

Dissenting Statement of Commissioner Gail Heriot

This is hardly the first time I've dissented from a Commission report. But to my knowledge, never before has the Commission so seriously misunderstood the empirical research that purportedly forms the basis for its conclusions. Time constraints prevent me from discussing all the report's problems. But I will try to discuss a few of the more important ones.

Discipline and Race:

Perhaps the most insupportable Finding in the report is this:

*Students of color as a whole, as well as by individual racial group, do not commit more disciplinable offenses than their white peers*⁹⁴¹

The report provides no evidence to support this sweeping assertion and there is abundant evidence to the contrary. Not the least of that evidence comes from teachers. When one looks at aggregate statistics concerning which students are sent to the principal's office by their teachers, there are strong differences. Denying those differences amounts to an accusation that teachers are getting it not just wrong, but very wrong. It is a slap in the face to teachers.⁹⁴²

I wish racial disparities of this kind did not exist. And there is very little I wouldn't give to make them disappear. But the evidence shows they do exist, and pretending otherwise doesn't benefit anyone (with the possible exception of identity politics activists). It certainly does not benefit minority children. To the contrary, they are its greatest victims.⁹⁴³

African American students disproportionately go to school with other African American students. American Indian students disproportionately go to school with other American Indian students. If

⁹⁴¹ Report at Findings, pp. 165.

⁹⁴² The argument that rates of misbehavior in schools are equal across all races (despite differing rates at which teachers refer students for discipline and differing rates at which discipline is administered) is somewhat reminiscent of arguments concerning criminal activity. Some argue that racial disparities in arrests and incarceration are attributable in large part to race discrimination and not to differing rate of criminal activity. They should consider this: If racial disparities in arrests were largely attributable to race discrimination, one would expect the greatest disparities to occur in connection with minor crimes, where the chance of getting away with a false accusation is greatest. But the greatest disparities are at the other end of the spectrum. Murder, where the motivation for making a false accusation and the likelihood of getting away with one are at their lowest, is the best example. While African Americans are about 12.7% of the population, they are, according to FBI statistics for 2016, 43% of murder victims and 47.3% of offenders. See Dissenting Statement of Commissioner Gail Heriot in U.S. Commission on Civil Rights, *Police Use of Force: An Examination of Modern Policing Practices* (November 2018), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3285429.

⁹⁴³ Interestingly, the Commission does not claim that the rates of school misbehavior by boys and girls are equal. As far as anyone on the Commission seems to believe, the sex disparities in rates of discipline, which in general are larger than the race disparities, are simply the result of disparities in behavior.

teachers fail to keep order in those classrooms out of fear that they will be accused of racism, it is these minority students who will suffer most.⁹⁴⁴ Children can't learn in disorderly classrooms.⁹⁴⁵

⁹⁴⁴ In 2003, New York University professor of sociology and education Richard Arum reported that there is “little evidence supporting the contention that the level of disorder and violence in public schools has [generally] reached pandemic proportions.” But, he writes, it is “indeed the case in certain urban public schools,” various factors have combined “to create school environments that are particularly chaotic, if not themselves crime producing.” See Richard Arum, *JUDGING SCHOOL DISCIPLINE: THE CRISIS OF MORAL AUTHORITY 2* (2003).

⁹⁴⁵ Maintaining good order in the classroom is not always easy, but it is necessary if students are to learn. The problem is sometimes especially acute in the inner-city and other low-income areas. A 2007 article in the *San Francisco Chronicle*, entitled “Students Offer Educators Easy Fixes for Combating Failure,” had this to say on the topic:

As thousands of learned men and women gathered in Sacramento this week to chew over the vexing question of why black and Latino students often do poorly in school, someone had a fresh idea: Ask the students.

So they did. Seven struggling students—black, brown and white—spent an hour Wednesday at the Sacramento Convention Center telling professional educators what works and doesn't work in their schools. ...

“If the room is quiet, I can work better—but it's not gonna happen,” said Nyrysha Belion, a 16-year-old junior at Mather Youth Academy in Sacramento County, a school for students referred for problems ranging from truancy to probation.

She was answering a question posed by a moderator: “What works best for you at school to help you succeed?”

Simple, elusive quiet.

Nyrysha said if she wants to hear her teacher, she has to move away from the other students. “Half our teachers don't like to talk because no one listens.”

The others agreed. “That's what made me mess up in my old school—all the distractions,” said Imani Urquhart, 17, a senior who now attends Pacific High continuation school in the North Highlands suburb of Sacramento.

Nanette Asimov, *Students Offer Educators Easy Fixes for Combating Failure*, S.F. CHRON., November 15, 2007. These students' stories match up well with complaints that students gave in response to a 1998 study, entitled “Strategies to Keep Schools Safe.” Sasha Volokh & Lisa Snell, *Strategies to Keep Schools Safe*, Policy Study No. 234, January 1998, available at <http://reason.org/files/60b57eac352e529771bfa27d7d736d3f.pdf>. “Some of my classes are really rowdy,” a student from Seattle told the researchers, “and it's hard to concentrate.” “They just are loud and disrupting the whole class,” a student from Chicago similarly said about some of her classmates. “The teacher is not able to teach. This is the real ignorant people.”

See also Josh Kinsler, *School Discipline: A Source or Salve for the Racial Achievement Gap?*, 54 INT'L ECON. REV. 355 (2013) (“I find that the threat of suspension deters students from ever committing an infraction, particularly those students who pose the greatest risk for poor behavior. Losing classroom time as a result of suspension has a small negative impact on the performance, whereas exposure to disruptive behavior significantly reduces achievement.”).

