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SEARCHING FOR THE PARENTAL CAUSES OF THE SCHOOL-TO-PRISON PIPELINE PROBLEM: A CRITICAL, CONCEPTUAL ESSAY

REGINALD LEAMON ROBINSON¹

*I believe that we're all born good, uncorrupted and
life itself does the corrupting. But, you know, someone
like [these children] . . . [they] just [aren't] capable
of something like this.²*

*In the extreme, moral poverty is the poverty of growing
up surrounded by deviant, delinquent, and criminal adults
in abusive, violence-ridden, fatherless, Godless, and jobless
settings. In sum, whatever their material circumstances,
kids of whatever race, creed, or color are most likely to
become criminally depraved when they are morally deprived.³*

ABSTRACT

*In this critical, conceptual essay, the author argues that the
School-to-Prison Pipeline (“STPP”) simply does not exist. Long*

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² *X-Files: Empedocles* (Fox Network television broadcast Apr. 22, 2001) (covering Kathy Dukes' statement to FBI Agent Monica Reyes, regarding her brother's murders, how he threatened his niece by putting a gun to her head).

³ Matt DeLisi, et al., *Super-Predators Revisited*, in CRIM. RES. FOCUS 21, 22 (2007), (quoting John J. DiLulio, *The Coming of the Super-Predators*, THE WKLY. STANDARD (Nov. 27, 1995).

before Columbine and the enactment of zero tolerance, caregivers have been wrongly harming their children, something causing them toxic stress that triggers their stress-response system, and making it nigh impossible for children easily ensnared by suspensions, expulsions, referrals to alternative schools, and SRO arrests to have the best developmental start and cognitive abilities to succeed in public schools. Further, teachers and administrators who are pressured to report great educational metrics, and for their own childhood reasons have a near inflexible need to enforce the strictest obedience rules. These elements overwhelmingly contribute to the rate at which children fall prey to the so-called STPP. But the real point is that teachers, administrators, and zero tolerance policies do not toss these children before juvenile court judges or eventually in front of criminal court judges. It is the brain structure on which these children are relying to understand and navigate their worlds that led them to externalizing behavior and criminal conduct, all of which flows from their earliest dysfunctional relationships with their well-meaning but antisocially conflicted caregivers. In this way, it is a caregiver-to-prison pipeline problem.

I. INTRODUCTION

More than a decade ago, I began reading Alice Miller's seminal works,⁴ which taught me that by blaming children solely for their actions and failure,⁵ we invariably shroud parents and caregivers directly from the consequences of their "poisonous pedagogy."⁶ And thus today, when I look at the so-called School-to-Prison Pipeline ("STPP") problem,⁷ I posit that parents and caregivers

⁴ See, e.g., ALICE MILLER, *THE DRAMA OF THE GIFTED CHILD: THE SEARCH FOR THE TRUE SELF* (Ruth Ward trans. 3d ed., 1997); ALICE MILLER, *FOR YOUR OWN GOOD: THE HIDDEN CRUELTY IN CHILD-REARING AND THE ROOTS OF VIOLENCE* (Hildegard Hannum & Hunter Hannum trans., 1983); ALICE MILLER, *THOU SHALT NOT BE AWARE: SOCIETY'S BETRAYAL OF THE CHILD* (Hildegard Hannum & Hunter Hannum trans., 1981); ALICE MILLER, *THE TRUTH WILL SET YOU FREE: OVERCOMING EMOTIONAL BLINDNESS AND FINDING YOUR TRUE ADULT SELF* (Andrew Jenkins trans., 2001).

⁵ See MILLER, *THE DRAMA OF THE GIFTED CHILD*, *supra* note 4, at 6.

⁶ See MILLER, *FOR YOUR OWN GOOD*, *supra* note 4, at 58-60.

⁷ See generally Russell J. Skiba, *Zero Tolerance, Zero Evidence: An Analysis of School Disciplinary Practice*, Policy Research Report No. SRS2, IND. EDUC. POL'Y CTR. (2000); Aaron J. Curtis, Note, *Tracing the School-to-Prison Pipeline from Zero Tolerance Policies*

must be conceptual and environmental predictors that explain why certain children like poor, race, and ethnic become disproportionate targets of zero tolerance policies. In adopting this view, I differ radically from some current scholars, advocates, and parents. Like co-conspirators, scholars, advocates, and parents nearly uniformly fault public school's zero tolerance policies and practices as external, objective and institutional factors over which poor blacks, for example, have no meaningful control. That self-absolving finger pointing has the redolence of *Plessy's* "tragic sequelae."⁸ And to say *Plessy* is to say slavery. It is also to say: "*look what they're doing to our poor, impoverished children!*"⁹ Without regard to the well-intentioned love, discipline, and sacrifices of poor, black parents for example, the finger pointing to bygone historical practices and to present-day policies means that powerful institutional policies and practices disproportionately suspend, expel, refer, and arrest poor, minority, learning disabled, and LGBTQ students. And with such finger pointing, the taint of race arrives. Looking to race and racism, scholars, advocates, and parents require us to engage in traditional socio-economic analyses of zero tolerance and the so-called STPP.

To analyze STPP, we must not become easy prey to race baiting as *deus ex machina*. Rather, we, or at the very least I, must drill down pass the racial patina, so that I can reveal the obviousness of what predicts for the child's "externalizing behavior" that gets so apparently and easily ensnared by zero tolerance policies. By not drilling down, we'll find ourselves faulting the mere presence of water-filled pools for why children

to Juvenile Justice Dispositions, 102 GEORGETOWN L.J. 1251 (2014); *Zero Tolerance and Exclusionary School Discipline Policies Harm Students and Contribute to the Cradle to Prison Pipeline*, CHILD. DEF. FUND – OH., (Nov. 2012), www.cdfohio.org.

⁸ See generally A. Leon Higginbotham, Jr., *An Open Letter to Justice Clarence Thomas from a Federal Bench Colleague*, 140 U. PA. L. REV. 1005, 1010 (1991) ("The tragedy, with *Plessy v. Ferguson*, is not that the Justices had the 'wrong' education, or that they attended the 'wrong' law schools. The tragedy is that the Justices had the wrong *values*, and these values poisoned this society for decades. Even worse, millions of Blacks today still suffer from the tragic sequelae of *Plessy* – a case which Chief Justice Rehnquist, Justice Kennedy, and most scholars say was wrongly decided.").

⁹ See, e.g., Anna Deavere Smith, *The School-to-Prison Pipeline Punishes Black and Brown Kids for Being Young and Poor*, THINK, Feb. 26, 2018, available at <https://www.nbcnews.com/think/opinion/school-prison-pipeline-punishes-black-brown-kids-being-young-poor-ncna850846>

drown. Could they swim? Why haven't they learned? Did their parents prevent them from learning? Did the parents order them into the pool? Children who have suffered traumatic interpersonal adversities¹⁰ and toxic stress¹¹ perinatally and postnatally, especially during the golden years of rapid brain development, and who have right brain architectures that prevent them from calming down after an arousal state, cannot swim in society's calmest waters.¹²

By necessity, these children will literally and figuratively drown,¹³ and unfortunately, like their parents, they will view the world through such a distorted perception that blames zero tolerance policies solely for the so-called STPP problem. Yet, these children's parents sent them to schools without caring about how they have shaped their children's brains through the earliest disruptions in the parent-child relationship.¹⁴ Once in school, these children will display midbrains that have adapted to complex trauma and that looks like developmental trauma disorder.¹⁵ Invariably, society's "normal" looks vastly abnormal to them, and they will see only at school the adversities with which they've struggled to overcome since birth.¹⁶ Once they are

¹⁰ See Monica Bucci et al., *Toxic Stress in Children and Adolescents*, 63 *ADVANCES IN PEDIATRICS* 403, 409 (2016) ("Stressful or traumatic events experienced in childhood or adolescence are referred to by many terms, including early life adversity, early life stress, early life trauma, or adverse childhood experiences (ACEs).").

