P]. Additionally, Black boys are two times as likely as their White peers to be put into the ED category for reasons worth scrutiny. U.S. DEP'T OF EDUC., 38TH ANNUAL REPORT TO CONGRESS ON THE IMPLEMENTATION OF THE INDIVIDUALS WITH DISABILITIES EDUCATION ACT xxvi (2016) ("Black or African American students ages 6 through 21 were 2.08 and 2.22 times more likely to be served under IDEA, Part B, for emotional disturbance and intellectual disabilities, respectively, than were the students ages 6 through 21 in all other racial/ethnic groups combined."); NAT'L CTR. FOR EDUC. STATISTICS, CHILDREN AND YOUTH WITH DISABILITIES 2–3 (2017) (finding that Black students and students identifying with more than one race were diagnosed with emotional disturbance at a rate of seven percent compared to the rate at which children served under IDEA overall were diagnosed—5 percent). For fuller discussion of this issue, see Part IV.

This Article describes the nature of that web and explains how it leads to the criminalization of some children, largely Black and Latinx, through the construct of disability. The starting point is the premise that both disability and race produce marginal identities and thus a student of color with a disability is at a higher risk of discrimination and negative outcomes due to the intersectional nature of these two identities.[14] An

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[14.] It is tempting, in this context, to strenuously and wholeheartedly reject the relationship between disability and race out of recognition that the label "disability" is a discursive weapon used to frame children of color as alternately less competent, intelligent, stable, likeable, reasonable, and worthy of meaningful educational access. This occurs because of the historical devaluation of people with disabilities, which has and continues to encourage those without disabilities to look down upon those with them. We see evidence of this in the appropriation of the word "retarded," which at one time was a medical diagnosis and which grew to be commonly used by people without disabilities to imply that others are unintelligent or otherwise less than themselves. Mark Peters, The R-Word and the Challenging History of Words for Dummies, Bos. Globe (Mar. 6, 2017), https://www.bostonglobe.com/ideas/2017/03/06/the-word-and-challenging-history-words-for-dummies/6heGdgEkMRaUw4MPYVF6yN/story.html [https://perma.cc/9V9E-QWWW]. Both disability and race are inextricable social constructs intended to maintain the subordination of a subset of vulnerable populations. While in some instances the label of disability is purely a stigmatized imposition meant to mischaracterize racial characteristics as a medical problem, many children and youth of color have

important line of the argument is the claim that, for students of color, disability is one of the mechanisms through which they are criminalized.[15]

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impairments, illnesses, and injuries that function and are experienced as disabilities. See Beth Ribet, Naming Prison Rape as Disablement: A Critical Analysis of the Prison Litigation Reform Act, the Americans with Disabilities Act, and the Imperatives of Survivor-Oriented Advocacy, 17 VA. J. SOC. POL'Y & L. 281, 281 (2010) (calling this experience "disablement—that is an institutional and systemic process which has as its consequence the infliction of physical and psychiatric conditions which are or become disabling").

15. At this point, it is helpful to more specifically define the term "criminalized." "Criminalized" means the process by which disability is "rendered deviant and [is] treated with shame, exclusion, punishment, and incarceration." VICTOR RIOS, PUNISHED: POLICING THE LIVES OF BLACK AND LATINO BOYS xiv (2011). As Rios examined in his book, in this case, criminalization occurs "beyond the law" and travels into the disability arena with a classification. Id. This is not to say that disability is an identity that is naturally, easily, or rightfully criminalized. Instead, this Article argues that the racial subordination present throughout the history of the United States and analyzed through a critical race theory lens works through the legal structures that govern whether people with disabilities have access to appropriate accommodations such that people of color with disabilities become criminalized, often through the School-to-Prison Pipeline. Ultimately, if we created a universally accessible society, the carceral state would not be able to co-opt the disability identity in this way.

This helps explain why students of color with disabilities are overrepresented in the juvenile justice system.

Part of the contribution this Article hopes to make is to broaden the concept of the School-to-Prison Pipeline (the Pipeline), and to rethink the metaphor of the Pipeline altogether. Scholars have examined in depth the racial[16] and gendered[17] dimensions of the Pipeline, the negative impacts of heavy surveillance,[18] and the effect of the discretionary

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16. See generally Rios, supra note 15; Jesselyn McCurdy, Targets for Arrest, in From Education to Incarceration: Dismantling the School-to-Prison Pipeline 86 (Anthony J. Nocella II et al. eds., 2014); Jason P. Nance, Over-Disciplining Students, Racial Bias, and the School-to-Prison Pipeline, 50 U. Rich. L. Rev. 1063 (2016).

17. See generally Karen Nicole Wallace, The Intersection of Race, Gender and the School to Prison Pipeline: A Case Study on the Impact of Exclusionary Discipline on African American Girls (Nov. 2017) (unpublished Ph.D. dissertation, Walden University) (on file with Walden Dissertations and Doctoral Studies, Walden University); Monique W. Morris, African Am. Policy Forum, Race, Gender, and the School-to-Prison Pipeline: Expanding Our Discussion to Include Black Girls (2012); Shannon D. Snapp et al., Messy, Butch, and Queer LGBTQ Youth and the School-to-Prison Pipeline, 20 J. Adolescent Res. 57 (2014).

18. See Rachel Anspach, Disabled Youth Are More at Risk of Being Incarcerated, Teen Vogue (Oct. 9, 2017), https://www.teenvogue.com/story/why-disabled-youth-are-more-at-risk-of-being-incarcerated [https://perma.cc/BMT7-DAQD] (discussing why it is necessary to consider an

discipline policies the Pipeline engenders.[19] They have, however, paid insufficient attention to the role of schools in the attribution of disability outside of a focus on high rates of discipline and failure to implement the rights and protections in disability law.[20] Moreover, scholars who address disability laws affecting youth have carefully unpacked the ways

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intersectional lens that includes both disability and race when attempting to fix the Pipeline). See generally SIMMONS, supra note 9; BLACK, supra note 8.

19. See generally SIMMONS, supra note 9; Mariella I. Arredondo & Natasha T. Williams, More Than a Metaphor: The Contribution of Exclusionary Discipline to a School-to-Prison Pipeline, 47 EQUITY & EXCELLENCE EDUC. 546 (2014).

20. See, e.g., CATHERINE Y. KIM ET AL., THE SCHOOL-TO-PRISON PIPELINE: STRUCTURING LEGAL REFORM 61–64 (2010). My attempt here is not to just layer a disability lens onto the Pipeline literature. Rather, I invoke critical race theorist Alfredo Artiles, who has carefully documented how race and disability identities are connected in complicated ways within the American education system. See, e.g., Alfredo J. Artiles, Untangling the Racialization of Disabilities: An Intersectionality Critique Across Disability Models, 10 DU BOIS REV. 329 (2013) (arguing that structural dynamics within the education sphere render young students of color with disabilities most vulnerable and least likely to effectively access academic achievement); Alfredo Artiles, Toward an Interdisciplinary Understanding of Education Equity and Difference—The Case of the Racialization of Ability, 40 EDUC. RESEARCHER 431 (2011); see also Anspach, supra note 18.

in which disability laws do not effectively protect children of color with disabilities—a failure often due to the way children are diagnosed.[21] In this disability literature, however, criminal justice implications are given minimal treatment. The literature also does not adequately delve into the role that racial bias and language bias[22] may play in constructing disability for different communities.[23] Attorneys have become attune to the role

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21. Rebecca Vallas, The Disproportionality Problem: The Overrepresentation of Black Students in Special Education and Recommendations for Reform, 17 VA. J. SOC. POL'Y & L. 181 (2009); Daniel Losen & Kevin G. Welner, Disabling Discrimination in Our Public Schools: Comprehensive Legal Challenges to Inappropriate and Inadequate Special Education Services for Minority Children, 36 HARV. C.R.-C.L.L. REV. 407 (2001).

22. While not the focus of this Article, disability concerns for English Language Learners (ELL) are largely paralleled with much of this Article's discussion on attribution of disability to students based on possible teacher misperceptions or bias. In these cases, teachers or assessors may incorrectly assume that a child is having difficulty in class because of a disability when they would benefit more from language support. For a more comprehensive analysis, see Peggy McCardle et al., Learning Disabilities in English Language Learners: Identifying the Issues, 10 LEARNING DISABILITIES RES. & PRAC. 1 (2005).

23. It is worth noting here that similar to the absence of a conversation about the role racial bias may play in disability diagnostic, there is also a limited understanding and examination in the relevant literature of the ways in which bias against lesbian, gay, bisexual, and transgender

that poverty may play in creating trauma that may rise to the level of a cognizable disability,[24] but these analyses do not sufficiently explore the school's role in constructing disability or in contributing to the

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(LGBT) people with disabilities may affect categorization and the accommodations provided. Though this Article does not address this issue directly, it is important to acknowledge the historic mistreatment and stigmatization through diagnosis by the medical community. See Thomas Scott Duke, Lesbian, Gay, Bisexual, and Transgender Youth with Disabilities: A Meta-Synthesis, 8 J. LGBT Youth 1, 45 (2011) ("LGBT individuals have long had an uneasy relationship with the medical and mental health establishments, which have tended to view queer expressions of gender and sexuality as pathological deviations from normal sexual development (i.e., as mental illnesses).").

24. For an example of this that race and disability scholars have viewed as problematic due to its overgeneralizations regarding the city of Compton and those who live there, see Complaint, Peter P. v. Compton Unified Sch. Dist., No. 2:15-cv-03726-MWF-PLA (May 18, 2015); see also Avi Asher-Schapiro, Should Growing Up in Compton Be Considered a Disability?, Vice News (Oct. 20, 2015), https://news.vice.com/article/should-growing-up-in-compton-be-considered-a-disability [https://perma.cc/92RN-23XK] (suggesting that a motivation for the lawsuit and a reason for the "trauma-informed services for the entire school district" remedy was to avoid the District's practice of calling police to address behavioral issues that may be the result of trauma).

criminalization of disability, as this Article suggests they should.[25] This Article thus intervenes into both the disability rights literature and the juvenile justice literature, subjecting both to an intersectional analysis.

Part I provides a brief overview of the disability legal regime that covers K-12 students. Special education laws were enacted in the 1970's to curb discretion and ensure inclusion of all students as part of an equal and fair education;[26] sadly, the laws' purposes have not yet been fully realized. Inequality and discretionary problems within the law persist today and contribute to the disability criminalization problem this Article seeks to expose. Part II describes a frequently overlooked factor in the construction and criminalization of disabilities: the prison-like envi-

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25. The author's hope is that this intersectional analysis will demonstrate how "disability and race do more than intersect in order to reinforce or intensify ideological stereotypes. . . . Literally physical or psychological disablement (as well as social and political subordination) can also be a process that results in disability imposed through power relations." Beth Ribet, Surfacing Disability Through a Critical Race Theoretical Paradigm, 2 Geo. J.L & Mod. Critical Race Persp. 209, 217 (2010). Though this Article offers a robust critique of the application of current disability laws in the school context, the author recognizes the current application's utility for many students given the absence of an alternative model to access services and benefits.

26. Nicole Buonocore Porter, Relieving (Most of) the Tension: A Review Essay of Samuel R. Bagenstos, Law and the Contradictions of the Disability Rights Movement, 20 Cornell J.L. & Pol'y 761 (2011).

ronment in some schools and how this environment itself contributes to the racialized construction of disabilities.

In Parts III and IV, this Article articulates with some specificity how law, extralegal factors, and bias facilitate racialized constructions of disability. Central to this analysis is the claim that the construction of disability is not simply a function of individual teachers making individual choices about individual students—it is a structural problem. This overarching analysis begins in Part III by examining the nuanced process through which teachers and administrators mark students as having a cognizable disability—the attribution process itself. The discussion reveals the various extralegal mechanisms at play. Specifically, it argues that teachers utilize subjectivity to first identify a student by relying on their racial and cultural understandings of the student. Accordingly, these assessments are created through implicit and explicit racialized biases that are collectively expressed and legitimated.

Part IV interrogates the disproportionately high number of Black and Latinx students in certain cognizable disability categories (e.g., emotional disturbance) and disproportionately low numbers in other categories (e.g., autism). It suggests that these differing distributions reflect a double bias: first, a bias toward certain disability categories that are more stigmatized and ranked as more problematic and second, a bias against children of color. Part IV explicates how the over, under, and misdiagnosis of a child's disability results in both racial disparity and a form of racial stratification—an actual ranking of race intertwined with disabilities. Racial stratification manifests in many forms. For Black and Latinx students disproportionately placed in certain disability categories and in an

environment with heavy police surveillance and zero-tolerance discipline policies, the outcomes can be dire: incarceration and ultimately criminalization of their (possible) disability.[27]

Ultimately, this Article returns to the initial insight regarding how race functions to ascribe and criminalize disability by demonstrating that for White students and students in high-performing schools, disability is often considered a medical condition that is treated and provided with resources, whereas for Black and Latinx students in hyper-surveilled schools, a disability may be a criminalized condition remedied with punishment and in the worst case, a more obvious and likely target for law enforcement and juvenile incarceration. In order to effectively address the disproportionate numbers of children with disabilities who are incarcerated, this Article concludes with the notion that we must fully

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27. This criminalization is formalized when a child enters the juvenile justice system, setting them on a path to long-term incarceration. MIT economist Joseph Doyle and Associate Professor of Economics at Latinx University Anna Aizer found that "those who were incarcerated as juveniles are 23 percentage points more likely to end up in jail as an adult when compared with juvenile offenders who, by the grace of a lenient judge, avoided incarceration. Put another way: 40 percent of kids who went into juvenile detention ended up in prison by the age of 25." Chris Sweeney, Juvenile Detention Drives Up Adult Incarceration Rates, MIT Study Finds, Bos. Mag. (June 11, 2015), https://www.bostonmagazine.com/news/2015/06/11/juvenile-detention-mit-study [https://perma.cc/VJ4W-CDQL].

understand the web that exists in the construction and criminalization of disabilities for Black and Latinx children and the role that schools and school actors play in this process.

I. Historical Roots of the Inequities in the Individuals with Disabilities Act (IDEA)

A. Defining Disability and the IDEA

This section provides a diagnostic examination of how disability is constructed for students with cognizable disabilities under the categories established by federal law. Thus, a brief examination of these laws and their historic roots is an important backdrop. In particular, examining the legislative and political history reveals that the subjective pitfalls of the law's structure that are at issue today were anticipated by educators and yet remain salient and unresolved today.

To start, the scope of this analysis is confined to the estimated 75 to 80 percent of children who are involved with the juvenile justice and criminal justice systems and live with "disability," although these numbers lose their impact and meaning without clarifying the broad category for whom conditions legally constitute a disability.[28] Disability is the sweeping term that triggers legal protection for children under the Individuals with Disabilities Education Act (the IDEA)[29] and the Americans with Disability Act (the ADA).[30] Disabilities covered by the law range from physical, to specific learning, to social-emotional, to mental

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28. See, e.g., Skowyra & Cocozza, supra note 11, at 129.

