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## Deficit Frame Dangers

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## DEFICIT FRAME DANGERS

**Jonathan P. Feingold\***

### ABSTRACT

*Civil rights advocates have long viewed litigation as an essential, if insufficient, catalyst of social change. In part, it is. But in critical respects that remain underexplored in legal scholarship, civil rights litigation can hinder short- and long-term projects of racial justice.*

*Specifically, certain civil rights doctrines reward plaintiffs for emphasizing community deficits—or what I term a “deficit frame.” Legal doctrine, in other words, invites legal narratives that track, activate, and reinforce pernicious racial stereotypes. This dynamic, even in the context of well-intended litigation, risks entrenching conditions that drive racial inequality—including the conditions that litigation is often intended to address. To concretize the theory, this Article explores how deficit frames can influence the behavior of four key constituencies who impact—and often undermine—the pursuit of educational equality.*

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## INTRODUCTION

In *Civil Rights Catch 22s*,<sup>1</sup> I detail how certain civil rights doctrines reward plaintiffs who deploy narratives that track racial stereotypes and regressive theories of inequality. Educational adequacy claims, in which public school students challenge the substantive conditions of their education, offer a prime example.<sup>2</sup> Under prevailing doctrine, for any chance at success, litigants must establish that they have been deprived a “minimally adequate education.”<sup>3</sup>

This high burden incentivizes plaintiffs to conjure an image of community impoverishment and academic incompetence.<sup>4</sup> Strategic plaintiffs respond in kind. Yet in so doing, they deploy statistics and stories prone to activate and entrench invidious stereotypes about Black and Brown students. The litigation, in other words, can calcify conditions that often drive inequality—even if the plaintiffs prevail.

In *Catch 22s*, I explore this dynamic through *Gary B. v. Whitmer*, a 2016 school financing lawsuit that targeted several of Detroit’s most under-resourced public schools.<sup>5</sup> The litigants, low-income Black and Latino students, claimed that Michigan had deprived them access to “foundational literacy”—that is, the basic ability to read and write.<sup>6</sup> The plaintiffs (and their attorneys) anchored this claim to a litany of anecdotes and data documenting the community’s

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1. See Jonathan Feingold, *Civil Rights Catch 22s*, 43 CARDOZO L. REV. (forthcoming 2022).

2. See *id.*; see also Kimberly Jenkins Robinson, *The Case for A Collaborative Enforcement Model for A Federal Right to Education*, 40 U.C. DAVIS L. REV. 1653, 1668 (2007).

3. Even satisfying this factual showing does not guarantee legal relief. The Supreme Court has held that the U.S. Constitution does not create a general right to education. See *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 29 (1973). Nonetheless, it remains an open question whether “a minimally adequate education is a fundamental right.” See *Papasan v. Allain*, 478 U.S. 265, 285 (1986); see also *Gary B. v. Whitmer*, 957 F.3d 616, 644 (6th Cir. 2020), *vacated*, 958 F.3d 1216 (concluding that the U.S. Constitution guarantees a “minimally adequate education”). In recent cases, plaintiffs, to varying success, have predicated their adequacy claims on this open legal question. Compare *Gary B.*, 957 F.3d at 644, with *A.C. v. Raimondo*, 494 F. Supp. 3d 170, 192 (D.R.I. 2020).

4. See Feingold, *supra* note 1 (outlining high legal and factual hurdles plaintiffs must overcome to prevail on a federal adequacy claim).

5. 957 F.3d at 620–21.

6. *Id.*

academic impoverishment and underachievement.<sup>7</sup> In effect, the *Gary B.* plaintiffs framed themselves and their community through a narrative of poverty and illiteracy.

Given doctrinal demands, this “deficit frame”<sup>8</sup> made sense; in fact, it propelled the plaintiffs to a historic victory before the U.S. Court of Appeals for the Sixth Circuit and a sizable settlement that followed.<sup>9</sup> Yet even if rational and efficacious from a litigation standpoint—and even though the plaintiffs’ victory warranted celebration—the framing posed non-trivial risks. Specifically, by mobilizing a legal narrative that tracks pernicious anti-Black stereotypes, the lawsuit risked entrenching structural and behavioral forces that perpetuate racial inequities in Detroit and beyond. In *Catch 22s*, I surface this threat.<sup>10</sup> Here, to deepen the analysis, I explore how exposure to racialized deficit frames could lead key stakeholders to engage in conduct or adopt policies that hinder educational equality. Specifically, I focus on the following four constituencies: (1) white parents, (2) teachers, (3) voters, and (4) school administrators.

This analysis, which focuses on individual actors, is inherently limited. Nonetheless, I highlight the relationship between legal narratives and stakeholder behavior for two principal reasons. First,

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7. *Id.* at 627–28. To a significant degree, I use the terms “litigants” and “plaintiffs” as a catch-all to capture the various actors that frame affirmative arguments in the course of litigation. This includes the plaintiffs’ attorneys. Although beyond the scope of this Symposium Article, any engagement with legal storytelling surfaces a longstanding debate about the proper role of civil rights attorneys vis-à-vis their clients. This debate includes questions about who is empowered to frame legal narratives and social realities. See generally GERALD LOPEZ, *REBELLIOUS LAWYERING* (1992). Although beyond the scope of this Article, such questions deserve mention—particularly given the race and class gaps that often separate civil rights attorneys and the communities they represent.

8. See Feingold, *supra* note 1 (defining “deficit frame” as storytelling that foregrounds and emphasizes what a group lacks (or is perceived to lack)).

9. See Press Release, Gretchen Whitmer, Gov. of Michigan, Governor Whitmer and Plaintiffs Announce Settlement in Landmark Gary B. Literacy Case (May 14, 2020), [https://www.michigan.gov/whitmer/0,9309,7-387-90499\\_90640-529231—,00.html](https://www.michigan.gov/whitmer/0,9309,7-387-90499_90640-529231—,00.html) [<https://perma.cc/5S7A-YXN7>]. The settlement provided, inter alia, \$280,000 for the named plaintiffs; \$2.72 million for Detroit public schools; and a commitment to seek at least \$94.4 million for literacy-related programs and initiatives. Press Release, *supra*.

10. Feingold, *supra* note 1. See generally Rebecca C. Hetey & Jennifer L. Eberhardt, *Racial Disparities in Incarceration Increase Acceptance of Punitive Policies*, 25 *PSYCH. SCI.* 1949 (2014) (observing that white voters became more supportive of punitive policies after exposure to severe racial disparities).

these stakeholders—through their individual and collective action—have an outsized impact on America’s educational landscape. Second, this analysis illuminates how racial inequality often flows from intersecting individual, structural, and discursive sources. Before turning to this analysis, however, I ground the conversation by briefly reviewing the racial biases literature.

### I. THE BASICS: FROM BIAS TO BEHAVIOR

The extensive research on racial biases is not new to legal scholarship.<sup>11</sup> This review is correspondingly concise.

To begin, a “bias” refers to any number of systemic errors in human judgment or decision-making that deviate from a neutral baseline.<sup>12</sup> Biases pertaining to social categories such as race, gender, or age often comprise one of two constructs: “attitudes” or “stereotypes.”<sup>13</sup>

An attitude is an association between a concept or category and an emotional or evaluative valence—e.g., positive versus negative or like versus dislike.<sup>14</sup> If a person prefers musicians to lawyers, or K-Pop to Alt-Rock, those preferences constitute attitudes. A stereotype, in contrast, refers to an association between a concept or category and a particular trait or characteristic.<sup>15</sup> If a person thinks all

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11. See generally Jerry Kang & Kristin Lane, *Seeing Through Colorblindness: Implicit Bias and the Law*, 58 UCLA L. REV. 465 (2010) (reviewing the literature).

12. Jerry Kang et al., *Implicit Bias in the Courtroom*, 59 UCLA L. REV. 1124, 1128 (2012) (“We suffer from a long litany of biases, most of them having nothing to do with gender, ethnicity, or race.”).

13. *Id.*

14. *Id.* The term “prejudice” is susceptible to multiple meanings, some of which overlap with my use of the term “attitudes.” See Christian S. Crandall & Amy Eshleman, *A Justification–Suppression Model of the Expression and Experience of Prejudice*, 129 PSYCH. BULL. 414, 414 (2003) (“[P]rejudice [is] a negative evaluation of a social group or a negative evaluation of an individual that is significantly based on the individual’s group membership.”).

