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By Lizette Rodriguez*

I. INTRODUCTION

From Trayvon Martin[1] to Stephan Clark,[2] news headlines plague the United States to constantly remind Americans that colored children do not get the benefit of the doubt in encounters with authority figures—that somehow a person's skin color skin influences the probability of his culpability.[3] In fact, after analyzing available FBI data, reporter Dara Lind found that "[American] police kill black people at disproportionate rates: [b]lack people accounted for 31% of police killing victims in 2012" while they only accounted for 13% of the American population.[4] Moreover, a *Guardian* study of police killings in 2015 found that racial minorities constitute

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[1] *Trayvon Martin Biography*, BIOGRAPHY, https://www.biography.com/people/trayvon-martin-21283721 (last visited Jan. 24, 2019). On February 26, 2012, seventeen-year-old Trayvon Martin was walking home from buying snacks when George Zimmerman, an armed neighborhood watch volunteer, shot and killed him. *Id.* Zimmerman alerted the police when he saw Martin walking home, claiming that Martin was a suspicious individual. *Id.* After being told not to confront Martin, Zimmerman decided to pursue Martin without identifying himself as a part of the community watch. *Id.* Zimmerman's pursuit ended with the unarmed teenager being shot in the chest less than a hundred yards from the door of his home. *Id.* Zimmerman was later charged with second-degree murder, but was acquitted of all charges by the jury.

[2] Jelani Cobb, *Stephan Clark and the Shooting of Black Men, Armed and Unarmed*, THE NEW YORKER (Apr. 5, 2018), https://www.newyorker.com/news/daily-comment/stephon-clark-and-the-shooting-of-black-men-armed-and-unarmed. On the night of March 18, 2018, police officers shot and killed Stephon Clark in his grandmother's backyard. *Id.* The police were responding to a call that someone was vandalizing the area when they saw Clark in his grandmother's dark backyard and began their pursuit. *Id.* When a police officer shouted that Clark had a gun, they started shooting. *Id.* Clark was shot eight times and died on the scene. *Id.* There was no evidence of Clark having a gun on him, only a cell phone. *Id.*

[3] German Lopez, *There are huge racial disparities in how US police use force*, VOX (Nov. 14, 2018, 4:12 PM), https://www.vox.com/identities/2016/8/13/17938186/police-shootings-killings-racism-racial-disparities; Dara Lind, *The FBI is trying to get better data on police killings. Here's what we know now*, VOX (Apr. 10, 2015, 10:31 AM), https://www.vox.com/2014/8/21/6051043/how-many-people-killed-police-statistics-homicide-official-black.

[4] Lopez, *supra* note 3; Lind, *supra* note 3.

46.6% of the American population, but represented 62.7% of unarmed people police killed.[5] After the killings of several unarmed black men, the "Black Lives Matter" movement took shape to "build local power and to intervene in violence inflicted on Black communities by the state and vigilantes."[6]

As crucial as it is to bring attention to these incidents and demand change, it is almost equally important to dig deeper into the issue and see that students of color[7] are being disproportionately punished in the classroom as well.[8] It is a gross over-simplification to presume that the racial disparity in public school discipline trends is a result of students of color simply being more troublesome. However, calling it discrimination does not make it so. In the legal realm, there is a remedy for discrimination.[9] Traditionally, to

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[5] Lopez, *supra* note 3. These statistics include deaths that resulted from the police's use of tasers, police vehicles, deaths following altercations in police custody, and when officers used their guns. Jon Swaine, Oliver Laughland & Jamiles Lartey, *Black Americans killed by police twice as likely to be unarmed as white people*, THE GUARDIAN (June 1, 2015, 8:38 AM), https://www.theguardian.com/us-news/2015/jun/01/black-americans-killed-by-police-analysis.

[6] *About*, BLACK LIVES MATTER, https://blacklivesmatter.com/about/ (last visited Feb. 1, 2019).

[7] The term "students of color" in this refers to African-Americans and Hispanics. Although Asians are also a minority, they are not as prominent in racial disparities in school discipline. *See generally* Bach Mai Dolly Nguyen, Pedro Noguera, Nathan Adkins & Robert T. Teranishi, *Ethnic Discipline Gap: Unseen Dimensions of Racial Disproportionality in School Discipline*, 20 AM. EDUC. RES. J. 1, 1-29 (2019).

[8] "The Department of Justice and Department of Education announced today what we have known to be true for a long time: yes, race discrimination in school discipline is a real problem." Deborah Vagins, *Is Race Discrimination in School Discipline a Real Problem?*, ACLU (Jan. 8, 2014), https://www.aclu.org/blog/racial-justice/race-and-inequality-education/race-discrimination-school-discipline-real-problem. This paper will not discuss the school-to-prison pipeline theory, but it is worth mentioning that there is a serious concurrence with how children of color are viewed in America when it comes to discipline, punishment, and culpability—inside or outside of the classroom. *School-to-Prison Pipeline*, ACLU, https://www.aclu.org/issues/juvenile-justice/school-prison-pipeline (last visited Feb. 1, 2019). The school-to-prison-pipeline theory argues that children of color are disproportionately funneled out of public schools and into juvenile and criminal justice systems due to reasons including underfunded schools, zero-tolerance, and other school discipline policies that remove children from school grounds. *Id.*

[9] *Civil Rights*, CORNELL L. SCH., https://www.law.cornell.edu/wex/civil_rights (last visited Oct. 30, 2018); *see generally What Remedies are There for Employment Discrimination Cases?*, LEGALMATCH, https://www.legalmatch.com/law-library/article/remedies-for-employment-discrimination.html (last visited Oct. 30, 2019).

establish that someone has engaged in discriminatory practices, the accuser must demonstrate that the person intended to be discriminatory.[10] This article will discuss this notion in detail.

According to the Equal Protection Clause, to pursue a legal remedy for this prominent racial disparity in school discipline, the plaintiff must be able to show that the school officials intended to discriminate against students of color.[11] In this day and age, people are not openly declaring that their actions are a result of racial discrimination, making this a difficult standard to meet.[12] Therefore, this article attempts to distinguish what legal remedies are available to the children affected and what the Department of Education can do to address the issues that the law cannot.[13]

Section I considers the evolution of education in the United States and how American society dealt with racial discrimination in public schools in the past, and how those facts and decisions differ from the issues that students of color are facing today.[14] Section II explains the Equal Protection Clause (EPC) and analyzes the seminal cases that demonstrate the power of the EPC and when it is appropriate to use it.[15] Section III introduces Title VII and walks through violations of disparate impact discrimination and disparate treatment discrimination.[16] Section IV explains what the Department of Education's Civil Rights Data Collection (CRDC) is and what the U.S. Government Accountability Office (GOA) found after analyzing the 2013 and 2014 data on public school discipline across the country.[17] Section V analyzes the GOA study facts with the legal standards of the EPC and Title VII to consider if Black students had a legal remedy under the current laws.[18] Section VI uses Title VII as a template for new legislation that can better protect students against the current trends of public-school discipline.[19] Section VII considers what current state of the country in regard to education and racial tensions more broadly and how Congress must react shift the

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[10] *Equal Protection*, CORNELL L. SCH., https://www.law.cornell.edu/wex/Equal_protection (last visited Oct. 28, 2019).

[11] *Id.*; *see* U.S. CONST. amend XIV.

[12] *See generally* Margaret Renkl, *How to Talk to a Racist*, N.Y. TIMES (July 30, 2018) https://www.nytimes.com/2018/07/30/opinion/how-to-talk-to-a-racist.html.

[13] *See infra* Section I-IV.

[14] *See infra* Section I.

[15] *See infra* Section II.

[16] *See infra* Section III.

[17] *See infra* Section IV.

[18] *See infra* Section V.

[19] *See infra* Section VI.

current trends.[20]

II. THE EVOLUTION OF EDUCATION IN AMERICA

"Bigotry is the disease of ignorance, of morbid minds; enthusiasm of the free and buoyant. Education and free discussion are the antidotes of both."[21] Unfortunately, in its conception, American education failed to be an antidote to bigotry. By the 1830s, Massachusetts established a public school open to all students free of charge.[22] Meanwhile, the other colonies relayed the onus of educating children to the home, leaving parents responsible to teach their children to read and write.[23] In contrast, most southern states had laws forbidding slaves from learning to read and write during this time.[24] During the Reconstruction, post-Civil War, African-Americans in the South made alliances with white Republicans to guarantee free education for all people.[25] Unfortunately, when federal troops withdrew from the South, whites regained control of the political authority and implemented systems of legal segregation.[26]

In 1896, the United States Supreme Court held in *Plessy v. Ferguson* that segregation did not violate the Equal Protection Clause of the Fourteenth Amendment so long the segregated facilities were equal.[27] Hence, the phrase "separate but equal"[28] was born. This decision was paramount because it demonstrated that the federal government officially recognized segregation as legal.[29] Thus, the Supreme Court sealed the fate of African-American children's education for nearly sixty-years, because courts were

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[20] *See infra* Section VII.