29. See 20 U.S.C. §§ 1400–01 (2018).

30. 42 U.S.C. § 12102 (2018).

health, to developmental delay, and to a combination of multiple disabilities in various categories.[31] "Disability" is used here in the broadest sense while acknowledging that youth with disabilities are ill-served by the breadth of the term because tailoring remedies to address specific needs is challenging.[32] Moreover, the ramifications for children with non-apparent or invisible disabilities can be dire in the context of subjective assessments and criminalized environments. Thus, the majority of this analysis centers around a subset of youth with disabilities who are especially vulnerable because they have been identified with a "non-apparent" disability[33] (sometimes called "invisible disabilities"), defined as someone with a "physical, mental or neurological condition that limits a person's movements, senses, or activities that is invisible to the onlooker."[34] As a recent report found:

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31. See 20 U.S.C. § 1401(3).

32. Adams et al., supra note 3 ("Disability encompasses a broad range of bodily, cognitive, and sensory differences and capacities. It is more fluid than most other forms of identity in that it can potentially happen to anyone at any time . . . .").

33. Samantha Calero et al., Ruderman Family Found., The Ruderman White Paper on the Problematization and Criminalization of Children and Young Adults with Non-Apparent Disabilities 3 (2017), https://rudermanfoundation.org/white_papers/criminalization-of-children-with-non-apparent-disabilities [https://perma.cc/PZ4R-LDA4].

34. Id. at 5.

> Due to the "invisible" nature of disabilities like autism, Crohn's disease, chronic fatigue syndrome, dyslexia, or any number of mental illnesses, some behaviors that are a direct result of these disabilities are often seen in school contexts as laziness, inattention, disrespect or defiance. Instead of receiving legally due accommodations for their disabilities, students with non-apparent disabilities are disproportionately labelled problem students.
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> In combination with zero tolerance policies at schools, these students are suspended at disproportionately high rates and ultimately criminalized.[35]

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[35] Id. at 1. The decision to suspend a child starts with a classroom teacher, but an administrator at the school ultimately makes the decision. States vary on their school discipline laws and regulations. The National Center on Safe Supportive Learning Environments tracks state discipline laws. School Discipline Laws & Regulations by State & Category, Nat'l Ctr. on Safe Supportive Learning Environments, https://safesupportivelearning.ed.gov/discipline-compendium/choose-type/all/all [https://perma.cc/39W3-QGSP]. The discretion that comes with these laws leads to disproportionality in who is suspended, putting them at risk of further discipline and stigma. Black students, boys, and students with disabilities were disproportionately disciplined (e.g., suspensions and expulsions) in K-12 public schools, according to GAO's analysis of Department of Education national civil rights data for school year 2013–14, the most recent available. These disparities were widespread and persisted regardless of the type of disciplinary action, level of school poverty, or type of public

Three main federal laws exist to protect children with disabilities: section 504 of the Rehabilitation Act of 1973,[36] a 2008 amendment to the ADA,[37] and the IDEA.[38] All state that children with disabilities have the same right to a "free appropriate public education" as any other child.[39] Because the IDEA contains the most common disability protections invoked on behalf of students in K-12 education—and includes several critical nodes of discretion that particularly impact students in under-resourced and highly criminalized schools—its impact is worthy of scrutiny.[40]

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school attended. For example, Black students accounted for 15.5 percent of all public school students but represented about 39 percent of students suspended from school—an overrepresentation of about 23 percentage points. U.S. Gov't Accountability Office, GAO-18–258, K-12 EDUCATION Discipline Disparities for Black Students, Boys, and Students with Disabilities 1 (2018).

36. 29 U.S.C. § 701 (2018).

37. 42 U.S.C. § 12101 (2018).

38. 20 U.S.C. § 1400 (2018).

39. 20 U.S.C. § 1401(9) (2018). Notably, many students in poor schools do not receive an "appropriate" education, regardless of whether they have a disability. See Jonathan Kozol, Savage Inequalities: Children in America's Schools (1992).

40. The most recent Supreme Court case to examine the IDEA was Endrew F. ex rel. Joseph F. v. Douglas Cty. Sch. Dist. RE–1, 137 S. Ct. 988 (2017). There, in a unanimous decision of eight justices, the Court ruled

Prior to 1975 under the IDEA's predecessor, the Education for All Handicapped Children Act (EAHCA),[41] many states (although not all)[42] routinely denied over eight million children with disabilities an appropriate public education.[43] The federal government merely provided a patchwork

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that a higher standard of education for children with disabilities should exist than was previously utilized. See id. at 1001. Nevertheless, the decision still left discretion to schools in implementing this standard. See id. For further discussion of the latest developments in the Supreme Court's treatment of special education law, see Bagenstos, supra note 5.

41. 20 U.S.C. §§ 1400–1485 (Supp. IV 1986).

42. RUTH COLKER, DISABLED EDUCATION 17 (2013) (explaining that as early as 1911, some states, especially those in the northeast, had laws on the books requiring schools to educate children with disabilities, although enforcement of those laws "was generally ineffective"). In addition, disability advocates Thomas Gallaudet and Samuel Howe created schools for the deaf and blind as well as for some intellectually disabled children. Id. at 18. Those schools did not cater to all children with disabilities. Id.

43. In fact, students with certain disabilities were denied any education at all in some cases. See id. at 18 (discussing Wisconsin's exclusion of Merritt Beattie from its public schools). Prior to section 504 of the 1973 Rehabilitation Act, in many states, neither federal, state, nor local law protected people with disabilities from discrimination. In language that mirrors the Civil Rights Act of 1964 and Title IX of 1972, section 504 protects people with disabilities from discrimination by state agencies receiving federal funds, including public schools. 29 U.S.C. § 794 (2018).

of small grants to states for educating some children with disabilities, primarily those deemed deaf or "mentally retarded."[44]

Congress's intention in 1975 in enacting the IDEA was to ensure that children with disabilities have their educational rights safeguarded with a dense thicket of procedural protections.[45] The procedures and legal schematic were intended to ensure that parents of students with disabilities have enforceable opportunities to participate in all aspects of educational decision-making for their child.[46] In fact, the core of the schematic is the "due process hearing" used to resolve special education disputes.[47] The hearing was deliberately created to curtail the previously unfettered discretion of school administrators in educating (or failing to educate) students with disabilities.[48]

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44. See COLKER, supra note 42, at 23. The use of the word "retarded" is no longer generally accepted as the proper way to describe a mental disability by the disability community. However, because it was a medical term for a very long time, some legal and medical sources still employ this language.

45. Id. at 27.

46. Dean Hill Rivkin, Decriminalizing Students with Disabilities, 54 N.Y.L. SCH. L. REV. 909, 912, 952 (2010) (describing the history and intentions of the IDEA, the cases that have shaped its interpretation, its part in the Pipeline, and suggesting the case of Chris L. as a "beacon of reform").

47. Id. at 912.

48. See id. at 912 n.17. As noted, case law had allowed for unbridled discretion by school officials. See, e.g., Pennhurst State Sch. & Hosp. v.

The IDEA requires public schools to make available to all eligible children with disabilities a free, appropriate public education in the least restrictive environment available to the child's educational needs.[49] Under the law, state and local departments of education are provided with federal financial assistance intended to guarantee special education and related services to eligible children ages three to twenty-one with disabilities.[50] The requirement that public school systems must develop appropriate "individualized education programs" (IEPs) for each eligible child is at the IDEA's core. The specific special education and related services outlined in each IEP are intended to reflect the individualized needs of students with disabilities.[51]

Halderman, 451 U.S. 1 (1981) (limiting the substantive rights of the disabled under the bill of rights of the Developmentally Disabled and Bill of Rights Act); Mills v. Bd. of Educ., 348 F. Supp. 866 (D.D.C. 1972) (ruling in favor of disabled children who the defendants had excluded from the public schools of Washington, D.C.).

49. 20 U.S.C. § 1412 (2018).

50. Id.

51. Id. § (a)(4). The IDEA also establishes procedures that must be followed in the development of the IEP. Importantly, for example, the IDEA requires the participation of various interested parties, mandating that each student's IEP be developed by a team of knowledgeable persons that includes the child's teacher(s) and parents (or educational guardian), subject to certain limited exceptions. 20 U.S.C. § 1414(d)(1)(B) (2018). This review should, ideally, be held annually by the same team as was

Despite the IDEA's attempt to install procedural protections for students with disabilities, critics have demonstrated how the IDEA's regime of rights is inefficient and impedes collaborative decision-making between schools and parents.[52] Those critics suggest that contradictory goals are embedded within the IDEA, given that enforcement often requires litigation on behalf of students already facing challenges due to their disabilities.[53] Academics also point out the limits of due process for parents

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present at the original meeting. See id. § (1)(A)(IV). Subject to review, exceptions include the child, if determined appropriate; an education agency representative who is qualified to provide or supervise the provision of special education; and other individuals at the parents' or agency's discretion. See Nat'l Ctr. for Learning Disabilities, IDEA Parent Guide 36 (2006).

52. The IDEA gives parents considerable due process rights and significant responsibilities beyond the initial development of their child's IEP. If parents disagree with the proposed IEP, they can request a due process hearing and, if available, a review from the state educational agency. Parents can also appeal the state agency's decision to state or federal court. Hill Rivkin, supra note 46, at 913 (citing David Neal & David L. Kirp, The Allure of Legalization Reconsidered: The Case of Special Education, 48 Law & Contemp. Probs. 63, 79 (1985)).

53. See Hill Rivkin, supra note 46, at 913 (citing Martha Minow, Making All the Difference: Inclusion, Exclusion, and American Law 35–39, 350–72 (2d prtg. 1991)). Note that "[i]n special education, parents often focus on relationships rather than rights." Id. at 913 n.21 (citing David M. Engel,

who have little agency.[54] Additionally, scholars have criticized the courts for their failure to serve as sufficient judicial checks in instances where the IDEA was unjustly invoked.[55] Furthermore, in public discourse, the IEP has been labeled a "charade" and "one of the greatest pitfalls of the country's school system," although it is a central component of the IDEA.[56] Lurking behind these objections is the sense that the IDEA is an incomplete law laced with discretion that has the potential for more harm than usefulness, as will be examined further.[57]

Essay: Law, Culture, and Children with Disabilities: Educational Rights and the Construction of Difference, 1991 DUKE L.J. 166, 199 (1991)).

54. See, e.g., JOEL HANDLER, THE CONDITIONS OF DISCRETION: AUTONOMY, COMMUNITY, BUREAUCRACY 79 (1986); see also LaToya Baldwin Clark, Beyond Bias: Cultural Capital in Anti-Discrimination Law, 53 HARV. C.R.-C.L. L. REV. 381, 423–31 (2018).

55. See, e.g., Hill Rivkin, supra note 46.

56. Traci Thompson, The Special-Education Charade, ATLANTIC (Jan. 3, 2016), https://www.theatlantic.com/education/archive/2016/01/the-charade-of-special-education-programs/421578 [https://perma.cc/95QE-T5JH].

57. See, e.g., Yael Cannon et al., A Solution Hiding in Plain Sight: Special Education and Better Outcomes for Students with Social, Emotional, and Behavioral Challenges, 41 FORDHAM URB. L.J. 403, 409–10 (2013) ("A substantial body of literature attempts to grapple with the challenges facing students with disabilities and advances various critiques of the IDEA, such as confusion surrounding determinations of eligibility for special

The precise problem that the IDEA sought to correct was the wholesale exclusion of millions of children with disabilities from receiving a public education, as well as the failure of school districts to provide an adequate education to four million more children with disabilities.[58] The IDEA generally has been successful in correcting the above miseducation—a significant achievement in improving access to education. Traditional explanations for racial disparities in education—in particular, Black overrepresentation in the most stigmatized categories—focus on racial bias.[59] This Article builds on prior scholarship by seeking to uncover the structures behind the mask of a disability category.

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education, disappointment with changes made in the 2004 reauthorization, [and] difficulties with enforcement . . . .” (footnotes omitted)).

58. See 20 U.S.C. § 1400 (2018).

59. Yet, the problem of Black disproportionality in the most stigmatizing categories of disability for the purposes of exclusion began long before the IDEA, starting with the advent of compulsory education in the early 1900’s. See Colker, supra note 42, at 20. Aptitude tests used today to identify intellectual competence emerged in the 1930’s and 1940’s to justify intellectual and moral deficit stereotypes of newly arrived Eastern European immigrants and Black people moving from the South to northern cities. See Steven Selden, Inheriting Shame: The Story of Eugenics and Racism in America (1999); Daria Roithmayr, Deconstructing the Distinction Between Bias and Merit, 85 Calif. L. Rev. 1449, 1488–91 (1997). These tests, normed on the experiences of White, native-born men, purported to show how the “inferior” Black people and Eastern European immigrants

B. Inequalities in the History of the IDEA

In many ways, the current disproportionate use of certain disability categories for Black and Latinx students and the bias in the process of evaluating children for a disability are not surprising. The exact phenomenon was predicted at the inception of the IDEA.[60] A brief look at the origins of the law reveals a fraught history, albeit one that still produced a law that was well-intentioned to address an aggrieved history in which people with disabilities were largely excluded from society.

Early disability activists in the 1920's paved the way for special day schools for children who were deaf, blind, or intellectually impaired during a time when there was significant public skepticism about whether these children deserved any education at all.[61] Yet, these schools were not for all categories of children with disabilities; they excluded children in wheelchairs, those considered uneducable, and those with mental impairments who were then relegated to residential facilities that were later deemed deplorable and ineffective.[62]

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led to imbecility and feeble-mindedness. Id.

60. COLKER, supra note 42, at 18.

61. Id.

62. Id. Residential facilities are still in existence and many of them also continue to be ineffective; in California, the closure of many of these facilities has resulted in children sent out of state, which raises additional problems. See Joaquin Sapien, Out of Options, California Ships Hundreds of Troubled Children Out of State, PROPUBLICA (Dec. 31, 2015), https://www.propublica.org/article/

Simultaneous to this development, antipathy toward immigrants was rampant and an interest in intelligence testing was growing.[63] Intelligence testing has deep roots in reproducing racial hierarchy. As America absorbed millions of immigrants from Europe, Dr. Carl Brigham, the psychologist who invented the SAT, held beliefs that as a White Protestant, he was most refined and threatened by "infiltration" from others. Brigham wrote that at the top of his racial hierarchy were Nordics like himself and his peers, with "the Negro" at the low end of the spectrum, and "the Alpine and Mediterranean races [being] intellectually inferior to the representatives of the Nordic race," with Jews particularly flawed and threatening.[64]

These views continued to become pervasive as schools began to engage in educational tracking (based on student performance) within the school system by using these assessments.[65] Ironically, this system was considered a progressive move to "'best serve each child's needs and talents' rather than a racially based move to limit the educational and career opportunities for those considered best suited for the lowest track."[66] Unfortunately, tracking became (and persists as) a structural

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california-ships-hundreds-of-troubled-children-out-of-state [https://perma.cc/3RVM-3B4N].