¹¹ Id. at 404 ("Toxic stress is characterized by prolonged or frequent activation of the stress response that leads to a dysregulation of the neuroendocrine immune circuitry, which produces altered levels of important hormones and neurotransmitters and ultimately changes in brain architecture and multiple organ systems.").

¹² See, e.g., BRUCE PERRY & MAIA SZALAVITZ, *THE BOY WHO WAS RAISED AS A DOG* 39 (2006) ("In sensitization, a pattern of stimulus leads to increase sensitivity to future similar stimulus. . . Vietnam veterans and the rats . . . were genetically oversensitive to stress or became sensitized, even small stressors can provoke large responses.").

¹³ See, e.g., Lauren Slagter, *Students with a History of Suspension Discuss School-to-Prison Pipeline*, *MLIVE*, Feb. 18 2018 ("Marquaun Kane, 17, . . . said the two frequently got into fights with other students while they attended middle school in Ypsilanti, and they were often suspended as a result."), available at https://articles.mlive.com/news/ann-arbor/index.ssf/2018/02/school_to_prison_pipeline_1.amp.

¹⁴ See, e.g., SUSAN F. COLE ET AL., *HELPING TRAUMATIZED CHILDREN LEARN: SUPPORTIVE SCHOOL ENVIRONMENTS FOR CHILDREN TRAUMATIZED BY FAMILY VIOLENCE* 16 (2005).

¹⁵ See generally Bessel A. van der Kolk, *Developmental Trauma Disorder: Towards a rational diagnosis for children with complex trauma histories*, 35 *PSYCHIATRIC ANNALS* 401, 406 (2005).

¹⁶ See COLE, *supra* note 14, at 17.

suspended or expelled, the parents, who no doubt were also harmed during their childhood,¹⁷ will believe that the zero tolerance policy must be the primary and principal cause for their children's exclusion from school. By fault, the parents will invoke race as *causa prima* because they too are "emotionally blind"¹⁸ to their own early childhood experiences,¹⁹ and to how they have created toxic stress for their children.²⁰ By not drilling down, scholars, advocates, and parents focus instead on race and ethnicity, for example, and by vouchsafing poor black parenting styles, they keep shrouded the primary predictors for what society erroneously calls the STPP problem.²¹

By drilling down and by seeking out the primary predictors for the STPP problem, which based on the literature must be insecure attachment experiences, I am not arguing that co-factors or secondary factors do not exist, i.e., institutional racism or teacher's attribution bias. Of course, they exist, and zero tolerance policies and new policing practices, along with a host of

¹⁷ See MILLER, *THE TRUTH WILL SET YOU FREE*, *supra* note 4, at 95-96 ("Our parents project the repressed feelings of their childhood onto us . . .").

¹⁸ See ALICE MILLER, *FOR YOUR OWN GOOD: HIDDEN CRUELTY IN CHILD-REARING AND THE ROOTS OF VIOLENCE* x (Hildegard Hannum & Hunter Hannum trans., 2002) ("Children must deny the pain in order to survive, but this strategy leads them, as grown-ups, to the emotional blindness responsible for the absurd attitude they act upon as parents and educators. The denial of violence endured leads to violence directed toward others or oneself."); Diane Connors, *Alice Miller: For Your Own Good – An Interview*, OMNI PUBLICATIONS INTERNATIONAL (1987), available at <http://www.no.spank.net/miller4.htm> (last visited July 15, 2012) ("My antipedagogical position is not directed against a specific type of pedagogy," Miller notes, "but against pedagogical ideology in general, which can be found also in the permissive theories." She fears that as a consequence of adults' arrogant attitudes – including "permissive" attitudes – toward children's feelings, children are trained to be accommodating. But their own voices will be silenced, and their awareness killed. And more blind and arrogant adults will be the result.).

¹⁹ See MILLER, *THE TRUTH WILL SET YOU FREE*, *supra* note 4, at 124 ("The memory traces we believe to have been blotted out forever persist and are still operative.").

²⁰ See Bucci, et al., *supra* note 10, at 409 ("The spectrum of the stress response includes positive, tolerable, and toxic stress. . . . The physiologic response to stress depends on the nature of the stressors and the availability of buffering and coping strategies. Although there is promising evidence from animal studies that the toxic stress response may be mitigated, the extent to which an individual's stress response can move along the continuum is currently unknown.") (citations omitted).

²¹ See Stacey Patton, *Some Black Parents See Physical Discipline as a Duty. The NAACP Shouldn't Agree*, Opinion, WASH. POST, June 22, 2012, https://www.washingtonpost.com/opinions/some-black-parents-see-physical-discipline-as-a-duty-the-naacp-shouldnt-agree/2012/06/22/gJQAyo5ovV_story.html?utm_term=.2aade99a65af.

co-factors, clearly correlate with why minor scuffles between middle school students, if viewed by an SRO, a School Resource Officer, or by teachers or administrators, become criminal offenses.²²

Accordingly, by not drilling down, we don't understand that without the earliest disruption in the parent-child relationship, one central feature of which must be complex trauma based on interpersonal abuse and chronic neglect by caregivers, we have a net that catches no fish. That is, in a world where caregivers have highly attuned attachment to their children, it would be nigh impossible for school districts' zero tolerance policies and heightened policing in public schools to yield approximately 3.45 million suspensions during 2011 and 2012.²³ Without drilling down, it would be quite easy for us to simply fault teachers, staff, administrators, and police officers, or institutional actors, for the STPP problem. However, if we drill down into this problem, getting past such superficialities that have heretofore not yielded better observations than just faulting white racism, ought we ask why some black, Hispanic, learning disabled, and LGBTQ students have not been subjected to zero tolerance's exclusionary policy? Equally important, ought we ask why do some students engage in "persistent aggression" that qualifies as externalizing behavior and related problems?²⁴ After drilling down, I hypothesize that, after controlling for institutional racism and teacher attribution bias, we ought to find conceptually that caregivers whose parenting styles replay the adversities and cruelties to which they were initially exposed during their own childhoods, and that exposure constitutes toxic stress, which correlates with the so-called STPP problem.²⁵

²² See Sarah E. Redfield & Jason P. Nance, *School-to-Prison Pipeline: Preliminary Report*, A.B.A. SEC. CRIM. JUST. REP. 14, 14 (Feb. 2016).