[21] *In the words of Thomas Jefferson: Why education matters*, DESERET NEWS (Feb. 26, 2015), https://www.deseretnews.com/top/3087/0/In-the-words-of-Thomas-Jefferson-Why-education-matters.html.

[22] *Historical Timeline of Public Education in the US*, RACE FORWARD, https://www.raceforward.org/research/reports/historical-timeline-public-education-us (last visited Feb. 4, 2019).

[23] Ted Brackemyre, *18th Century, 19th Century Education to the Masses: The Rise of Public Education in Early America*, U.S. HISTORY SCENE, http://ushistoryscene.com/article/rise-of-public-education/ (last visited Feb. 4, 2019).

[24] Brown v. Bd. of Educ. of Topeka, 347 U.S. 483, 490 (1954); *see also Historical Timeline of Public Education in the US*, *supra* note 22.

[25] *Historical Timeline of Public Education in the US*, *supra* note 22.

[26] *Id*.

[27] Plessy v. Ferguson, 163 U.S. 537, 552 (1896).

[28] *Id.* at 552 (Harlan, J., dissenting).

[29] *Historical Timeline of Public Education in the US*, *supra* note 22.

bound to abide by the legitimacy of segregation.[30]

For example, in *Briggs v. Elliot*, the district court held that the state's legislature segregating children was legitimate and referenced *Plessy* as the leading authority.[31] Additionally, the court emphasized that the segregation of schools "has been held to be a valid exercise of legislative power even by courts of states where the political rights of the colored race have been longest and most earnestly enforced."[32] Nevertheless, the court issued an injunction to remedy the inequalities between the segregated schools.[33] Lastly, in its dicta, the court argued that "if conditions have changed so that segregation is no longer wise, this is a matter for the legislatures and not for the courts."[34] Fortunately, the Supreme Court in 1954 did not have the same restraint.[35]

A. *Brown v. Board of Education*

In 1954, the Supreme Court changed the course of American education when it held that separate but equal was "inherently unequal"[36]—eradicating the legitimacy of segregated public schools.

In *Brown v. Board of Education*, the Court needed to resolve whether public school segregation deprived African-Americans of their Fourteenth Amendment right to equal protection of the laws.[37] The Court considered multiple variables before reaching its decision.[38]

First, it addressed the argument that when the Fourteenth Amendment was adopted, racial segregation was practiced.[39] The Court reasoned that proponents of the Fourteenth Amendment intended to "remove all legal distinctions among 'all persons born or naturalized in the United States.'"[40]

Second, the Court contemplated the evolution of education in

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[30] Briggs v. Elliot, 98 F. Supp. 530, 537 (D.S.C. 1952) ("We do not think, however, that we are at liberty thus to disregard a decision of the Supreme Court which that court has not seen fit to overrule and which is expressly refrained from reexamining . . . .").

[31] *Id.* at 532.

[32] *Id.*

[33] *Id.* at 538.

[34] *Id*. at 537.

[35] *See infra* Section I.A.

[36] *Brown*, 347 U.S. at 495.

[37] *Id.* at 487–88.

[38] *Id.* at 486-96.

[39] *Id.* at 489.

[40] *Id.*

the country and how segregation affected public education.[41] The Court compared the educational practices when the amendment was adopted and the role education played in society in 1954.[42] For example, they considered that in 1954 education was a function of state and local governments, compulsory attendance laws existed, and significant government spending occurred in support of education—demonstrating that American society now considered education to be a cornerstone of a democratic nation.[43] Therefore, given the importance of education and the fact that the state "has undertaken to provide it, [education] is a right which must be made available to *all* on *equal* terms."[44] Moreover, the Court was also concerned with the negative effect segregation had on African-American children and their perception about their place in society.[45] Therefore, the Court held that "segregation is a denial of the equal protection of the laws."[46]

However, eradicating public school segregation did not single-handedly remove racial discrimination in schools. Unfortunately, racial discrimination transformed into something subtler—not signs excluding Blacks from school buildings, but rather, Black students being disproportionately removed from the classroom due to discipline decisions.[47]

III. EQUAL PROTECTION CLAUSE

The Fourteenth Amendment provides that "[n]o state shall deprive to any person the equal protection of the laws."[48] The first rule of the EPC is that policymakers cannot use suspect classifications[49] (race, national origin, alienage, same-sex

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[41] *Id.* at 492.

[42] *Id.* at 493.

[43] *Id.*

[44] *Id.* (emphasis added).

[45] *Id.* at 494 ("To separate [African-Americans] from others of similar age . . . solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely to ever be undone").

[46] *Id.* at 495.

[47] *See generally* U.S. GOV'T ACCOUNTABILITY OFF.: K-12 EDUC. DISCIPLINE DISPARITIES FOR BLACK STUDENTS, BOYS, AND STUDENTS WITH DISABILITIES (Mar. 2018) (DISCIPLINE DISPARITIES).

[48] U.S. CONST. amend XIV.

[49] "Suspect classification refers to a class of individuals that have been historically subject to discrimination." *Suspect classification*, CORNELL L. SCH., https://www.law.cornell.edu/wex/suspect_classification (last visited Oct. 28, 2019).

relationships, gender, and illegitimacy) or the statute will be subject to judicial review according to the classification used.[50] Thus, the Constitution is violated when a government practice or a law singles out a suspect classification for different treatment and the treatment is not based on a legitimate government interest.[51]

Moreover, "[t]he central purpose of the Equal Protection Clause of the Fourteenth Amendment is the prevention of official conduct discriminating on the basis of race."[52] However, the equal protection guarantee of the Fourteenth Amendment does not take away all the states' power of classification.[53] The Court clarified that this provision does not guarantee "equal results," only equal application of the law.[54] "Most laws classify, and many affect certain groups unevenly, even though the law itself treats them no differently from all other members of the class described by the law."[55] Therefore, if a basic qualification is rationally based, unequal effects on different groups do not raise a constitutional concern.[56] The Court in essence washes its hands of the law's societal impact, because in *Dandridge v. Williams* it asserted that the legislature is accountable for the reverberating effects laws might have on society.[57] Therefore, "[i]n assessing an equal protection challenge, a court is called upon *only* to measure the basic validity of the legislative classification."[58] However, an explicit racial classification in the legislation "regardless of purported motivation, is presumptively invalid and can be upheld only upon an extraordinary justification."[59]

As a result, for a petitioner to successfully present an Equal Protection Clause claim based on racial discrimination, they must

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[50] *Id.*

[51] *Levels of Scrutiny Under the Equal Protection Clause*, EXPLORING CONST. CONFLICTS, http://law2.umkc.edu/faculty/projects/ftrials/conlaw/epcscrutiny.htm (last visited Oct. 28, 2019). A legitimate government interest usually is when the law is to protect the citizen's "health, safety, and economy." *What is a Legitimate Interest?,* LEGAL MATCH, https://www.legalmatch.com/law-library/article/legitimate-interest-lawyers.html (last visited Oct. 28, 2019).

[52] Washington v. Davis, 426 U.S. 229, 239 (1976).

[53] Mass. Bd. of Retirement v. Murgia, 427 U.S. 307, 314 (1976).

[54] Pers. Adm'r of Mass. v. Feeney, 442 U.S. 256, 273 (1979) (*Feeney*).

[55] *Id.* at 271–72.

[56] *Id.* at 272; N.Y.C. Transit Authority v. Beazer, 440 U.S. 568, 592-93 (1979).

[57] Dandridge v. Williams, 397 U.S. 471, 487 (1970).

[58] Feeney*,* 442 U.S. at 272.