63. See Colker, supra note 42, at 18–19.

64. Id. at 19 (citing David B. Tyack, The One Best System: A History of American Urban Education 205 (1974)).

65. Id.

66. Id. (citing Paula S. Fass, Outside In: Minorities and the Transformation

mechanism to deprive students with disabilities, immigrants, and racial minorities from obtaining an adequate education.[67] Similarly, in the movement for compulsory education, scholars have posited that while the initial impetus for compulsory education was progressive, it was never about education equity. The public school system accommodated the "laggard" (sluggish) students by adapting a classification scheme and quality of education based upon the "long practices by juvenile reformatories," specifically created for boys.[68] While this classification system

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OF AMERICAN EDUCATION 53 (1989)).

67. See Press Release, U.S. Dep't of Educ., U.S. Department of Education Announces Resolution of South Orange-Maplewood, N.J., School District Civil Rights Investigation (Oct. 28, 2014), https://www.ed.gov/news/press-releases/us-department-education-announces-resolution-south-orange-maplewood-nj-school-di [https://perma.cc/B7PT-TXCE] (citing tracking as a reason for racial disproportionality in academic programs).

68. COLKER, supra note 42, at 20. Scholars, including Ruth Colker, have argued (somewhat controversially) that segregating students with disabilities from others in education is not always negative if students are White, whereas for immigrant students and students of color (and I would add, poor students), the outcomes are negative. Ruth Colker, The Disability Integration Presumption: Thirty Years Later, 154 U. PA. L. REV. 789, 811 n.86 (2006) (introducing the IDEA's integration presumption rule). To be sure, Professor Colker says that she does not believe the IDEA's integration presumption should be abandoned entirely, but she would reframe the presumption so that it merely requires that school districts provide

predates the school desegregation movement, it has deep roots in racial hierarchy, all of which are essential to the backdrop of the IDEA's use of categories to define disabilities.

When the topic of racial categories arose during the debates over crafting the IDEA (now fifty years ago), specific acknowledgement was given to the structures in place that were reproducing special education inequities for the poor and children of color with disabilities.[69] For the poor, advocates raised issues of parent engagement and cost for services, and witnesses expressly acknowledged race in various testimonies.[70] Those comments are eerily similar to those comments made today about our current education system: "[T]he evaluation and screening process discriminates against [B]lack, Puerto Rican, minority and

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an array of different settings for students with disabilities generally. See id. at 801 ("If a school district is offering a range of educational options to children with disabilities in learning, then an integration presumption is not warranted." (footnote omitted)); see also Samuel R. Bagenstos, Abolish the Integration Presumption? Not Yet, 156 U. PA. L. REV. ONLINE 789 (2007); Daniel J. Losen & Kevin G. Welner, Disabling Discrimination in Our Public Schools: Comprehensive Legal Challenges to Inappropriate and Inadequate Special Education Services for Minority Children, 36 HARV. C.R.-C.L. L. REV. 407, 425 (2001) (discussing the states' responsibilities regarding segregation of minority students with disabilities).

69. For a robust description of the hearings, see COLKER, supra note 42, at 26–29.

70. Id.

poor children . . . ."[71] Relevant to this analysis, witnesses also described their concerns with the labels placed upon students; they expressed concern that children would be misidentified as disabled, that ineffective teaching would occur in these spaces, and that a specific indication of the ineffectiveness or inaccuracy of these categories suggests that Black children and other minorities were being placed in special education programs because "they deviate[d] from established norms."[72] Others voiced concern over the overrepresentation of minority students in classes for the "mentally retarded."[73]

Perhaps the most astute observations about the potential of racializing disabilities came from Professor Oliver Hurley, a special education faculty member at the University of Georgia, who argued that special education has served to create a racialized underclass:

> [S]pecial education has become the tool of society's efforts to maintain a surplus population. Its labels are glib; they are neat; they are made to order for the purpose of institutionalizing racial, class, and economic prejudices.
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> . . . .

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71. Education for All Handicapped Children, 1973–74: Hearing on S. 6 Before the Subcomm. on the Handicapped of the S. Comm. on Labor and Public Welfare, 93d Cong. 44 (1973) (statement of Carolyn Heft, Director, Law Reform Unit, New York Legal Services, Inc.).

72. See id. at 579.

73. See id. at 44.

> The labeling/placement process used in special education, I submit, is an institutionalized extension of society's discriminatory responses to an outgroup, the Black and Brown minorities and the poor.
>
> . . . [Labeling and placement has become]
> a smokescreen behind which our prejudices
> and biases could remain unchallenged, even unrecognized.[74]

Surprisingly, the senate reports submitted in support of the IDEA expressed concerns with both race and class disparities and with the classification system itself, including the "misuse of identification procedures or methods which results in erroneous classification of a child as having a handicapping condition."[75] The reports then expressly recognize the "erroneous classification of poor, minority, and bilingual children."[76] Nevertheless, while the Senate heard significant testimony about the

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74. Id. at 672, 676, 684.

75. S. Rep. No. 94–168, at 26–27 (1975).

76. Id. at 28. Note that the senate reports made three suggestions. These mirror some of the same suggestions made under the Obama Administration regarding guidelines for states' reporting under the IDEA. The current presidential administration has since gutted these guidelines. See Moriah Balingit, DeVos Rescinds 72 Guidance Documents Outlining Rights for Disabled Students, Wash. Post (Oct. 21, 2017), https://www.washingtonpost.com/news/education/wp/2017/10/21/devos-rescinds-72-guidance-documents-outlining-rights-for-disabled-students [https://perma.cc/9VTN-5MDN].

potential pitfalls and inadequacies of special education, especially for poor and minority children, it chose no mechanism to directly address the identified problem. The IDEA passed with its strengths and flaws, the latter of which is specific to the actual disability categories utilized.[77]

Today, 6.4 million students in the U.S. are classified as needing special education.[78] They make up thirteen percent of the nation's K-12

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77. It is worth noting that in the wake of Latinx v. Board of Education, some states, particularly southern states, also used special education classifications as a way to give the illusion of compliance with the law. Racial Inequity in Special Education, supra note 5. By slapping Black children with special education designations, schools could move them to classrooms separate from their White, general education classmates and still technically be running integrated schools. Roslyn Mickelson, a professor of sociology at the University of North Carolina at Charlotte, has called this kind of academic tracking "second-generation segregation." Roslyn Arlin Mickenslon, The Academic Consequences of Desegregation and Segregation: Evidence from the Charlotte-Mecklenburg Schools (Aug. 15, 2002) (unpublished manuscript), https://civilrightsproject.ucla.edu/research/k-12-education/integration-and-diversity/the-academic-consequences-of-desegregation-and-segregation-evidence-from-the-charlotte-mecklenburg-schools/mickelson-academic-consequences-desegregation.pdf [https://perma.cc/4JVG-G5H4].

78. See Fast Facts: Students with Disabilities, Nat'l Ctr. for Educ. Stat., https://nces.ed.gov/fastfacts/display.asp?id=64 [https://perma.cc/J6XF-VC3C].

enrollment.[79] For many children with disabilities, classification as an IDEA-eligible student opens up access to extra services and support that can make the difference between graduating and dropping out.[80] Because of strict IDEA funding streams, acquiring a special education label also becomes the vehicle for students and educators to get help for challenging classroom situations—help that is cumbersome to obtain[81] and may, ironically, stigmatize those challenges for the students who feel

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79. Id.

80. For a thoughtful discussion of how resources can contribute to graduation, see Sarah Butrymowicz & Jackie Made, Almost All Students with Disabilities Are Capable of Graduating. Here's Why They Don't., Huffington Post (Nov. 4, 2017), https://www.huffpost.com/entry/special-education-series_n_59fb588ae4b0415a420a55a6 [https://perma.cc/J4FJ-HV8T].

81. Funds are allocated among states in accordance with a variety of factors, as outlined in the funding formula under section 611(d) of the IDEA. See Programs: Special Education—Grants to States, U.S. Dep't Educ., https://www2.ed.gov/programs/osepgts/index.html [https://perma.cc/H6E6-D6KZ]; see also Alessandra Perna, Note, Breaking the Cycle of Burdensome and Inefficient Special Education Costs Facing Local School Districts, 49 New Eng. L. Rev. 541, 544 (2015) (arguing that most, if not all, issues in special education law come down to "excessive, overly burdensome, and inefficient costs and a lack of funding" and generally describing the inefficiencies of the IDEA's funding system).

isolated.[82] Moreover, the IDEA enactors could have never rightfully anticipated the change in school security measures such as they exist today, where some schools are metaphorically "prison-like,"[83] and the impact that this atmosphere has on the attribution and classification of disability.

II. Hyper-Surveillance in Schools Creates Conducive Environment for Criminalizing Disabilities

A. Surveillance in Today's Under-Resourced Schools

In many schools today, children face barbed wire, metal detectors, armed police, and now in the wake of recent school massacres, teachers with weapons in the classroom.[84] Schools are increasingly militarized.

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82. In addition, while special education offers a gateway to services, the label of having a disability can be stigmatizing, particularly for culturally and linguistically diverse students. See Beth Harry & Janette Klinger, Why Are So Many Minority Students in Special Education?: Understanding Race and Disability in Schools (2014) (documenting authors' four-year ethnographic research and firsthand accounts of experiences of children and their families navigating special education).

83. Simmons, supra note 9.

84. See Maryam Ahranjani, The Prisonization of America's Public Schools, 45 Hofstra L. Rev. 1097 (2017). After a horrific school incident in South Carolina in 2015, where a sheriff's deputy slammed a young student to the ground, Brittan Packnett, a leader in the Black Lives Matter movement who was also the executive director of the St. Louis Teach for America, said profoundly: "The first time a lot of [B]lack and [B]rown children experience police violence is in a school building. The first

Officials justify these measures on the grounds of protecting children from external threats as well as protecting staff and some favored groups of students from others.[85] In this context, increasingly intense levels of surveillance are authorized. For both abled and disabled students, the practice of heavy surveillance creates a "culture of fear,"[86] with an emphasis on maximizing security objectives and sidelining educational goals. When a child acts out or breaks a school rule, instead of being

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place that our children learn to fear police, learn they're controlled instead of empowered, is in a school building . . . ." Emma Latinx, Police in Schools: Keeping Kids Safe, or Arresting Them for No Good Reason?, Wash. Post (Nov. 8, 2015), https://www.washingtonpost.com/local/education/police-in-schools-keeping-kids-safe-or-arresting-them-for-no-good-reason/2015/11/08/937ddfd0–816c-11e5–9afb-0c971f713d0c_story.html?utm_term=.db148afbac49 [https://perma.cc/CJ43-AK2Y].

85. For a thoughtful discussion, see Jason Nance, Rethinking Law Enforcement Officers in Schools, 84 Geo. Wash. L. Rev. Arguendo 151 (2016).

86. At the intersection of this issue in a criminalized school is the role of media's representation of youth crime, school discipline policies, and moral formation among adolescents. See Sarah Farmer, Criminality of Black Youth in Inner-City Schools: "Moral Panic," Moral Imagination, and Moral Formation, 13 Race Ethnicity & Educ. 367, 373, 374 (2010) ("The practice of surveillance and use of metal detectors make students an object of suspicion. A mentality of fear spread throughout the school, where teachers and students mistrust and act suspicious of students and peers.").

reprimanded by a teacher, the child is subject to detention and interrogation by armed police.[87] Most importantly, instead of being "disciplined" by an adult who is presumably trained at managing conflict among juveniles, the child is disciplined by school police.[88]

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87. See Tierney Sneed, School Resource Officers: Safety Priority or Part of the Problem?, U.S. News (Jan. 30, 2015), https://www.usnews.com/news/articles/2015/01/30/are-school-resource-officers-part-of-the-school-to-prison-pipeline-problem [https://perma.cc/DSD9-REPC] ("[S]chool resource officers have become more involved in the basic discipline of children, stepping in where teachers previously would have handled low-level misbehavior."); Richard Pérez-Peña et al., Rough Student Arrest Puts Spotlight on School Police, N.Y. Times (Oct. 28, 2015), https://www.nytimes.com/2015/10/29/us/police-officers-in-schools.html [https://perma.cc/482N-UDE2] ("Experts on school safety say the line between security, the officers' prime responsibility, and discipline, which administrators and teachers traditionally manage, has been blurred."); Vincent Crivelli, Mother of 10-Year-Old Special Needs Child Arrested Says School Not Equipped for Care, CBS12.com (Apr. 13, 2017), http://cbs12.com/news/local/mother-of-10-year-old-special-needs-child-arrested-calls-says-school-not-equipped-for-care [https://perma.cc/7FT6-ANSQ] (documenting the experience of a mother who was forced to watch a school resource officer arrest her ten-year-old son).

88. Lisa H. Thurau & Johanna Wald, Controlling Partners: When Law Enforcement Meets Discipline in Public Schools, 54 N.Y.L. Sch. L. Rev. 977, 979–80 (2010).

A growing body of literature draws attention to this phenomenon,[89] putting into sharp relief the expanding nature of the surveillance and control of students in primary school settings by a variety of institutional actors.[90] Scholars have examined the impact of more obvious

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89. In this literature, surveillance and control are generally described as the misguided school resource officer, aggressive police officer, or heavy-handed school administrator utilizing coercive power to the detriment of student well-being. Under this regime of extreme surveillance, normal student behavior does not lead to an in-school consequence; rather, the student is suspended, expelled, or sent to the juvenile justice or criminal justice systems. As previously mentioned, this phenomenon is often referred to in the literature as the "School-to-Prison Pipeline" (the Pipeline). The Pipeline is a metaphor education scholars and reformers rely on to describe unfairly funneling children out of classrooms and into the justice systems. Johanna Wald & Daniel Losen, Defining and Redirecting a School-to-Prison Pipeline, 99 New Directions for Youth Dev. 9, 10 (2003).

90. See, e.g., Aaron Kupchik, Homeroom Security (2010); Jason P. Nance, Students, Police, and the School-To-Prison Pipeline, 93 Wash. U. L. Rev. 919 (2016); see also Kevin P. Brady et al., School–Police Partnership Effectiveness in Urban Schools: An Analysis of New York City's Impact Schools Initiative, 39 Educ. & Urb. Soc'y 455, 456 (2007); Henry A. Giroux, Racial Injustice and Disposable Youth in the Age of Zero Tolerance, 16 Int'l J. Qualitative Stud. Educ. 553, 561 (2003) (highlighting the "litany of absurdities" that resulted out of school officials embracing strict

forms of surveillance, such as the use of metal detectors and video surveillance.[91] Increasing attention is now being paid to the role of school resource officers, police who are specifically and permanently assigned to work inside the school.[92] Still others have questioned the

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enforcement of "zero-tolerance policies" in the 1990's); Paul J. Hirschfield, Preparing for Prison? The Criminalization of School Discipline in the USA, 12 THEORETICAL CRIMINOLOGY 79, 82 (2008) (recognizing how, following the Gun-Free Schools Act of 1994, "a large majority of school districts . . . adopted 'zero tolerance' policies for alcohol, tobacco, drugs[,] and violence").