²³ *Id.*

²⁴ NICHD Early Child Care Research Network & William F. Arsenio, *Trajectories of Physical Aggression from Toddlerhood to Middle Childhood: Predictors, Correlates, and Outcomes*, 69 MONOGRAPHS SOC'Y FOR RES. CHILD DEV. 1, 6 (2004)

²⁵ See, e.g., ALICE MILLER, *FREE FROM LIES* 48 (Andrew Jenkins trans., 2009) (positing that children tend to parent the way they were parented); ROBIN KARR-MORSE & MEREDITH S. WILEY, *GHOSTS FROM THE NURSERY: TRACING THE ROOTS OF VIOLENCE* 44-45 (Atlantic Monthly Press rev. & updated ed. 2013) (referring to the child who was fed lying down as an infant due to a medical condition, and when she played with dolls and fed them throughout her childhood, she did so as she was fed as an infant, even though she

From an institutional view, the STPP problem, which purportedly or metaphorically drives young students out of school through suspensions, expulsions, alternative schools, juvenile detentions, and criminal incarcerations, flows inexorably from contemporary efforts by teachers and administrators to ensure safe, learning environments for students. For such teachers and administrators, it would be a state-mandated duty to ensure that learning takes place in a safe, protected school environment. If teachers, administrators, and students do not feel safe, then teachers cannot teach, and students will not learn.²⁶ And if teachers don't feel respected, they will stand as sentinels against for such conduct and punish it through zero tolerance mechanisms.²⁷ Although objective breaches like smoking would violate school policy, subjective violations would provoke a teacher's anger and need to discipline the offenders.²⁸ Since the 1990s and the Columbine murders, school discipline has been dominated by zero tolerance's punitive, inflexible policy and practice. Since the 1990s, zero tolerance has been widely adopted by states at the behest of federal authorities. Under zero tolerance, schools would warn parents and students that if students engage in impermissible behavior, then predetermined consequences would befall them. That is, if they violate school policies that promote learning, decorum, respect, and safety, schools will mete out severe, punitive punishment without real regard to the "gravity of behavior," the "mitigating

ought to have no explicit memories because she was less than 2 years old); Adele Diamond & Dima Amsó, *Contributions of Neuroscience to Our Understanding of Cognitive Development*, 17 CURRENT DIRECTIONS PSYCHOL. SCI., 136, 138-139 (2008) [hereinafter *Contributions of Neuroscience*] (explaining that based on animal studies, adult rats will aggressively lick their new pups if they too were licked by highly attuned adults at birth).

²⁶ AM. PSYCHOL. ASS'N ZERO TOLERANCE TASK FORCE, *Are Zero Tolerance Policies Effective in the Schools? An Evidentiary Review and Recommendations*, 63 AM. PSYCHOLOGIST 852, 852 (2008).

²⁷ See, e.g., Billy Maddalon, *CMS's Treatment of Black Boys Creates School-to-Prison Pipeline*, THE CHARLOTTE OBSERVER, Jan. 23, 2018, available at <http://amp.charlotteobserver.com/opinion/editorials/article196179279.html> ("Kids who get smart with a teacher are charged with disorderly conduct.").

²⁸ See Valarie Strauss, *Report: Black Students Disciplined More Because of Implicit Racial Bias*, WASH. POST, April 6, 2018 at A3 ("The disparity was worse for children of color in prekindergarten: Black students accounted for 19 percent of preschool students in public schools, but represented 47 percent of students suspended from preschool."). See also MILLER, THE TRUTH WILL SET YOU FREE, *supra* note 4, at 64; van der Kolk, *supra* note 15, at 404.

circumstances,” or the “situational context.”²⁹ Without taking into context that some of these students simply engage in developmentally appropriate behavior, *viz.*, *nondisruptive* whispering or *noninjurious* horseplay, then the STPP appears not only insensitive to the familial settings out of which these students come,³⁰ but also appears motivated by institutional metrics and professional rewards.³¹

In response to the so-called STPP problem, traditional socio-economic analyses, which focus principally on downstream external factors like structural poverty and racial oppression,³² don't permit us to drill down, so that we can begin to redress why some black students, for example, don't engage in persistent aggression that leads to externalizing behavior issues in public schools. To be sure, the traditional socio-economic framework limits scholars, advocates, and parents to external, objective, and institutional forces³³ as the prime predictors not only of

²⁹ AM. PSYCHOL. ASS'N ZERO TOLERANCE TASK FORCE, *supra* note 26, at 852.

³⁰ See, e.g., Lauren Slagter, *Students with History of Suspensions Discuss School-to-Prison Pipeline*, MLIVE.COM, Feb. 18, 2018, https://articles.mlive.com/news/ann-arbor/index.ssf/2018/02/school_to_prison_pipeline_1.amp (consider Marquan Kane, a former student, now working as a restorative justice practitioner at the Dispute Resolution Center, who cannot describe the family as the primary environment source of complex trauma that correlates at the very least with suspensions and expulsion, saying “If we're suspending students and we're sending them back home, which is likely the origin of their angst and where all this conflict happens, are they really doing better?”).

³¹ ADVANCEMENT PROJECT ET AL, FEDERAL POLICY, ESEA REAUTHORIZATION, AND THE SCHOOL-TO-PRISON PIPELINE 3 (2011) (In order to produce results under the No Child Left Behind Act, which puts districts, schools, administrators, and teachers under pressure to rid themselves of low performing students, “many schools across the country have . . . assign[ed] such students to alternative schools, encouraging or coercing them to drop out or enroll in General Educational Development (GED) programs, removing them from attendance rolls, or improperly using exclusionary school discipline methods such as suspension, expulsion, and arrest.”).

³² See, e.g., Roger D. Turner, *Black on Black Violence: Moving Towards Realistic Explanations and Solutions*, in *BLACK ON BLACK CRIME: FACING FACTS – CHALLENGING FICTIONS* 1, 13 (P. Ray Kedia ed., 1994) (engaging in a “Structural-Cultural” critique of black on black crime, and adopting William Oliver's perspective on American socialization as organized patterns of America's economic, social, and cultural life that has been designed to “perpetuate White superiority and Black inferiority,” thus leaving blacks who don't know themselves with “free floating anger (anger not generated by specific individual or event, but rather from global factors such as racism and limited employment opportunities,” which according to Oliver explains why blacks respond to pressure in “abnormal ways.”).

³³ Cf. William Julius Wilson, *More Than Just Race: Being Black and Poor in the Inner City*, 18 *POVERTY & RACE* 1, 10 (May/June 2009). See also William Julius Wilson, *Being Poor, Black, and American: The Impact of Political, Economic, and Cultural Forces*, *AM. EDUCATOR* 10, 14-23 (Spring 2011).

suspensions and expulsions, but also of future outcomes for those who drop out, spend time in detention centers, learn at alternative centers, or commit adult crimes. Under this framework, scholars, teachers, and parents aptly focus on institutional resources and priorities.³⁴ Under this framework, they might focus on implicit biases by teachers, staff, and administrators.³⁵

And while such biases must exist, especially because teachers and parents project and attribute onto others their biases,³⁶ it's my point that traditional socio-economic approaches to the STPP problem disinvites us from drilling down so that we can get beyond a simple view that suspensions and expulsions, due to "externalizing behavioral" issues,³⁷ exist because whites oppress black and brown folks, preparing them for an eventual mass incarceration experience.³⁸ By focusing simply and perhaps exclusively on racism, biases, and funding issues, a traditional socio-economic analysis can then shift our view away from students' behavior and toward lost opportunities when schools'

³⁴ See Wilson, *More Than Just Race: Being Black and Poor in the Inner City*, *supra* note 23, at 9 (referring to the results cultural-structural revelations of Sharkey and Sampson's longitudinal study on the impact of culture and structure on the academic development of poor, inner city Chicago children), citing Patrick Sharkey, Robert Sampson, & Stephen W. Raudenbush, *Durable Effects of Concentrated Disadvantage of Verbal Ability among African-American Children*, 105 PROC. OF THE NAT'L ACAD. OF SCI. OF THE U.S. OF AM., 845, 846-852 (2008). See also Patrick Sharkey, *The Intergenerational Transmission of Context*, 113 AM. J. OF SOC. 931, 933 (2008).