[59] *Id.*; *see also Brown*, 347 U.S. at 495.

show that a state actor purposefully discriminated.[60] Systemic exclusion of eligible people of the prescribed race or an unequal application of the law to such an extent can demonstrate purpose.[61] Additionally, an invidious discriminatory purpose may often be inferred from the totality of the relevant facts, including the fact that the law bears more heavily on one race than the another.[62]

Thus, when there is proof that a discriminatory purpose is a motivating factor, strict scrutiny applies.[63] Discriminatory purpose implies that the decision maker selected a particular course of action because of its adverse effects on an identifiable group.[64] The Court reasoned that while it cannot control such prejudices, neither can it tolerate them.[65]

A. *Cases Where an EPC Was Not Found*

1. Washington v. Davis

In *Washington v. Davis*, the Court established that the racially disproportionate impact of a law does not signify that the law violates the EPC.[66] The Court found that for a neutral law to violate the EPC, the plaintiff must demonstrate that the disproportionate impact can be "traced to a purpose to discriminate on the basis of race."[67] In *Washington*, the plaintiffs were a group of black men that applied to be police officers in the District of Columbia, but were unsuccessful.[68] They alleged that the department's recruiting procedures were racially discriminatory because it excluded a disproportionately high number of Black applicants.[69] To be admitted into the Department's seventeen-week training program, an individual had to satisfy "certain physical and character standards, to be a high school graduate or its equivalent, and to receive a grade of at least [forty] out of [eighty] on 'Test [twenty-one]'."[70] After considering the facts presented, the Court found that the recruiting procedures, specifically Test twenty-one,

[60] *Feeney*, 442 U.S. at 272.
[61] *Id.* at 279.
[62] *Id.* at 272.
[63] *Id.* at 273.
[64] *Id.*
[65] *Id.* at 272; *see also Brown*, 347 U.S. at 495.
[66] *Davis*, 426 U.S. at 236.
[67] *Feeney*, 442 U.S. at 260
[68] *Davis*, 426 U.S. at 232-33.
[69] *Id.* at 233.
[70] *Id.* at 234.

was a racially neutral test which served the government purpose of pursuing a certain degree of competence.[71] The Court emphasized that the test "[sought] to ascertain whether those who took it [] acquired a particular level of verbal skill."[72] Therefore, "simply because a greater proportion of [blacks] fail to qualify than members of other racial or ethnic groups"[73] does not establish racial discrimination because it is an "otherwise valid qualifying test."[74] The Court did not place weight on the allegation that the test favored one race over others, because members of other races also did not pass the exam.[75] Therefore, to uphold this discrimination claim would support the idea that government actors could not discriminate based on competency.[76] Thus, the Court found that there was an equal application of the law, even if it did not yield equal results.[77]

Consequently, this distinction limits an individual's ability to make a Fourteenth Amendment claim because he must have evidence to establish that the purpose of the law is to discriminate—racially disproportionate impact of a statute is not, in itself, evidence of a discriminatory purpose.[78] Lastly, the Court rationalized that if it invalidated facially neutral law simply because it "benefits or burdens one race more than another would be far reaching and would raise serious questions about, and perhaps invalidate, a whole range of tax [and] welfare . . . statutes . . . ."[79]

2. Personnel Administrator of Massachusetts v. Feeney

In *Personnel Administrator of Massachusetts v. Feeney*, the Court held that the Massachusetts statute that allowed veteran

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[71] *Id.* at 245-46.

[72] *Id.* at 245.

[73] *Id.*

[74] *Id.* at 246.

[75] *Id.*

[76] *Id.* at 245-46.

"Had respondents, along with all others who had failed Test [twenty-one], whether white or black, brought an action claiming that the test denied each of them equal protection of the laws as compared with those who had passed with high enough scores to qualify them as police recruits, it is most unlikely that their challenge would have been sustained."

Id. at 245.

[77] *Id.* at 248.

[78] *Id.* at 247. "[A] law or other official act, without regard to whether it reflects a racially discriminatory purpose, is unconstitutional *solely* because it has a racially disproportionate impact." *Id.* at 239.

[79] *Id.* at 248.

preference in state and civil service positions did not violate the EPC.[80] In her complaint, the plaintiff alleged that the statute was gender discrimination because it "inevitably operates to exclude women from consideration for the best [state] civil service jobs . . . ."[81]

However, the Court found the statutory classification facially neutral.[82] The Court reasoned that "the definition of 'veterans' in the statute [was] always [] neutral as to gender . . . Massachusetts []consistently defined veteran status in a way that [] [was] inclusive of women who [] served in the military . . . [and] Veteran status is not uniquely male."[83] The Court further analyzed whether the neutral classification adversely affected women.[84] The Court considered the legislative intent of the statute to determine whether the statute's purpose was to be discriminatory against women.[85] The Court found that when the statute's purpose was to "prefer 'veterans'"—nothing more.[86] Therefore, the Court held that the statute did not violate plaintiff's right to equal protection because there was no evidence to support intentional discrimination.[87]

3. Village of Arlington Heights v. Metropolitan Housing

In *Village of Arlington Heights v. Metropolitan Housing*, the Village of Arlington Heights denied a housing development corporation (MHDC) its request to rezone a single-family parcel into a multiple-family classification.[88] MHDC[89] claimed that its "denial

[80] *Feeney*, 442 U.S. at 281.

[81] *Id.* at 259. This case differs from *Washington v. Davis* because it was dealing with a gender-based classification rather than a race-based classification. *See Davis*, 426 U.S. at 233. Nevertheless, gender is included under the Equal Protection Clause. Reed v. Reed, 404 U.S. 71, 76-77 (1971). In its analysis, the Court repeated the precedent that "any state law overtly or covertly designed to prefer males over females in public employment would require an exceedingly persuasive justification to withstand a constitutional challenge under the Equal Protection Clause of the Fourteenth Amendment." *Feeney*, 442 U.S. at 273.

[82] *Feeney*, 442 U.S. at 275.

[83] *Id.*

[84] *Id.* at 279.

[85] *Id.*

[86] *Id.* at 275.

[87] *Id.* at 279.

[88] Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 254 (1977).

[89] The court considered the issue of standing with MHDC as the petitioner, but found that MHDC had standing as a party "with a personal stake in the outcome of the controversy." *Id.* at 261 (quoting Baker v. Carr, 369 U.S. 186, 204 (1962)).

was racially discriminatory and that it violated, inter alia, the Fourteenth Amendment . . . ."[90] However, the Court held that given all of the evidence the zoning committee presented and facts of the case, MHDC failed to prove that "discriminatory purpose was a motivating factor in the [v]illage's decision."[91]

MHDC was a nonprofit developer that specialized in building low and moderate-income housing throughout the Chicago area.[92] In the Village of Arlington Heights, MHDC entered into an agreement with a landowner to buy a parcel of land and convert it into multi-family housing that would be subsidized and affirmatively advertised to assure that the "subsidized development [was] racially integrated."[93] During three public meetings, the Plan Commission considered the rezoning request.[94] The main opposition to the rezoning request was that the area was always zoned as a single-family parcel and neighboring citizens relied on this classification; as a result, rezoning would "threaten[] to cause a measurable drop in property value for neighboring sites."[95] Additionally, the Plan Commission was concerned that the single-family housing zones were a "buffer between single-family development and land uses thought incompatible, such as commercial or manufacturing districts."[96]

In its holding, the Court considered *Washington v. Davis* and held that a state action that results in racially disproportionate impact would not be found to be unconstitutional unless the petitioner can also show that the state action was purposely or intentionally racially discriminatory.[97] Here, the petitioner, MHDC, claimed that the rezoning denial was racially discriminatory because the decision would negatively impact racial minorities more than whites.[98] However, the Court found that the Village had "adopted its buffer policy long before MHDC entered the picture and has applied the policy too consistently for us to infer discriminatory purpose from its application in this case."[99]

Therefore, with this decision the Court enhanced the

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[90] *Id*.
[91] *Id.* at 270.
[92] *Id.* at 256.
[93] *Id.* at 257.
[94] *Id.*
[95] *Id.* at 258.
[96] *Id.*
[97] *Davis*, 426 U.S. at 261; *Vill. of Arlington Heights*, 429 U.S. at 265.
[98] *Vill. of Arlington Heights*, 429 U.S. at 269.
[99] *Id.* at 270.

importance of *Washington v. Davis* and the rule that the Fourteenth Amendment is not violated simply because there is evidence of disproportionate impact. The holding highlights the Court's commitment to the standard that the petitioner must demonstrate that the disproportionate impact is a result of a purposeful discrimination.[100]

B. *Cases where the Court Found a Violation of the EPC*

1. Castaneda v. Partida

In *Castaneda*, a Texas prisoner filed a petition for a writ of habeas corpus alleging discrimination against Mexican-Americans in the selection of the grand jury who indicted him.[101] The Court held that the prisoner "made out a 'bare prima facie case' of invidious discrimination with proof of a 'long continued disproportion in the composition of the grand juries in Hidalgo County.'"[102] Therefore, "the burden of proof shift[ed] to the State to rebut the presumption of unconstitutional action by showing that the racially disproportionate results came from neutral selection criteria and procedures . . . ."[103]

However, the Court found that there was a motive for discrimination even though a Mexican-American majority currently ran the government.[104] "[We] have rejected—that human beings would not discriminate against their own kind—in order to find that the presumption of purposeful discrimination was rebutted."[105]

2. Loving v. Virginia

In *Loving v. Virginia*, an interracial married couple were convicted of violating an anti-miscengation statute and sentenced to not return to Virginia for twenty-five years.[106] The Court held that Virginia's statutory scheme "to prevent marriages between persons solely on the basis of racial classification" violated the Fourteenth

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[100] *See Davis*, 426 U.S. at 242. This is the standard for laws that are neutral on their face, meaning it does not include a suspect classification. *Vill. of Arlington Heights*, 429 U.S. at 266.