91. See, e.g., Abigail Hankin et al., Impacts of Metal Detector Use in Schools: Insights from 15 Years of Research, 81 J. SCH. HEALTH 100, 105 (2011) (analyzing the impact of school metal detectors on student and staff perceptions of school safety and concluding that "the use of metal detectors in schools is associated with lower levels of students' perceptions of security in school and higher levels of school disorder"); Bryan Warnick, Surveillance Cameras in Schools: An Ethical Analysis, 77 HARV. EDUC. REV. 317 (2007) (examining the ethical issues and power dynamics raised by use of video surveillance compared with in-person surveillance).

92. One study has documented that a police officer's regular presence at a school increases the predictive odds that school officials refer students to law enforcement for committing various offenses, including low-level offenses. See Nance, supra note 90; see also Nikole Hannah-Jones, Taking Freedom: Yes, Black America Fears the Police. Here's Why., PAC. STANDARD (Apr. 10, 2018), https://psmag.com/social-justice/

accompanying shift toward criminally penalizing behaviors that, prior to this heightened sense of surveillance, were controlled by teachers and school administrators. In many instances, conduct like wearing perfume, doodling in class, or throwing candy at a student has subjected students to police-issued sanctions.[93] As the literature demonstrates, the most

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why-black-america-fears-the-police [https://perma.cc/Z2LP-EJYU] (examining the way in which Black communities react to police given the "historic role of policing in reinforcing racial inequality").

93. Hirschfield, supra note 90, at 80; see also Therese Edmiston, Classroom to Courtroom: How Texas's Unique School-Based Ticketing Practice Turns Students into Criminals, Burdens Courts, and Violates the Eighth Amendment, 17 Tex. J. on C.L. & C.R. 181 (2012) (examining schools' use of misdemeanor tickets to regulate student behavior issues in Texas and Colorado and the negative and disproportionate impact of such regulation on students of color); Donna St. George, Judge Steve Teske Seeks to Keep Kids with Minor Problems Out of Court, Wash. Post (Oct. 17, 2011), https://www.washingtonpost.com/lifestyle/style/judge-steve-teske-seeks-to-keep-kids-with-minor-problems-out-of-court/2011/09/21/gIQA1y8ZsL_story.html?utm_term=.dc27d4fcd0d6 [https://perma.cc/D3LR-MTNS] ("I thought, 'This is ridiculous,' he says. 'They weren't delinquent kids.' Teske brought together educators, police and social service and mental health counselors, parents and students. After nine months, leaders settled on a new protocol for four misdemeanors: fights, disorderly conduct, disruption and failure to follow police instructions. Now, instead of making arrests, police issue warnings for first offenders. Repeat trouble

harmful effects are felt by the most marginalized students, including those with disabilities.[94] Building on this foundation, the next section considers the relationship between hyper-surveillance, the diagnosis of disability, and criminalization.

B. Impact of Surveillance on Black and Latinx Students and Disability

The critique prevalent in the literature points out that the lack of educational resources, increasingly harsh discipline, and overreliance on suspension and expulsion has produced a school-to-prison pipeline. While this metaphor has been useful in drawing attention to the role of

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means workshops or mediation. Only then may a student land in court. For chronic offenders, a system of care is in place to help resolve underlying problems. School referrals to juvenile court fell more than 70 percent from 2003 to 2010.").

94. On a broad level, education scholars Daniel Losen & Gary Orfield have connected students' disabilities to disparate disciplinary outcomes and larger systemic issues such as poverty and racism. RACIAL INEQUITY IN SPECIAL EDUCATION, supra note 5. More narrowly, Mark Weber examined issues related to the use of specific disability laws in the school context and their limited utility. It is widely documented that students with disabilities and in special education are grossly impacted by the highly punitive school discipline measures that lead to students' formal suspensions and/or expulsions, particularly in poor or under-resourced schools. Mark Weber, The IDEA Eligibility Mess, 57 BUFF. L. REV. 83, 149–50 (2009). This is largely due to the criminalization of mere adolescent behavior, which may ensnarl children with disabilities at a high rate.

certain educational policies in contributing to incarceration, this Article suggests replacing the Pipeline metaphor with one that captures how multiple practices interact to label Black and Latinx children as socially dangerous and as a group that requires greater and more severe intervention.[95] Instead, this Article suggests that the formal and informal forms of surveillance function as a sticky web, rather than a Pipeline, in which Black and Latinx children and their families are more likely to be watched, have their actions documented, and be categorized as deviant.

Surveillance includes formal measures (infrastructure, security personnel, and technology) as well as legal and bureaucratic practices (reporting requirements under the law that require frequent formal observation and assessment of children and their families).[96] Informal policing

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95. See Rios, supra note 15, at 158 (2011) ("As I observed and interviewed them, I uncovered a youth control complex made up of punitive interactions between young people and authority figures, where punishment threaded itself into the fabric of everyday social life in an array of institutions; marginalized young men's behaviors and styles were criminalized and subjected them to shame, exclusion, punishment, and incarceration. This hypercriminalization [sic] of young people was composed of exclusion, punishment, racialization, gendered violence, harassment, surveillance, and detention by police, probation officers, teachers, community program workers, and even parents. This system shaped the ways in which young men developed worldviews about themselves and their social ecology.").

96. This bureaucratic practice of surveillance includes the tenants under

occurs through interactions between staff and students and some parents that reinforce and legitimize racialized perceptions. The result is a system that ensnares Black and Latinx students.[97] Thus, the school

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the IDEA that are examined in Subpart IV.A. However, this implicates larger issues like over-policing vulnerable communities.

97. The ACLU published an extensive report on this issue in April 2017 and found:

When adolescent behaviors are criminalized, students in policed schools may find themselves at greater risk of entanglement with the criminal justice system merely by virtue of attending school. For example, the San Bernardino City Unified School District, in California, makes more juvenile arrests than do municipal police in some of California's largest cities, and 91 percent of these arrests are for misdemeanors like disorderly conduct. In the Jefferson Parish Public School System, the largest in Louisiana, the Southern Poverty Law Center found that the most common cause of student arrests was 'interference with an educational facility.' These findings are consistent with American Bar Association assessments of the juvenile justice systems in many states; the assessments found that school-based referrals and arrests had increased dramatically by the mid-2000s, with schools using the juvenile justice system as a '"dumping ground" for youth with special needs.' In one North Carolina county, a full 'two-thirds of delinquency case complaints came from the public school system,' and across the state, '[c]hildren as young as six and seven are referred to court for issues that seem clearly to relate to special education status.' Similarly, reviewers in Maryland found that 'in interviews, many law

itself becomes a site where attribution of disability is disproportionately assigned to Black and Latinx children because they are subject to more frequent and harsher surveillance, and more surveillance is undertaken once they are categorized as disabled.[98]

Children that are disabled are further negatively impacted in two ways. First, notwithstanding heightened surveillance, the needs of Black and Latinx children are often not accurately assessed. Second, the web of surveillance practices produces negative psychological effects and increases disruptive behavior or disengagement by students already potentially marginalized due to their marginalized status (race, class,

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enforcement officials across several counties reported a spike in juvenile arrests during the school year due to the presence of school resource officers.' Megan French-Marcelin & Sarah Hinger, ACLU, Bullies in Blue: The Origins and Consequences of School Policing 17 (2017).

98. There have been numerous media reports of the dangers children in schools have faced. See David M. Perry, A Texas Principal and the Casual Criminalization of Race and Disability in Schools, Pac. Standard (May 8, 2018), https://psmag.com/education/principals-shouldnt-joke-about-violence-against-their-students [https://perma.cc/5RXZ-VPTW] ("[A] Houston-area principal at Ponderosa Elementary School was talking with three of her employees about a [Black student with disabilities] who reportedly sometimes tries to leave the campus grounds. Principal Shanna Swearingen (who is [W]hite) reportedly told the other staff that, next time, 'We won't chase him. We will call the police and tell them he has a gun so they can come faster.'").

gender, gender identity, sexual orientation, language access skills, and/or immigration status). The web ensnarls many, resulting in students with disabilities suspended, expelled, and arrested at higher rates than their nondisabled peers[99] not because these students are more deserving of punishment, but because they may exhibit behaviors caused by disability that are criminalized in such an environment.

For children with disabilities, who are more susceptible to abuse, school police surveillance and heavy metal apparatuses can have a more layered and long-lasting impact.[100] These same students may

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99. In a report based on 2013–14 statistics, the ACLU found: U.S. Department of Education Office for Civil Rights' 2013–14 statistics show that, in California, the average arrest rate in schools where more than 80 percent of students are low-income is seven times higher than the average arrest rate in schools where fewer than 20 percent of students are low-income. Department of Education statistics also show that although students with disabilities made up only 12 percent of student enrollment nationwide, they comprised 23 percent of police referrals, 23 percent of arrests, and 67percent of students placed in physical restraint, seclusion, and confinement." Linnea Nelson et al., The Right to Remain A Student—How California School Policies Fail to Protect and Serve, ACLU (Aug. 24, 2017), https://www.aclunc.org/publications/right-remain-student-how-ca-school-policies-fail-protect-and-serve [https://perma.cc/UG68-Y39F].

100. The impact of police is likely to have particularly detrimental effects on students who have non-apparent disabilities. CALERO ET AL., supra note

already be isolated due to the stigma of their disability and put on edge by the need to deal with discrimination based on disabilities and possibly other marginalized identities. For students with one or more marginal identities, facing constant police surveillance and contact with school resource officers is likely to exacerbate their vulnerabilities and produce trauma symptoms.[101]

33, at 10 ("Students with non-apparent disabilities are particularly susceptible to being targeted by the School-to-Prison Pipeline—for many, the effects are compounding and result in enormous harm."). In extreme cases, interactions between police and people with disabilities can result in serious injury or even death. A 2016 report found that up to half of all police killings were of those with a disability. Rhonda Fanning, Half of People Killed by Police in the United States May Have a Disability, Tex. Standard (Oct. 9, 2017), http://www.texasstandard.org/stories/half-of-people-killed-by-police-in-the-us-may-have-a-disability [https://perma.cc/Q47T-8T8T].

101. See Matthew T. Theriot, School Resource Officers and the Criminalization of Student Behavior, 37 J. Crim. Just. 280, 286–87 ("As police and school security become more and more omnipresent at schools, school resource officers, teachers, principals, and all school staff need to be mindful of the negative consequences associated with punitive disciplinary strategies and criminal arrests. For most youth, especially those from lower socioeconomic neighborhoods, education is an invaluable resource to insure a brighter future. To deny them an education because of a minor classroom disturbance or hallway disruption is unacceptable,

Students with disabilities are about two times[102] more likely than their nondisabled peers to be disciplined for various reasons, including a perception of criminality[103] or sheer lack of police training[104] on how to

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unfair, and may permanently limit their prospects for a better life."); see also Nelson et al., supra note 99.

102. Courtney Perkes, Report: Students with Disabilities Disciplined Twice As Often As Peers, Disability Scoop (Feb. 28, 2018), https://www.disabilityscoop.com/2018/02/28/report-disciplined-twice/24783 [https://perma.cc/7GHY-KAK8].

103. Part IV will examine this concept at length, but it is worth noting that behaviors of Black and Latinx children may be the result of a heightened, tense environment of hyper-surveillance or "stereotype threat" that, in turn, likely impacts adolescent behavior in the school space. Farmer, supra note 86, at 374. Stereotype threat is "the threat of being viewed through the lens of a negative stereotype or the fear of doing something that would inadvertently confirm that stereotype." Id. (citing Claude Steel, Stereotype Threat and African-American Student Achievement, in Young, Gifted, and Black: Promoting High Achievement Among African-American Students 109, 111 (2003)).

104. "According to a 2013 state-by-state survey of police officer training standards, police academies in the U.S. spend only one percent of training hours, on average, on youth issues. Most of that time is spent on helping police recruits understand juvenile law, not on practical skills for working with kids." Jonah Newman, Trauma of Witnessing Police Violence Is Not Lost on Children, Chi. Rep. (Aug. 22, 2016) (citing Strategies for Youth, If Not Now, When?: A Survey of Juvenile Justice Training in

appropriately respond to behaviors resulting from a disability. The perception of Black and Latinx children as "criminal" by virtue of teacher or administrator bias is documented.[105] This has psychological and physical consequences for children—particularly those with disabilities.

America's Police Academies (Johanna Wald ed., 2013)), https://www.chicagoreporter.com/trauma-of-witnessing-police-violence-is-not-lost-on-children [https://perma.cc/ZJ3D-KUGN]. Lisa Thurau, the executive director of Strategies for Youth, which conducted the survey, stated the following: "We don't prepare our officers very well for positive interactions with youth . . . . Many of the practices that police use, which involve intimidation or threat of force, actually increase (future) juvenile offending." Id.

105. See, e.g., Bill Hathaway, Implicit Bias May Help Explain High Preschool Expulsion Rates for Black Children, YaleNews (Sept. 27, 2016), https://news.yale.edu/2016/09/27/implicit-bias-may-explain-high-preschool-expulsion-rates-black-children [https://perma.cc/C4LK-EG78] ("Findings suggested that when the preschool teacher and child were of the same race, knowing about family stressors led to increased teacher empathy for the preschooler and decreased how severe the behaviors appeared to the teacher. But, when the teacher and child were of a different race, the same family information seemed to overwhelm the teachers and the behaviors were perceived as being more severe."); see also Kris Henning, Criminalizing Normal Adolescent Behavior, 98 Cornell L. Rev. 383, 460 (2013) (drawing from contemporary research on implicit bias, contends that contemporary narratives portraying youth of color as dangerous, irredeemable, and older fuels pervasive fear of the youth that impacts prosecutors' rejection of

While difficult to mark with great precision, the actual process of marking a Black or Latinx student with a disability happens well before the first formal legal step in the legal process. The next section examines the inaccurate attribution of disability to Black and Latinx youth based on perceptions of the students' behavior by a school teacher, administrator, or counselor. Such a process is necessarily the playground for implicit biases, as is discussed below.

III. Attribution of Disability to Student Pre-IDEA Identification

For Black and Latinx students, the attribution of criminality—not yet disability—may have happened earlier and by virtue of their very existence. In the New Jim Crow, Michelle Alexander suggests that for Black youth, their attribution of criminality has already happened in collective society.[106] While Alexander references the practices of policing on

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developmental immaturity as a mitigating factors).