What accounts for the differing rates of misbehavior? The best anybody can say is, “*We don’t know entirely.*”⁹⁴⁶ But differing rates of poverty, differing rates of fatherless households, differing parental education, differing achievement in school, and histories of policy failures and injustices likely each play a part.⁹⁴⁷ Whatever the genesis of these disparities, they need to be dealt with realistically. We don’t live in a make believe world.⁹⁴⁸

⁹⁴⁶ Note that it is probably also error to suppose that *all* the differences in rates of discipline are due to differences in individual behavior (regardless of whether those differences in behavior are mediated by other factors, such as poverty rates). Different schools and school districts sometimes have different discipline codes, some more strict, others less so. Schools that have experienced higher rates of misbehavior are more likely to adopt stricter discipline codes. Since African American students tend to be over-represented at schools that have adopted such codes, this can have an effect on rates of discipline.

But these variations in discipline codes do not constitute discrimination. The evidence shows that at each such school or school district, students are treated equally regardless of race. Nor is there any evidence that these stricter codes were imposed on the schools because they have proportionately more minority students. School officials at those schools and school districts, who tend to be disproportionately minority themselves, appear to have chosen it for the school or school district based on their judgment of what was useful for maintaining classrooms where students can learn. See Josh Kinsler, *Understanding the Black-White School Discipline Gap*, 30 ECON. EDUC. REV. 1370 (2011)(finding cross-school variation in punishment in North Carolina); Josh Kinsler, *School Discipline: A Source or Salve for the Racial Achievement Gap?*, 54 INT’L ECON. REV. 355 (2013)(finding that “the racial gap in discipline stemming from cross-school variation in discipline policies is consistent with achievement maximization” for the minority students at those schools).

⁹⁴⁷ At an earlier school discipline briefing of the U.S. Commission on Civil Rights held on February 11, 2011, teacher Patrick Walsh acknowledged factors like these and made it clear that it was his opinion the disparities in school discipline are not related to race per se. He stated:

It’s not the African American girls on their way to UVa or William & Mary [who disproportionately are disciplinary problems at school]; it’s not the black girls from Ghana or Sierra Leone or Ethiopia who come here to live the American dream, but it’s the black girls who are products of what [Washington Post columnist] Colbert King ... called an inter-generational cycle of dysfunction. Girls who have no fathers in their homes, who often are born to teen mothers. ... [I]t’s the same with the boys.”

U.S. Commission on Civil Rights, Transcript of School Discipline Briefing at 26-27 (February 11, 2011), available at http://www.usccr.gov/calendar/trnscript/BR_02-11-11_School.pdf. Walsh openly acknowledged that this cycle of dysfunction may have roots in a history of racial discrimination. But that doesn’t mean it can be solved by pretending it doesn’t exist. Walsh was not optimistic that the disparity would disappear before “the problems of poverty and teen pregnancy and lack of fathers can be reduced or solved.” *Id.* See Colbert I. King, *Celebrating Black History as the Black Family Disintegrates*, WASH. POST, February 4, 2011 (the article to which Walsh was referring).

Note that the February 11, 2011 briefing led to a very different report from this one. See U.S. Commission on Civil Rights, *School Discipline and Disparate Impact* (April 2012), available at https://www.usccr.gov/pubs/docs/School_Disciplineand_Disparate_Impact.pdf.

⁹⁴⁸ When OCR and DOJ published their Dear Colleague letter on student discipline in 2014 (“2014 Dear Colleague letter”), I wondered what could possibly cause policymakers to promulgate a guidance that would push school districts in the direction of racial quotas in discipline. I suppose I have my answer now. If policy makers believe with their hearts and souls (and against all evidence) that all racial groups engage in school misbehavior at equal rates, quotas will seem like a good solution.

My colleagues are not willing to credit the data from teachers. But even self-reported data demonstrate racial differences in aggregate student conduct. The National Center for Education Statistics has asked students in grades 9-12 every other year since at least 1993 whether they have been in a physical fight on school property over the past 12 months. The results have been consistent. Each time, more African American students have reported participation in such a fight than white students.

In 2015, 12.6% of African American students reported being in a fight on school property, as contrasted with 5.6% of white students. Put differently, the African American rate was **125%** higher than the white rate. Similarly, in 2013, 12.8% of African American students reported being in a fight on school property and 6.4% of white students did. Back in the 1990s, the number of students reported participating in a fight on school property was generally higher. But the racial gaps were just as real. In 1993, 22% of African American students and 15% of white students admitted to participating in such a fight. Two years later, in 1995, the African American rate had declined to 20.3%, and the white rate had decreased to 12.9%.⁹⁴⁹

It should go without saying that these are aggregate statistics and have nothing to do with individual conduct. If a particular student is African American and has not been in a fight on school property then ... well ... he hasn't been in a fight on school property. If another student is white and she has been in a fight, then she has. Their race has nothing to do with it.

Note that neither African Americans nor whites were at the extremes among racial groups on the issue of fighting. Data on Asian American and Pacific Islander students didn't start to be collected until 1999. But in nearly every year for which data were collected, Asian American rates of participation in fights on school property were *lower* than white rates. On the other end of the spectrum, in every year since 1999 for which sufficient data existed, Pacific Islander students reported *higher* rates than African American students. For example, in 2005, 24.5% of Pacific Islander students reported being in such a fight, while only 16.9% of African American students did.⁹⁵⁰ The rates for whites and Asian Americans in that year were 11.6% and 5.9% respectively.

Weirdly, the staff-generated portion of this very report also contradicts the Commission's Finding (despite assertions that the Commission's Finding is supported by it).⁹⁵¹ On page 185, a chart of

⁹⁴⁹ Digest of Education Statistics, Percentage of students in grades 9-12 who reported having been in a physical fight at least one time during the previous 12 months by location and selected student characteristics: Selected years, 1993 through 2015, available at https://nces.ed.gov/programs/digest/d16/tables/dt16_231.10.asp.