[101] Castaneda v. Partida, 430 U.S. 482, 490 (1977).

[102] *Id.* at 491 (quoting Partida v. Castenada, 384 F. Supp. 79, 90 (S.D. Tex. 1979)) (emphasis omitted).

[103] *Id.* at 494 (quoting Alexander v. Louisiana, 405 U.S. 625, 623 (1972)).

[104] *Id.* at 499.

[105] *Id.* at 500.

[106] Loving v. Virginia, 388 U.S. 1, 3 (1967).

Amendment.[107]

In its analysis, the Court responded to Virginia's argument.[108] Virginia reasoned that the statute did not violate the Fourteenth Amendment because, despite its "reliance on racial classifications,"[109] the law punished both whites and blacks equally for interracial marriage; therefore, there was no evidence of "invidious discrimination" based on race.[110] However, the Court completely rejected the "notion that the mere 'equal application' of a statute containing racial classifications is enough to remove the classifications from the Fourteenth Amendment's proscription of all invidious racial discrimination . . . ."[111]

The Court distinguished this case from other cases in which the equal application theory had sufficed to prevent a valid Fourteenth Amendment claim. The Court acknowledged that Virginia relied on the holding in *Pace v. Alabama*.[112] In that case, the Court upheld a statute that penalized interracial adultery or fornication because "the statute could not be said to discriminate against [blacks] because the punishment for each participant in the offense was the same."[113] However, the Court rejected this reasoning in *Loving* and clarified that it no longer was applicable to subsequent decisions.[114] Instead, the Court asserted the notion that "[t]he clear and central purpose of the Fourteenth Amendment was to eliminate all official state sources of invidious racial discrimination . . . ."[115] As a result, the Court found the statute intended to limit who a person could marry[116] based on her race, while the state's only possible objective was to maintain white supremacy.[117] Thus, the statute "violate[d] the central meaning of the Equal Protection Clause."[118]

Thus, the Court assertively rejected the theory that equal

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[107] *Id.* at 2.
[108] *Id.* at 7-10.
[109] *Id.* at 8.
[110] *Id.*
[111] *Id.*
[112] *Id.* at 10 (citing Pace v. Alabama, 106 U.S. 583, 583-85 (1883)).
[113] *Id.* at 10.
[114] *Id.*
[115] *Id.*
[116] *Id.* at 11. "The freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men." *Id.* at 12.
[117] *Id.* at 7.
[118] *Id.* at 12.

application can be used to deny an Equal Protection claim.[119] Additionally, the Court shed some light on how a state would possibly combat a Fourteenth Amendment claim; by showing that the racial classification serves a legitimate state objective and the classification is necessary to accomplish that goal.[120]

3. Palmore v. Sidoti

In *Palmore v. Sidoti*, the state revoked a mother's custody of her child because her ex-husband filed a petition to remove the child due to a change in circumstances.[121] The change was that the white mother was cohabiting with an African-American man and soon married him.[122] Nevertheless, the trial court found that there was "no issue as to either party's devotion to the child, adequacy of the housing facilities, or respectability of the new spouse of either parent."[123] The lower courts found that it was in the child's best interest for the father to raise her, because if she remained with her mother when she started school she would be "more vulnerable to peer pressures, [and] suffer from the social stigmatization that is sure to come [from her mother's biracial relationship]."[124]

The Supreme Court typically does not hear cases based on family law.[125] However, the Court intervened here because of the facts and the lower court's lack of adequate reasoning to remove the child, which gave rise to the concern that the "Constitution's commitment to eradicating discrimination based on race" was not respected.[126] The Court reversed and held that the lower court based its holding on race, because there was no evidence that the child's welfare was in jeopardy if she remained with her mother.[127] The Court stating that "[t]he Constitution cannot control such prejudices [against biracial relationships] but neither can it tolerate them."[128]

Therefore, the Court held that the mother's Fourteenth

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[119] *Id.*

[120] *Id.* at 11. This standard is also known as "strict scrutiny." *Id.*

[121] Palmore v. Sidoti, 466 U.S. 429, 430 (1984).

[122] *Id.*

[123] *Id.* The standard for a family custody case such as this is to consider what is in the best interest of the child. *Id.* at 433.

[124] *Id.* at 431 (emphasis omitted).

[125] *Jurisdiction of Federal Courts*, SE. ADA CNR., http://adacourse.org/courtconcepts/juris.html (last visited Oct. 30, 2019). Family law cases are often handled in state court. *Id.*

[126] *Palmore*, 466 U.S. at 432.

[127] *Id.*

[128] *Id.* at 433.

Amendment rights were violated based on her husband's race.[129] The burden shifted to the government to show how the classification served a compelling government interest, because the holding was exclusively based on the suspect classification of race.[130]

IV. TITLE VII

Congress has the authority to "enforce, by appropriate legislation, the provisions of the [Fourteenth Amendment]" under the Fourteenth Amendment.[131] Under this authority Congress created Title VII of the Civil Rights Act of 1964 to remedy workplace discrimination.[132] Title VII prohibits an employer "to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment because of such individual's race, color, religion, sex, or national origin."[133] Title VII's goal is to ensure "equality of opportunity and meritocracy" among individuals applying for jobs—not that a person must be hired because they are part of a group that has been historically discriminated against.[134] The courts found that Congress intended Title VII to remove "artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification."[135] The difference between the Equal Protection Clause and Title VII is that the latter is Congress enacted positive law, while the former is a constitutional right.[136] With that distinction, Title VII specifically relates to workplace discrimination and provides four different avenues through which an individual can seek relief: (1) disparate treatment, (2) disparate impact, (3) hostile work environment, and (4) retaliation.[137]

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[129] *Id.* at 432.

[130] *Id.*

[131] Kristina Campbell, *Will "Equal" Again Mean Equal?: Understanding Ricci v. DeStefano*, 14 TEX. REV. L. & POL. 385, 397–98 (2010).

[132] *Id.* at 398.

[133] 42 U.S.C. § 2000 (2018); *see* Pacheco v. N.Y. Presbyterian Hosp., 593 F. Supp. 2d 599, 609 (S.D.N.Y. 2009).

[134] Campbell, *supra* note 131, at 398; *see also* Griggs v. Duke Power Co., 401 U.S. 424, 430–31 (1971).

[135] *Griggs*, 401 U.S. at 431.

[136] *See also* Randy E. Barnett, *The Intersection of Natural Rights and Positive Constitutional Law*, 25 CONN. L. REV. 853, 853-856 (1993).

[137] *See Pacheco*, 593 F. Supp. 2d at 609-627.

A. *Legal Standard*

This section discusses disparate treatment and disparate impact.[138]

1. Disparate Treatment

The disparate treatment provision of Title VII makes it unlawful for employers to use race, or any of the other aforementioned classifications, as a factor in an employment decision.[139] Courts found that disparate treatment is the "most easily understood type of discrimination and occur[s] where an employer treated a particular person less favorable than others because of a protected trait."[140] The prominent aspect of disparate treatment is that an employer cannot treat a person differently because of a protected class,[141] which makes this provision the most similar to Equal Protections Clause protections.[142]

Moreover, to bring a disparate treatment Title VII claim, the plaintiff must demonstrate that the employer had a "discriminatory intent or motive for taking a job-related action."[143] In order to establish a prima facie case, the plaintiff must be able to prove four elements: "(1) that he is a member of a protected class; (2) that he is qualified for his position;
(3) that he suffered an adverse employment action; and (4) that the circumstances give rise to an inference of discrimination."[144] Once the plaintiff establishes a prima facie case, a presumption of discrimination arises and the burden shifts to the employer to present a legitimate and nondiscriminatory reason to justify the decision.[145] If the employer satisfies its burden of production, the court will raise a presumption in favor of the employer[146] unless the plaintiff can

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[138] Disparate treatment and disparate impact are the most relevant for an EPC analysis. *See generally* Reva B. Siegel, *Race-Conscious but Race-Neutral: The Constitutionality of Disparate Impact in the Roberts Court*, 66 ALA. L. REV. 653, 666 (2015); Kenneth L. Marcus, *The War between Disparate Impact and Equal Protection*, 8 CATO SUP. CT. REV. 53, 53-83 (2008).