15. See Kang et al., *supra* note 12, at 1128 n.9 (“If the association is nearly perfect, in that almost every member of the social group has that trait, then we think of the trait less as a stereotype and more as a defining attribute. Typically, when we use the word ‘stereotype,’ the correlation between social group and trait is far from perfect.”); see also Anthony G. Greenwald & Linda Hamilton Krieger, *Implicit Bias: Scientific Foundations*, 94 CALIF. L. REV. 945, 949 (2006).

lawyers are dishonest “ambulance chasers,” or that all musicians are irresponsible, those associations constitute stereotypes.<sup>16</sup>

In recent years, *implicit* biases have garnered increased attention within lay discourse and academic scholarship. Implicit biases refer to attitudes and stereotypes measured through indirect techniques.<sup>17</sup> The most well-known indirect measure is the Implicit Association Test (IAT).<sup>18</sup> In contrast to implicit biases, *explicit* biases comprise attitudes or stereotypes measured through direct techniques.<sup>19</sup> This includes, for example, survey instruments that ask respondents to share opinions about, e.g., different ice cream flavors; social media platforms; or racial groups.<sup>20</sup>

Implicit biases, including those concerning racial groups, are pervasive and consequential.<sup>21</sup> Specifically, implicit biases have been shown to influence human judgment and decision-making across domains, particularly in socially sensitive contexts such as interracial interactions.<sup>22</sup>

So where do these pervasive biases come from? Often, implicit (and explicit) biases derive from vicarious experiences with individuals from racial out-groups.<sup>23</sup> Vicarious experiences refer to

16. See Kang et al., *supra* note 12, at 1128–29. Attitudes and stereotypes do not always align. *Id.* Asian Americans, for example, have been viewed as intelligent and industrious (positive stereotypes), yet subject to public disdain (a negative attitude). *Id.* at 1126. See generally Brian A. Nosek et al., *Pervasiveness and Correlates of Implicit Attitudes and Stereotypes*, 18 EUR. REV. SOC. PSYCH. 36 (2007).

17. See Anthony G. Greenwald & Mahzarin R. Banaji, *The Implicit Revolution: Reconceiving the Relation Between Conscious and Unconscious*, 72 AM. PSYCH. 861, 861–62 (2017).

18. See *id.* at 866.

19. *Id.* at 861.

20. Jerry Kang, *Rethinking Intent and Impact: Some Behavioral Realism About Equal Protection*, 66 ALA. L. REV. 627, 630 (2015).

21. *Id.* at 629–30.

22. See *id.* at 630 (discussing meta-analyses of implicit bias); see also Galen V. Bodenhausen & Kurt Hugenberg, *Attention, Perception, and Social Cognition*, in SOCIAL COGNITION: THE BASIS OF HUMAN INTERACTION 1, 11 (Fritz Strack & Jens Forster eds., 2009) (“In general, social attitudes and expectancies can exert many noteworthy effects on what people perceive and how they perceive it . . .”). See generally Anthony Greenwald et al., *Understanding and Using the Implicit Association Test: III. Meta-Analysis of Predictive Validity*, 97 J. PERSONALITY & SOC. PSYCH. 17 (2009).

23. See Jerry Kang, *Cyber-Race*, 113 HARV. L. REV. 1130, 1166 (2000) (“From youth, we infuse racial categories with meanings based on ‘experiences’ with people mapped to these [racial] categories.”). Biases can also come from direct experiences. *Id.* But given hyper-segregation in the United States, particularly among whites, intergroup interactions are often vicarious. See Michelle

“imagined experiences—both fictional and nonfictional—that are mediated through stories told by parents, teachers, friends, and increasingly by the electronic mass media.”<sup>24</sup> As a result, popular culture—transmitted through traditional mass media, local news, and social media—comprises a potent conduit of racial biases.<sup>25</sup> Civil rights attorneys and litigants, through the legal narratives they disseminate, can influence the racial narratives that circulate within this information ecosystem.<sup>26</sup>

Building on this overview, I now turn to our four featured constituencies. Although a thought experiment of sorts, the following analysis illuminates how well-intended legal narratives can produce perverse effects.

## II. UNINTENDED CONSEQUENCES

### A. “Nice White Parents”<sup>27</sup>: The Neighborhood Profiling Trap

Racial segregation has become an enduring and defining element of American life.<sup>28</sup> Segregation—and housing policy more broadly—

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Wilde Anderson & Victoria C. Plaut, *Property Law: Implicit Bias and the Resilience of Spatial Colorlines*, in *IMPLICIT RACIAL BIAS ACROSS THE LAW* 25, 27 (Justin D. Levinson & Robert J. Smith eds., 2012) (discussing hyper-segregation); Thomas J. Sugrue, *Expert Report of Thomas J. Sugrue*, 5 MICH. J. RACE & L. 261, 265 (1999) (“[F]ew Americans of different racial and ethnic backgrounds interact in a meaningful way on a daily basis.”).

24. Kang, *supra* note 23; see also ROBERT M. ENTMAN & ANDREW ROJECKI, *THE BLACK IMAGE IN THE WHITE MIND: MEDIA AND RACE IN AMERICA* 49 (2000) (suggesting that vicarious exposure to racial out-groups dominates in the construction of mainstream culture); Srividya Ramasubramanian, *Television Viewing, Racial Attitudes, and Policy Preferences: Exploring the Role of Social Identity and Intergroup Emotions in Influencing Support for Affirmative Action*, 77 COMM’N MONOGRAPHS 102, 103 (2010) (“Media messages, along with numerous other factors such as family and friends, play a crucial role in forming and maintaining social stereotypes.”).

25. Cf. Srividya Ramasubramanian, *The Impact of Stereotypical Versus Counterstereotypical Media Exemplars on Racial Attitudes, Causal Attributions, and Support for Affirmative Action*, 38 COMM’N RSCH. 497, 500 (2011) (“Portrayals of race/ethnicity on television not only lead to biased perceptions about *how* racial groups differ from each other along various traits and characteristics, but also offer suggestions for *why* subordinate groups deserve their assigned positions.”).

26. For further analysis concerning the potential for civil rights litigation to impact already pervasive racial biases, see Feingold, *supra* note 1.

27. In July 2020, the *New York Times* released *Nice White Parents*, a podcast that explored the outsized impact well-meaning white parents have had on public education in the United States. See *Introducing: Nice White Parents*, N.Y. TIMES, <https://www.nytimes.com/2020/07/23/podcasts/nice-white-parents-serial.html> [<https://perma.cc/CT95-36JA>] (Dec. 4, 2020).

is also inseparable from an education landscape where race and class often dictate a student's access to well-resourced public schools.<sup>29</sup> This dynamic exists against a historical backdrop in which predominately white communities have hoarded critical resources.<sup>30</sup> The foregoing suggests that reducing racial segregation offers one path to better equalize educational opportunities.<sup>31</sup> We might ask, accordingly, how one would undertake such an effort?

To start, federal law offers little help.<sup>32</sup> As education scholar Erika Wilson summarizes: “the Supreme Court’s remedial school desegregation jurisprudence places the problem of school segregation caused by residential segregation outside the purview of the federal courts’ remedial powers.”<sup>33</sup> In other words, absent a facially discriminatory policy, the Supreme Court has effectively inoculated

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28. See Bodenhausen & Hugenberg, *supra* note 22 and accompanying text; see also Erika K. Wilson, *Leveling Localism and Racial Inequality in Education Through the No Child Left Behind Act Public Choice Provision*, 44 U. MICH. J.L. REFORM 625, 645 (2011).

29. See Thomas Kleven, *Federalizing Public Education*, 55 VILL. L. REV. 369, 394 (2010) (“[D]ue to the demographic differences among local governments, public education in the United States is significantly segregated along class and race lines.”). Although we often conflate race and class segregation, residential segregation in the United States tracks more closely with race than it does class. See Reynolds Farley et al., *Stereotypes and Segregation: Neighborhoods in the Detroit Area*, 100 AM. J. SOCIO. 750, 751 (1994) (“If residential segregation were a matter of income, rich blacks would live with rich whites and poor blacks with poor whites. This does not happen.”).