⁹⁵⁰ See also Bach Mai Dolly Nguyen, Pedro Noguera, Nathan Adkins, & Robert T. Ternaishi, *Ethnic Discipline Gap: Unseen Dimensions in School Discipline*, ___ AM. EDUC. RESEARCH J. ___ (2019)(finding that Pacific Islanders have much higher rates of discipline than Asians and finding further differences when Asians and Pacific Islanders are disaggregated into ethnicities). See also Mark Alden Morgan & John Paul Wright, *Beyond Black and White: Suspension Disparities for Hispanic, Asian, and White Youth*, 43 CRIM. JUSTICE REV. 1 (2017).

⁹⁵¹ Shortly after the Commission meeting at which this report along with its findings and recommendations was adopted, I made an inquiry as to which studies the Commission's majority was relying on for this Finding (and for the Chair's statement in the April 2019 meeting to the effect that she stood by the Finding). My attention was directed specifically to pp. 184-186 of the then-current draft of the report (pp. 114-6 of the final version) as well as to unspecified materials that Chair Lhamon has reviewed in the course of her career.

self-reported wrongdoing by a sample of 10th grade students is broken down by race. And while the chart appears to have been deliberately designed to make the differences in misbehavior seem as small as possible, it still does not come close to supporting the Commission's Finding that there are *no* differences in misbehavior rates.⁹⁵² It shows instead that there are.⁹⁵³ Moreover, a fair

There is nothing on pages 184-86 of the final draft other than (1) the chart described above, which is taken from data presented in John M. Wallace, Sara Goodkind, Cynthia M. Wallace, & Jerald G. Bachman, *Racial, Ethnic, and Gender Differences in School Discipline Among U.S. High School Students: 1991-2005*, 59 NEGRO EDUC. REV. 47 (2008), (2) a citation to Jason A. Okonofua & Jennifer L. Eberhardt, *Two Strikes: Race and the Disciplining of Young Students*, PSYCHOLOGICAL SCI. 1 (2015), and (3) a citation to an interrogatory submitted to the Department of Education by the Commission in connection with the research conduct for this report. As I have described in the text and *infra* at note 14, the data from the Wallace et al. study do not support the Commission's Finding. To the contrary, they tend to refute it. For a discussion as to why the other two citations are no more useful in supporting the Commission's Finding, see *infra* at note 13.

⁹⁵² For misbehavior rates, the bar graph on page 116 reports figures that range from 0.5 to 15.0. Yet the Y-axis runs from 0 to 60. This necessarily makes the differences look small. If the Y-axis had run from 0 to 20 things would have looked a lot different.

To justify this unusual method for presenting data, the Commission could say that it wanted to present data on office visit/detention rates and on suspension/expulsion rates in the same graph. But there was no good reason to combine those issues into the same graph. Office visits, detention, suspensions, and expulsions are not merely a response to the misbehaviors (e.g. gun possession) addressed in the graph. They are a response to all types of misbehavior combined. The effect of the graph is to mislead.

⁹⁵³ The two other sources cited in the staff-generated portion of this report on which the Commission majority rely as proof of the Finding are Jason A. Okonofua & Jennifer L. Eberhardt, *Two Strikes: Race and the Disciplining of Young Students*, PSYCHOLOGICAL SCI. 1 (2015), and a citation to an interrogatory submitted to the Department of Education by the Commission.

The citation to Okonofua & Eberhardt is perplexing. That study reports an experiment. It does not purport to gauge rates of misbehavior in school by race. In the article's introductory paragraph it happens to describe some of the prior literature in the area of school discipline this way: "In a recent national survey of more than 70,000 schools ... the Office for Civil Rights (2012) reports that Black students are more than three times as likely to be suspended or expelled as their White peers, a fact not *fully* explained by racial differences in socioeconomic status or in student misbehavior (Fenning & Rose, 2007; see also McFadden, Marsh, Price & Hwang, 1992; Shaw & Braden, 1990; Skiba et al., 2011; Skiba, Michael, Nardo & Peterson, 2002; Wu, Pink, Crain, & Moles, 1982)." (Emphasis supplied). That word "fully" is important. The authors mean that they believe that some of the previous studies they are citing show that *sometimes* Black students are disciplined more harshly than White students who have committed the same offense. Okonofua & Eberhardt were not going out on a limb and saying that rates of misbehavior in school are equal across all races. Nor do any of the studies they cite say this. See also John Paul Wright, Mark Alden Morgan, Michelle A. Coyne, Kevin M. Beaver & J.C. Barnes, *Prior Problem Behavior Accounts for the Racial Gap in School Suspensions*, 42 J. CRIM. JUST. 257 (2014)(discussed *infra* at n. 24).

As for the Department of Education's answer to the Commission's interrogatory, the report states the following in Footnote 655:

"...OCR has not investigated or identified any information or evidence suggesting, one way or another, that students of color with disabilities engage in excludable or disruptive behaviors more often and/or more severely" See e.g., U.S. Dep't of Education, Office for Civil Rights, Interrogatory Responses to Commission at 9.

This cannot be the basis for a finding there are no differences among the various races in rates of misbehavior at school. First of all, the Department of Education's response to our interrogatory was not that it had proof that

examination of the data finds the differences are not at all small. The most serious example is the possession of a gun at school. This is a comparatively rare form of misbehavior (especially at schools that have instituted metal detectors at the school entrances). Among 10th grade boys, 3.0% of whites and 7.9% of African Americans confess to having possessed one in the last 12 months. That means the rate reported for African Americans was **163.3% higher** than the rate reported by whites. Similarly, the rate reported by American Indian boys (7.4%) was **146.7% higher** than that for white boys.⁹⁵⁴ Asian American boys on the other hand were at 2.7%, which is **10% lower** than that for white boys (although the sample size for Asian American boys was too small to yield statistically significant figures at the $p < .01$ level preferred by the authors of the underlying study being cited).