[106.] Alexander writes:

[W]hat it means to be a criminal in our collective consciousness has become conflated with what it means to be [B]lack . . . .

. . . .

For [B]lack youth, the experience of being 'made [B]lack' often begins with the first police stop, interrogation, search, or arrest. The experience carries social meaning—this is what it means to be [B]lack.

. . . .

. . . For the [racial caste] system to succeed . . . [B]lack [youth] must be labeled criminals before they are formally subject to control. . . . This process of being made a criminal is, to a large extent, the process of

the streets, the system of policing Black children in schools is equally prevalent and equally infected by social and racial biases. Scholars have documented how Black boys,[107] Latinx boys,[108] and Black girls[109] are

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'becoming' [B]lack." MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS 198–200 (rev. ed. 2012).

107. See Phillip Atiba Goff et al., The Essence of Innocence: Consequence of Dehumanizing Black Children, 106 J. PERSONALITY & SOC. PSYCHOL. 526, 526 (2014) (finding "converging evidence that Black boys are seen as older and less innocent and that they prompt a less essential conception of childhood than do their White same-age peers. . . . [and] demonstrat[ing] that the Black/ape association predicted actual racial disparities in police violence toward children."); see also Farmer, supra note 86, at 374.

108. See RIOS, supra note 15 (examining the manifestation and consequences of hyper-criminalization of Black and Latinx boys and finding that the interplay of social forces that constructed their sense of selves and reality pushed them into a criminalized state).

109. We know females of color are more likely to be criminalized as was first examined by Dorothy E. Roberts, Unshackling Black Motherhood, 95 MICH. L. REV. 938, 948 (1997) ("Despite similar rates of substance abuse, however, Black women were ten times more likely than [W]hites to be reported to government authorities [in the 1990's]. Both public health facilities and private doctors were more inclined to turn in Black women than [W]hite women for using drugs while pregnant. Just as important as this structural bias against Black women is the ideological bias against them. Prosecutors and judges are predisposed to punish Black crack addicts

perceived by the general population as older than their actual age, less innocent, less childlike and, therefore, more culpable. This perception may contribute to more punitive exercises of discretion,[110] greater uses of force, and harsher penalties for Black children imposed by those in authority.[111] Though fewer studies have examined the way Latinx children and those with linguistic differences are perceived, there have been a few that document bias against Latinx girls in the system that demonstrate they are equally stereotyped.[112]

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because of a popular image promoted by the media during the late 1980s and early 1990s." (footnotes omitted)). See also KIMBERLÉ CRENSHAW ET AL., AFRICAN AM. POLICY FORUM, BLACK GIRLS MATTER: PUSHED OUT, OVERPOLICED, AND UNDERPROTECTED 29 (2016) (finding that society's deeply entrenched expectations of Black girls—influenced by racism and patriarchy—has led to a ritual whereby these young women are often mischaracterized and mislabeled because of how they look, dress, speak, and act; Black girls are devalued based on how others perceive them).

110. See Jyoti Nanda, Blind Discretion: Girls of Color and Delinquency in the Juvenile Justice System, 59 UCLA L. REV. 1502, 1531 (2012).

111. See REBECCA EPSTEIN ET AL., GEORGETOWN UNIV. LAW CTR.—CTR. ON POVERTY & INEQUALITY, GIRLHOOD INTERRUPTED: THE ERASURE OF BLACK GIRLS' CHILDHOOD 8 (2017) ("Across all age ranges, participants viewed Black girls collectively as more adult than [W]hite girls. Responses revealed, in particular, that participants perceived Black girls as needing less protection and nurturing than [W]hite girls . . . .").

112. See Jody Miller, An Examination of Disposition Decision-Making for

Thus, Black and Latinx children marked with a disability in school have an added vulnerability layered on top of a misperception that they are deviant or, at worst, criminal. These children must now navigate through a landscape that reinforces multidimensional stereotypes and debilitating narratives that negatively influence how their race, culture, linguistic difference, gender, and disability are understood. Implicit racial and gender biases may also inform how we read the behaviors and actions of Black and Latinx children. All of this comes together to guide their disability identification and subsequent treatment. Nirmala Erevelles suggests that this is part of a larger process when she writes that "the simultaneous process of 'becoming black' AND 'becoming disabled' described uncritically as 'natural' deviance foregrounds a complex intersectional politics of race, class, and disability . . . ."[113]

Delinquent Girls, in RACE, GENDER, AND CLASS IN CRIMINOLOGY: THE INTERSECTIONS 219, 239 (Martin D. Schwartz & Dragan Milovanovic eds., 1999) (reporting that a study of 244 Los Angeles County probation reports revealed that there was a more "paternalistic" discursive framework when describing the behavior of White and Latinx girls and that, in contrast, more punitive constructs described African American girls); see also Anthony A. Peguero & Zahra Shekarkhar, Latino/a Student Misbehavior and School Punishment, 33 HISPANIC J. BEHAV. SCI. 54, 65 (2011) (finding that Latinx youth face a number of educational hurdles, such as disproportionate school punishment).

113. Nirmala Erevelles, Crippin' Jim Crow: Disability, Dis-Location, and the School-to-Prison Pipeline, in DISABILITY INCARCERATED: IMPRISONMENT AND

The IDEA also operates here in ways that allow for racialized attribution given its inherently subjective nodes that, when combined with bias, can result in an incorrect diagnosis. Identifying students with a disability is largely a highly subjective process from start to finish, with discretion built into each step. This discretion allows for bias to influence each step of the multilayered process as disability is constructed in ways that are both obvious and unassuming.

The IDEA is first triggered when a teacher or administrator makes a subjective determination to seek a special education evaluation; after this referral, a psychologist conducts a formal evaluation. Under the IDEA, schools have an affirmative obligation, called "child find," to identify, locate, and evaluate all children with disabilities who require special education in the state.[114] This is not limited to instances in which a parent

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DISABILITY IN THE UNITED STATES AND CANADA 81, 88 (Liat Ben-Moshe et al. eds., 2014).

114. See 20 U.S.C. § 1412(a)(3)(A) (2018) ("All children with disabilities residing in the State, including children with disabilities who are homeless children or are wards of the State and children with disabilities attending private schools, regardless of the severity of their disabilities, and who are in need of special education and related services, are identified, located, and evaluated and a practical method is developed and implemented to determine which children with disabilities are currently receiving needed special education and related services."). For further discussion, see Cannon et al., supra note 57, at 426–47. See generally Perry A. Zirkel, Child Find, 2015 PRINCIPAL 50 (discussing legal issues related to child find).

or guardian has informed the school of a possible disability and need for services, but instead encompasses instances in which school teachers and administrators perform this task by observing a student's behaviors and performance.[115] Therefore, subjective determinations about whether a student's behavior or performance is out of the ordinary is a determination made by a teacher or administrator. However, research on disproportionality is limited given that data does not exist on whether the underlying disability is properly identified.[116]

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115. See Cannon et al., supra note 57, at 427; see also Zirkel, supra note 114, at 2.

116. Amanda L. Sullivan, Wading Through Quicksand: Making Sense of Minority Disproportionality in Identification of Emotional Disturbance, 43 Behav. Disorders 244, 246 (2017) ("[M]any scholars are concerned that special education services may not be beneficial for many CLD [culturally or linguistically diverse] students, particularly those identified with disabilities for which validity and accuracy of identification is questioned. These assumptions are especially relevant because little of the disproportionality research allows for determination of the appropriateness of the identification studied. As a consequence, scholars often extrapolate from research in related fields of education and the broader social sciences, but the varied findings throughout contribute to contradictory inferences regarding special education needs and identification." (citations omitted)). Analogizing here to the theories posited around causes for racial disparities in school discipline is one alternative explanation. Educators have argued that poverty, low achievement, and rates of misconduct among students of color are not

For students of color, the attribution process may happen too quickly—a teacher's rash determination. Alternatively, it may happen too slowly—a teacher ignores or misreads a possible behavioral or learning impairment as what is to be expected from Black and Latinx children. Though there are a multitude of outcomes, it is likely that attribution of a disability for a Black or Latinx student happens or fails to happen during one or more of these scenarios:

Student repeatedly misbehaves in class à via lens of typically deviant à no attribution, possible disability undiagnosed.

Student repeatedly misbehaves in class à via lens of likely troubled à attribution, suspected disability, although may be inaccurate.

Student continuously performs well below standard à via a lens of normal expectations à attribution, suspected disability, although may be inaccurate.

Student continuously performs well below standards à via a lens of low expectations à no attribution, possible disability undiagnosed.

Thus, at this first stage, no formal assessment has been made and the outcome for students with or without disabilities is still preliminary.[117]

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sufficient to explain the discipline disparities along racial lines and that the "school and teacher contributors" should be further examined. Anne Gregory et al., The Achievement Gap and the Discipline Gap: Two Sides of the Same Coin?, 39 EDUC. RESEARCHER 59, 59 (2010); see also KIMBERLÉ CRENSHAW ET AL., supra note 109; Nanda, supra note 110.

117. It is important to acknowledge the setting in which the process of attributing a child with a disability occurs: under-resourced schools with a

Situated in hyper-surveilled schools and coming from overpoliced neighborhoods, the children encounter a primary node of the attribution process—teachers. Teachers in these same schools (often with minority-majority populations) are not themselves racially or ethnically reflective of the students they teach and thus are impacted by and react to prevailing social stereotypes about Black children. Implicit bias, we know from numerous studies, impacts the way teachers generally interact with students, even as young as preschool, and may contribute to the racial disparity in discipline.[118] In a well-respected study conducted by the Yale Child Study Center, researchers used sophisticated eye-tracking technology and found that preschool teachers "show a tendency to more closely observe [B]lack students, and especially boys, when challenging behaviors

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student population that is largely Black, Latinx, and poor and that is heavily policed both formally (heavy security apparatus, presence of armed police officers) and informally (zero tolerance policies, strict behavior guidelines) in ways that are often inconsistent with their White peers. Moreover, these students are more likely to have challenging experiences and exposure to traumatic events that are often symptomatic of growing up in poor, urban neighborhoods with heavy policing, an absence of services, and poverty.

118. See Hathaway, supra note 105 ("'The tendency to base classroom observation on the gender and race of the child may explain in part why those children are more frequently identified as misbehaving and hence why there is a racial disparity in discipline,' added Walter S. Gilliam, director of The Edward Zigler Center in Child Development and Social Policy and associate professor of child psychiatry and psychology at the Yale Child Study Center.").

are expected."[119] At the same time, the study found that Black teachers hold Black students to a higher standard of behavior than their White counterparts and speculated that it may be based on a tough love view that because a tough world awaits them, they deserve harsh assessment.

The researchers suspected that White educators, by contrast, may be acting on stereotypes that Black preschoolers are more likely to misbehave in the first place, and so they judge them against a different standard than that which they are applying to White children.[120] Remarkably, the same study also found that "when the preschool teacher and child were of the same race, knowing about family stressors led to increased teacher empathy for the preschooler and decreased how severe the behaviors appeared to the teacher. But, when the teacher and child were of a different race, the same family information seemed to overwhelm the teachers and the

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119. Id.

120. Rebecca Klein, Teachers Expect Less from Black and Latino Students, HUFFINGTON POST (Oct. 7, 2014), https://www.huffingtonpost.com/2014/10/07/pygmalion-effect-study_n_5942666.html [https://perma.cc/49FA-RPR2] ("Researchers found that students whose teachers expected them to graduate from college were significantly more likely to do so. But teachers had lower expectations for disadvantaged students and students of color, the researchers found. Teachers thought a college degree was 47 percent less likely for African-American students than for [W]hite peers, and 53 percent less likely for low-income students than for students from more affluent families. Teachers thought [Latinx] students were 42 percent less likely than [W]hite students to graduate from college, the study found.").

behaviors were perceived as being more severe."[121] Such "severe" behaviors are likely to either end in a referral to discipline or disability assessment. Thus, teacher bias, teacher expectation of the student, teacher race, and student race and gender are all part of the extralegal determination that happens when student behavior is read or misread and attributed as a disability.

One process of attribution that occurs when a teacher views the behavior(s) of a Black or Latinx child as deviant, possibly lacking impulse control and therefore likely to have a disability, is troubling. This process—being labeled disabled for normal adolescent behavior—is a variation of police profiling of Black and Latinx communities in that normal behavior (a young Black boy mowing a lawn, for example) is perceived by White neighbors as a child who does not belong and is thereby acting criminally.[122]

A second process is when a teacher may find the misbehavior or outburst of a child as unremarkable given their bias for the ways in which Black and Latinx children act combined with a sense of low expectations.[123] That is, they may ignore impulsive behavior or write it off as typical of Black or

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121. Hathaway, supra note 105.

122. Kristin N. Henning, The Reasonable Black Child: Race, Adolescence, and Reasonable Articulable Suspicion, 67 Am. U. L. Rev. 1513 (2018).

123. Evie Blad, Teachers' Lower Expectations For Black Students May Become 'Self Fulfilling Prophecies,' Study Finds, EducationNext (Aug. 10, 2016), http://blogs.edweek.org/edweek/rulesforengagement/2017/10/teachers_lower_expectations_for_black_students_may_become_self-fulfilling_prophecies_researchers_say.html [https://perma.cc/2AVG-CFH4].

Latinx children while not viewing their poor or struggling behavior in school as suspicious or worthy of further examination. This is the deficit-model way of examining behavior; the student's behavior and poor performance do not trigger a full evaluation by the teacher because the teacher does not expect much from the student. These lower expectations may directly correlate to the fact that studies have repeatedly found that "[a]mong children displaying the same clinical needs, [W]hite children are more likely to receive special education services than racial or ethnic minority children."[124]

Disability lawyers are all too familiar with how this attribution process happens in ways that are harmful to Black and Latinx children but unable to be addressed by law. The subsequent scenarios are all based on real cases:

Student has a short attention span and, as a result, disrupts the classroom. Julie, the teacher, has heard from her colleagues and others that Black children lack impulse control. Due to this perception, Julie assumes that Student is "acting out" and lacks the ability to control themselves. Accordingly, Julie invokes the discipline policies such that Student is suspended from school.[125]

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124. Paul L. Morgan & George Farkas, The Wrong and Right Ways to Ensure Equity in IDEA, EDUCATIONNEXT (Aug. 10, 2016), https://www.educationnext.org/the-wrong-and-right-ways-ensure-equity-idea [https://perma.cc/8QDV-SBZ4] ("In addition to being repeatedly replicated, our findings also are consistent with those reported by public health researchers. These researchers also find that [W]hite children are more likely than otherwise similar minority children to receive treatment for disabilities.").