30. For decades, a host of private and public forces—including the law—have incentivized whites to propagate, live in, and maintain racially exclusionary communities. See generally K-Sue Park, *How Did Redlining Make Money?*, JUST MONEY (Sept. 25, 2020), <https://justmoney.org/k-sue-park-how-did-redlining-make-money> [https://perma.cc/4S4F-YRPG].

31. I am not suggesting that residential integration is, or should be privileged as, the key to greater K–12 educational equality. Nor do I mean to discount how white communities have long engaged in legal and non-legal measures—including harassment and violence—to maintain racially exclusive neighborhoods. See generally JEANNINE BELL, *HATE THY NEIGHBOR: MOVE-IN VIOLENCE AND THE PERSISTENCE OF RACIAL SEGREGATION IN AMERICAN HOUSING* (2013). Nonetheless, I focus on integration because segregation—or more precisely, the erection and maintenance of racially exclusive white spaces—has long fueled educational inequality. See generally Erika K. Wilson, *Monopolizing Whiteness*, 134 HARV. L. REV. 2382 (2021).

32. See Kimberly Jenkins Robinson, *The Case for a Collaborative Enforcement Model for a Federal Right to Education*, 40 U.C. DAVIS L. REV. 1653, 1660–67 (2007) (describing the federal judiciary’s failure to realize effective school desegregation plans); LaToya Baldwin Clark, *Education As Property*, 105 VA. L. REV. 397, 399 (2019) (“Due to *Milliken*, moving children across school district boundaries to equalize education was no longer a viable option.”); Wilson, *supra* note 28, at 628 (“Doctrinally, the . . . federal judiciary is situated such that it cannot adequately address issues of racial and economic inequality in schools.”).

33. Wilson, *supra* note 28, at 649.

racial segregation in our schools and neighborhoods from legal attack.

Recognizing the limits of litigation, an alternative strategy might instead focus on influencing behavior. More precisely, one might try to incentivize upper- and middle-class white parents to desegregate their communities—and thereby make the resources in those communities accessible to all. Among other challenges, pro-white racial biases—explicit and implicit—continue to inform housing preferences contrary to such efforts.<sup>34</sup> This includes the presumption that whiter neighborhoods have better schools—the precise bias that cases like *Gary B.* risk activating and reproducing.<sup>35</sup>

Imagine a white parent in search of her first home.<sup>36</sup> Among other considerations, our parent prioritizes high-quality schools.<sup>37</sup> To gauge options, she spends an afternoon driving through neighborhoods scattered around the city where she lives. As she drives, the parent attends to various environmental cues that signal each neighborhood's socioeconomic make-up. Why care about class? Because even if our parent is not an expert in public school financing, she intuits—correctly—that a wealthier district (with its higher tax base) means more educational resources (relative to poorer districts).

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34. See Sheryll D. Cashin, *Middle-Class Black Suburbs and the State of Integration: A Post-Integrationist Vision for Metropolitan America*, 86 CORNELL L. REV. 729, 737 (2001) (“[B]lacks, like whites, now appear to prefer an integrated neighborhood in which their own group is in the majority.”).

35. See Ann Owens, *Racial Residential Segregation of School-Age Children and Adults: The Role of Schooling As a Segregating Force*, 3 RUSSELL SAGE FOUND. J. SOC. SCI. 63, 77 (2017) (“[W]hite parents seem to avoid living in school districts where black and Hispanic children live, perhaps because they use racial composition as a proxy for neighborhood—and local neighborhood school—quality.”).

36. Although more acute among parents, one might expect a similar decision-making process to extend to nonparents, realtors, and lenders. See WILLIAM A. FISCHER, *THE HOMEVOTER HYPOTHESIS: HOW HOME VALUES INFLUENCE LOCAL GOVERNMENT TAXATION, SCHOOL FINANCE, AND LAND-USE POLICIES* 149–52 (2001) (observing that homeowners without children are likely concerned with local public schools given the expected correlation between school quality and property values).

37. Nicole Stelle Garnett, *Unbundling Homeownership: Regional Reforms from the Inside Out*, 119 YALE L.J. 1904, 1915 (2010) (reviewing LEE ANNE FENNEL, *THE UNBOUNDED HOME: PROPERTY VALUES BEYOND PROPERTY LINES* (2009)) (identifying “high-quality public schools, safe communities, and efficient governmental services” as policies homeowners demand of local government).

Beyond class, our parent might also attend to each neighborhood's racial identity.<sup>38</sup> Why? Because she likely presumes that the whiter the neighborhood, the better the school.<sup>39</sup> If pressed, our parent might explain that she is not prejudiced against the poor or people of color. Really, she would love for her children to attend a “diverse” school, but she prioritizes a high-quality education over all else. It just so happens, she might continue, that money matters and “green follows white.”<sup>40</sup>

In other words, our white parent defends her class- and race-based neighborhood preference as “rational discrimination” driven by an accurate, if unpleasant, empirical backdrop. One can understand this logic as a form of racial profiling—but one that implicates neighborhoods, not individuals. Rather than assess each neighborhood on its own merits, our parent openly employs race and class proxies for school quality.<sup>41</sup> Education scholar Jack Schneider describes the rationale as follows:

Knowing that students of color have long been denied equal educational opportunities, middle-class white parents often shy away from schools with large concentrations of black and brown students. In so doing, they exacerbate segregation, take their high levels of capital elsewhere, and ensure that people like them continue to avoid schools with large populations of color.<sup>42</sup>

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38. See JACK SCHNEIDER, *BEYOND TEST SCORES: A BETTER WAY TO MEASURE SCHOOL QUALITY* 3 (2017) (“Many parents also tend to use race as a proxy for school quality.”).

39. See *id.*

40. Richard Thompson Ford, *Brown's Ghost*, 117 HARV. L. REV. 1305, 1309 (2004) (“The presumption underlying this position is that the politically empowered majority will improve the schools used by the relatively powerless minority if and only if their own children attend those schools as well: ‘green follows white,’ the old motto holds.”).

41. See Maria Krysan et al., *In the Eye of the Beholder: Racial Beliefs and Residential Segregation*, 5 DU BOIS REV.: SOC. SCI. RSCH. ON RACE 1, 16 (2008) (“In the absence of any other information, Whites assume that neighborhoods where Blacks live have less expensive housing, are less safe, are less likely to appreciate in value, and have lower-quality schools than do identical neighborhoods with White residents.”).

42. SCHNEIDER, *supra* note 38; see also Krysan et al., *supra* note 41, at 19 (“Whites avoid Black or

Racial profiling, when framed as *rational* discrimination, often enjoys common-sense appeal. Nonetheless, the empirical case for profiling—not to mention its normative purchase<sup>43</sup>—is fragile at best.<sup>44</sup> At a minimum, our white parent must (a) hold accurate probabilities in her head, and (b) act on those probabilities rationally.<sup>45</sup> Both conditions are dubious. First, even if whiter neighborhoods tend to have higher tax bases,<sup>46</sup> the biases that undergird profiles rarely anchor to precise and accurate base rates.<sup>47</sup> Rather, profiles tend to reflect overbroad generalizations and societal stereotypes. In our hypothetical, for example, prevailing stereotypes are prone to conjure a “typical” Black community defined by “lower-cost homes, poorly performing schools, and considerable [crime] risks.”<sup>48</sup>

Second, even when we possess accurate information in our heads, that knowledge rarely translates to rational behavior or decision-making.<sup>49</sup> Due to a constellation of cognitive biases and heuristics, people tend to interpret information in ways that confirm existing hypotheses or stereotypes.<sup>50</sup> As a result, the profile—and the stereotypes on which it rests—will likely influence our parent’s

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racially mixed neighborhoods . . . because of the negative characteristics associated with those neighborhoods.”).

43. Among myriad moral considerations, racial profiling stigmatizes its targets and departs from the basic commitment to judge individuals by their character, not their color. *See generally* Devon Carbado & Jonathan Feingold, *Whren v. United States*, in *CRITICAL RACE JUDGMENTS* (forthcoming 2022) (discussing racial profiling’s stigmatic harm).

44. Kang & Lane, *supra* note 11, at 514.

45. *Id.* (“The descriptive claim of accuracy itself comprises two sub-claims: We carry accurate probabilities in our heads (the accurate probability data claim), and we act on the basis of those probabilities rationally (the rational processing claim).”).