Similarly, self-reported gang membership is not evenly distributed among children and teenagers by race and ethnicity. In *Gang Membership Between Ages 5 and 17 Years in the United States*, David C. Pyrooz and Gary Sweeten took data from the National Longitudinal Survey of Youth 1997. They found that while Hispanics were 12.9% of the young people in the sample who had never been in a gang, they were 20% of those who had been. Similarly, African Americans were 15.6% of the young people who had never been in a gang, but they were 23.6% of those who had

misbehavior rates were the same across racial groups. Rather its response was that it had no evidence “one way or another.” Second, even if it had evidence, the comparison it was being asked to make was not among students of the various races, but rather among students *with disabilities* of the various races. That is an entirely different thing. See *infra* at 16-17.

⁹⁵⁴ These figures are from John M. Wallace, Sara Goodkind, Cynthia M. Wallace, & Jerald G. Bachman, *Racial, Ethnic, and Gender Differences in School Discipline Among U.S. High School Students: 1991-2005*, 59 *NEGRO EDUC. REV.* 47 (2008). They were significant to a $p < .01$ level.

The article also provided figures for two other self-reported misbehaviors for which schools professed zero tolerance and these other misbehaviors were also reported on the Commission’s chart on page 125. For example, among boys, African Americans reported having alcohol at school 25% more often than whites (9.0% vs. 7.2%). American Indians reported such conduct 73.6% more often (12.5% vs. 7.2%), and Hispanics reported it 98.6% more often (14.3% vs. 7.2%). On the other hand, whites confessed to such conduct 28.6% more often than Asian Americans. Unfortunately, the sample sizes for African American, Asian American, and American Indian boys were too small for the differences to be significant to the $p < .01$ level. Note, however, that the failure to prove a difference to a statistically significant level is emphatically not the same thing as proof that the behavior is the same. Believing otherwise is a rather elementary error. (Note also that .01 is an unusually stringent standard for measuring significance. Moreover, the authors inexplicably failed to combine the data for boys and girls, which showed even greater disparities, except in the comparison of White and Asian American rates. Combining data in that way is a routine method for dealing with small sample sizes and likely would have yielded more statistical significance.)

Among boys, African Americans reported having marijuana or other drugs at school at rates only 19% higher than whites did (10% vs. 8.4%). The corresponding comparisons for Hispanics and American Indians to whites were 94.4% higher (15.0% vs. 8.4%) and 22.6% higher (10.3% vs. 8.4%). For Asian Americans the corresponding figure was 20.2% lower (6.7% vs. 8.4%). Only the Hispanic-white comparison was significant to the $p < .01$ level. It is worth pointing out that not all studies of marijuana use have found that African American teenagers use marijuana and other drugs at higher rates than whites. National Institute on Drug Abuse, *Drug Use Among Racial and Ethnic Minorities*, (Table 16) , available at https://archives.drugabuse.gov/sites/default/files/minorities03_1.pdf; NYC Health, *Drug Use among Youth in New York City Public High Schools, by Sexual Orientation and Gender Identity*, 2015, available at <https://www1.nyc.gov/assets/doh/downloads/pdf/epi/databrief92.pdf>. I have not, however, found a study that contradicts these numbers for use of drugs in school.

been. Asian Americans were also over-represented in gangs with 2.3% never in a gang, but 2.5% of those who had been in a gang. Whites were the only group to be under-represented in gangs. They were 72.6% of the non-gang members, but 58.4% of those who had been gang members.⁹⁵⁵

There are, of course, other forms of misbehavior. Not everything is fighting on school property or possession of a gun at school, and not everything is related to gang membership. But the Commission has presented no evidence that other forms of misbehavior are disproportionately committed by whites and Asian Americans such that they cancel out the disproportionalities I have discussed. Indeed, it would be extraordinary if the differing rates for each kind of misbehavior *just happened* to net out to zero for all racial groups. Moreover, insofar as there is evidence, it runs the other direction. While the Commission's Finding suggests that the Commission's majority views the differing rates of teacher referrals for discipline with suspicion, it is impossible to ignore the fact that those numbers are roughly consistent with the self-reported data I have discussed above.

I can only surmise that the Commissioners who voted in favor of the Finding have misread the studies that purport to find that discrimination *may* account for *some portion* of the differences in the rate of discipline imposed on African American students. Somehow they have conflated that with a finding that *all* of the differences in rates of school discipline are caused by discrimination or by some factor other than differing behaviors. To my knowledge, no researcher makes such a claim.

Note that, according to the Department of Education, African American students are suspended at a rate approximately three times that of white students.⁹⁵⁶ Similarly, in the staff-generated portion of this report, among 10th grade boys, African Americans report being suspended or expelled at some point during their education slightly more than twice as often as whites so report.⁹⁵⁷ In turn, whites report being suspended or expelled at some point during their education 41% more often than Asian Americans so report.⁹⁵⁸

⁹⁵⁵ David C. Pyrooz and Gary Sweeten, *Gang Membership Between Ages 5 and 17 Years in the United States*, 56 J. ADOLESCENT HEALTH 1 (2015).

⁹⁵⁶ 2014 Dear Colleague Letter at 3.

⁹⁵⁷ Report at 116.

⁹⁵⁸ If you are wondering why the racial disparities are higher for suspension/expulsion rates than they are for office visit/detention rates that can be easily explained. It is likely to be at least in part the result of multiple violations. Suppose 10% of African American students have participated in a fight on school property and 5% of white students have. This is not too far off from the actual figures for 2015 (12.6% vs. 5.6%). I used 10% and 5%, because they make the calculations easier. Suppose also that a school district disciplines students who have been in just one fight with in-school detention. But a student who has been in two fights will be suspended, and a third fight will result in the student's expulsion.