³⁵ See, e.g., Laura R. McNeal, *Managing Our Blind Spot: The Role of Bias in the School-to-Prison Pipeline*, 48 ARIZ. ST. L.J. 285, 289, 297, 298, 302, 303, 306, 309, 311 (2016); Strauss, *supra* note , at A3.

³⁶ Cf., Robert L. Nix, et al., *The Relation Between Mothers' Hostile Attribution Tendencies and Children's Externalizing Behavior Problems: The Mediating Role of Mothers' Harsh Discipline Practices*, 70 CHILD DEVE. 896 (1999); ROBERT E. ORNSTEIN, *PSYCHOLOGY OF CONSCIOUSNESS* 64-76 (2d ed. 1972).

³⁷ Jennifer E. Lansford, et al., *Forms of Spanking and Children's Externalizing Behaviors*, 61 FAM. RELAT. 224, 224 (2012) ("the term 'externalizing behavior' generally refers to specific noncompliant, physically aggressive, defiant, and delinquent behaviors that are deemed inappropriate by parents or other authority figures.").

³⁸ See, e.g., Kimberlé Williams Crenshaw, *Twenty Years of Critical Race Theory: Looking Forward to Move Forward*, 43 CONN. L. REV. 1253, 1256, 1327, 1338 (2011). See also Kimberlé Williams Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331, 1357 (1988) ("Black people do not create their oppressive worlds moment to moment but rather are coerced into living in worlds created and maintained by others. Moreover, the ideological source of this coercion is not liberal legal consciousness, but racism.").

suspend and expel black, brown, and LGBTQ students,³⁹ while noting that without an education these students will effectively live as second-class or marginalized citizens.⁴⁰ By relying on a traditional socio-economic critique of the STPP problem, scholars, advocates, and parents seek to address and redress its consequences like lost educational opportunities through a framework that shields poor black caregivers' parenting styles, as an example, from harsh criticism, even though we now know that social environments, in which caregivers figure prominently, strongly influence the infant's brain development during the critical period of her earliest existence⁴¹ and later adolescent behavior problems.⁴²

As a major weakness, traditional socio-economic analysis of so-called STPP requires us to ignore what we now know: "early and persistent aggression is associated with other negative outcomes including poor emotion regulation and impulsive behavior, school failure and school drop-out, peer problems, and adolescent delinquency."⁴³ Given this well-established finding, and axiomatic proposition, why then do most scholars, advocates, and parents refuse to focus on the earliest relationship between caregivers and infants? Could this refusal give rise to the same concerns that caused outrage over the *Moynihan Report*?⁴⁴ Some

³⁹ See Redfield & Nance, *supra* note 22, at 12.

⁴⁰ Cf. Pat Levitt, *Toxic Stress and its Impact on Early Learning and Health: Building a Formula for Human Capital Development* 19 (2014), available at https://www.purdue.edu/hhs/hdfs/fii/wp-content/uploads/2015/07/s_wifis32c02.pdf, (early brain development of an infant and child constitutes an opportunity for optimal brain architecture, and represents an approach for "human capital development and community success that provides a solid foundation for economic productivity, responsible citizenship, and a prosperous society.").

⁴¹ See, e.g., Elizabeth T. Gershoff, *Corporal Punishment by Parents and Associated Child Behaviors and Experiences: A Meta-Analytic and Theoretical Review*, THE AM. PSYCHOL. ASS'N., INC., 539, 557 (2012); Allan N. Shore, *The Effects of Early Relational Trauma on Right Brain Development, Affect Regulation, and Infant Mental Health*, 22 INFANT MENTAL HEALTH J., 201, 206-207 (2001).

⁴² See Elizabeth T. Gershoff, *Should Parents' Physical Punishment of Children Be Considered a Source of Toxic Stress That Affects Brain Development?*, 65 FAM. REL., 151, 155 (2016) ("Physical punishment has also been linked with more behavior problems in childhood.") (citations omitted).

⁴³ See, e.g., Arsenio, *supra* note 24, at 1.

⁴⁴ See U.S. DEP'T. OF LAB., OFF. OF POL'Y PLAN. AND RES., THE NEGRO FAMILY: THE CASE FOR NATIONAL ACTION (1965), available at <http://web.stanford.edu/mrosenfe/Moynihan%27%20The%20Negro%20Family.pdf>. For a brief history of the authorship and background of this report, see generally LEE RAINWATER & WILLIAM L.

those who expressed outrage over the *Moynihan Report* thought that whites were blaming the victim.⁴⁵ Without reflecting on the earliest experiences of these children, whether perinatal or postnatal, liberal or progressive scholars for example will not blame the poor, black parenting culture,⁴⁶ and they thus cannot solve the obviousness of this riddle: despite changes in policing policies, why do poor, black and Hispanics students generally engage in externalizing behavior, which gets targeted by zero-tolerance policies?⁴⁷ Due to their earliest childhood experiences, such children who have been raised by well-intentioned but clearly misguided caregivers, must have brain structures⁴⁸ that at the very least correlate with very sensitive stress-response systems,⁴⁹ especially if these children have suffered complex trauma⁵⁰ and toxic stress.⁵¹ Thus, once their stress response

YANCY, THE MOYNIHAN REPORT AND THE POLITICS OF CONTROVERSY 9-37 (1969); GREGORY ACS ET AL., URBAN INST., THE MOYNIHAN REPORT REVISITED (2013), <http://www.urban.org/UploadPDF/412839-The-Moynihan-Report-Revisited.pdf>; see also KENNETH B. CLARK, DARK GHETTO: DILEMMAS OF SOCIAL POWER, 70-74 (2d ed. 1989).

⁴⁵ See RAINWATER & YANCEY, *supra* note 44, at 162 (arguing that Moynihan could have directly faulted white society, which would have removed all doubt that he was blaming “the family for the Negroes disadvantaged situation,” and that he could have faulted white society for not giving black families adequate tools to socialize their children toward equality.).

⁴⁶ See JOYCE A. LADNER, TOMORROW’S TOMORROW: THE BLACK WOMAN 266 (1971). See also WILLIAM RYAN, BLAMING THE VICTIM, 67-70 (1971).

⁴⁷ See generally Reginald Leamon Robinson, *A Dark Secret Too Scandalous to Confront: Did the Moynihan Report Imply that Poor Black Caregivers’ Parenting Style and Childhood Cruelties were Strongly Correlated with Self-Perpetuating Pathologies?*, 8 GEO. J. L. & MOD. CRIT. RACE PERSP. 103 (2016) [hereinafter Robinson, *A Dark Secret Too Scandalous*].

⁴⁸ See Allan N. Schore, *Attachment, Affect Regulation, and the Developing Right Brain: Linking Developmental Neuroscience to Pediatrics*, 26 PEDIATRICS IN REV. 204, 205 (June 2005) (“Because the right hemisphere is dominant for the emotional and corporeal self, the social experience-dependent maturation of the right brain in human infancy is equated with the early development of the self.”).

⁴⁹ See, e.g., Bucci et al., *supra* note 10, at 407 (“The etiologic pathways by which the effects of early life adversity becomes embedded in the body and brain of the developing child have yet to be fully understood, but promising research suggests that a dysregulation of the physiologic stress response plays a critical role in the development of negative health outcomes.”).