46. *But see generally* JACK SCHNEIDER ET AL., *SCHOOL INTEGRATION IN MASSACHUSETTS: RACIAL DIVERSITY AND STATE ACCOUNTABILITY* (2020) (questioning the presumption that residential segregation predicts school quality).

47. Kang & Lane, *supra* note 11, at 514 (explaining that profiles often fail to satisfy “at least three different and potentially unrelated accuracy measures”).

48. Krysan et al., *supra* note 41, at 19.

49. *See* Kang & Lane, *supra* note 11, at 516 (“We are, in fact, terrible calculators of probabilities, and our behaviors do not seem rationally tailored to any such computations.”); Ben Grunwald & Jeffrey Fagan, *The End of Intuition-Based High-Crime Areas*, 107 *CALIF. L. REV.* 345, 345 (2019).

50. *See generally* Jonathan P. Feingold & Evelyn R. Carter, *Eyes Wide Open: What Social Science Can Tell Us About the Supreme Court’s Use of Social Science*, 112 *NW. U. L. REV.* 1689 (2018) (discussing how common cognitive biases and heuristics interact with racial stereotypes).

perceptions of school quality even in the face of concrete countervailing evidence.<sup>51</sup> This is even more likely if our parent recently read about litigation—such as *Gary B.*—that emphasized dire educational conditions in Black and Brown communities.<sup>52</sup>

To better illustrate this dynamic, a 2008 study from sociologist Maria Krysan and colleagues exposes how racialized deficit frames could exacerbate neighborhood profiling and thereby entrench racial segregation.<sup>53</sup> For the study, participants viewed one of thirteen brief videos. Each video depicted a neighborhood across one of five socioeconomic tiers and one of three racial compositions.<sup>54</sup> The racial compositions included: all white, all Black, and racially mixed.<sup>55</sup>

Immediately after viewing the video, participants answered several questions. First, participants rated the neighborhood across five characteristics: (a) home costs, (b) property upkeep, (c) safety, (d) future property values, and (e) school quality.<sup>56</sup> Then, to measure explicit racial stereotypes, participants rated whites and Blacks vis-à-vis each of the following statements, each of which implicated a distinct group trait:

- (1) *tend* to be intelligent or *tend* to be unintelligent;
- (2) *tend* to *prefer* to be self-supporting or *tend* to *prefer* to live off welfare;
- (3) *tend* to be involved with street crime or gangs or *tend* to *not* be involved with street crime or gangs; and
- (4) *tend* to do a good job of supervising their children or *tend* to do a bad job of supervising their children.<sup>57</sup>

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51. *Id.*

52. *See generally* Gary B. v. Whitmer, 957 F.3d 616 (6th Cir. 2020); L. Song Richardson & Phillip Atiba Goff, *Self-Defense and the Suspicion Heuristic*, 98 IOWA L. REV. 293, 308 (2012) (discussing the availability heuristic); Amos Tversky & Daniel Kahneman, *Judgment Under Uncertainty: Heuristics and Biases*, 185 SCIENCE 1124, 1127 (1974) (same).

53. *See generally* Krysan et al., *supra* note 41.

54. *Id.* at 12. Socioeconomic tiers included: “lower working class,” “upper working class,” “blemished middle class,” “unblemished middle class,” and “upper middle class.” *Id.*

55. *Id.*

56. *Id.* at 13.

57. *Id.*

As with prior research, (a) participants tended to hold pro-white biases and (b) racial biases predicted neighborhood evaluations.<sup>58</sup> Krysan et al. describe their findings:

[O]ur results are consistent with the notion that neighborhood evaluations are socially constructed. When identical neighborhoods are shown to respondents—and only the race of the residents varies—Whites nevertheless downgrade their evaluations of the features of that neighborhood when there are Black residents.<sup>59</sup>

A statistically significant race effect emerged on four of the five neighborhood traits.<sup>60</sup> This included perceptions of property values and school quality—even when participants encountered concrete evidence that should have countered the prevailing profile.<sup>61</sup> In other words, “neighborhoods with the exact same observable characteristics [were] presumed by Whites to be lower-quality neighborhoods simply because of the race of the residents.”<sup>62</sup>

Notably, self-reported—that is, *explicit*—racial biases mediated neighborhood evaluations.<sup>63</sup> To begin, participants exhibited pro-white biases across the four measured group traits.<sup>64</sup> With respect to general intelligence, for example, over 40% of “Whites said their own race tended to be more intelligent than Blacks.”<sup>65</sup>

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58. *Id.* at 18.

59. Krysan et al., *supra* note 41, at 20.

60. *Id.* at 15.

61. *Id.* at 20.

62. *Id.*

63. *Id.* at 5.

64. *Id.* at 15. This tracks other research. *See, e.g.*, Jason A. Okonofua et al., *A Vicious Cycle: A Social-Psychological Account of Extreme Racial Disparities in School Discipline*, 11 *PERSPS. ON PSYCH. SCI.* 381, 384 (2016) (“Blacks are commonly stereotyped as unintelligent, lazy, hostile, and dangerous.”).

65. Krysan et al., *supra* note 41, at 16–17 (“About the same percentage (44%) endorsed the belief that Blacks were more likely than Whites to ‘prefer to live off welfare.’ The idea that Blacks tend to be more involved in crimes and gangs than Whites was endorsed by over 70% of Whites, and a majority of Whites (54%) also thought that Whites as a race tended to do a better job of raising their children than Blacks.”).

And, critically, bias predicted behavior. Participants with average pro-white bias rated white neighborhoods, relative to otherwise identical Black neighborhoods, 0.36 points higher for safety and 0.30 points higher for school quality.<sup>66</sup> For high prejudice individuals,<sup>67</sup> who exhibited stereotypes one standard deviation above the mean, those gaps jumped to 0.54 and 0.46, respectively.<sup>68</sup> Notably, these differences emerged even in higher-class neighborhoods—that is, neighborhoods where one might expect class cues to overcome underlying presumptions and profiles. The authors describe this dynamic as follows:

[W]hen looking for housing, prospective White residents may be shown by a real estate agent, for example, a Black or racially mixed neighborhood that has many positive features. But these may not be sufficient to overcome their negative predispositions about the neighborhood. This is because the very perception of the features of the neighborhood is colored by the race of its residents.<sup>69</sup>

Before proceeding, it is worth reiterating that individual behavior is neither the only, nor most important variable that drives racial segregation. Still, personal decisions matter. Given the weight homeowners place on school quality, even small gradients in perceived difference can have significant consequences. In the aggregate, individual decisions can reproduce and calcify residential housing patterns that effectively render well-resourced schools inaccessible to students of color. And as Krysan et al. illustrate, this behavior often trades on ostensibly “rational” discrimination more

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66. *Id.* at 17.

67. *Id.* Highly biased participants rated whites “2.1 points ahead of Blacks as a group on each of the [four measured traits].” *Id.*

68. *Id.* at 19 (“We show that those Whites who more frequently endorse negative racial stereotypes were more strongly influenced by the race of residents than those who endorsed fewer of the stereotypes.”).

69. *Id.* at 20.

informed by racial biases than actual neighborhood characteristics.<sup>70</sup> For school financing litigants, this dynamic implicates legal narratives that reduce communities of color to poverty and academic underachievement. Such frames, even if pragmatic from a litigation perspective, can reify the racial logics that fuel neighborhood profiling.<sup>71</sup>

### *B. Teachers: Same Performance, Different Score*

As referenced *supra*, pervasive societal stereotypes often subject Black and Brown communities to presumptions of intellectual inferiority.<sup>72</sup> These pernicious presumptions extend to students as well. Even accepting the prevalence of such negative expectations, one might expect that teachers can overcome their own biases when a student's individual performance contravenes group-based stereotypes. The trouble is, stereotypes and the deleterious expectations they create are harder to escape than we might presume.

When we encounter someone from a stereotyped social category, “characteristics that are associated with the [person’s] group as a whole can be inductively applied to this person.”<sup>73</sup> This occurs automatically and even if we lack any additional information about that individual.<sup>74</sup> Critically, stereotypes do more than conjure default expectations. Those expectations also inform how we perceive, interpret, and even remember an individual and their behavior.<sup>75</sup>

70. *Id.* at 16.