If the school district has 10,000 African American and 10,000 white students, one would expect 1000 African American students and 500 white students to be given detention for fighting, which results in a 2 to 1 ratio for detention. In the next year, if one assume that a random 10% of African American students will get a fight and that a random 5% of white students will get in a fight, 100 African American students and 25 white students will now have been in two fights, which results in a 4 to 1 ratio for suspensions. In the third year, again a random 10% of African Americans will

If discrimination were to blame, it would take discrimination of epic proportions to account for all that.⁹⁵⁹ It would mean that two out of three African Americans who are suspended would not have been suspended if they had been white. Similarly, it would mean that huge numbers of white students would not have been suspended if they had been Asian. Teachers, guidance counselors, principals and school district officials *of every race and ethnicity* would have had to cooperate together to produce such a result.

No explanation is ever given to as why teachers would be so pro-Asian and so anti-Pacific Islander if there is really *no difference* in their behavior. To believe that they are would require one to take it on faith that the country is not just deeply racist, but arbitrarily racist: One minority group, many of whose members are fairly recent immigrants, is treated especially well; another minority group with many members who are fairly recent immigrants, is treated especially poorly.

Are teachers a particularly racist element of the American population? I doubt it, and I cannot understand why anyone would think they are. For what it's worth, teachers are one of the most liberal/Progressive/left-leaning professions in the country.⁹⁶⁰ Among them, Democrats outnumber Republicans by more than 3 to 1.

be in a fight. This will mean 10 African American and 1.25 white students will have been in three fights, which is an 8 to 1 ratio for expulsions.

⁹⁵⁹ Josh Kinsler appears to rule out race discrimination by teachers, principals or school district as the reason for large race disparities in discipline. Josh Kinsler, *Understanding the Black-White School Discipline Gap*, 30 ECON. EDUC. REV. 1370 (2011). But he suggests that differences in discipline policy from school district to school district (or school to school) may affect the racial statistics, because the school districts and schools that adopt stricter policies have disproportionately large numbers of minority students. See *supra* at note 6. This is not discrimination. At each school district or school, all students are treated exactly the same regardless of race. Nobody decides that one school (that happens to have more minority students than average) will have a harsher discipline policy while another school district or school (with fewer minority students) will have a more lenient one. Officials from each school district or school decide what sort of discipline policy is best for that particular school district or school.

Interestingly, in a later study, Kinsler suggests that heterogeneity in school discipline policies may be serving the interests of minority students. Those school district or schools that adopt more stringent policies in response to higher rates of misbehavior are more successful in maintaining order, which in turn leads to greater achievement by its students, including its minority students. To attempt to impose a one size fits all approach could sacrifice that gain. Josh Kinsler, *School Discipline: A Source or Salve for the Racial Achievement Gap?*, 54 INT'L ECON. REV. 355 (2013).

⁹⁶⁰ Ana Swanson, *The Most Liberal and Conservative Jobs in America*, WASH. POST (June 3, 2015). As a conservative, I am not inclined toward the notion that liberal/Progressive/left-leaning individuals are less likely to engage in race discrimination. It is on the left side of the political spectrum that the notion that colorblindness is a bad thing has taken root. See, e.g., Monnica T. Williams, *Colorblind Ideology Is A Form of Racism*, PSYCH. TODAY (December 27, 2011); Jennifer Delton, *In Praise of Colorblind Conservatism*, WASH. POST (October 9, 2018). But left-of-center racial ideology frequently calls for discrimination in *favor* of racial minorities in the form of affirmative action that is available to some groups and not others. It thus seems somewhat unlikely to me that teachers are discriminating *against* minorities. On the whole, however, the most likely explanation for the aggregate statistics is that race discrimination plays at most only an extremely small role in the differences.

A close friend of mine reported having dinner with two young elementary school teachers while the Commission was working on its Findings and Recommendations for this report. The two teachers faithfully hewed to the Progressive line on every single issue with one curious exception: *school discipline*. On that, they were troubled by their school's failure to support them as teachers in their efforts to maintain order in the classroom. The unruly students they sent to the principal would return shortly thereafter *with candy*. These teachers understood fully that the federal government's Obama-Era policy on school discipline was doing students, very much including minority students, no favors by pressuring schools to lighten up on discipline on account of its disparate impact on minority students.⁹⁶¹

So allow me to discuss the studies that purport to present evidence that discrimination may be *part* of the explanation for the differences in discipline rates. For reasons I discuss in *The Department of Education's Obama-Era Initiative on Racial Disparities in School Discipline: Wrong for Students and Teachers, Wrong on the Law*,⁹⁶² I believe those studies fail even to demonstrate that race discrimination is a partial explanation for the differences in rates of discipline.⁹⁶³ But they certainly do not support the Commission's Finding that *none* of the differences are the result of differences in rates of misbehavior.

Of course, the first and most obvious reason to believe rates of misbehavior are not equal across all races is that the eyewitnesses to the individual cases—the teachers—have, through their individual actions of sending students to the principal's office for discipline, demonstrated that they are not equal. Principals have evidently agreed with those teachers. No student gets suspended without the agreement of a school official above the teacher. Researchers working with aggregate statistics are looking to prove that these teachers and principals were in part motivated by race (or are otherwise systematically biased against one or more racial groups). But the researchers were not flies on the wall when the student's alleged misbehavior occurred; they don't have the facts concerning the alleged misbehavior.

One technique that researchers have used is to control for factors that are thought to be associated with misbehavior in school—like low-income status, family structure, parental education, etc. If, after attempting to account for such factors, there remains some residual differences in rates of

⁹⁶¹ I believe this is an excellent example of historian Robert Conquest's rule that everyone is a conservative about the things they know best. Put differently, when it comes to dealing with problems in their own professions, even the most ardent Progressives are able to see the nuance and complexity, which allows them to understand better and appreciate the traditions of that profession.

⁹⁶² 22 TEX. REV. L. & POLITICS 471 (2018)(with Alison Somin), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3104221.