[139] Campbell, *supra* note 131, at 399.

[140] Ricci v. DeStefano, 557 U.S. 557, 577 (2009).

[141] Lisa Guerin, *Disparate Treatment Discrimination*, NOLO, https://www.nolo.com/legal-encyclopedia/disparate-treatment-discrimination.html (last visited Oct. 30, 2019).

[142] *Equal Protection*, *supra* note 11.

[143] *Ricci*, 557 U.S. at 577.

[144] *Pacheco*, 593 F. Supp. 2d at 610.

[145] *Id.*; Campbell, *supra* note 131, at 399.

[146] *Pacheco*, 593 F. Supp. 2d at 611.

prove the employer's reason was not genuine.[147] Before moving forward with the trial, it is the "'Court's responsibility . . . to 'examine the entire record to determine whether the plaintiff could satisfy his 'ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff.'"[148] Therefore, the plaintiff must demonstrate that the employer manifested intent before his day in court.

Because many employment decisions are left to the employer's discretion, it is harder to establish intent in many situations.[149] Therefore, another avenue must be available to remedy the discrimination that cannot be sufficiently established in this provision.

2. Disparate Impact

In *Griggs v. Duke Power Co.*, the Court opened the door to Title VII claims based on disparate impact rather than disparate treatment.[150] The Court reasoned that Congress' objective for Title VII was to create equal opportunity employment and remove barriers that allowed employers to favor white employees.[151] Therefore, the Court found that "practices, procedures, or tests neutral on their face and even neutral in terms of intent, cannot be maintained if they operate to 'freeze' the status quo of prior discriminatory employment practices."[152] This holding significantly distinguished Title VII from the EPC because a plaintiff can seek relief without establishing intent.

Moreover, the Civil Rights Act of 1991 formally codified the prohibition of disparate impact discrimination.[153] Under the statute's disparate impact provision, a plaintiff establishes a prima facie violation when the employer uses a facially neutral employment practice that causes a disparate impact.[154] Courts typically addressed Title VII disparate impact claims with a three-step dance.[155]

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[147] Campbell, *supra* note 131, at 399.

[148] *Pacheco*, 593 F. Supp. 2d at 611 (quoting Schnabel v. Abramson, 232 F.3d 83, 90 (2d Cir. 2000)).

[149] *See* Price Waterhouse v. Hopkins, 490 U.S. 228, 271 (1989) (stating that "direct evidence of intentional discrimination is hard to come by") (O'Connor, J., concurring).

[150] *Pacheco*, 593 F. Supp. 2d at 611 (emphasis added) (quoting Schnabel v. Abramson, 232 F.3d 83, 90 (2d Cir. 2000); *see Griggs*, 401 U.S. at 430–31.

[151] *Griggs*, 401 U.S. 424, 429–30; *Ricci*, 557 U.S. at 577–78.

[152] *Griggs*, 401 U.S. at 430.

[153] *Ricci*, 557 U.S. at 578.

[154] Campbell, *supra* note 131, at 400.

[155] *Pacheco*, 593 F. Supp. 2d at 620.

First, the plaintiff must establish prima facie case of discrimination.[156] A prima facie case is typically established when there is data that a policy created a statistical disparity between members of two different groups.[157] Under this provision, statistical disparity is sufficient to demonstrate discrimination because an employer is liable for the results of his actions, not his state of mind.[158] Nevertheless, the statistical disparity in the outcome of an employment decision or policy must be relevant in showing that "although neutral, the policy in question imposes a significantly adverse or disproportionate impact on a protected group of individuals."[159] Second, the employer is able to rebut the presented statistical disparity or demonstrate that the policy is related to the job and is a business necessity.[160] Third, the plaintiff can show that there is an alternative, non-discriminatory practice, that would not result in the disparate impact to rebut the employer's business necessity assertion.[161]

This procedure demonstrates that the objective of Title VII is to prevent employment discrimination, yet it still acknowledges that some practices are necessary although they might result in unequal outcomes.[162] Thus, the important aspect of the Title VII's disparate impact provision is that it alleviates the plaintiff's burden to get inside the employer's head.[163] In addition, it serves as a platform where both parties are accountable for finding an alternative practice, which serves its workplace purpose without ostracizing a particular group.

B. *Case Examples of Title VII*

This section will discuss *Pacheco* and *Ricci.*

1. Pacheco v. New York Presbyterian Hospital

In *Pacheco*, the court held that the employer did not violate

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[156] *Id.*

[157] Campbell, *supra* note 131, at 400. "Groups" refers to the protected classes of Title VII.

[158] *Id.*

[159] *Pacheco*, 593 F. Supp. 2d at 620.

[160] Campbell, *supra* note 131, at 400.

[161] *Pacheco*, 593 F. Supp. 2d at 620.

[162] Campbell, *supra* note 131, at 401. This is to not get in the way of workplace efficiency. *Id.*

[163] *Id.* at 400.

the disparate treatment nor disparate impact provision of Title VII.[164] Both violations were based on plaintiff's allegation that the hospital's "English-only" policy discriminated against Hispanic employees.[165] Plaintiff identified as Hispanic by national origin and spoke both English and Spanish.[166] The hospital granted plaintiff his request for a lateral transfer to the Ambulatory Referral Registration Area (ARRA).[167] However, during his time in the ARRA, several patients complained to the plaintiff's supervisor that plaintiff and others were making fun and laughing at them in a different language.[168] As a result, his supervisor asked plaintiff to only speak in English while performing his duties and in the presence of patients, but he could speak Spanish off-duty.[169] Before his ARRA transfer probation period ended, he requested to return to his previous department and filed suit against his supervisor.[170]

Taking into consideration the facts plaintiff presented, the court first considered the plaintiff's disparate treatment claim.[171] The court assumed that a prima facie case of discrimination was presented and immediately considered the employer's reasoning behind the purported "English-only" policy.[172] The court found that there was no discriminatory intent in asking the plaintiff to speak English on-duty and it was a business necessity because they received complaints about employees speaking a different language while working.[173] More importantly, the court emphasized that the plaintiff was not prohibited from speaking Spanish off-duty, nor was he penalized for when he did speak Spanish in front of the patients.[174] Therefore, the court did not find discriminatory intent behind the employer requesting that the plaintiff not speak Spanish in front of the patients.[175]

Second, the court analyzed the disparate impact claim and found that the plaintiff failed to defend his claim because he did not

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[164] *Pacheco*, 593 F. Supp. 2d at 620, 623.
[165] *Id.* at 604.
[166] *Id.* at 605.
[167] *Id.*
[168] *Id.* at 606.
[169] *Id.*
[170] *Id*. at 607. When he returned to his previous department, he did not suffer any consequences and shortly received a promotion with a salary raise. *Id.*
[171] *Id.* at 610.
[172] *Id.* at 612–14.
[173] *Id.* at 614.
[174] *Id.*
[175] *Id.* at 629.

refute his employer's business necessity argument.[176] The court dismissed the plaintiff's disparate impact claim because he did not provide an alternative practice and "did not produce any evidence that the limited English-only practice at issue was contested by any other Spanish-speaking employees, let alone that it disproportionately affected such employees."[177] Therefore, although it may appear that the threshold for a disparate impact claim is low, the court remains responsible to assure that it is not being used haphazardly.