71. See Ramasubramanian, *supra* note 24, at 106 (“Because of the chronic accessibility of racial stereotypes, even subtle racial cues in the media are sufficient to activate racial attitudes that influence decision making without requiring conscious effort.”).

72. See Okonofua et al., *supra* note 64; Jordan G. Starck et al., *Teachers Are People Too: Examining the Racial Bias of Teachers Compared to Other American Adults*, 49 *EDUC. RESEARCHER* 273, 279 (2020). Over 30% of teachers responding to a survey exhibited the belief that Black parents value education less than white parents. Holly Kurtz, *Educators Support Black Lives Matter, but Still Want Police in Schools, Survey Shows*, *EDUC. WEEK: EQUITY & DIVERSITY* (June 25, 2020), <https://www.edweek.org/leadership/educators-support-black-lives-matter-but-still-want-police-in-schools-survey-shows/2020/06> [https://perma.cc/DR6K-LFCP].

73. Galen V. Bodenhausen & Andrew R. Todd, *Social Cognition*, 1 *WILEY INTERDISC. REV.: COGNITIVE SCI.* 160, 164 (2010).

74. See Bodenhausen & Hugenberg, *supra* note 22, at 10.

75. Bodenhausen & Todd, *supra* note 73, at 164–65 (explaining that “stereotypes do not consist

Social psychologists Galen Bodenhausen and Kurt Hugenberg explain this process:

After a target is assigned to a particular category, such as a racial group, general attitudes toward that group create expectancies of positive or negative characteristics that can bias perception of the target's behavior.<sup>76</sup>

Translated to the classroom, racialized expectations about academic competence threaten the basic goal of equal treatment—that is, the simple promise that the same performance will yield the same evaluation.<sup>77</sup> A seminal study from John Darley and Paget Gross is instructive.<sup>78</sup> Darley and Gross examined whether a student's socioeconomic status would affect how evaluators viewed her academic potential.<sup>79</sup> The researchers predicted (a) that the student's perceived class would create negative or positive expectations about her academic ability, and (b) that the prevailing expectation would influence how participants rated the student's academic performance.<sup>80</sup>

To test this hypothesis, Darley and Gross showed participants a videotape of nine-year-old “Hannah,” a white public school student, engaging in several academic tasks.<sup>81</sup> To manipulate expectations, half of the participants learned that Hannah lived in “an urban,

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merely of lists of features possessed by a group” and “stereotypes can bias attention and perception in a number of ways”).

76. Bodenhausen & Hugenberg, *supra* note 22, at 10.

77. By “basic goal of equal treatment,” I mean social category disparate treatment in the “but for” causation sense. See Noah D. Zatz, *Disparate Impact and the Unity of Equality Law*, 97 B.U. L. REV. 1357, 1371 (2017) (“The canonical formulation focuses on causation: ‘treatment of a person in a manner which but for that person’s [race] . . . would be different.’”). I am not suggesting that avoiding “but for” disparate treatment should be *the* goal from an equality standpoint. For reasons that exceed the scope of this Article, such a vision would be both under- and over-inclusive.

78. See generally John M. Darley & Paget H. Gross, *A Hypothesis-Confirming Bias in Labeling Effects*, 44 J. PERSONALITY & SOC. PSYCH. 20 (1983).

79. *Id.* at 20.

80. *Id.* at 22.

81. *Id.* at 23.

low-income area (negative expectancy).”<sup>82</sup> The other half learned that Hannah lived in a “middle-class, suburban setting (positive expectancy).”<sup>83</sup>

After viewing the video, participants rated Hannah across three principal dimensions: ability measures, performance measures, and supplementary academic measures.<sup>84</sup> Ability measures, most relevant here, required participants to identify Hannah’s grade level in reading, mathematics, and liberal arts.<sup>85</sup> Supplementary academic measures required participants to evaluate Hannah across five trait clusters: work habits, motivation, sociability, maturity, and cognitive skills.<sup>86</sup>

To repeat, all participants viewed the *same video* of the *same child* performing the *same tasks*. The only difference was exposure to information about Hannah’s socioeconomic status. This detail mattered; it affected how participants perceived Hannah’s existing competence and potential. Across all measures, “wealthy” Hannah received higher evaluations than “poor” Hannah.<sup>87</sup> In grade level placement, for example, “wealthy” Hannah received mean scores of 4.83, 4.67, and 4.10 in liberal arts, reading, and mathematics, respectively.<sup>88</sup> “Poor” Hannah, in contrast, received corresponding grade placements of 3.79, 3.71, and 3.04.<sup>89</sup> All three gaps, which approached or exceeded a full grade level, reached statistical and practical significance.

As expected, Hannah’s socioeconomic status activated stereotype-laden expectations about Hannah’s academic abilities and potential. Those expectations then shaped how participants interpreted Hannah’s actual performance. This dynamic—which

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82. *Id.* at 22.

83. *Id.*

84. Darley & Gross, *supra* note 78, at 23–24.

85. *Id.* at 24.

86. *Id.*

87. *Id.* at 26 (“On every measure, positive-expectancy subjects made interpretations more favorable to the child than did negative-expectancy subjects.”).

88. *Id.* at 24.

89. *Id.*

tethers stereotypes, expectations, and teacher conduct—implicates racial biases as well. Among other things, it helps explain why Black and Brown students routinely confront unfounded presumptions of intellectual inferiority even when their individual characteristics—from trajectory (e.g., growing up in a middle-class community) to accomplishments (e.g., attending an elite university)—contradict those very presumptions.<sup>90</sup> These presumptions, in turn, render students susceptible to the same biased behavior that “poor” Hannah faced.<sup>91</sup>

A 2014 study by Arin Reeves captures this precise threat.<sup>92</sup> Reeves invited lawyers to participate in what was characterized as a general writing exercise.<sup>93</sup> During the exercise, each participant evaluated a legal memo from a fictional junior associate.<sup>94</sup> All participants received the same legal memo.<sup>95</sup> To manipulate race, half of the participants received a cover letter indicating the memo’s author was “African American”; the other half received a cover letter indicating the memo’s author was “Caucasian.”<sup>96</sup>

Across general and specific criteria, the “Caucasian” memo received more favorable quantitative and qualitative evaluations. On a five-point scale, the “African American” memo received an average score of 3.2; the “Caucasian” memo, in contrast, received a score of 4.1.<sup>97</sup> This disparate treatment transcended general feedback. With respect to spelling and grammar, participants identified an average of

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90. See Feingold & Carter, *supra* note 50, at 1707 (introducing the concept of an “elite student paradigm” to capture the presumption of academic incompetence that follows Black and Brown students).

91. Deirdre M. Bowen, *Brilliant Disguise: An Empirical Analysis of a Social Experiment Banning Affirmative Action*, 85 IND. L.J. 1197, 1199 (2010).

92. See generally ARIN REEVES, NEXTIONS YELLOW PAPER SERIES, WRITTEN IN BLACK & WHITE: EXPLORING CONFIRMATION BIAS IN RACIALIZED EXPECTATIONS OF WRITING SKILLS (2014), <http://nextions.com/wp-content/uploads/2017/05/written-in-black-and-white-yellow-paper-series.pdf> [<http://perma.cc/LMB6-ZBZF>].

93. *Id.* at 3.

94. *Id.*

95. *Id.*

96. *Id.* at 4.