125. Arlene B. Mayerson, Ending the School-to-Prison-Pipeline,

Student has a short attention span and, as a result, disrupts the classroom. The school undertakes its own evaluation and disregards Mother's evaluation that Student has multiple learning disabilities—both ADHD and SLD. Despite Student's poor academic progress (failing all subjects except for physical education) and impulse behaviors, the school disregards the ADHD and SLD diagnosis and concludes that Student was merely being defiant and oppositional.[126]

Once a child is identified, they must receive an evaluation to determine whether they have a disability and what accommodations are appropriate for ensuring that they receive a "free appropriate public education," or "FAPE."[127] An evaluation must occur for every suspected area

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Disability Rts. Educ. & Def. Fund, https://dredf.org/news/publications/ending-school-prison-pipeline [https://perma.cc/2YDV-MCFH].

126. The attorney in this case attributed the failure to identify the disabilities here to implicit bias against Black boys in that there were low expectations of the child. Due to a learning disability and ADHD, the student did not understand teacher instructions; this, coupled with his attention span of a few minutes, resulted in displays of lack of impulse control. As a result, the student was suspended multiple times and was recommended for expulsion until a special education advocate stepped in to assert the child's federal special education rights. See Complaint, East Count NAACP v. Antioch Unified Sch. Dist., No. C16–01297 (July 6, 2016).

127. The IDEA defines FAPE as "special education and related services that (A) have been provided at public expense, under public supervision and direction, and without charge; (B) meet the standards of the State

of disability.[128] These evaluations must be done at public expense, and, further, if a parent or guardian disagrees with the outcome of the school's evaluation, they are entitled to another outside evaluation at public expense.[129] If a student is identified as having a disability, they are entitled to a comprehensive evaluation at least every three years to ensure that diagnoses continue to be accurate and accommodations continue to be appropriate.[130] What is also relevant but outside the scope of this

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educational agency; (C) include an appropriate preschool, elementary school, or secondary school education in the State involved; and (D) are provided in conformity with the individualized education program required under section 1414(d) of this title." 20 U.S.C. § 1401(9) (2018).

128. See 20 U.S.C. § 1414(b)(3)(B) (2018); see also Kalvesmaki & Tulman, supra note 10, at 181 (discussing the rights of students' parents in the evaluation process).

129. 34 C.F.R. § 300.502(b) (2018); see also Baldwin Clark, supra note 54 (discussing the role of social capital and its interplay with parents' ability to navigate the IDEA process). For a thorough discussion of this requirement, see Cannon et al., supra note 57, at 428; and Kalvesmaki & Tulman, supra note 10, at 181.

130. 20 U.S.C. § 1414(a)(2)(B)(ii) (2018).

Article is the role of the psychologist in the evaluation itself[131] and the variance of a student having multiple disabilities.[132]

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131. Diagnosis itself is a subjective act performed by people in authority who have their own implicit biases and should, in another setting, be analyzed for its role in perpetuating the burdens placed upon the shoulders of children of color with and without disabilities. See DANIEL A. ALBERT ET AL., REASONING IN MEDICINE: AN INTRODUCTION TO CLINICAL INFERENCE 181–83 (1988) ("[D]iagnosis is the name for the process the clinician goes through to arrive at a conclusion about the state of health of a patient. Diagnosis, in this sense, is something the clinician does. It is an activity or action (making a diagnosis, or diagnosing). As such, it can be done well or poorly, hastily or carefully. . . . Diagnosis in the second sense refers to the outcome of the diagnostic process. The clinician typically declares that the patient 'has' such and such disease or diseases—that the features displayed by the patient can be fit into one or more of the diagnostic categories. Such a declaration is often qualified by an accompanying estimate of how likely it is that the category identified is the correct one. . . . Diagnosis in the second sense involves a labeling of the patient. . . . [A]t first view, it may seem that the diagnostic label alone is simultaneously a classification, an explanation, and a prognosis. In fact, the diagnostic label is no more than the tip of the diagnostic iceberg. Floating beneath the surface is the body of information and theory that give the label its meaning and significance.").

132. Below, this Article focuses on the extralegal or subjective determinations made by teachers that end up both over-, under-, and/or

After performing the evaluation, the school must make a determination of whether the student is eligible for services under the IDEA.[133] There is a two-pronged test for determining eligibility: (1) the student must experience at least one of the thirteen disabilities listed in the IDEA,[134] and (2) the student must, as a result of that or those disability(ies), need special education in order to make progress in school.[135] A team of qualified professionals must consult with the student's family to determine whether the child is eligible under the IDEA, and factors to be considered include relevant functional, developmental, and academic information and any additional information provided by the family.[136] More than one measure or assessment must be considered when making this determination.[137] Here too, as Professor LaToya Baldwin Clark points out, the process of evaluating students or attributing a disability is influ-

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mis-identifying Black and Latinx students with a disability in a school environment that is hyper-surveilled.

133. Nat'l Ctr. for Learning Disabilities, supra note 51, at 32.

134. These categories are: specific learning disability, other health impairment, autism spectrum disorder, emotional disturbance, speech or language impairment, visual impairment (including blindness), deafness, hearing impairment, deaf-blindness, orthopedic impairment, intellectual disability, traumatic brain injury, and multiple disabilities.

135. Nat'l Ctr. for Learning Disabilities, supra note 51, at 32.

136. 20 U.S.C. § 1414(d)(1)(B)(i) (2018); see also Nat'l Ctr. for Learning Disabilities, supra note 51, at 32.

137. Nat'l Ctr. for Learning Disabilities, supra note 51, at 32.

enced not only by race and class, but also by the parent's social capital or agency in the process.[138]

Once a child is determined to be eligible for services under the IDEA, the school and family work together to create an "individualized education program" (IEP).[139] This document must outline both the services that the school is obligated to provide and the outcomes that are expected of the student.[140] Further, the IDEA requires IEPs to include a robust list of specific sections, including a statement of the child's current performance and functioning; measurable annual goals; a statement of how progress towards these goals will be measured; a statement of services the student is to receive from the school; a statement of where and how these services will be delivered in the least restrictive environment possible; and, beginning at age sixteen, measurable postsecondary goals and a plan for meeting them.[141] The IEP is the foundation of the special education services that the child then receives to ensure that they receive a FAPE; therefore, its accuracy is extremely important to the child's eventual success. Formally, it is the final step in this IDEA evaluation but one that is ongoing and also subject to the same teacher

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138. Baldwin Clark, supra note 54, at 381.

139. 20 U.S.C. § 1414(b)(2)(A); see also Cannon et al., supra note 57, at 448 ("The IDEA requires that an IEP be developed for every student with a disability who is identified as eligible to receive services.").

140. See generally 20 U.S.C. § 1414(d).

141. See generally id. For further discussion, see Cannon et al., supra note 57, at 449.

biases and further surveillance. Currently, the surveillance[142] monitors the role of parents, guardians, and family. Parents and guardians are considered an important part of the IEPs. Cooperation from parents is critical and may require parents and guardians to share details of their personal lives to a team of school officials. This process is often frustrating for even the most involved parents, and IEPs have been referred to as the "special-education charade" given the cumbersome, lengthy, and arguably ineffective process.[143]

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142. In a future article, the author plans to examine how the lives of children and parents are scrutinized and subject to a form of informal policing as part of the process by which IEP plans are determined. Beautifully described by a parent journalist, IEP meetings are a "cross between a legal deposition and a committee meeting." Thompson, supra note 56. The questioning of family life (poverty, class) are also forms of intrusion that are not necessary. Alternative ways of thinking about the special education identification process are beyond the scope of this Article. For a discussion about one such alternative, see Lynn Fuchs & Douglas Fuchs, Treatment Validity: A Unifying Concept for Reconceptualizing the Identification of Learning Disabilities, 13 Learning Disabilities Res. & Prac. 204 (1998) (proposing a four-phase eligibility assessment process).

143. For a firsthand account from a parent involved in this process, see Thompson, supra note 56 (discussing Thompson's perspective as the parent of a child who is deemed twice-exceptional, a term which refers to children who are both gifted and have a learning disability); see also Emily Williams King, Addressing the Social and Emotional Needs of Twice-Exceptional

The criminalization of disabilities, thus, can occur before or at the referral process and is further reinforced by the disparate ways in which "similarly situated students of different races are treated differently."[144] Part IV lays out how the attribution process—entangled with extralegal influences (e.g., teacher bias, nebulous disability categories) in a school site with a web of surveillance—influences the manner in which some students are placed in certain cognizable disability categories. As a result, significant racial disproportionality emerges. This Article argues that what is seen as racial disparity is actually a form of racial stratification that leads to the criminalization of Black and Latinx students.

IV. Racial Disparities as Racial Stratification of Children with Disabilities

A. The Role of Subjectivity in the Law in Categorizing Black and Latinx

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Children, 38 Teaching Exceptional Children 16, 17 (2005).

144. Office for Civil Rights, U.S. Dep't of Educ., Dear Colleague Letter: Preventing Racial Discrimination in Special Education 11 (2016), https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201612-racedisc-special-education.pdf [https://perma.cc/B5YA-VZ97]. The Office of Civil Rights has reported: For example, district staff may refer only Latin[x] and [B]lack students for evaluation, while not referring [W]hite students in the same class with similar behavior and academic records. Alternatively, district staff may fail to refer Latin[x] or [B]lack students who are experiencing behavioral and academic difficulties that might be related to disability while referring [W]hite students with similar behavior and academic records in the same class. Id.

Students with a Disability

The overrepresentation[145] and underrepresentation[146] of minority

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145. See, e.g., Christina A. Samuels & Alex Harwin, Racial Disparities in Special Ed.: How Widespread Is the Problem?, Educ. Wk. (Jan. 24, 2018), https://www.edweek.org/ew/articles/2018/01/24/racial-disparities-in-special-ed-how-widespread.html [https://perma.cc/7AZQ-PV8G] (highlighting recent data suggesting that minority students are being placed in special education and isolated classrooms and punished at higher rates than their overall numbers); Becky Pérez et al., Ctr. for Evaluation & Educ. Pol'y, Latino Students and Disproportionality in Special Education 2 (2008) ("What do patterns of disproportionality for Latino students look like in specific disability categories? NCCRESt's [National Center for Culturally Responsive Educational Systems's] analyses of specific disability categories combine Emotional Disturbance (ED), Specific Learning Disability (LD), and Mental Retardation (MR) into a category termed high incidence. In the high incidence category, evidence of disproportionality was found in 14 U.S. states . . . ."). But see Nora Gordon, Race, Poverty, and Interpreting Overrepresentation in Special Education, Brookings Inst. (Sept. 20, 2017), https://www.brookings.edu/research/race-poverty-and-interpreting-overrepresentation-in-special-education [https://perma.cc/ABH4-GVKX] (highlighting a new study finding that "when you take other student characteristics—notably family income and achievement—into account, racial and ethnic minority students are less likely to be identified for special education than [W]hite students").

146. See, e.g., Jason Travers & Michael Krezmien, Racial Disparities in Autism Identification in the United States During 2014, 84 Exceptional Children 403 (2018) (performing analyses of the number of students

students in certain special education categories has received a great deal of attention over the past thirty years.[147] The issue has largely been understood as one of racial disparity, where Black and Latinx students are overrepresented or underrepresented in certain disability categories.[148] This framing, however, fails to recognize the most

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diagnosed with autism in each state and finding that minorities are significantly underrepresented in this IDEA category); Morgan et al., Racial and Ethnic Disparities in ADHD Diagnosis from Kindergarten to Eighth Grade, 132 Pediatrics 85, 85 (2013) ("Racial/ethnic disparities in ADHD diagnosis occur by kindergarten and continue until at least the end of eighth grade."). But see Avi Salzman, Special Education and Minorities, N.Y. Times (Nov. 20, 2005), https://www.nytimes.com/2005/11/20/nyregion/nyregionspecial2/special-education-and-minorities.html [https://perma.cc/7N5B-D56C] (describing the overrepresentation of Black and Latinx students in special education in Connecticut).

147. See generally Artiles et. al., Justifying and Explaining Disproportionality, 1968–2008: A Critique of Underlying Views of Culture, 76 Exceptional Children 279 (2010); Alfredo Artiles & Stanley C. Trent, Overrepresentation of Minority Students in Special Education: A Continuing Debate, 27 J. Special Educ. 410 (1994).

148. However, there is current debate about whether the issue policymakers should be focusing on is overdiagnosis or underdiagnosis. See Christina Samuels, Special Education Bias Rule Put on Hold for Two Years by DeVos Team, Educ. Wk. (June 29, 2018, 6:00 PM), http://blogs.edweek.org/edweek/speced/2018/06/special_education_bias_rule_postponed.

significant consequence of this disparity: racial stratification, a hierarchical sorting of races that relegates Black and Latinx children with constructed disabilities to segregated classrooms with a substandard education, a decreased graduation rate, and an increased likelihood of ending up in the criminal justice system. This process occurs with the attribution of disability pre-IDEA and the labeling of a disability in the IEP process and results in disproportionate numbers of Black and Latinx students in certain categories.[149] As a window into how

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html [https://perma.cc/4AGY-FCH6]; Lauren Camera, New Study Questions Links Between Race, Disability in Students, U.S. News (Aug. 31, 2017), https://www.usnews.com/news/education-news/articles/2017–08–31/new-study-questions-links-between-race-disability-in-students [https://perma.cc/EMD9-Y2GE].

149. One study found that "(a) the disproportionate identification of African American and [Latinx] students with learning disabilities is accounted for by the lower average SES of these racial/ethnic subgroups, (b) identification with a learning disability is associated with a student's sex, sociodemographic (noncognitive) characteristics, and academic history, and (c) aspects of being a language minority appear to play a role in a student's likelihood of identification with a learning disability." Dara Shifrer et al., Disproportionality and Learning Disabilities: Parsing Apart Race, Socioeconomic Status, and Language, 44 J. Learning Disabilities 246, 254 (2011) (describing the many factors, including socioeconomic status, race, gender, and language proficiency, that are often taken into account when diagnosing specific learning disability).

disability is constructed through the IDEA, this section traces the process by which Black children are identified as "emotionally disturbed" (ED)—a cognizable disability category under the IDEA. It then examines the increased likelihood that students with these designations, against a backdrop of segregation for special education students, fewer resources, and an overall substandard education, will be propelled into to the criminal justice system. The channeling effect of the ED designation ultimately reveals a few theoretical and practical consequences that the final part of this Article addresses, including ideas to address its impact and how it touches on larger problems of subjectivity in disability assessment in the broader context of hyper-surveilled, segregated, and grossly unequal schools.