⁵⁰ See, e.g., *Complex Trauma in Child and Adolescents*, THE NAT’L CHILD TRAUMATIC STRESS NETWORK, COMPLEX TRAUMA TASK FORCE 5 (2003), www.NCTSNet.org [hereinafter *Complex Trauma*] (“The term complex trauma describes the dual problem of children’s exposure to traumatic events and the impact of this exposure on immediate and long-term outcomes . . . [T]he initial traumatic experiences (e.g., parental neglect and emotional abuse) and the resulting emotional dysregulation, loss of a safe base, loss of

systems have been triggered by physical punishment at home or school, these children will likely evaluate their present, personal experiences and social realities through their repressed, traumatic past.⁵² Such evaluations distort how they perceive their at-school treatment or maltreatment by administrators, teachers, and other students.⁵³

Yet, in route to implementing zero tolerance, I cannot imagine that policymakers, administrators, and teachers focused keenly on the etiology of students' externalizing behavior. That source must be the earliest disruption on the caregiver-child relationship.⁵⁴ Based on the neurobiological literature, the etiology for such behavior must be infants' earliest perinatal and postnatal experiences, which were likely traumatic and toxic.⁵⁵ That trauma and toxin would strongly influence children's brain

direction, and inability to detect or respond to danger cues, often lead to subsequent trauma exposure (e.g., physical and sexual abuse, or community violence).").

⁵¹ See generally *Excessive Stress Disrupts the Architecture of the Developing Brain: Working Paper 3*, NAT'L SCI. COUNCIL ON THE DEVELOPING CHILD (2005/2014), <http://www.developingchild.harvard.edu> ("Extensive research on the biology of stress now shows that healthy development can be derailed by excessive or prolonged activation of stress response system in the body and the brain, with damaging effects on learning, behavior, and health across the lifespan.").

⁵² See Bessel A. van der Kolk & Alexander C. McFarlane, *The Black Hole of Trauma*, in *TRAUMATIC STRESS: THE EFFECTS OF OVERWHELMING EXPERIENCES ON MIND, BODY, AND SOCIETY* 3, 7 (Bessel A. van der Kolk, Alexander C. McFarlane, & Lars Weisaeth, ed., 2007) (providing that since present becomes so unconsciously informed by the repressed past, childhood trauma of parents and their children "can lead to a range of maladaptive responses in their current lives, to which 'neurotics' keep responding as if they are reliving the past.").

⁵³ See, e.g., *Complex Trauma*, *supra* note 50.

⁵⁴ See generally Levitt, *supra* note 40, at 11 ("children grow up in an environment of relationships, and if these relationships are not reliable and responsive, the developing architecture of the brain may be disrupted in ways that impair future learning, behavior, and development."); R. Pasco Fearon, et al., *The Significance of Insecure Attachment and Disorganization in the Development of Children's Externalizing Behavior: A Meta-Analytic Study*, 81 *CHILD DEVE.* 435, 438 (2010) ("Externalizing behavior was defined as aggression, oppositional problems, conduct problems or hostility (either alone or in combination)."); Bessel A. van der Kolk, et al., *Childhood Origins of Self-Destructive Behavior*, 148 *AM. J. PSYCHIATRY* 1665, 1669 (1991) ("although childhood trauma contributes heavily to the initiation of self-destructive behavior, lack of secure attachments maintains it.").

⁵⁵ See, e.g., Bucci et al., *supra* note 10, at 404 ("The current body of data suggests that a maladaptive response to stress during childhood, referred to as a toxic stress response, plays an important role in the pathway from early adversity to disease."); *id.* at 408 (early childhood adversities create pathways for externalizing behavioral issues like bullying, dating violence, delinquent behavior, learning disabilities, physical fighting, and weapon carrying).

structure, causing them to acquire an inner map based on pain, rejection, and cruelties.⁵⁶ Unfortunately, most adults have repressed their own childhood experiences by averting their eyes, and ignoring these school-age children's sufferings and cruelties,⁵⁷ lest they may become triggered by their past parental cruelties.⁵⁸ Despite such cruelties and how they've shaped [the brain], "biology [like race] is not destiny."⁵⁹ And still, infants or toddlers' earliest experiences with traumatic cruelty and toxic stress can snuff out or limit their potentialities, giving rise not to destiny but to limiting, negative predispositions.⁶⁰ Once public schools adopted a zero tolerance philosophy, these predispositions would make it more likely than not that these students would struggle to control how their stress response systems fired, and would thus be subject consistently and disproportionately to exclusionary discipline of zero tolerance.

Accordingly, in order for students to have very maladaptive stress-response systems and to be predisposed to externalizing behaviors,⁶¹ the key actors must be caregivers who not only physically harmed but also emotionally rejected their children, which may cause these children to have a dysregulation of their "physiologic stress response" system that can develop into a "negative [behavioral and] health outcomes."⁶² By maladaptive

⁵⁶ See, e.g., ARTHUR JANOV, *WHY YOU GET SICK, HOW YOU GET WELL: THE HEALING POWER OF FEELINGS* (1996).

⁵⁷ Cf. ALICE MILLER, *FREE FROM LIES: DISCOVERING YOUR TRUE NEEDS* 58 (Andrew Jenkins trans., 2008) ("But the media pay little attention to the horrors in which children grow up because we have all learned in early childhood to suppress the pain, avert our eyes from the truth, and deny the infinite feelings of helplessness inflicted on a humiliated child.").

⁵⁸ See, e.g., ALICE MILLER, *BANISHED KNOWLEDGE: FACING CHILDHOOD INJURIES* 33 (Leila Vennewitz trans., 1990) (1988) [hereinafter MILLER, *BANISHED KNOWLEDGE*] ("A black psychology student in a group in London once told me, 'From the very beginning I was physically, psychically, and sexually abused' . . . 'Our parents claimed to have learned cruelty from whites and deny their own parents' contributions.'").

⁵⁹ See, e.g., Diamond & Amso, *supra* note 25, at 137. ("Ironically, one of the most important findings to emerge from neurobiology is that biology is not destiny. Neuroscience research has shown that experience plays a far larger role in shaping the mind, brain, and even gene expression than was ever imagined. This insight is particularly important in advancing theory in cognitive development, where debates have raged about the importance of nature versus nurture.").

⁶⁰ Schore, *supra* note 48, at 204.

⁶¹ See, e.g., Bessler A. van der Kolk & Rita E. Fisler, *Childhood Abuse and Neglect and Loss of Self-Regulation*, 58 *BULL. OF THE MENNINGER CLINIC* (Spring 1994).

⁶² Bucci, et al., *supra* note 10, at 407.

stress-response systems, Bucci and other researchers mean that the children's normal stress response system, which will be compromised when they suffer toxic stress during the first 2 to 6 years of their lives, can "incorporate into long-term regulatory physiologic processes, and subsequently, can increase vulnerability to developmental, biological, mental, and behavioral adverse outcomes, resulting in an increased risk for chronic diseases in adulthood."⁶³ By externalizing behaviors, researchers mean "noncompliant, physically aggressive, defiant, and delinquent behaviors" that authority figures dislike.⁶⁴ Unfortunately, zero-tolerance policies cast institutional webs too widely and ensnare these students. And so if we wish to link why poor black students find themselves suspended, expelled, referred to alternative programs and to eventual juvenile detentions or incarceration, we now know that the child's earliest, attuned nurturing experiences like touching⁶⁵ were critical to creating a resilient, self-regulated child.⁶⁶ We also now know that an infant's social environments "play critical roles in these development origins."⁶⁷ But if the parents have handicapped their children before they enter pre-k, kindergartens, and public schools by hitting, harming, humiliating, and traumatizing them, these children will exhibit

⁶³ *Id.* at 409.