97. *Id.*

5.8 (out of 7.0) total mistakes in the “African American” memo, yet only 2.9 total mistakes in the “Caucasian” memo.<sup>98</sup>

The foregoing studies, albeit limited data points, illustrate how stereotypes can generate expectations that burden students even in the presence of countervailing information. This dynamic implicates the potential downstream consequences of legal narratives that track and reinforce racial stereotypes. Consider, again, *Gary B.*<sup>99</sup> The plaintiffs do not suggest that their dire educational conditions afflict all—or even most—Black and Brown students.<sup>100</sup> On the contrary, they stress the uniquely troubling state of their schools.<sup>101</sup> Nonetheless, by mobilizing a narrative of Black and Brown poverty and academic underachievement, the litigation reproduces racial tropes that rationalize low expectations about Black and Brown students.<sup>102</sup> These expectations, in turn, render teachers more likely to discriminate against their own Black and Brown students—regardless of the students’ connection (or lack thereof) to *Gary B.*

### C. Voters: When Racial Disparities Beget Regressive Policies

In *Catch 22s*, I note that school financing doctrine—among other areas of civil rights law—is not the only force that motivates racial justice advocates to employ deficit frames.<sup>103</sup> Conventional wisdom

98. REEVES, *supra* note 92.

99. See generally *Gary B. v. Whitmer*, 957 F.3d 616 (6th Cir. 2020).

100. *Id.*

101. See Christopher Peak & Emily Hanford, *In Gary B. v. Snyder, a Federal Court Rules Giving Children a Chance at Literacy Is a Constitutional Right*, HECHINGER REP. (Apr. 30, 2020), <https://hechingerreport.org/in-gary-b-v-snyder-a-federal-court-rules-giving-children-a-chance-at-literacy-is-a-constitutional-right/> [<https://perma.cc/KVF9-HBLH>] (“Evan Caminker, a law professor and former dean at the University of Michigan law school who worked on the case, said that *Gary B. v. Snyder* was ‘surgically precise’ in seeking remedies for kids in ‘the worst of the worst schools. This lawsuit is not designed to cure all evil, so to speak. This lawsuit is designed to show that there are particular pockets, where we would say it’s not just that the kids are not becoming literate; it’s that they don’t have the opportunity to become literate,’ he said.”).

102. See Devon W. Carbado et al., *Privileged or Mismatched: The Lose-Lose Position of African Americans in the Affirmative Action Debate*, 64 UCLA L. REV. DISCOURSE 174, 177 (2016) (“That the mismatch theory at least implicitly relies on longstanding ‘reasonable doubt’ about black intellectual competence and capacity makes it all the more important that scholars and policymakers carefully examine the empirical basis for the theory.”).

103. See Feingold, *supra* note 1.

is also at play. Specifically, many on the Left presume that “bombarding the public with images and statistics documenting the plight of minorities will motivate people to fight inequality.”<sup>104</sup> I appreciate the logic. The trouble is, recent research from social psychologists Rebecca Hetey and Jennifer Eberhardt paints a sobering picture.<sup>105</sup> Across two studies, rather than galvanize public support for reform, exposing whites “to a world with extreme racial stratification increase[d] their support for the policies that help to maintain that stratification.”<sup>106</sup>

In one of the studies,<sup>107</sup> Hetey and Eberhardt explored whether exposure to more extreme racial disparities would alter public support for New York City’s stop-and-frisk policy.<sup>108</sup> Study participants, who were white, received demographic information about New York’s inmate population.<sup>109</sup> In the “less-Black” condition, participants read that the prison population was 40.3% Black.<sup>110</sup> In the “more-Black” condition, participants read that the prison population was 60.3% Black.<sup>111</sup> Across conditions, participants learned that a judge had recently ruled that the stop-and-frisk policy was unconstitutional and that the City was appealing.<sup>112</sup> After receiving this information, participants answered several questions about the policy and crime more broadly.<sup>113</sup>

To conclude the study, participants were shown a sample petition to end stop-and-frisk and asked the following question: “If you had been approached by someone and asked to sign a petition like the one

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104. Hetey & Eberhardt, *supra* note 10, at 1952.

105. *Id.* at 1950 (observing that white support for punitive policies increased after exposure to more severe racial disparities).

106. *Id.*

107. *See id.* (describing a companion study employed a similar format but targeted white California residents).

108. *Id.* at 1951.

109. *Id.*

110. Hetey & Eberhardt, *supra* note 10, at 1951 (this number approximated the percentage of Black inmates in the United States).

111. *Id.* (this number approximated the percentage of Black inmates in New York City correctional facilities).

112. *Id.*

113. *Id.*

you just read, would you have signed it?”<sup>114</sup> Participants could answer “yes” or “no.”<sup>115</sup>

Consistent with a companion study, participants in the “more-Black” condition were “significantly less willing” to support reform.<sup>116</sup> In other words, exposure to higher racial disparities increased support for a regressive policy—even when participants viewed that policy as punitive.<sup>117</sup> For the studies’ authors, this prompted the following question: What was driving an effect that seemed to contradict conventional wisdom?

A dynamic between racial disparities and racial stereotypes provided an answer. To begin, Hetey and Eberhardt discovered that participants in the “more-Black” condition “were significantly more concerned about crime.”<sup>118</sup> As fear of crime increased, participants became less willing to sign a petition to end stop-and-frisk.<sup>119</sup> As the authors’ explain:

[E]xposing people to extreme racial disparities in the prison population heightened their fear of crime and increased acceptance of the very policies that lead to those disparities. Thus, institutionalized disparities can be self-perpetuating.<sup>120</sup>

Albeit dispiriting, this finding tracks empirical scholarship on the phenomenon of racial priming.<sup>121</sup> Priming occurs when exposure to

114. *Id.*

115. *Id.*

116. Hetey & Eberhardt, *supra* note 10, at 1952. Thirty-three percent of participants in the “less-Black” condition would have signed the petition. This number dropped to 12% in the “more-Black” condition. *Id.*

117. *Id.* (noting that this effect was significant and remained regardless of a participant’s views concerning the policy’s punitiveness).

118. *Id.*

119. *Id.*

120. *Id.*

121. Payne et al., *Best Laid Plans: Effects of Goals on Accessibility Bias and Cognitive Control in Race-Based Misperceptions of Weapons*, 38 J. EXPERIMENTAL SOC. PSYCH. 384, 384 (2002). Priming can occur through exposure to characteristics associated with a social category. See Jennifer L. Eberhardt et al., *Seeing Black: Race, Crime, and Visual Processing*, 87 J. PERSONALITY & SOC. PSYCH.

racial cues activates group-based stereotypes—such as the association between blackness and criminality.<sup>122</sup> Priming occurs automatically and beyond our conscious awareness.<sup>123</sup> Once activated, the relevant stereotype “increases the likelihood that the knowledge contained in the stereotype will be used in subsequent judgments.”<sup>124</sup> In other words, when race is made salient, perceivers are more likely to interpret information in ways that confirm related racial stereotypes.<sup>125</sup>

Translated to the Hetey and Eberhardt study, the bare “evidence of racial disparities in the criminal justice system” appears to have “activate[d] [or heightened] implicit stereotypical associations linking blackness with crime, violence, threat, and aggression.”<sup>126</sup> For participants in the “more-Black” condition, exposure to greater racial inequity rendered the association more salient. Participants, in turn, exhibited greater fear of crime and less support for reform.<sup>127</sup> Moreover, as the authors explain, if evidence of racial inequality “triggers the stereotype that Blacks are criminals and criminals are Black, then such information is no longer concerning on its face.”<sup>128</sup> In other words, beyond heightening crime concerns, the Black-crime

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876, 876–81 (2004) (noting, for example, that a story about crime can trigger racial stereotypes associated with blackness).

122. See Robert J. Smith et al., *Implicit White Favoritism in the Criminal Justice System*, 66 ALA. L. REV. 871, 879 (2015) (“Priming seeks to assess whether and to what degree exposure to a concept or object (e.g., a black face) automatically activates stereotypes (e.g., ‘black people are hostile’) or shapes stereotype-congruent responses to race-neutral prompts (e.g., rating an ambiguous shove as more aggressive).”).

123. Travis L. Dixon, *Psychological Reactions to Crime News Portrayals of Black Criminals: Understanding the Moderating Roles of Prior News Viewing and Stereotype Endorsement*, 73 COMM’N MONOGRAPHS 162, 164 (2006).

124. *Id.* at 166.

125. See Bodenhausen & Hugenberg *supra* note 22, at 3 (“[N]ot all stimuli in the perceptual field receive equal attention; instead, some stimuli are selected for relatively intense scrutiny, making them more likely to reach the threshold of awareness, while others are processed only superficially, receiving little of our precious attention.”).

126. Rebecca C. Hetey & Jennifer L. Eberhardt, *The Numbers Don’t Speak for Themselves: Racial Disparities and the Persistence of Inequality in the Criminal Justice System*, 27 CURRENT DIRECTIONS PSYCH. SCI. 183, 185 (2018); see also Dixon, *supra* note 123, at 167 (“Previous research suggests that crime news featuring more African Americans than Whites could lead to the activation and use of a ‘Black criminal’ stereotype.”).