This Article confines its discussion to examining ED because it is reflective of the ill-defined way in which disability is constructed, both under the law and otherwise.[150] A 2008 report in Philadelphia attempted

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150. Similar IDEA categories ripe for discretionary abuse include the umbrella categories of "other health impairment" and "special learning disabilities." "Other health impairment" covers conditions that limit a child's strength, energy, or alertness. One example is an attention issue like ADHD. See Andrew M.I. Lee, The 13 Conditions Covered Under IDEA, UNDERSTOOD, https://www.understood.org/en/school-learning/special-services/special-education-basics/conditions-covered-under-idea [https://perma.cc/2LES-DZRM]. "Special learning disabilities," or "SLD," covers a specific group of learning issues. The conditions in this group affect a child's ability to read, write, listen, speak, reason, or do math. See id.

to unpack the startling statistic that African American boys made up fifty-nine percent of the "emotional support" programs (due to the ED classification) when they comprised less than a third of the student population.[151] Black boys are twice as likely as their White male peers to be put into this category.[152] They are also six times more likely to be

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(describing the personal struggle of the author as she tries to gain inclusive education for her child).

[151] A National Trend: Black and Latino Boys Predominate in Emotional Support Classes, THENOTEBOOK (Nov. 26, 2008) [hereinafter A National Trend], http://thenotebook.org/latest0/2008/11/26/a-national-trend-black-and-latino-boys-predominate-in-emotional-support-classes [https://perma.cc/D8F9-WBTM].

[152] OFFICE OF SPECIAL EDUC. & REHAB. SERVS., U.S. DEP'T OF EDUC., 38TH ANNUAL REPORT TO CONGRESS ON THE IMPLEMENTATION OF THE INDIVIDUALS WITH DISABILITIES EDUCATION ACT xxvi (2016) ("Black or African American students ages 6 through 21 were 2.08 and 2.22 times more likely to be served under IDEA, Part B, for emotional disturbance and intellectual disabilities, respectively, than were the students ages 6 through 21 in all other racial/ethnic groups combined. The risk ratio for Black or African American students ages 6 through 21 was larger than the risk ratio for the students ages 6 through 21 in all other racial/ethnic groups combined for every disability category except autism (0.99), deaf-blindness (0.76), and orthopedic impairments (0.86)."); see also NAT'L CTR. FOR EDUC. STATISTICS, CHILDREN AND YOUTH WITH DISABILITIES (2017) (finding that Black students and students identifying with more than one race were diagnosed with

labeled “emotionally disturbed” than White girls.[153] Educators nationwide have recognized the label’s detrimental effects.[154] Shortly after

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emotional disturbance at a rate of seven percent compared to the rate at which students served under IDEA overall were diagnosed—five percent).

153. The same study also noted that White girls were four times more likely than Black boys to be identified as mentally gifted. Ironically, labeling students as “gifted” is also not a colorblind process. See Anya Kamenetz, To Be Young, “Gifted” And Black, It Helps To Have A Black Teacher, NPR (Jan. 20, 2016), https://www.npr.org/sections/ed/2016/01/20/463190789/to-be-young-gifted-and-black-it-helps-to-have-a-black-teacher [https://perma.cc/9JG7-YS3X] (“A new, national study finds that [B]lack students are about half as likely as [W]hite students to be put on a ‘gifted’ track—even when they have comparable test scores. Only one factor erased this disparity between students: the race of their teachers. Nonblack teachers identify [B]lack students as gifted in reading 2.1 percent of the time. Black teachers are three times more likely to identify [B]lack students as gifted in reading: 6.2 percent of the time.”).

154. The nebulous nature of the ED category is particularly detrimental for Black, Latinx, and poor students in schools with a web of surveillance and few therapeutic resources. Black and Latinx children are “pushed out” of schools, end up in segregated classrooms or separate schools, and receive a subpar education, increasing the likelihood they will not graduate and end up in the juvenile justice system. The result is racial stratification, as will be discussed. Children with special education labels are often segregated from general education classrooms. Today,

this report's release, Philadelphia Superintendent Arlene Ackerman addressed this issue: "The research clearly shows us that for young men of color, particularly African American and Latino . . . a special education label, especially 'emotionally disturbed,' becomes a life sentence, causing many . . . to drop out of school early and enter the criminal justice system."[155]

The ED category—defined as an "inability to learn that cannot be explained by intellectual, sensory, or health factors"—is often considered the catchall category used when no other label fits.[156] Because

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approximately 13.3 percent of children with disabilities spend forty percent or less of their day inside a regular classroom. Students Served Under IDEA, supra note 13. For criticism of the segregation of children with disabilities in schools, see Liza Long, Don't Segregate My Special Needs Child, TIME (Sept. 2, 2014), http://time.com/3257982/special-needs-children-education [https://perma.cc/BGU6-AY37].

155. A National Trend, supra note 151.

156. The IDEA defines emotional disturbance as follows:

a condition exhibiting one or more of the following characteristics over a long period of time and to a marked degree that adversely affects a child's educational performance:

(A) An inability to learn that cannot be explained by intellectual, sensory, or health factors.

(B) An inability to build or maintain satisfactory interpersonal relationships with peers and teachers.

(C) Inappropriate types of behavior or feelings under normal

the designation turns largely on the subjective assessment of teachers and administrators, it is particularly prone to abuse. Additional factors that are deemed warning signs heighten the risk of over-designation in this expansive category. Antisocial behavior, the inability to build positive relationships with teachers and students, inappropriate behavior, or even a "general pervasive mood of unhappiness or depression" are all indicators that are social, contextual, and subject to highly subjective interpretations.[157] Experts, parents, and advocates have been sounding the alarm about racial disproportionality in these highly subjective classifications for decades.[158]

Diagnosing a child with ED requires a subjective assessment and interpretation of key elements such as "long period of time," "marked

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circumstances.

(D) A general pervasive mood of unhappiness or depression.

(E) A tendency to develop physical symptoms or fears associated with personal or school problems.

34 C.F.R. § 300.8(c)(4)(i) (2018) (emphasis added).

157. See id.

158. See Julianne Hing, Race, Disability and the School-To-Prison Pipeline, Colorlines (May 13, 2014), https://www.colorlines.com/articles/race-disability-and-school-prison-pipeline [https://perma.cc/7S84-RKM9] ("What is clear, says UCLA's Civil Rights Project Director Dan Losen, is that disproportionality in special education highlights the many places where 'bias can seep in.'").

degree," "satisfactory," "inappropriate," and "unhappiness."[159] These so-called "soft disabilities" have thus become catchalls for broad classes of learning challenges and antisocial behaviors that are often applied to Black and Latinx children given the bias that may seep in during the attribution process. The very category of ED is indistinct, or what some have called an "unintelligible" category, given the "ambiguity of language and frailty of logic."[160] Notably, this same ambiguity was recognized when ED was codified into law. The federal definition was largely based on E.M. Bower's research despite the fact that Bower defined ED by social maladjustment, which drew harsh criticism: "To use a definition that operationally and conceptually defines emotional disturbance by their social maladjustments, then disqualifies them on the same basis, fits Tweedledee's logic, 'If it were so, it might be; and if it were so, it would be; but as it isn't, it ain't.'"[161]

Thus, from its codification, the definition of ED has lacked specificity and seemingly relied on circular reasoning, failings that remain unresolved. Moreover, case law reveals that the range of actors involved in making decisions about the meaning of ED—educators, related service providers, families, and judges—maintain contradictory interpretations of the category and its applicability to individuals.[162] As a result, the under-

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159. See 34 C.F.R. § 300.8(c)(4)(i).

160. Sullivan, supra note 116, at 246.

161. Id. at 246 (citing Eli M. Bower, Defining Emotional Disturbance: Public Policy and Research, 19 Psychol. Schools 55, 58 (1982)).

162. See Sullivan, supra note 116, at 246 ("More fundamentally, this case

lying issues (disability-related and other issues such as trauma or fear of separation) that may exist have the potential to be easily swept into a neat—but largely unhelpful—category.[163]

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law reveals varying, and at times wildly inappropriate (e.g. irrational and unempirical), conceptualizations of psychopathology, volition, culpability, the purpose of special education, and students' rights to treatment versus penalty that parallel divergent scholarly perspectives."); Shanna Sadeh & Amanda L. Sullivan, Ethical and Legal Landmines: Causal Inference in Special Education Decisions, 54 PSYCHOL. SCHOOLS 1134 (2017).

163. The porous nature of ED has the potential for expansion and allows for it to be used as a catchall category and subject to changes in interpretation, as evidenced by a recent novel legal challenge. In Peter P. v. Compton Unified School District, a group of students allege that the trauma they have experienced impacts their ability to learn and may cause PTSD—a category absent from the cognizable IDEA categories. Complaint, Peter P. v. Compton Unified Sch. Dist., No. 2:15-cv-03726-MWF-PLAX (May 18, 2015). One way experts have managed the absence of a PTSD category in the IDEA is by labeling students such as the plaintiffs in Peter P. as emotional and behaviorally disturbed. See Kaitlyn Ahlers et al., Trauma-Informed Schools: Issues and Possible Benefits from a Recent California Lawsuit, 44 COMMUNIQUE 23, 24 (2016). In fact, the National Association of School Psychologists has anticipated that, in light of Peter P., one of the possible changes will be "adjusting ED [emotionally disturbed] symptom criteria" such that the "ED category more clearly identified symptoms that are connected to trauma-related conditions." Id.

The jarring racial disproportionality in this category can be explained by an ill-defined category and the myriad of factors previously examined that reflect teacher bias.[164] However, if we link the disproportionality to a broader constellation of opportunity gaps, it is clear that ED is often, at least in part, related to context and shaped by educational experiences. Improved teacher practices (student to teacher ratio, smaller

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at 25. Adjusting the category will ensure that legal protections are triggered.

[164.] Sullivan, supra note 116, at 248 ("Although not yet well substantiated in special education, behavioral differences between children from dominant and nondominant cultural backgrounds may be related to general tendencies for White observers to interpret behavior differently based on the race and gender of the actor. Research has frequently demonstrated racial bias in numerous decision-making contexts related to capability, culpability, and treatment—all of which are certainly interwoven in notions of ED—across a variety of fields including social psychology, criminal justice, economics, and various helping professions. It is unlikely educators and related service providers involved in special education disability identification are immune to such biases when the decisions rendered parallel those in other contexts where there is robust evidence of bias. Furthermore, educational research indicates teachers' tendencies to perceive and respond differently to students' behavior in ways that disadvantage students from some racial minority backgrounds and may contribute to problematic behaviors . . . ." (citations omitted)).

class sizes, race of teacher matching student[165]) not only enhance student achievement, but also mitigate the more critical aspects of ED (e.g., peer interactions, engagement).[166] Consequently, it is valuable to examine the ways in which school environments may contribute to the ED label—and by extension, all disability identification—for children who are in particularly fraught school environments with heavy surveillance, both formal and informal.[167] For example, the presence of police creates an

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165. Ted Gregory, Possible Key to Black Boy's Academic Success: Hire Black Men as Elementary School Teachers, Chi. Trib. (July 25, 2018), http://www.chicagotribune.com/news/ct-met-recruiting-male-black-elementary-teachers-20180724-story.html [https://perma.cc/K32Y-E2HJ] ("Research by an economist at University of California at Santa Barbara, for example, showed that [B]lack students with [B]lack teachers were suspended less often than [B]lack students with [W]hite or Hispanic teachers. A 2016 study by the American Educational Research Association concluded that, test scores and other factors being equal, [B]lack students were three times more likely to be assigned to gifted programs when taught by a [B]lack teacher than a non-[B]lack teacher.").

166. See Anne Gregory et al., The Relationship of School Structure and Support to Suspension Rates for Black and White High School Students, 48 Am. Educ. Res. J. 904, 929 (2011) ("Schools in which the students experience neither a strong sense of support by teachers nor high expectations of academic achievement appear to be most vulnerable [to disproportionate suspension of Black students].").

167. Sociologist Victor Rios distinguishes between the ways Black and

atmosphere of stress that has a direct impact on how Black and Latinx students respond. They may try to cope with the stress and respond with fear that authority figures incorrectly perceive as "acting out."[168] These acting-out behaviors, in turn, may then result in the mis-identification of a diagnosis as well as disciplinary proceedings, as there is no requirement for schools to be more lenient with students with a diagnosed disability, even if it will almost necessarily mean that they will engage in disruptive behavior. Police presence combined with zero-tolerance discipline policies creates a school atmosphere where children are under a magnifying lens, and this magnifying lens only increases the number of students who are labeled as having a disability, whether this is appropriate or not.

The channeling effect of the ED designation ultimately reveals a few theoretical and practical consequences that are worth noting. These include how this reveals larger problems of subjectivity in disability assessment in the broader context of hyper-surveilled, segregated, and grossly unequal schools. To address these consequences, solutions outside the law may be needed.[169]

Latinx boys are policed by dividing this category as "material" versus "symbolic" criminalization. Rios, supra note 15.

168. See Hannah-Jones, supra note 92 (arguing that Black communities fear police given the "historic role of policing in reinforcing racial inequality"); see also James Foreman, Locking Up Our Own: Crime and Punishment in Black America (2017) (providing a comprehensive analysis of the historic role of policing in Black communities).

169. See Hing, supra note 158 (documenting how a principal relied on

B. Criminalization and Racial Stratification of Disability

This Article concludes where it begins by suggesting that for White students and students in high-performing and well-funded schools, disability is often considered a medical condition that is provided treatment and resources, whereas for Black and Latinx students in hyper-surveilled schools, a disability such as ED (if it exists) may be a criminalized condition remedied with punishment and, in the worst case, a more obvious and likely target for law enforcement and juvenile incarceration. As a result, this Article suggests this is a form of racial stratification, a differentiation based on race with its very essence consisting of an unequal distribution of rights and privileges.[170] Given the limited data on treatment of students categorized by disability, it is difficult to confine this analysis to the channeling effect of students solely with ED. However, generally, students with disabilities in under-resourced districts are provided fewer special education resources, more likely to be taught in segregated

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outside funding to do a trauma evaluation of child, preventing the child from obtaining a disability designation and resulting in an accurate assessment and services). Some districts, like Oakland Unified School District in California, are piloting innovative programs with a holistic, communitywide approach to dealing with the trauma kids confront outside of school. For example, the Seneca Center program "All-In" is a compelling program and a way to reimagine a school community while being fiscally efficient. Id.

170. For a thoughtful analysis on this issue, see Kimberlé Crenshaw et al., Critical Race Theory: The Key Writings That Formed the Movement (1995).

classrooms separate from their peers who are not disabled, more highly surveilled and thereby disciplined, more likely to end up in a continuation school, and thus more likely to be suspended, expelled, and criminalized. This is in sharp contrast to students in well-funded school districts where, despite limited funding, resources are more plentiful; there is a higher likelihood of teaching special education students in maistream classes (inclusion), less surveillance, more college counselors, more access to special education resources, including attorneys, and students are thereby less likely to be suspended, expelled, and criminalized.[171]

First, the heavy police presence emblematic of hyper-surveillance at schools has a significant impact on children with disabilities.[172] Specifi-

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171. See Ramey, supra note 8, at 83 (finding, based on an empirical review of 600,000 students with disabilities, that schools and districts with relatively large Black and Latinx populations organize their student disciplinary policies around the principles of the criminal justice system rather than the mental health system).