⁶⁴ Lansford, et al., *supra* note 37, at 234; R. Pasco Fearon, et al., *The Significance of Insecure Attachment and Disorganization in the Development of Children's Externalizing Behavior: A Meta-Analytic Study*, 81 *CHILD DEVE.* 435, 438 (2010) (Externalizing behavior can mean "aggression, oppositional problems, conduct problems or hostility (either alone or in combination).").

⁶⁵ See Diamond & Amso, *supra* note 25, at 139 ("human newborns can see, hear, and smell, as well as feel touch. Yet, . . . touch is still crucial. Human infants who receive little touching grow more slowly, release less growth hormone, and are less responsive to growth hormone that is exogenously administered. Throughout life, they show larger reactions to stress, are more prone to depression, and are vulnerable to deficits in cognitive functions commonly seen in depression or during stress.").

⁶⁶ See, e.g., PERRY & SZALAVITZ, *supra* note 12, at 38-39 ("children are more vulnerable to trauma than adults; . . . Resilient children are made, not born. The developing brain is most malleable and most sensitive to experiences – both good and bad early in life. . . Children become resilient as a result of the patterns of stress and of nurturing that they experience early on in life."). See also Robin L. Jarrett, *Resilience among Low-Income African American Youth: An Ethnographic Perspective*, 25 *ETHOS* 218, 218-219 (1997) (resilience has been viewed as "protective mechanisms that allow individuals to positively respond to adverse situations.").

⁶⁷ Schore, *supra* note 48, at 204. See generally DONALD WOOD WINNICOTT, *THE CHILD, THE FAMILY, AND THE OUTSIDE WORLD* (1987).

externalizing behaviors or cognitive deficits.⁶⁸ Naturally, we ought to ask: do public schools suspend, expel, refer for alternative learning, and arrest students who have suffered through adversities in the earliest years of their lives due to violence and aggression from caregivers to children? Do such caregivers have their own childhood histories of interpersonal violence and aggression, and if so, they're apt to hit and harm their children,⁶⁹ which affect the neonates' brain development "during critical periods of infancy."⁷⁰ It would thus follow that if zero tolerance policies and practices ensnare such children, then the so-called STPP problem flows directly from a child's "developing brain in the context of a relationship with another self, another brain."⁷¹

In this critical, conceptual essay, I argue that the STPP problem does not exist for the following reasons. First, we now know that social environments, especially adult caregivers, play an acute role in shaping the structure of infants' brains. Second, we now know that once children have acquired inner maps of the world, whether positive or negative, it is quite difficult to alter those maps, even though children's brains remain plastic until the day they die.⁷² Third, we now know that infants, toddlers, and little children repress their cruel and traumatic childhood experiences, and that denial becomes the primary engine for psychopathologies, including behavioral issues, PTSD, and

⁶⁸ See Diamond & Amso, *supra* note 25, at 139 ("Thus, besides 'simple touch' being able to calm our jitters and lift our spirits, the right kind of touch regularly enough early in life can improve cognitive development, brain development, bodily health throughout life, and gene expression.")

⁶⁹ Cf. Diamond & Amso, *supra* note 25, at 138 ("rats tend to raise their offspring the way they themselves were raised, so these effects are transmitted intergenerationally, not through the genome but through behavior.")

⁷⁰ See Schore, *supra* note 48, at 205 ("Neuroscientists are concluding that the accelerated growth of brain structure during critical periods of infancy is dependent on experience and influenced by 'social forces.'")

⁷¹ *Id.*, citing Allan N. Schore, *The Experience-Dependent Maturation of a Regulatory System in the Orbital Prefrontal Cortex and the Origin of Developmental Psychopathology*, 8 DEV. PSYCHOPATHOL. 59-87 (1996).

⁷² See, e.g., Levitt, *supra* note 40, at 11 ("as early as the first year of life, the baby's brain is becoming specialized to the sounds that it hears and is already losing its ability to respond to sounds in other languages. When neural circuits are not formed properly from the beginning, it takes more physiological energy to compensate later. This means that influencing a baby's brain early in life is easier than rewiring it later.")

personality disorders.⁷³ Fourth, we now know that denial, or repression, and its pain will shape how they perceive themselves and their worlds, and fifth if these perceptions become distorted, they will not function too well in public school settings, where they will appear to authority figures like teachers and staff to be aggressive, disrespectful, disruptive, or just intolerable. Sixth, once authority figures have fixed ideas of the behaviors that they find either disruptive of the education purpose or violative of zero tolerance policies, they will focus on these students and attribute greater significance to their actions. And lastly, we now know that people – be they teachers, administrators, parents, or students, who’ve been reared in childhood adversities – will not only expose themselves to “situations that are reminiscent of their original traumas,”⁷⁴ but also will impose toxic bonding on others.⁷⁵

In this way, this critical, conceptual essay asks if the so-called STPP problem flows inexorably from the childhood adversities that innocent, dependent infants and toddlers suffered at the hands of their caregivers, especially during the golden or sensitive developmental years from zero to two-years of age.⁷⁶

⁷³ See, e.g., MILLER, BANISHED KNOWLEDGE, *supra* note 58, at 38 (“The only way she can get rid of these emotions [e.g., panic, impotent fury, despair and anguish] is to repress them. But repression is a perfidious fairy who will supply help at the moment but will eventually exact a price for this help. The impotent fury comes to life again when the girl’s own child is born, and at last the anger can be discharged – once again at the expense of a defenseless creature.”).

⁷⁴ Stuart W. Turner, Alexander C. McFarlane, & Bessel A. van der Kolk, *The Therapeutic Environment and New Explorations in the Treatment of Posttraumatic Stress Disorder*, in TRAUMATIC STRESS, *supra* note 15, at 537, 546-47.

⁷⁵ Cf. Reginald Leamon Robinson, *Hoes, Bitches, and the Search for the Enlightened Witnesses: Gangsta Lyrics and the Real Truth of Black Mother-Son Love*, 5 J. OF RES. IN GENDER STUDIES 73, 75 (2015) (citing Alice Miller’s *The Body Never Lies*, and arguing that rapper artists like Common have an obedient, a respectful, and an honor-based relationship with their mother, which originated not in trust but in fear, thus giving rise to a pathological attachment to their caregivers that “hardly deserves the name of love in the genuine sense of the word.”); ALICE MILLER, *THE BODY NEVER LIES: THE LINGERING EFFECTS OF HURTFUL PARENTING* 14-15 (Andrew Jenkins, trans., 2004); Orlando Patterson, *Blacklash*, 62 TRANSITION 4, 9, 15 (1993) (describing the black male-female conflict and struggle, the matter in which black mothers brutalize their children, especially boys, the violent need of black boys and men to expurgate their internalized maternal pedagogy, and the tropes and dissing that reveal a dark, dysfunctional ties between black men and women).

⁷⁶ Cf. van der Kolk & McFarlane, *supra* note 15, at 9 (“Years and even decades after the original trauma, victims claim that their reliving experiences are as vivid as when the trauma first occurred. Because of this timeless and unintegrated nature of traumatic

Given the current research, I conclude that we can best understand why suspended and expelled students might engage in juvenile acts, commit adult crimes, or become adult criminals if we view the STPP problems as principally a “Caregiver-to-Prison-Pipeline” (“CTPP”) problem, and when these children who have suffered adversities enter public schools, they will likely exhibit externalizing behaviors that’ll get them ensnared by zero tolerance policies. As such, it would appear that the primary neurobiological precursors to the so-called STPP must be toxic stress or adversities during the earliest years of the caregiver-infant relationship. It would thus follow that how zero-tolerance policies and practices identify and punish the resulting externalizing behavior must be a secondary effect. To be sure, such effects will be influenced by institutional and attribution biases, the deep examination of which lay beyond the scope of this critical essay.