⁹⁶³ This is not because I believe that discrimination against African Americans or other racial minorities with higher than average school discipline rates is never a factor in school discipline decisions. It could be and indeed probably is. Particularly given that the U.S. Department of Education had recently been instructing school districts that they can be held responsible for mere disparate impact in school discipline, there could have been (and indeed probably was) discrimination against white and Asians too. Discrimination in one direction could mask discrimination in the other direction in aggregate statistics. As always, it is individuals who count and not groups. If a student is being punished (or punished more harshly) because of his or her race, that's a travesty and a violation of the law no matter what the aggregate statistics show.

misbehavior between racial groups these researchers suggest (or sometimes merely imply) that the possibility that race discrimination is a factor must be entertained. But they do not suggest or imply that the underlying rates of misbehavior were equal across races prior to controlling for other factors.⁹⁶⁴ To the contrary, by controlling for those factors, these studies are acknowledging that we shouldn't expect misbehavior rates to be equal when other factors aren't.⁹⁶⁵

⁹⁶⁴ Interestingly one thing that most researchers had not been able to do until 2014 is control for each student's prior disciplinary record. In cases in which an African American student appeared to have been punished more harshly than a white or Asian student who committed the same offense, it was impossible to tell whether the students being compared had different past records of misbehavior. That changed with *Prior Problem Behavior Accounts for the Racial Gap in School Suspension*. The authors of that study had a database that gave them good evidence of whether particular students had been in disciplinary trouble before. John Paul Wright, Mark Alden Morgan, Michelle A. Coyne, Kevin M. Beaver & J.C. Barnes, *Prior Problem Behavior Accounts for the Racial Gap in School Suspensions*, 42 J. CRIM. JUST. 257 (2014).

The authors employed the Early Childhood Longitudinal Study, Kindergarten Class of 1998-99 database, which includes data on over 21,000 students; full data for the project was available for 2737 of them. Prior behavior measures came from the fall of kindergarten (1998), the spring of first grade (2000), and the spring of third grade (2002). In addition, the authors used parent-reported data from the eighth grade in response to questions whether the student cheats, steals, or fights. The disciplinary "outcome" data came from the spring of the eighth grades (2007).

In the abstract to the article, the authors put their findings modestly, stating that "the use of suspensions by teachers and administrators may not have been as racially biased as some scholars have argued." *Id.* at 257. In fact, as the title to the article suggests, their findings are devastating for those who argue that disproportionality in discipline signals discrimination.

In the body of their article, the authors explain their findings more completely:

Capitalizing on the longitudinal nature of [our database], and drawing on a rich body of studies into the stability of early problem behavior, we examined whether measures of prior problem behavior could account for the differences in suspension between both whites and blacks. The results of these analyses were straightforward: The inclusion of a measure of prior problem behavior reduced to statistical insignificance the odds differentials in suspensions between black and white youth. Thus, our results indicate that odds differentials in suspensions are likely produced by pre-existing behavioral problems of youth that are imported into the classroom, that cause classroom disruptions, and trigger disciplinary measures by teachers and school officials. Differences in rates of suspensions between racial groups thus appear to be a function of differences in problem behaviors that emerge early in life, that remain relatively stable over time, and that materialize in classroom.

Id. at 7.

Put differently, they found that once prior misbehavior is taken into account, the supposed racial differences in severity of discipline melt away.

⁹⁶⁵ John M. Wallace, Sara Goodkind, Cynthia M. Wallace, & Jerald G. Bachman, *Racial, Ethnic, and Gender Differences in School Discipline Among U.S. High School Students: 1991-2005*, 59 NEGRO EDUC. REV. 47 (2008), which is discussed supra at n. 11 is an example of such a study. Another good example of this is *Breaking Schools' Rules: A Statewide Study on How Schools Discipline Relates to Students' Success and Juvenile Justice Involvement*—a report issued by the Justice Center of the Council of State Governments and the Public Policy Research Institute of Texas A&M University. That study purports to find that even after 83 different variables are taken into account, African American students are still 31.1% more likely than white students to have been the subject of discretionary disciplinary action in the 9th grade. The inference that the authors appear to want the reader to draw is that perhaps some teacher reports of misbehavior by African American students were false or misleading. It does not in any way

Another approach is associated with the work of Russell Skiba and his various co-investigators. In *The Color of Discipline: Sources of Racial and Gender Disproportionality in School Punishment* (“Skiba I”),⁹⁶⁶ for example, their analysis runs this way: Whites are (within the population of students referred for discipline in their database) more likely to be referred for “smoking,” “left without permission,” “vandalism,” and “obscene language,” while African Americans are more likely to be referred for “threat,” “disrespect,” “excessive noise,” or “loitering.”⁹⁶⁷ The latter offenses, by the authors’ reckoning, are more judgment calls than the former. They posit that this shows that African American students *could* be the victims of bias in the sense that things that they could be referred for discipline for something that would not be regarded as a “threat” or as “disrespect” if it had come from a white student.

I have criticized the Skiba I methodology in *The Department of Education’s Obama-Era Initiative on Racial Disparities in School Discipline: Wrong for Students and Teachers, Wrong on the Law*.⁹⁶⁸ But the reasons for my criticism are unrelated to the Commission’s current Finding that

suggest that rate of misbehavior among races are equal. Indeed, quite the opposite: By controlling for factors like family structure, parental education (as a proxy for socio-economic status), and the region and urbanicity of the community in which students live, it implicitly acknowledges that it is naïve to expect rates of misbehavior to be equal when rates of poverty, etc. are not equal.

I have criticized the conclusions drawn in *Breaking Schools’ Rules: A Statewide Study on How Schools Discipline Relates to Students’ Success and Juvenile Justice Involvement* insofar as the article suggests that the residual differences are the result of race discrimination in Gail Heriot and Alison Somin, *The Department of Education’s Obama-Era Initiative on Racial Disparities in School Discipline: Wrong for Students and Teachers, Wrong on the Law*, 22 TEX. REV. L. & POLITICS 471 (2018)(with Alison Somin), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3104221. There is no need to make those criticisms here, because the article does not claim that school misbehavior rates are equal across races.