172. "Students with disabilities represented about 12 percent of the total student population but accounted for a quarter of those arrested and referred to law enforcement, 75 percent of those who were physically restrained at school and 58 percent of those placed in seclusion or involuntary confinement." Radley Balko, Putting More Cops in Schools Won't Make Schools Safer, and It Will Likely Inflict A Lot of Harm, Wash. Post (Feb. 22, 2018), https://www.washingtonpost.com/news/the-watch/wp/2018/02/22/putting-more-cops-in-schools-wont-make-schools-safer-and-it-will-likely-inflict-a-lot-of-harm [https://perma.cc/VPT5-MXA4].

cally, the presence of police officers who lack training on how to interact with children with disabilities[173] can lead to destructive outcomes. An example is a 2011 documented story in California where "school officials

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Racial disparities also exist in the way police respond to mental health interventions for children. Press Release, Advocates for Children of N.Y., Children in Crisis: Police Respond to Students in Emotional Distress (Nov. 2, 2017), http://www.advocatesforchildren.org/node/1183 [https://perma.cc/UP2U-UC9R] ("Black students accounted for 61.8% of students handcuffed during this type of [emotional distress call] intervention. Students of color [Black or Latinx students] accounted for 100% of students handcuffed at ages 12 and under.").

173. "Special-needs students are disproportionately referred to police in schools, and officers themselves say they need better training." See Kriston Capps, Why Disabled Students Suffer at the Hands of Classroom Cops, City Lab (Oct. 28, 2015), https://www.citylab.com/equity/2015/10/why-disabled-students-suffer-at-the-hands-of-classroom-cops/412723 [https://perma.cc/469G-XMHN]; see also Valerie Strauss, Why Are We Criminalizing Behavior of Children with Disabilities?, Wash. Post (Apr. 25, 2017), https://www.washingtonpost.com/news/answer-sheet/wp/2017/04/25/why-are-we-criminalizing-behavior-of-children-with-disabilities/?utm_term=.c977068bdcaf [https://perma.cc/RV3E-TFHY]; Mark Keierleber, Why So Few School Cops Are Trained to Work with Kids, Atlantic (Nov. 5, 2015), https://www.theatlantic.com/education/archive/2015/11/why-do-most-school-cops-have-no-student-training-requirements/414286 [https://perma.cc/X5W4-6TU5].

in Stockton asked an officer to meet with a five year-old student with disabilities to 'scare him straight'. When the child had a tantrum, the officer zip-tied the child's hands and feet and took him to a mental health facility."[174] Moreover, the wide discretion given to school staff about when to call the police to campus or how to interact with the police exacerbates issues for all children, rendering those with disabilities particularly more vulnerable[175] and revealing the complexities of the web that both constructs and criminalizes some children with disabilities.[176] The growing number of police on campus also raises larger policy issues of whether police presence is actually helpful for students' safety and, particularly for students with disabilities, whether the use of funds for police should instead be spent on an increase in the number of counselors and social workers.[177] Second, alongside heavy presence of school

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174. Nelson et al., supra note 99.

175. "Most school districts give staff complete discretion to call police to address student misbehaviors that should be handled by school staff such as administrators or counselors, including: general school rule violations (62% of districts give staff discretion), bullying and harassment (60.7% of districts give staff discretion), school disruption (57.4% of districts give staff discretion), and vandalism (66.7% of districts give staff discretion or even require reporting to police)." Id.

176. For an account of how this occurs in practice, see Hing, supra note 158.

177. Strauss, supra note 173 ("In Chicago, New York and Houston, for example, there are more school security guards and SROs in schools

resource officers and police in many under-resourced districts, there is a heavy emphasis on zero-tolerance discipline policies resulting in disproportionately high numbers of children with disabilities expelled or suspended.[178]

The underlying pressure for these under-resourced schools is a lack of funding that manifests into a lack of resources.[179] As a result, there

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than there are counselors and social workers. Yet it is counselors and social workers who are needed to address the root causes of the problems causing students, particularly those with disabilities, to act out in schools in the first place.").

178. See supra Part II; see also U.S. GOV'T ACCOUNTABILITY OFFICE, supra note 35 (students with disabilities were disproportionately disciplined (e.g., suspensions and expulsions) in K-12 public schools, even when controlling for type of disciplinary action, level of school poverty, or type of public school attended).

179. Since the enactment of the IDEA, the law has included a commitment to pay forty percent of the average student cost per student for every special education student. The current average per student cost is $7,552 and the average cost per special education student is an additional $9,369 per student, or $16,921. Background of Special Education and the Individuals with Disabilities Education Act (IDEA), NAT'L EDUC. ASS'N, http://www.nea.org/home/19029.htm [https://perma.cc/6F7M-U5DA]; see also Maya Srikrishnan, When It Comes to Special Education in California Schools, "Funding is Very Unequal," VOICE SAN DIEGO (Aug. 10, 2017), https://www.voiceofsandiego.org/topics/education/

are not enough options to educate children with disabilities, especially in places that are less segregated and restrictive.[180] As schools continuously face accountability pressures (test scores, rankings), students with disabilities are also sometimes relegated to "alternative schools" where the education options are limited and the graduation rates are

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comes-special-education-california-schools-funding-unequal [https://perma.cc/QS3F-YWW6] (finding that funding in California is very unequal, with districts with higher needs sometimes receiving less money per student than districts with lower needs). This issue was supposed to be addressed by an effort in 2015 when the California Department of Education began working to create a unified system to elevate the academic success of students with disabilities and low-income students via the "Local Control Funding Formula," which directs additional funds to serve "high needs" students. The goal is to bring special education students into every school district initiative to improve achievement. Local Control Funding Formula Guide, EdSource, https://edsource.org/2016/local-control-funding-formula-guide-lcff/89272 [https://perma.cc/QBS4-SK2E].

[180] By law, students with disabilities under the IDEA should be taught in the least segregated and least restricted environment to ensure ideal learning outcomes. See 20 U.S.C. § 1412(a)(5)(A) (2018); 34 C.F.R. § 300.114 (2018). The debate on segregated learning for students with special education versus inclusion education is beyond the scope of this Article but a worthy and hotly debated issue in education. See generally Arlene Kanter & Beth Ferri, Right Educational Wrongs: Disability Studies in Law and Education (2013).

much lower.[181] Students in these schools often report that they "listen to music the whole time" or cannot "get enough help from teachers when the material [is] confusing."[182] In some of these schools, they are not allowed to participate in after-school activities—no sports, no drama, and no clubs. As a result, students with ED, much like students with other disabilities, are either put in segregated classrooms[183] at their respective schools or transferred from their neighborhood schools into segregated classrooms in substandard buildings where they get minimal therapeu-

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181. A recent investigative article on alternative schools shined a light on this issue, which is increasingly becoming a dumping ground for children with disabilities. See Heather Vogell & Hanna Fresques, "Alternative" Education: Using Charter Schools to Hide Dropouts and Game the System, ProPublica (Feb. 21, 2017), https://www.propublica.org/article/alternative-education-using-charter-schools-hide-dropouts-and-game-system [https://perma.cc/M9AB-XY49] ("[A]lternative schools at times become warehouses where regular schools stow poor performers to avoid being held accountable. Traditional high schools in many states are free to use alternative programs to ride themselves of weak students whose test scores, truancy and risk of dropping out threaten their standing, a ProPublica survey of state policies found.").

182. Id.

183. Simultaneously, the labeling of these same students is too freely used by schools to mark them as deficient, segregating them from regular classrooms. See generally Floyd Weatherspoon, Racial Justice and Equity for African American Males, 29 N.C. Cent. L.J. 29 (2006).

tic support and second-rate educational instruction. In these schools, the expectations are low, the dropout rates are high, and the risk that they will end up in jail is even higher given that dropout rates lead to a higher likelihood of entering the juvenile delinquency system.[184] For students with disabilities, the phenomenon of poor quality and segregated schools is so outrageous and damaging in some places that it has prompted lawsuits and inquiry from the Department of Justice.[185] In these schools, there are minimal resources and therapeutic support.

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184. Dropping out of high school has been correlated with an increase in entering the juvenile justice system, although there are a myriad of factors that are at play. See Andrew Sum et. al., The Consequences of Dropping Out of High School: Joblessness and Jailing for High School Dropouts and the High Cost for Taxpayers (Oct. 2009) (unpublished manuscript), https://repository.library.northeastern.edu/downloads/neu:376324?datastream_id=content (finding that male high school dropouts were forty-seven times more likely to be incarcerated than their similar-aged peers who held a college degree and that relative odds were especially high among Black males compared to White and Asian males). During a 2006 conference on the high school dropout problem in Illinois, then state senate president Emil Jones noted that "[d]ropping out of high school was an apprenticeship for prison." Id. at 11.

185. See Complaint, United States v. Georgia, No. 1:16-cv-03088-ELR (Aug. 23, 2016), https://www.justice.gov/crt/file/887356/download [https://perma.cc/83A9-EQ88]. In this case, the Justice Department sued the State of Georgia alleging that many of the 4600 children who are enrolled

Thus, criminalization for Black and Latinx children happens with untrained police officers in hyper-surveilled schools with heavy handed discipline policies that may lead to suspension, expulsions, and drop-out. It also happens in segregated classrooms with a lack of resources or when they end up in an alternative school and drop out. As a result, students who have been surveilled their entire lives, either because of or despite their disability and/or race, enter the juvenile justice system, thereby reaching the end of the Pipeline.[186]

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in the state-run program for students with disabilities are taught via computer programs and that many go to school in poor-quality facilities once used as schools for Black children during the days of Jim Crow. The lawsuit seeks to force the state to provide students with the services they need in integrated, general-education settings, where they can interact with—and have the same educational opportunities as—their nondisabled peers.

[186.] Sociologist Victor Rios profoundly captures the import of this moment when he describes one such student, Jose, who had been in a highly punitive school environment and policed heavily from a young age and is now in the juvenile justice system. Rios writes, "Criminalization and punishment had accomplished themselves: stigmatizing Jose at a young age, excluding him from productive activities as he matured, brewing a resentment and resistance in him that would lead him deeper into criminalization, marking him with negative credentials, preparing him for prison, and ultimately ingesting him into its punitive carceral abyss." Rios, supra note 15, at 159.

Meanwhile, for students in well-functioning school systems, it is not always ideal,[187] but local schools can usually provide appropriate services for most special-needs children or recognize their inability to do so and refer the student to an appropriate private provider.[188] Central to the success of special

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187. In New York, a growing number of affluent families have successfully sued the city on the grounds that the public schools are so bad for their learning-disabled children that taxpayers should pay to send their children to elite private schools. What exists now—where wealthy parents can send their children to a private schools—is described as a "defector private voucher system that is largely inaccessible to poor families." Epstein, supra note 12. Wealthy parents admit that some schools are mere "warehouses" and "places where they no longer send kids on an academic track . . . . [a]nd they're no longer on a therapeutic track." Id. This unfair system has caused New York thousands of dollars and Mayor Bloomberg pushed back. Elissa Gootman, In Special Education Cases, City Is Fighting Harder Before Paying for Private School, N.Y. Times (Dec. 12, 2007), https://www.nytimes.com/2007/12/12/nyregion/12consultants.html?pagewapage=print&_r=0 [https://perma.cc/9RGV-4NSK].

188. See Megan McArdle, Our Special-Ed System Favors the Rich (and Romney Has a Plan to Fix It), Atlantic (June 1, 2012), https://www.theatlantic.com/business/archive/2012/06/our-special-ed-system-favors-the-rich-and-romney-has-a-plan-to-fix-it/257949 [https://perma.cc/3Y-HK-E8TP]; see also Ramey, supra note 8, at 197 ("Criminalized and medicalized disciplinary policies represent updated approaches to the reproduction of racial and economic social structures in schools.").

education services in all schools is the use of transition plans and services post-high school; with solid plans, students who benefit from special education graduate, pursue higher education, and gain meaningful employment instead of living at home and working low-paying jobs.[189] In turn, students in special education classrooms in high-performing schools with well-funded special education programs, correct and regularly accessed diagnostics, proper services updated as needed, and healthy school environments that reward behavior and do not rely on punitive discipline can be successful.

Conclusion

The discrepancy between well-funded and grossly underfunded schools raises larger policy questions that are outside the scope of this Article but are worth raising; the main red flag this Article raises is the way disabilities are subjectively determined in grossly unequal schools and its impact on Black and Latinx communities. We must fully understand this web that exists in the construction and criminalization of disabilities for Black and Latinx children and the role that schools play in this process in

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189. See Sarah Butrymowicz & Jackie Mader, The "Forgotten" Part of Special Education that Could Lead to Better Outcomes for Students, Hechinger Rep. (Dec. 16, 2017), https://hechingerreport.org/forgotten-part-special-education-lead-better-outcomes-students [https://perma.cc/85QE-Y3SD] (finding that post-high school transition plans were determinative of the outcome of students in special education; moreover, "[e]mployment rates varied considerably by disability" and "[n]early 80 percent of students with learning disabilities had jobs, compared to 45 percent of those with autism and 55 percent of those with an emotional disturbance").

order to effectively address (via laws, policies, and practices) and ultimately end the disproportionate number of children with disabilities who are incarcerated.[190] In doing so, we would move closer to a human-rights-based model of justice where the child's individual needs are front and center.[191]

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190. The complexity of this web is gaining increased recognition. Christina A. Samuels, Schools' Racial Makeup Can Sway Disability Diagnoses, EDUC. WK. (June 11, 2019), https://www.edweek.org/ew/articles/2019/06/12/segregation-sways-disability-diagnoses.html [https://perma.cc/3SE3–6KB6] ("[A] handful of new studies, all published in May, suggest that identifying a child with a disability is linked to a complex set of factors. They include the racial makeup of the school that child attends, the resources available to that school, and even the perception of certain disabilities being more desirable than others."). Understanding the complexity is particularly important given that students with disabilities who end up with juvenile delinquency records are particularly vulnerable to becoming recidivists. See Dalu Zhang et. al., Adolescents with Disabilities in the Juvenile Justice System: Patterns of Recidivism, 77 COUNS. FOR EXCEPTIONAL CHILD. 283 (2011) (suggesting that more research is needed on why students with disabilities have high rights of recidivism; one promising suggestion to curb the tide is implementation of wraparound and family empowerment services).

191. See generally FRANKLIN E. ZIMRING ET AL., JUVENILE JUSTICE IN A GLOBAL PERSPECTIVE (David S. Tenanhaus ed., 2015); Thomas Hammarberg, A Juvenile Justice Approach Built on Human Rights Principals, 8 YOUTH JUST. 193 (2008); see also Bernardine Dorhn, Something's Happening Here: Children and Human Rights Jurisprudence in Two International Courts, 6 NEV. L.J. 749 (2006).