Part II of this paper examines how the STPP problem has been defined. Part III examines how a child’s earliest relationship with interpersonal adversities like harm, hitting, humiliation, and trauma fuel cognitive issues, posttraumatic stress disorder, externalizing behaviors, distrust, and interrelated issues. Part IV invites the reader to consider conceptual work of Elizabeth T. Gershoff who queries whether the simple act of not physical abuse but physical punishment can cause a child to experience potentially brain altering toxic stress, and based on her research, I posit that if simple physical punishment can place a child at risk for toxic stress and thus downstream negatives like externalizing behavioral problems in public school, then caregivers who physically, emotionally, and psychologically abuse, neglect, and humiliate their children can be the neurobiological precursors or environmental predictors for the so-called STPP problem. Part V concludes by drawing the logical deduction that the STPP problem doesn’t exist, and thus I argue that we can best understand this social and institutional

memories, victims remain embedded in the trauma as a contemporary experience, instead of being able to accept it as something belonging to the past.”).

phenomenon as a “Caregiver-to-Prison Pipeline” (“CTPP”) problem.⁷⁷

II. THE ZERO TOLERANCE POLICY, THE SCHOOL-TO-PRISON PIPELINE (STPP) PROBLEM, AND THE LIMITS OF TRADITIONAL SOCIO-ECONOMIC ANALYSES

A. *Zero Tolerance Philosophy: Policies and Practices.*

For scholars, advocates, and parents who dislike the so-called “School-to-Prison-Pipeline” (STPP), the culprit must be the philosophy of zero tolerance and its consequences. This philosophy grew out a drug enforcement policy,⁷⁸ by which assets of drug traffickers were seized without regard to the quantity of drugs.⁷⁹ Attorney General Ed Meese touted this policy’s successes,⁸⁰ and in 1994, President Clinton and Congress gave this policy federal imprimatur when they enacted the Guns-Free School Act.⁸¹ Initial efforts began in 1990, when President Bush signed into law the Guns-Free School Zones Act,⁸² which was untethered to a zero tolerance philosophy. By 1995, the Supreme Court in *United States v. Lopez*⁸³ had invalidated the 1990 Act as an impermissible use of Congress’s power to regulate under the Commerce Clause.⁸⁴ Mindful of the Supreme Court’s ruling in *Lopez*, Congress in 1997 enacted the “Guns Free School Act.”⁸⁵

⁷⁷ See generally STACEY PATTON, SPARE THE KIDS (2017) (who uses the phrase “parents-to-prison pipeline”). See Children’s Defense Fund, who uses the “cradle-to-prison pipeline,” taking aim at the class politics that affect children, arguing that class explains blacks disproportionately find themselves expelled, suspended, standing in front of a juvenile judge, or required to lose his liberty before a criminal court judge, and taking deliberate pains not to criticize parents.

⁷⁸ See Skiba, *supra* note 7, at 18, 19. See also, *Zero Tolerance and Exclusionary School Discipline Policies Harm Students and Contribute to the Cradle to Prison Pipeline*, CHILD. DEF. FUND – OH. (Nov. 2012), www.cdfohio.org.

⁷⁹ See Skiba, *supra* note 7, at 19.

⁸⁰ *Id.* at 18.

⁸¹ 20 U.S.C. §§ 8921-23 (1994) (repealed 2002).

⁸² See Skiba, *supra* note 7, at 1.

⁸³ 514 U.S. 549 (1995).

⁸⁴ *Id.* at 567.

⁸⁵ See Guns Free School Act of 1997, Pub. L. 89–10, Title XIV, §14601, as added Pub. L. 103–382, Title I, §101, Oct. 20, 1994, 108 Stat. 3907.

Simply defined, zero tolerance philosophy requires “the application of predetermined consequences, most often severe and punitive in nature, that are intended to be applied regardless of the gravity of behavior, mitigating circumstances, or situational context.”⁸⁶ Prior to 1994, school districts across the nation had adopted zero tolerance philosophy, but it became a national, federal mandate because states, which received educational funding under the Elementary and Secondary Education Act,⁸⁷ were required to adopt zero tolerance.⁸⁸ Undoubtedly, schools have a duty to “maintain a safe and disciplined learning environments.”⁸⁹ To achieve safety and discipline, schools removed disruptive, disrespectful, disobedience, and violent students through suspensions and expulsions,⁹⁰ especially gun possessing, drug holding, and crime engaging students.⁹¹ Ultimately, school districts sought to use zero tolerance philosophy to “deter others from disruption and create an improved climate from those students who remain.”⁹² Generally, scholars, advocates, and parents could not argue with the collective sacrifices such rules and regulations required if school districts applied it fairly, so that students and staff were safe.⁹³

Prior to this 1994 Act, aggression and crimes at public schools were increasing. According to Arnold P. Goldstein, between 1970 and 1973, surveys for the Safe School Report of 1975 revealed that killings had increased by 18.5 percent, rapes and attempted rapes by 40.1 percent, robberies by 36.7 percent, assaults on students by 85.3 percent, assaults on teachers by 77.4 percent, burglaries in school by 11.8 percent, drug and alcohol consumption or possession by 37.5 percent, and weapons seizures by school authorities by 54.5.⁹⁴ By the late 1980s, students were committing more crimes and carrying more weapons onto school

⁸⁶ AM. PSYCHOL. ASS'N ZERO TOLERANCE TASK FORCE, *supra* note 26, at 852.

⁸⁷ 20 U.S.C. §§ 236-244 (1950) (repealed 1994).

⁸⁸ AM. PSYCHOL. ASS'N ZERO TOLERANCE TASK FORCE, *supra* note 26, at 852.

⁸⁹ *Id.*

⁹⁰ *Id.* See generally Skiba, *supra* note 7, at 2.

⁹¹ *Id.*

⁹² AM. PSYCHOL. ASS'N ZERO TOLERANCE TASK FORCE, *supra* note 26, at 852.

⁹³ *Id.*

⁹⁴ ARNOLD P. GOLDSTEIN, THE ECOLOGY OF AGGRESSION 34-35 (1994).

property. By the early 1990s, elementary school saw the “greatest increase in crime rate.”⁹⁵ Although school crimes include rapes, robberies, assaults, and larcenies, most aggressive crimes are from student to student. In late 1970s reporting, researchers noted that seventh-graders (e.g., 13-year-olds) were more likely than twelfth-graders to attack a student. By the late 1980s, the School Safety Council reported that “almost 3 million students, faculty, staff, and visitors were crime victims in American schools in 1987.”⁹⁶ During the first half of 1990, nine percent of students who were ages 12 to 19 were crime victims, and seven percent of those crimes were property related.⁹⁷ By 1991, Siegel and Senna reported that “40 percent of the robberies and 36 percent of the physical attacks” in schools involved teenagers.⁹⁸

Zero tolerance became thus a no-nonsense, personal accountability tool that dealt with guns, gangs, and weapons. Before this 1994 Act, some school districts like New York were already expelling students for drugs, aggression, and gang activities.⁹⁹ “By 1993, zero tolerance policies had been adopted across the country, often broadened to include not only drugs and weapons, but also smoking and school disruption.”¹⁰⁰ By the 1994 Act, school districts now had a national policy that supported their efforts to limit disruptions, encourage respect and civility, and to carve out students who repeatedly violated rules and regulations by possessing weapons, destroying school property, by aggressing toward others, including teachers and staff, and by committing crimes on or off school grounds.