⁹⁶⁶ *Skiba I* is a study of 11,001 students in 19 middle schools in an unnamed large Midwestern city. Russell J. Skiba, Robert S. Michael, Abra Carroll Nardo, & Reece L. Peterson, *The Color of Discipline: Sources of Racial and Gender Disproportionality in School Punishment*, 34 URBAN REV. 317 (2002).

Skiba I found that attempting to control for socio-economic class did not account for all or even most of the racial disproportionalities. Put differently, African American students who are eligible for the free lunch program are referred more often for discipline than white students who are eligible for the free lunch program. Then again, eligibility for free lunch is a very restricted measure of socio-economic class. No attempt was made here to control for out-of-wedlock birth or low scholastic performance, both factors known to correlate with school discipline referrals. The latter, of course, is difficult to measure in that the same bias researchers are trying to measure in school discipline could conceivably infect school grades.

See also Russell J. Skiba et al., *Race Is Not Neutral: A National Investigation of African American and Latino Disproportionality in School Discipline*, 40 SCH. PSYCHOL. REV. 85 (2011).

⁹⁶⁷ Note that this does not mean that whites students generally are more likely to be referred for discipline for “smoking,” “left without permission,” “vandalism,” and “obscene language,” than African American students. The comparison here is between white students who were referred for discipline and African American students who were referred for discipline.

⁹⁶⁸ 22 TEX. REV. L. & POLITICS 471 (2018)(with Alison Somin), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3104221.

there are *no* differences in behavior among racial groups. At no point do Skiba and his co-investigators take the position that there are *no* differences in misbehavior rates among races. They are making comparisons within the population of students who have been disciplined. Their point is that *some* of the disparities in discipline rates could be caused by discrimination rather than by differences in behavior.

Another technique that one researcher—Michael Rocque—has employed on more than one occasion is ask individual teachers, in retrospect, to give an overall rating the conduct of individual students who have been in their classroom. He and his co-investigators then attempted to compare those ratings with each student’s actual record of discipline. He found that in comparing students of different races with the same “rating,” the African American students were more likely to have been the recipient of actual discipline or of more discipline.

Again, I have criticized Rocque’s methodology in *The Department of Education’s Obama-Era Initiative on Racial Disparities in School Discipline: Wrong for Students and Teachers, Wrong on the Law*,⁹⁶⁹ and will not do so again here. The point is that even Rocque does not claim that the teacher ratings he used as his benchmark of actual misbehavior were equal across races. Rather he makes the much more limited claim that the teacher ratings did not fully account for the differences in rates of discipline. Put differently, he is suggesting that race discrimination may be a *part* of the explanation for the differences in rates of discipline, not that it is anything close to the *full* explanation.

Discipline and Disability:

With regard to disability, the Commission adopted the following Findings:

Students with disabilities are approximately twice as likely to be suspended throughout each school level compared to students without disabilities. Five states (including the District of Columbia) reported a ten percentage point or higher gap in suspension rates between students with disabilities and students without disabilities.

The type of disability a student has may also affect disparate discipline rates. Having a learning disability remains the largest category of students with disabilities (42 percent) served by special education. These students are majority male students, disproportionately poor, and often students of color. These students continue to receive disciplinary actions at much higher rates compared to students without learning disabilities.

Here’s the problem: We are not talking about students who are blind, wheelchair-bound, or deaf. As Max Eden testified at our briefing, those students generally have lower than average discipline rates (though for reasons I cannot fathom, this significant clarification didn’t make it into the Commission’s findings). ***Instead, it is students with behavioral disorders who have higher than average discipline rates.***

⁹⁶⁹ Ibid.

If that surprises anyone, it shouldn't. It is essentially *by definition* that students with behavioral disorders engage in misbehavior at school more often than other students. The diagnostic criteria established under the Diagnostic and Statistical Manual of Mental Disorders, 5th Edition ("DSM 5") for them often includes findings that the individual has engaged in some sort of misbehavior.

For example, one of the criteria used to diagnose Oppositional Defiant Disorder is "often actively defies or refuses to comply with requests from authority figures or with rules."⁹⁷⁰ Similarly, the diagnostic criteria for attention deficit hyperactivity disorder (ADHD) note that a person with the disorder "often interrupts or intrudes on others (e.g. butts into conversations, games, or activities); may start using other people's things without asking or receiving permission; for adolescents or adults, may intrude into or take over what others are doing."⁹⁷¹ "Recurrent behavioral outbursts representing a failure to control aggressive impulses" is likewise a criterion for diagnosing Intermittent Explosive Disorder,⁹⁷² and the essential feature of Conduct Disorder is "A repetitive and persistent pattern of behavior in which the basic rights of others or major age-appropriate social norms or rules are violated."⁹⁷³

What the Commission has found is that students who misbehave a lot get disciplined a lot. *That should not be news.*

One can question what the best method is for instilling discipline in students with (or without) such disabilities. The Commission seems to assume that once a student is pronounced to have a particular behavioral disorder that means the student should not be disciplined for misbehavior, presumably on the ground that he can't help it. As a matter of logic, that doesn't follow. In any event, "best practices" in school discipline is not a question for this Commission.⁹⁷⁴

⁹⁷⁰ DSM 5 at 462.

⁹⁷¹ DSM 5 at 60.

⁹⁷² DSM 5 at 466.

⁹⁷³ DSM 5 at 470. The same is true for students with pyromania, which is "deliberate and purposeful fire setting on more than one occasion," DSM 5 at 476, or kleptomania, which is "recurrent failure to resist impulses to steal objects that are not needed for personal use or their monetary value." DSM 5 at 478.