2. Ricci v. DeStefano

In *Ricci*, the Court held that an "employer must have a strong basis in evidence to believe it will be subject to disparate impact liability if it fails to take the race-conscious, discriminatory action."[178] This is a different holding because the facts were distinguishable from typical discrimination cases. In this case, the plaintiffs were nonminority employees that were denied their place in the promotion pool because their employers did not use the results of a prior test because they believed it caused a disparate impact on minority employees.[179] Therefore, the plaintiffs alleged that the employer engaged in disparate treatment when the it "rejected the test results solely because the higher scoring candidates were white."[180] The plaintiffs argued that an employer could not engage in intentional discrimination to avoid unintentional discrimination.[181]

The Court considered the innate purpose of Title VII and restated the idea that its main objective "is to promote hiring on the basis of job qualifications, rather than on the basis of race or color."[182] The Court reasoned that while Congress made employers liable for neutral practices that caused unintentional discrimination, it prohibited employers from "taking adverse employment actions 'because of' race[.]"[183] The strong basis in evidence standard was a way to remedy conflicts between Title VII's intent.[184] The premise

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[176] *Id.* at 623.
[177] *Id.*
[178] *Ricci*, 557 U.S. at 558.
[179] *Id.* at 562–63.
[180] *Id.* at 558.
[181] *Id.*
[182] *Id.* at 582 (quoting *Griggs*, 401 U.S. at 434).
[183] *Id.* at 583.
[184] *Id.* The strong basis in evidence standard refers to the relying on possible future litigation because of disparate impact. *Id.* Therefore, an employer acting on this premise must show that they have a strong basis in evidence that they would

here was that the employer took various steps to ensure that the test employees took to enter the promotion pool was legitimate and did not discriminate against minorities.[185] Yet, when the test results showed that white candidates had outperformed minority candidates—and the minority candidates threatened to sue—the employer threw out the results.[186] The Court responded that "once [a] process has been established and employers have made clear their selection criteria, they may not then invalidate the test results, thus upsetting an employee's legitimate expectation not to be judged on the basis of race."[187] Therefore, if an employer intends to participate in disparate treatment discrimination to prevent disparate impact liability, they must show that there is evidence that an "impermissible disparate impact, amounts to the sort of racial preference that Congress has disclaimed."[188] This standard restrains an employer's ability to consider disparate impact minority discrimination because Congress intended that the workplace become a place of equal opportunity for all under Title VII.

Therefore, it appears that Title VII allows the courts to be involved with the facts of the case when determining if a practice constitutes discrimination.[189] Moreover, Title VII allows courts to juxtapose the statistical disparity impact with the goal of eradicating the historical status quo in the workplace.[190] In many ways, this is a byproduct of Title VII being a positive law created with a specific goal.[191] The goal informs judges decisions on alleged discrimination.[192]

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be sued unless they acted to remedy the situation. *Id.* This means an employer cannot engage in disparate treatment if they guess they might be sued. *Id.*

[185] *Id.* at 565.

[186] *Id.* at 562.

[187] *Id.* at 585.

[188] *Id.*

[189] As discussed earlier, "discrimination" is a legal term with a legal remedy. *See Civil Rights*, *supra* note 10; *see generally What Remedies are There For Employment Discrimination Cases?*, *supra* note 9.

[190] *See* Linda Lye, *Title VII's Tangled Tale: The Erosion and Confusion of Disparate Impact and the Business Necessity Defense*, 19 BERKELEY J. OF EMP. & LAB. L. 315, 348 (1998).

[191] *See* U.S. DEP'T OF JUST.: TITLE IV LEGAL MANUAL (last updated March 18, 2019).

[192] This discretion is not present in the EPC. *See Equal Protection of the Laws*, CORNELL L. SCH., https://www.law.cornell.edu/constitution-conan/amendment-14/section-1/equal-protection-of-the-laws (last visited Oct. 30, 2019).

V. DEPARTMENT OF EDUCATION DATA ON SCHOOL DISCIPLINE ACROSS THE UNITED STATES

A. *The Civil Rights Data Collection (CRDC) Studies*

Since 1968, the United States Department of Education conducts the CRDC studies to collect data on key education and civil rights issues in the public school system.[193] The information gathered during the studies includes but is not limited to: student enrollment, educational programs and services, discipline reports, and educational equity reports.[194] Moreover, the CRDC data is accessible to the public on their website.[195] The public can search the data by school and district.[196] Therefore, individuals can look at the data of a specific school or compare trends across the country.[197] More importantly, the CRDC collects data from every public school and school district in the country.[198] This allows organizations like the United States Government Accountability Office to analyze the information to understand national issues, rather than attribute them to idiosyncratic districts or schools.[199]

B. *The Government Office of Accountability Study*

The Government Office of Accountability (GOA) used the information the CRDC gathered for the 2013 to 2014 school year to identify patterns in disciplinary actions among public schools across the nation.[200] Additionally, the GOA interviewed federal and state officials from five states to gain a better understanding of the information the CRDC provided for the states.[201] The GOA specifically selected the five states because there was a distinguishable disparity in suspension rates for black students and students with disabilities and diversity in size and location.[202] Therefore, the GOA studies go beyond the CRDC numbers because it attempts to further understand the information to identify racial

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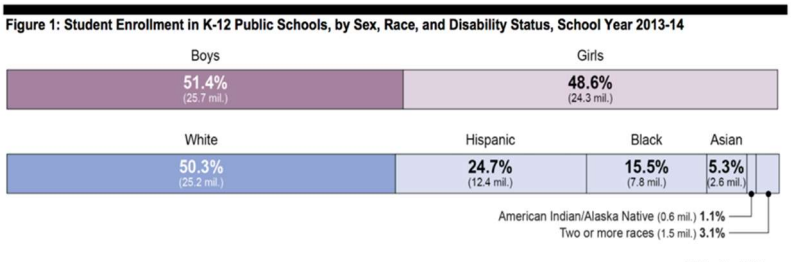
[193] U.S. DEP'T OF EDUC, OFF. FOR CIVIL RIGHTS: CIVIL RIGHTS DATA COLLECTION FOR THE 2015–16 SCH. YEAR (Sept. 25, 2018).
[194] *Id.*
[195] *Id.*
[196] *Id.*
[197] *Id.*
[198] *Id.*
[199] DISCIPLINE DISPARITIES, *supra* note 47.
[200] *Id.*
[201] *Id.*
[202] *Id.*

issues that are present in public schools.[203] It is particularly useful here, because simply analyzing state-by-state or district-by-district results would limit its applicability to that region's scope.

1. Findings

In a brief synopsis, the GOA presented its findings that public grade schools disproportionately disciplined black students.[204] In fact, the GOA found that this disciplinary racial disparity persisted "regardless of the type of disciplinary action, level of school poverty, or type of public school . . . these students attended."[205] To understand the disparities, the GOA created charts to demonstrate the stark differences among the race of the students.[206]



Nevertheless, to understand the charts in relation to school discipline, one must understand the racial makeup of the students attending public schools across the nation. Figure 1 demonstrates that across the country, white students account for 50.3% of the population, while Hispanic students account for 24.7%, black students account for 15.5%, Asian students account for 5.3%, while American Indian, Alaska Natives, and mixed-race students account for 4.2% of the school population.[207] Because white students account for more than a majority of the student's population, it follows that white students account for the majority of other findings. The rationale is that the racial classification should only represent the percentage that it contributes to the makeup of the public school population. Therefore, if a racial classification represents a larger percent than its population in a given classification, than it is overrepresented in that classification.

The GOA analyzed the information the CRDC collected on

[203] *Id.*
[204] *Id.* at 3.
[205] *Id.* at 12.
[206] *Id.* at 7.
[207] *Id.*

public school discipline across the country and created Figure 2.[208] The graph below shows the six different forms of discipline across the country and the racial classification of the students being disciplined in that way.[209] This information can serve as the cornerstone of an EPC claim because it demonstrates a racially disproportionate impact through school discipline practices.[210] The disproportion occurs because black students are significantly overrepresented in all levels of discipline.[211] In particular, "[a]lthough there were approximately 17.4 million more White students than Black students attending K[indergarten through twelve] public schools in 2013 [and 20]14, nearly 176,000 more Black students than White students were suspended from school that school year."[212] Despite more white children being enrolled in public school, schools punish black children more than white children.[213] Some commentators blame this tendency on other variables such as poverty, alleging that poverty affects a child's development and their ability to focus in school and avoid discipline.[214] However, the GAO found that poverty levels do not affect schools disciplining Black students more.[215]

VI. ANALYSIS

This section will apply the EPC and Title VII to the GAO findings.

A. *Applying the EPC to GAO Findings*

The Equal Protection Clause gives individuals the right to the equal protection of the law—providing a legal remedy to discrimination.[216] However, discrimination is a legal term with elements that the plaintiff must establish to prove discrimination and

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[208] *See infra* Figure 2.

[209] *Id.*

[210] *Id.*

[211] DISCIPLINE DISPARITIES, *supra* note 47.