127. Hetey & Eberhardt, *supra* note 10, at 1952.

128. Hetey & Eberhardt, *supra* note 126.

association—when salient—rationalizes racial inequality as the product of group-based pathologies or predispositions, not environmental forces that render certain people more vulnerable to state violence.<sup>129</sup>

To summarize, Hetey and Eberhardt illuminate how exposure to racial disparities can (a) activate anti-Black stereotypes, which thereby (b) entrench white support for the status quo.<sup>130</sup> These studies focused on the intersection of race and crime. For multiple reasons, one might expect similar backlash to across domains laden with anti-Black bias and contemporary disparities.

This includes higher education. One might expect, for example, a parallel phenomenon to impact public perceptions of, and support for, racial affirmative action in university admissions.

To begin, recall the pathway observed *supra*: (1) individuals are exposed to racial disparities; (2) those disparities activate domain-relevant racial stereotypes (the greater the disparity, the more salient the stereotype); and (3) participants become more likely to rationalize the status quo and less likely to support reform. Against this backdrop, we can pivot from the domain of crime to education. To do so, we shift two key details. First, rather than exposing participants to racially disparate prison populations, we expose them to racially disparate admissions statistics. Second, rather than invite participants to support a specific criminal justice reform (e.g., eliminating “stop-and-frisk”), we invite them to support a specific education reform (e.g., race-conscious admissions).

Racial stereotypes pervade the domain of education. The association between blackness and intellectual inferiority, for example, “has long been an important part of the social transcript of American life.”<sup>131</sup> For decades, this stereotype—alongside other

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129. *Id.* at 184 (“An alternative interpretation is that members of particular racial groups must be doing something—namely committing crime—to capture the attention of police and be imprisoned at higher rates. By focusing on group traits [e.g., over-incarceration], the possibility that structural bias is at play in creating disparities falls out of view.”).

130. *Id.*; see also Hetey & Eberhardt, *supra* note 10.

131. Carbado et al., *supra* note 102 (“Indeed, perhaps the only thing easier in the United States, racially speaking, than questioning black intellectual ability is associating African Americans with

anti-Black biases—has underwritten our national affirmative action discourse.<sup>132</sup> Consider dominant affirmative action positions from the Right and the Left; both defenders and opponents of race-conscious admissions routinely assume that such practices confer a “racial preference” on their beneficiaries.<sup>133</sup> Critical Race Theorists have long resisted this framing by highlighting how racial affirmative action is often needed to counter race- and class-based advantages embedded within standard admissions regimes.<sup>134</sup> Nonetheless, the dominant framing that positions “presumptively unqualified” Blacks against “innocent and meritorious” whites continues to pervade lay and legal discourse.<sup>135</sup> In other words, dominant discourse from both sides of the affirmative action debate presume Black intellectual inferiority.

Drawing on Hetey and Eberhardt, imagine a study that invites participants to sign a petition to reinstate racial affirmative action in their state.<sup>136</sup> How might exposure to extreme racial admission gaps affect participant behavior? To begin, exposure to disparities could activate (or heighten) pervasive anti-Black stereotypes such as intellectual incompetence and laziness.<sup>137</sup> The now-primed stereotypes, in turn, could render participants more likely to expect

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crime.”).

132. *See id.*

133. *Id.* at 188 (“Both conservatives and liberals regularly refer to affirmative action as a thumb on the scale and both conceptualize the policy as a preference. As noted earlier, the basic difference between conservative and liberal positions on affirmative action is that whereas liberals believe that the costs of affirmative action are outweighed by the benefits (including diversity), conservatives perceive the costs of the policy (including “reverse discrimination”) to be too high.”). For an early rebuke of this “preference” frame, see Luke Charles Harris & Uma Narayan, *Affirmative Action and the Myth of Preferential Treatment: A Transformative Critique of the Terms of the Affirmative Action Debate*, 11 HARV. BLACKLETTER L.J. 1, 4 (1994).

134. *See* Carbado et al., *supra* note 102.

135. *Id.* (“Cheryl Harris has suggested that the reason arguments about mismatch are almost always rehearsed with reference to African Americans is because the mismatch thesis aligns with preexisting notions of black intellectual deficit.”).

136. In November 2020, California voters rejected a ballot measure that would have permitted the state to reinstate racial affirmative action in university admissions, among other contexts. *See* Janie Har, *Politically Liberal California Rejects Affirmative Action*, AP NEWS (Nov. 4, 2020), <https://apnews.com/article/race-and-ethnicity-campaigns-san-francisco-college-admissions-california-4c56c600c86f37289e435be85695872a> [<https://perma.cc/A7VY-NN8D>].

137. *See* Ramasubramanian, *supra* note 25, at 507.

and rationalize disparities, which they might attribute to neutral market forces that reward academic merit and effort—not a biased admissions regime that rewards inherited race and class advantage.<sup>138</sup> Accordingly, one might expect these participants to grow more hostile to affirmative action—which they see as contrary to basic commitments to neutrality and meritocracy.<sup>139</sup>

This pathway, which begins with exposure to racial inequality and ends with antipathy toward affirmative action, is largely theoretical. But it is not without empirical support. Consider a 2011 study from Professor Srividya Ramasubramanian.<sup>140</sup> Professor Ramasubramanian had two principal inquiries. First, she asked whether “internal attributions for out-group failures” would mediate support for affirmative action.<sup>141</sup> Second, she asked whether exposure to stereotypical versus counterstereotypical exemplars would influence how participants viewed racial achievement gaps.<sup>142</sup>

The study proceeded as follows. Roughly 350 white undergraduates viewed images of counterstereotypical or stereotypical Black media characters.<sup>143</sup> Participants then completed a series of tasks to measure (a) racial stereotypes, (b) explanations for out-group failure, and (c) support for affirmative action.<sup>144</sup>

Consistent with prior scholarship, “[s]tereotypical beliefs regarding African American criminality and laziness were fairly high.”<sup>145</sup> Even here, the condition mattered. Participants in the

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138. See generally Jonathan Feingold, *'All (Poor) Lives Matter': How Class-Not-Race Logic Reinscribes Race and Class Privilege*, 2020 U. CHI. L. REV. ONLINE 47 (2020) (explaining how wealthy white applicants tend to receive unearned race and class advantages from facially race-neutral admissions criteria).

139. For a forceful argument that affirmative action is often necessary to mitigate race and class privileges baked into standard admissions processes, see Devon W. Carbado, *Footnote 43: Recovering Justice Powell's Anti-Preference Framing of Affirmative Action*, 53 U.C. DAVIS L. REV. 1117, 1121–22 (2019).

140. See Ramasubramanian, *supra* note 25, at 507.

141. *Id.* at 498.

142. *Id.*

143. *Id.* at 504 (noting that although an imperfect fit, the stereotypical exemplar arguably maps onto the “more-Black” condition from the Hetey and Eberhardt study and that both render domain-relevant stereotypes more salient).

144. *Id.*

145. *Id.* at 507.

stereotypical condition exhibited stronger anti-Black stereotypes than those in the counterstereotypical condition.<sup>146</sup> Heightened stereotypical beliefs, in turn, “led to internal attributions for failures of African Americans, increased prejudicial feelings toward African Americans, and ultimately reduced support for affirmative action policies.”<sup>147</sup>

Notably, the “statistically significant, direct relationship between stereotypical beliefs and support for affirmative action policies . . . became nonsignificant when ‘[i]nternal causes for out-group failures’ was included as a mediating variable.”<sup>148</sup> In other words, participants who embraced *internal* theories of inequality (e.g., personal disposition or cultural deficiency) were less likely to support affirmative action than those who embraced *external* theories of inequality (e.g., unequal access to social capital).<sup>149</sup> And, critically, participants were more likely to embrace internal theories if they viewed a stereotypical media character.

To be clear, the foregoing studies do not, in themselves, prove that exposure to academic achievement gaps will suppress support for affirmative action. Still, the social science suggests that the risk is real and reaffirms the power of stereotypes to shape behavior.<sup>150</sup> In so doing, the studies expose how racialized deficit frames can thwart antiracist reform by entrenching support for the status quo.<sup>151</sup>

Now, to conclude, I turn to a final stakeholder: administrators.

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146. Ramasubramanian, *supra* note 25, at 508. This effect reached statistical significance for laziness. *Id.* (“[Participants] exposed to negative out-group exemplars (M = 4.89, SD = 0.063) were significantly more likely than those exposed to positive out-group exemplars (M = 4.63, SD = 0.080) to report stereotypical beliefs about African Americans as lazy . . .”).