With other types of disabilities, the relationship between disability and discipline problems may be subtler. A child with a sleep-related disability may be especially likely to misbehave at school because of irritability caused by lack of sleep. While children on the autism spectrum face exclusionary discipline at disproportionately low rates, they may be nonetheless disproportionately likely to misbehave (and hence face other kinds of discipline) because of the lack of social skills that is a hallmark of that disorder. Poor skills at reading faces, for example, might mean that they misunderstand that someone is angry at them and that they need to stop the behavior that is causing that anger. Good teachers will try to be attentive to this kind of problem and respond appropriately. But not every teacher can or will do so all the time, especially if the relationship between the disability and the misbehavior is subtle. None of this should be interpreted as driven by bias against disability per se.

⁹⁷⁴ It is worth noting that the validity of the standard DSM labeling schemes for psychiatric disorder is now widely doubted in by researchers in psychiatry and psychology. See B.J. Casey, Nick Craddock, Bruce N. Cuthbert, Steven E. Hyman, Francis S. Lee & Kerry J. Ressler, *DSM-5 of RDoC: Progress in Psychiatry Research?*, 14 NATURE REVIEWS.

Discipline and Intersectionality:

With regard to “intersectionality,” the Commission’s Findings were as follows:

The U.S. Department of Education recognizes that since it began collecting state-level data on suspensions and expulsions in the 1998-1999 school year, “there appears to be a consistent pattern where Black students with disabilities were suspended or expelled at greater rates than their percentage in the population of students with disabilities.

Black girls with disabilities are substantially more likely than white girls with disabilities to experience school discipline; recent data reflects that black girls with disabilities are four times more likely than white girls with disabilities to experience one or more out of school suspensions.

The most recent CRDC data reflects that, with the exception of Latinx and Asian American students with disabilities, students of color with disabilities were more likely than white students with disabilities to be expelled without educational services.

None of this is startling. The rates of discipline for African American students are higher than average; the rates of discipline for students with disabilities are also higher than average (though that is not true of students with physical disabilities like blindness, deafness and paralysis). It isn’t surprising that the rates of discipline for African American students with disabilities would be higher than for white students with disabilities.

Sometimes interactions between variables can produce unexpected results. It is not impossible that both African American students generally and students with disabilities generally could have higher than average discipline rates, but that African American students *with disabilities* could have lower than average discipline rates. For example, suppose that white parents are more aggressive than African American parents at getting their children diagnosed with behavioral disabilities and that consequently a much larger proportion of African American students with disability diagnoses have physical disabilities rather than behavioral disabilities relative to white students with disability diagnoses. Since we know that students with physical disabilities have

NEUROSCIENCE 810 (2013). There are some medical conditions—diabetes, thyroid disorders—that are detected by simple blood tests. Either you have the wrong level of something in your bloodstream or you don’t. Behavioral disorders generally cannot be so easily identified. Most children have exhibited behavior at one point or another that could contribute to a diagnosis for ADHD, Oppositional Defiant Disorder, Intermittent Explosive Disorder, or Conduct Disorder (and those that haven’t may have engaged in behaviors that could contribute to a diagnosis of some other disorder recognized by DSM 5). There are necessarily judgment calls that have to be made. But the issues go beyond that. For some or all behavioral disorders, it is difficult to know whether there is any “there” there. Given that the behaviors that go into a diagnosis are ordinarily distributed on a normal curve rather than found in discontinuous clusters, is it fair to call them disorders at all? Is there a functional reason to group disorders as the DSM 5 does? Is there any functional reason to distinguish between, for example, a teenager with Oppositional Defiant Disorder and a teenager who is more rebellious than most?

lower rates of discipline than average, it wouldn't be impossible for African American students with disabilities to have lower than average rates of discipline despite higher rates for African American students generally and disabled students generally.⁹⁷⁵

My point is simply that it isn't surprising that, at least according to the Commission's Finding, it didn't turn out that way. I do not know if the Commission has a sufficient basis upon which to make that Finding. I note that some researchers have found just the opposite—that “[s]tudents with disabilities who are Black, Hispanic, or of other race/ethnicity were not more frequently suspended than [students with disabilities] who are White.”⁹⁷⁶

Conclusion:

One of my earliest heroes – Daniel Patrick Moynihan – famously said that “Everyone is entitled to his own opinion, but not to his own facts.” A taxpayer-funded federal commission should be especially careful to avoid making these kinds of errors. Yet for all the reasons I discuss above, I fear that the Commission failed to do so with this report. The policymakers we advise and the public who fund us deserve better.

⁹⁷⁵ Should we expect all racial and ethnic groups to have similar rates of disabilities? We know that certain racial and ethnic groups are more likely to have certain diseases or disorders that don't much affect academic performance or school behavior. Tay-Sachs disease is much more common in Ashkenazi Jews than in the general population. See, e.g., The Jewish Standard: Why to Test for Tay-Sachs, available at <https://www.jewishgeneticdiseases.org/test-tay-sachs-article-jewish-standard/>. French Canadians have unusually high rates of Leber's hereditary optic neuropathy because of a genetic mutation carried by a single common ancestor. See Sarah Zhang, How One Woman Brought the 'Mother's Curse' to Canada, September 19, 2017, available at <https://www.theatlantic.com/science/archive/2017/09/how-a-fille-du-roy-brought-the-mothers-curse-to-canada/540153/>. African Americans are unusually likely to have sickle cell trait (the genetic trait that can lead to the development of sickle cell anemia.) It is thought that this is because the gene for sickle cell trait has protective effects against malaria, meaning that groups in malaria-prone areas are more likely to carry it. See “Mystery Solved: How Sickle Hemoglobin Prevents Against Malaria,” SCIENCE DAILY, available at <https://www.sciencedaily.com/releases/2011/04/110428123931.htm>.

⁹⁷⁶ Paul L. Morgan, George Farkas, Marianne M. Hillemeier, Yangyang Wang, Zoe Mandel, Christopher DeJarnett & Steve Maczuga, Are Students with Disabilities Suspended More Frequently than Otherwise Similar Students without Disabilities, 72 J. SCHOOL PSYCH. 1 (2019).