[212] *Id.* at 13.

[213] Erica L. Green, *Why Are Black Students Punished So Often? Minnesota Confronts a National Quandary*, NY TIMES (Mar. 18, 2018), https://www.nytimes.com/2018/03/18/us/politics/school-discipline-disparities-white-black-students.html?auth=login-facebook&login=facebook.

[214] DISCIPLINE DISPARITIES, *supra* note 47, at 13.

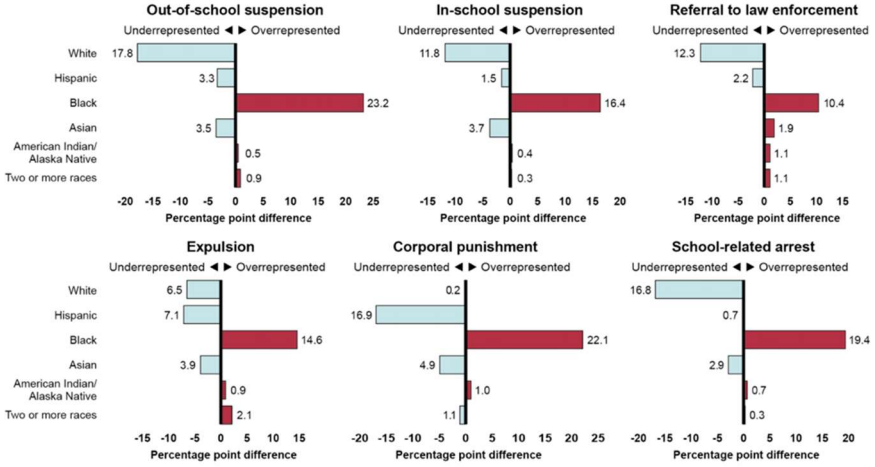
[215] *Id.* at 19.

[216] U.S. CONST. amend. V. § 1.

obtain a legal remedy.[217] According to the Equal Protection Clause, an individual must demonstrate that the state actor intended to discriminate.[218] Although a plaintiff could assert a violation of the EPC by claiming that there is invidious discrimination due to a statistically disproportionate racial impact, the plaintiff still has the burden of proving an intent to discriminate.[219]

Figure 2: Representation of Students Who Received Disciplinary Actions Compared to Overall Student Population, by Student Race or Ethnicity, School Year 2013-14

This chart shows whether each race or ethnicity was underrepresented or overrepresented among students who received six types of discipline. For example, White students were underrepresented among students suspended out of school by approximately 18 percentage points, as shown in the chart, because they made up about 50% of the overall K-12 student population, but 32% of the students suspended out of school.



Source: GAO analysis of Department of Education, Civil Rights Data Collection. | GAO-18-258

Unfortunately here, the ability for black students to assert a discriminatory *intent* in the way their educators conduct discipline is almost impossible because educators do not openly label themselves as racist.[220] Otherwise, the EPC requires the students to read the mind of school officials and discover the various reasons behind their discipline decision to prove that the *motive* of their decision is the student's race.[221] Nevertheless, it is clear from the numbers that there is a significant, disproportionate racial impact on how schools are disciplining children across the nation.[222]

The facts of this situation are like *Castaneda*.[223] In

[217] *Id.*
[218] *Id.*
[219] *See generally Davis*, 426 U.S. at 254.
[220] This is not to argue that educators and administrators are racists, only to draw on the fact that it is difficult for children affected to adhere to a legal remedy.
[221] *Davis*, 426 U.S. at 249.
[222] *See generally* DISCIPLINE DISPARITIES, *supra* note 47.
[223] *Castaneda*, 430 U.S. at 482.

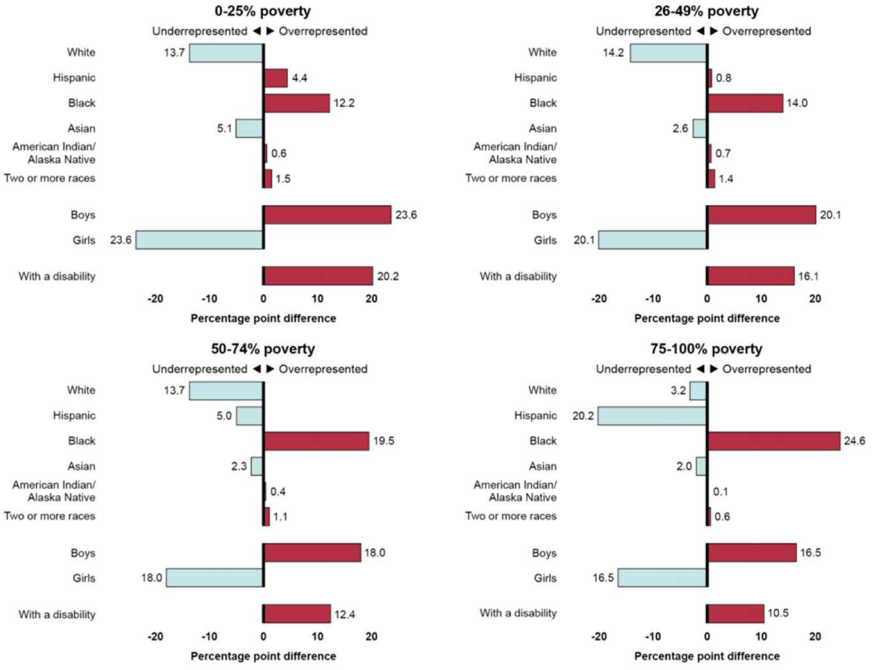
Castaneda, the plaintiff presented a prima facie case of discrimination by showing a statistical disparity in the amount of Mexican-American citizens that the state court included in the grand jury selection process.[224] The Court determined that the plaintiff had made a prima facie case of invidious discrimination because "'[s]ometimes a clear pattern, unexplainable on grounds other than race, emerges from the effect of the state action even when the governing legislation appears neutral on its face.'"[225]

Similarly here, the schools' discipline systems are facially neutral, yet the numbers across the country show that there is a clear pattern in public school discipline that is facially unexplainable on grounds other than race. Thus, there are multiple theories as to why black children have higher rates of discipline. For example, the GAO study presented the theory that "[c]hildren's behavior in school may be affected by health and social challenges outside the classroom that tend to be more acute for poor children, including minority children who experience higher rates of poverty."[226] However, even if outside variables, such as poverty, affect a child's behavior and, therefore, their discipline, should there not be a greater correlation between poverty levels and discipline than between race and discipline? Instead, according to Figure 6,[227] poverty does not seem to have a distinguishable impact on discipline like race does.[228]

[224] *Id.* at 483-84.
[225] *Id.* at 493 (citing Vill. of Arlington Heights, 429 U.S. at 266 (1977)).
[226] DISCIPLINE DISPARITIES, *supra* note 47, at 5.
[227] *Id.*
[228] *Id.*

Figure 6: Representation of Students Suspended Out-of-School Compared to Student Population, by Level of School Poverty, School Year 2013-14

This chart shows whether each group of students was underrepresented or overrepresented among students suspended out of school based on the poverty level of the school. For example, boys were overrepresented among students suspended out of low-poverty schools by about 24 percentage points, as shown in the chart, because they made up about 51% of all students in those schools, but 75% of the students suspended out of school.



Source: GAO analysis of Department of Education, Civil Rights Data Collection and Common Core of Data. | GAO-18-258

Even if black students could adequately establish a prima facie case of invidious discrimination based on a clear unexplainable pattern, they would still have to rebut the school officials' demonstration that the discipline guidelines used "permissible racially neutral selection criteria and procedures [that] have produced the monochromatic result."[229] Because there is no evidence that schools are not using neutral discipline guidelines, it is unlikely that the students will able to move forward with their case.[230]

Therefore, the EPC does not provide an adequate legal remedy for black students statistically overrepresented in discipline matters, because the students must prove they are receiving this treatment *because of* their race.[231]

[229] *Castaneda*, 430 U.S. at 494.
[230] *See generally* DISCIPLINE DISPARITIES, *supra* note 47.
[231] 42 U.S.C. § 2000 (2018).