147. *Id.*

148. *Id.* at 509. Albeit “quite low” across all conditions, support for affirmative action “was significantly and negatively correlated with stereotypical beliefs, individual attributions, and prejudicial feelings.” *Id.* at 507. Notably, participants “exposed to counterstereotypical exemplars reported more support [for affirmative action] than those in the stereotypical condition but these differences did not attain statistical significance.” *Id.* at 507.

149. *Id.* at 507.

150. *Id.* at 510 (“[The] [f]indings support the notion that media characters activate stereotypes of African Americans among White audiences . . .”).

151. *Id.* (“[T]he findings . . . could be similarly interpreted to mean that negative media characters increase negative stereotypical beliefs, internal attributions, and lack of pro-minority policy support.”).

*D. Administrators: Misdiagnosing Institutional Deficiencies as Student Deficiencies*

Administrators enjoy unique power to shape equal learning environments. To appreciate how deficit frames that foreground poverty and illiteracy could compromise such efforts, consider the following hypothetical.

Imagine a well-resourced public high school. The school boasts a wealth of economic resources and a team of dedicated teachers, administrative staff, and senior leaders. The student body is predominately white. Last year, following nationwide racial justice protests, a coalition of students and parents challenged the school to prioritize diversity and inclusion. In response, the Dean appointed a committee to identify areas of concern and corresponding prescriptions. Through its work, the committee discovers that, on average, Black students receive lower grades than their white peers. Armed with the data, the committee begins drafting recommendations designed to close this achievement gap.

Just as the drafting commences, national attention turns to a high-profile school financing lawsuit. The suit features low-income Black and Brown students who are challenging educational conditions in their primary and secondary schools. As in *Gary B.*, the plaintiffs frame the case through a narrative that emphasizes student underachievement and community plight.<sup>152</sup> We could ask, accordingly, how exposure to this framing might inform the committee's response to racial disparities at its school?

To begin, the litigation mobilizes a narrative that tracks pervasive and pernicious stereotypes about Black and Brown students and the communities in which they live. Exposure to the litigation, accordingly, could prime those very stereotypes for committee members.<sup>153</sup> Once activated, the stereotypes are more likely to shape

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152. See generally *Gary B. v. Whitmer*, 957 F.3d 616 (6th Cir. 2020).

153. Even without the litigation, committee members could interpret the performance data as evidence supporting pre-existing racialized presumptions about academic competence—presumptions that trade on anti-Black stereotypes. See Ramasubramanian, *supra* note 25, at 506.

how the committee interprets its school's own racial disparities—even if its students have no connection to the lawsuit. Moreover, the committee might adopt internal causal theories (e.g., student deficiencies) to explain the observed gap.<sup>154</sup> In other words, when achievement gaps are viewed through a stereotype-laden lens, the committee is more likely to attribute those disparities to actual and expected differences in ability, preparation, and motivation—not, for example, teacher bias or environmental forces that uniquely tax students of color.<sup>155</sup>

Further, a cognitive bias known as the “ultimate attribution error” could amplify this dynamic for white committee members.<sup>156</sup> This well-studied bias leads people to “view negative attributes of outgroups as stable, fixed, and dispositional.”<sup>157</sup> In contrast, negative traits or outcomes associated with ingroup members “are viewed as malleable, contingent, and a result of environment or bad luck.”<sup>158</sup> With respect to positive traits, the reverse occurs.<sup>159</sup>

In effect, exposure to litigation that deploys a narrative of Black and Brown academic underachievement could trigger a social-cognition cocktail that leads committee members to: (a) expect Black and Brown students to underperform relative to their peers and (b) identify student deficits as the cause.<sup>160</sup> A corresponding

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154. See *id.* Standard causal theories fall into one of two categories: internal explanations or external explanations. See Mark Peffley & Jon Hurwitz, *Persuasion and Resistance: Race and the Death Penalty in America*, 51 AM. J. POL. SCI. 996, 999 (2007) (noting that internal explanations attribute disparities to individual or group-based traits while external explanations attribute inequality to situational or environmental factors).

155. See Jonathan P. Feingold, *Hidden in Plain Sight: A More Compelling Case for Diversity*, 2019 UTAH L. REV. 59, 65 (discussing how students of color often confront uneven conditions within predominately white institutions).

156. See Thomas F. Pettigrew, *The Ultimate Attribution Error: Extending Allport's Cognitive Analysis of Prejudice*, 5 PERSONALITY & SOC. PSYCH. BULL. 461, 461 (1979).

157. Kang & Lane, *supra* note 11, at 516 (describing “motivations to justify the self and the groups we belong to slant how we use or fail to use base-rate information”); see also Eric Luis Uhlmann et al., *The Motivated Use and Neglect of Base Rates*, 30 BEHAV. & BRAIN SCI. 284, 285 (2007).

158. Kang & Lane, *supra* note 11, at 516; see also Okonofua et al., *supra* note 64 (noting that “associations can alter . . . attributions about misbehavior and result in harsher punishment decisions” and finding that “teachers were more likely to label a misbehaving Black middle school student as a troublemaker than they were a misbehaving White middle school student”).

159. Kang & Lane, *supra* note 11, at 516.

160. Cf. Feingold & Carter, *supra* note 50, at 1708 (describing how an “elite student paradigm”

prescription, in turn, might prioritize individualized remedial efforts designed to improve the academic skills of “damaged” Black and Brown students.<sup>161</sup>

This recommendation, which presupposes deficient students, is as significant for what it prescribes as for what it omits. When the problem is defined as “unprepared” or “unmotivated” students, administrators tend to overlook the myriad environmental forces that often subject Black and Brown students to identity-contingent headwinds that their white counterparts never face. Accordingly, by defaulting to perceived student shortcomings, the committee may misdiagnose institutional deficiencies (that is, the failure to provide an equal learning environment) as student deficiencies (that is, insufficient preparation or motivation).<sup>162</sup>

The point is not that institutional deficiencies, alone, explain *all* racial gaps *all* the time. But far too often, administrators fail to even consider whether disparities derive, even in part, from environmental forces that uniquely burden certain students because of their racial identity.<sup>163</sup> As a result, institutions invite a vicious feedback loop. To begin, existing institutional environments subject students of color to identity-contingent headwinds. Those headwinds produce or exacerbate racial achievement gaps. The achievement gaps activate and reinforce racialized presumptions of incompetence. Administrators, in turn, target individualized remedies instead of

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“renders Black students perpetual outsiders to the elite institution”).

161. See Luke Charles Harris, *Beyond the Best Black: The Making of a Critical Race Theorist at Yale Law School*, 43 CONN. L. REV. 1379, 1403 (2011) (“The focus of our concern would shift from a story about damaged individuals to a story about damaged institutions . . .”).

162. Cf. Rosalee A. Clawson & Rakuya Trice, *Poverty As We Know It*, 64 PUB. OP. Q. 53, 61 (2000) (“Thus, if attitudes on poverty-related issues are driven by inaccurate and stereotypical portrayals of the poor, then the policies favored by the public (and political elites) may not adequately address the true problems of poverty.”).

163. See Feingold, *supra* note 155 (discussing how environmental forces can compromise students’ rights to “equal university membership”).

structural interventions necessary to create an environment in which every student is positioned to thrive.<sup>164</sup> Wash and repeat.

#### CONCLUSION

In this Article, my goal has been to concretize the deficit frame dangers I surfaced in *Catch 22s*.<sup>165</sup> The examples included herein are illustrative, not exhaustive. And in many respects, the theory remains provisional. Nonetheless, these examples expose how well-meaning litigation and legal narratives can compromise near- and long-term projects of racial equality across educational domains. Above all, I hope to spark further conversation concerning the relationship between racial narratives—whether arising in litigation or elsewhere—and conditions that continue to hinder meaningful racial reform.

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164. See generally Stacy Hawkins, *Reverse Integration: Centering HBCUs in the Fight for Educational Equality*, 24 U. PA. J.L. & SOC. CHANGE 351 (2021) (comparing the overwhelming success of HBCUs to successfully train and educate Black students to the consistent failure of predominately white institutions).

165. See Feingold, *supra* note 1.