B. *Applying Title VII to GAO Findings*

Unlike the EPC, which hinges on intent for a cause of action, Title VII provides statutory relief for discrimination based on disparate impact.[232] As a result, black students have a stronger footing under a Title VII claim.[233]

First, black students would have to establish a prima facie case of discrimination.[234] Here, the prima facie case would be the overrepresentation of black students in school discipline across the country.[235] The court would likely find this statistical racial disparity to be sufficient to establish a prima facie case because it demonstrates that despite the "neutral" discipline guidelines in schools, "the policy in question imposes a significantly adverse or disproportionate impact on a protected group of individuals'"[236] Second, the school officials would have to rebut the statistical disparity, or demonstrate that the discipline guidelines are a necessity.[237] School officials may argue that the guidelines are a necessity because the children's safety and well-being are at stake.[238] Regardless of their response, the benefit of Title VII is that it gives the plaintiff the ability to demonstrate that there is an alternative that would serve the same necessity.[239] Fortunately, the GAO study revealed that some schools are already taking progressive steps to deal with the issue of racial disparity and the discipline guidelines.[240] For example, school districts across the country are "implementing alternative discipline models that emphasize preventing challenging student behavior and focus on supporting individuals and the school community."[241] They are using techniques such as restorative justice, social-emotional learning, positive behavioral interventions, and supports.[242] Therefore, black students would likely succeed in their Title VII case against school officials for disparate impact

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[232] Guerin, *supra* note 141.

[233] However, this is only in theory because Title VII only applies to employment. *See Title VII of the Civil Rights Act*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, https://www.eeoc.gov/laws/statutes/titlevii.cfm (last visited Dec. 19, 2019).

[234] *See Pacheco*, 593 F. Supp. 2d at 620.

[235] *See supra* Section VI.

[236] *Pacheco*, 593 F. Supp. 2d at 620.

[237] *Id.*; Campbell, *supra* note 131, at 400.

[238] *Pacheco*, 593 F. Supp. 2d at 620.

[239] *Id.*

[240] DISCIPLINE DISPARITIES, *supra* note 47, at 27.

[241] *Id.*

[242] *Id.*

discrimination.

VII. TITLE E: A POSITIVE LAW FOR EDUCATION BASED ON TITLE VII

The disparate impact provision of Title VII came from the courts and Congress realizing that schools cannot maintain facially and intentionally neutral practices "if they operate to 'freeze' the status quo of prior discriminatory employment practices."[243] Therefore, this positive law came from the understanding that society cannot forget past discrimination when considering the lasting present effects and that people can unintentionally discriminate.[244] Discrimination, regardless of intent, promotes and preserves the status quo that this country attempted to stop when it passed the Civil Rights Act of 1964.[245]

Here, there is arguably a case of discrimination because schools are disproportionately disciplining black students.[246] To state it more bluntly, schools are removing black students from the classroom at higher rates than their white counterparts.[247] Given the history of African-Americans and education in this country, it is plausible that the schools are discipling black students because they believe the historical notion that African-American children do not belong in the classroom.[248] Consequently, the current discipline guidelines appear to "'freeze' the status quo of prior discriminatory"[249] educational school practices. Given the critical importance of education, it is time to provide a legal remedy against disparate impact discrimination for students. It is time for Title E.

Title E would essentially mirror the disparate impact provision of Title VII. The hope is that Title E will provide a legal remedy for students in a way that the EPC currently does not. Congress and the Courts recognized that finding discriminatory intent in a person's actions is harder than when racial discrimination was socially acceptable in the United States—accusing someone of racism is a serious offense today.[250] Therefore, the disparate impact

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[243] Guerin, *supra* note 141; *see Griggs*, 401 U.S. at 430.
[244] *See* Quarles v. Phillip Morris Inc., 279 F. Supp. 505, 510 (E.D. Va. 1968).
[245] *See Title VII of the Civil Rights Act*, *supra* note 234.
[246] *See* DISCIPLINE DISPARITIES, *supra* note 47.
[247] *See id.*
[248] *See id.*
[249] Guerin, *supra* note 141; *see Griggs*, 401 U.S. at 430.
[250] Lisa Milam, *Employee fired after calling supervisor evil can't revive FMLA claim; accusations of being racist no basis for race bias claim*, EMP. L.

provision of Title VII allowed employees to bring claims when procedures looked, sounded, and felt like discrimination, but was not intentional discrimination.[251] Moreover, the disparate impact provision benefitted employers because it allowed them to acknowledge a problem in their procedures without having to admit to racism.[252]

A. *Legal Standard of Title E*

Similar to Title VII, Title E would have a three-step process to establish a claim of disparate impact discrimination.[253] First, the student would have to present data that there is a statistical racial disparity in the outcome of discipline practices.[254] As mentioned before, Title E is not concerned with whether the educators subjectively engage in racial bias or not. Instead it is focused on ensuring that schools do not use neutral policies to protect a historical status-quo that kept children of color out of the classroom.[255] However, plaintiffs cannot use Title E for every disproportionate impact that adversely affects a child's education directly.

Second, school officials would have the opportunity to either rebut the statistical disparity or demonstrate how the discipline practices are necessary to promote their educational mission.[256] This aspect of Title E acknowledges that school officials should decide what discipline strategy is the most effective with their students. Therefore, Title E does not intend to strip school administrators from their agency or to hinder their ability to ensure school safety. Instead, Title E serves as a measure of accountability. It allows students to draw attention to procedures that negatively affect them and forces school officials to either accept and remedy the situation or explain its procedure to a judge.

DAILY, http://www.employmentlawdaily.com/index.php/news/employee-fired-after-calling-supervisor-evil-cant-revive-fmla-race-bias-claims-accusations-of-being-racist-no-basis-for-race-bia/ (last visited Dec. 19, 2019).

[251] *See* David Benjamin Oppenheimer, *Negligent Discrimination*, 141 U. OF PENN. L. REV. 899, 899 (1993).

[252] *See generally id.*

[253] *See Pacheco*, 593 F. Supp. 2d at 620.

[254] *See* Campbell, *supra* note 131, at 400 (explaining that the term "groups" still refers to the protected classes of Title VII).

[255] *See Resistance to School Desegregation*, EQUAL JUSTICE INITIATIVE, https://eji.org/news/history-racial-injustice-resistance-to-school-desegregation/ (last visited Dec. 19, 2019).

[256] *See Pacheco*, 593 F. Supp. 2d at 620; *see also* Campbell, *supra* note 131.

Third, and most importantly, the student would have the opportunity to present an alternative procedure that would not result in the same disproportionate impact.[257] This aspect of Title E is critical because it puts the power of innovation and change in the hands of the students. It allows them to take control of their education and be agents in their communities. Additionally, it is important because it focuses on providing an alternative to the current procedures, instead of simply eliminating them and not providing a replacement. More importantly, the purpose of Title E is not to demonize school administrators—it is to acknowledge and remedy institutionalized barriers that came from the foundation of education in this country.

Title E can genuinely thrive because students will have the opportunity to use their own experiences to provide an alternative form of discipline. Students, like school officials, understand the inward dynamics of a school and even the classroom. They can provide critical insight into what discipline works, which can even lead to a greater understanding between the school officials and students as to the core of school discipline.

Thus, Title E is not proposed to be a fix-all law. Instead, the hope is that it would be an avenue through which students could reclaim their education.

VIII. CONCLUSION

The Equal Protection Clause is a constitutional right all citizens have to the equal protection of the law. However, equal protection of the law does not guarantee equal results, and unequal results do not signify discrimination. Consequently, for a person that suffered from the disproportionate impact of the law to claim that it violated her EPC right, she must show it was intentional discrimination. She must prove that the man behind the curtain intended to discriminate against their protected trait. However, the difficulty of the EPC is that it is hard to prove a person's state of mind.

The legislature passed a positive law, Title VII, which ensures that job applicants have an equal opportunity to employment. Congress and the courts recognized that discrimination could occur without anyone intending it to and included the disparate impact provision as an avenue to a legal remedy. This opened the door to alleviating discrimination in ways that the EPC could not,

[257] *See Pacheco*, 593 F. Supp. 2d at 620; *see also Campbell*, *supra* note 131.

because it no longer required the plaintiff to prove thoughts, only results.

The CRDC and GAO studies provided results that some people knew—that schools discipline black children at statistically disproportionate rates in public schools. The GAO numbers do not lie. There can be alternative reasoning, but the numbers show that there is a problem—and it is discrimination. Unfortunately, under the EPC *looking* like discrimination is not enough to seek a legal remedy. However, school discipline is an aspect of education that permeates the student's life inside and outside of the classroom. It is important to question why black children experience more discipline, instead of assuming they are more disobedient. Such an assumption would only protect a racial status quo this country has striven to dismantle for the past fifty-years.

It is time for Congress to rise and create positive law that protects the children of this country in areas that the drafters of the Constitution did not consider. It is time for Title E.