Perhaps, for beleaguered school districts, the zero tolerance philosophy gave administrators and teachers a legal mechanism to teach and reinforce strict obedience to institutional authorities like parents (e.g., *in loco parentis*).¹⁰¹ It also gave school districts

⁹⁵ *Id.* at 35.

⁹⁶ *Id.*

⁹⁷ *Id.* at 36.

⁹⁸ *Id.*

⁹⁹ See Skiba, *supra* note 7, at 2.

¹⁰⁰ *Id.*

¹⁰¹ See, e.g., Baker v. Owen, 395 F. Supp. 294, 301 (M.D.N.C.), *aff'd without opinion*, 423 U.S. 907 (1975) (“[W]e cannot allow the wishes of a parent to restrict school officials’ discretion in deciding the methods to be used in accomplishing the not just legitimate, but

opportunities to rid the classroom of students who could not easily learn,¹⁰² who did not cooperate,¹⁰³ who disobeyed rules or regulations, who disrespected teachers and staff, who had poor reading skills, or who had difficulty controlling their emotions and actions.¹⁰⁴ School districts sought to eliminate both major crimes that would threaten the safety of staff and students, and the nagging problems associated with the “battered teacher syndrome,” which combines “stress reactions including anxiety, depression, disturbed sleep, headaches, elevated blood pressure, and eating disorders.”¹⁰⁵ Consciously or otherwise, administrators and teachers, especially if they suffered from this syndrome, may have been inclined towards zero tolerance policies to alleviate children’s externalized behaviors because this institutional tool permitted teachers qua in loco parentis to discipline students who could not abide simple, repeated rules and regulations, who were by necessity at risk of failing to get required academic skills and personal civility, and who at base they may have viewed as disrespectful and disobedient charges.¹⁰⁶

essential purpose of maintaining discipline. So long as the force used is reasonable – and that is all that the statute here allows – school officials are free to employ corporal punishment for disciplinary purposes until in the exercise of their own professional judgment, or in response to concerted pressure from opposing parents, they decide that its harm outweighs its utility.”(citations omitted); *see also* Ingraham v. Wright, 403 U.S. 651, 661 (1977). *But see* Susan Stuart, *In Loco Parentis in the Public Schools: Abused, Confused, and in Need of Change*, 78 U. CINN. L. REV. 969 (2010); Lois A. Weithorn, *Symposium on Law & Policy of the Developing Brain: Developmental Neuroscience, Children’s Relationships with Primary Caregivers, and Child Protection Policy Reform*, 63 HASTINGS L.J. 1487 (2012).

¹⁰² *See, e.g.*, RAINWATER & YANCY, *supra* note 44, at 81-82; ACE ET AL. *supra* note 32 at 12-14.

¹⁰³ *See* CHILD. DEF. FUND - OH., *supra* note 7, at 1 (“Zero tolerance policies impose automatic and harsh discipline for a wide range of student infractions, including non-violent disruptive behavior, truancy, dress code violations, and insubordination.”).

¹⁰⁴ *See* Redfield & Nance, *supra* note 22, at 25 (“Because reading is one of the most critical skills for every student and citizen and relates to many other academic and societal skills, one’s ability to read offers a clear example of a primary academic concern.”). *See also* van der Kolk & Fislser, *supra* note 61, at 6-7 (referring to self-regulation, what traumatized children lack, as the cornerstone of the social brain.).

¹⁰⁵ GOLDSTEIN, *supra* note 94, at 35.

¹⁰⁶ *Cf.* Catherine A. Taylor, et al., *Perceived Instrumentality and Normativeness of Corporal Punishment Use among Black Mothers*, 60 FAM. RELAT. 60, 69 (2011) (“Parents believed that CP [corporal punish] was both effective and necessary in certain situations, particularly when the child compromised his or her safety, was disrespectful, or would not respond to other types of discipline. Parents also emphasized that they used CP for a

Under the zero tolerance policy, such students (or charges), who would bring guns, weapons, or drugs to public schools, will be subject to expulsion or suspension. Under a zero tolerance policy, these disobedient actions would constitute strict liability offenses. By law, public school officials have no discretion to give a lesser punishment if rule-breaking, disrespectful students were to bring guns, weapon, or drugs public schools. But what of other offenses? States began adopting zero tolerance policies ostensibly because school district officials did not wish to contend with daily violence by students who were either disgruntle or had violent propensities. However, in reality, states were under some pressure from principals, classroom teachers, and guidance counselors to help their deal with classroom aggression, disruption, disrespect, etc., which were impacting their ability to make public schools safer. Disruptive student behavior also hindered school professional's ability to deliver substantive knowledge, create cooperative, positive atmospheres, and foster constructive and creative experiences for students eager to learn. In effect, we're talking about the *Tinker* standards.¹⁰⁷ Under the *Tinker* rule, school officials can take disciplinary actions, including expulsion or suspension if a student engages in conduct that materially and substantially interferes with the school's educational goals.¹⁰⁸ In short, by broadening the zero tolerance policy to deal with more than guns or weapons, school officials hope not only to end the potential for serious body harm or imminent death, but also to stamp down on student conduct that *materially* and *substantially* interfered with teachers' ability to do their jobs.

child's own good, in both the short and long-term, and that it was not intended to harm the child. Regarding the perceived normativeness of CP use, parents felt that CP was more common and more accepted among Blacks than among Whites.”)

¹⁰⁷ See *Tinker v. Des Moines Indep. Comm. School Dist.*, 393 U.S. 503 (1969).

¹⁰⁸ *Id.* at 509, citing *Burnside v. Byars*, 363 F.2d 744, 749 (5th Cir. 1966) (“Certainly where there is no finding and no showing that engaging in the forbidden conduct would ‘materially and substantially interfere with the requirements of appropriate discipline in the operation of the school,’ the prohibition [of free speech] cannot be sustained.”). See *Morse v. Frederick*, 551 U.S. 393, 394 (2007) (holding that under *Tinker*, where students engage in speech that endorses illicit drug use while on a school-sponsored activity, a school principal may suppress such expression if the school official reasonably conclude that it will “materially and substantially disrupt the work and discipline of the school.”).

Thus, in concert with the *Tinker* doctrine, school officials can use the zero tolerance policy to prohibit a host of acts by students. So, what new offenses would fall of the zero tolerance policy? Do school officials have discretion or were they bound to enforce the policy's prohibitions strictly? And who would be affected? First, apart from guns, if a student showed aggression towards another student, the teacher could remove this student her class. That student showing aggression could face either expulsion, suspension, or arrest if school officials alerted local police. If a student shoved, talked out of turn, or had a temper tantrum, the student would be at risk of expulsion, suspension, or other disciplinary actions. Second, it's clear that if a student brings a gun, weapon like a knife, or drugs to school, he or she will risk receiving mandatory harsh disciplinary action like expulsion. Under zero tolerance policy, school officials have no choice but to implement the mandatory disciplinary actions.

First, under mandatory disciplinary action, should a student need to be expelled or suspended because, for example, he draws a picture of a gun, or he forms his hand into the shape of a gun? School officials may have more discretion under these circumstances, depending on the student and whether his purported conduct has fallen under the zero-tolerance policy in the past. Second, should a kindergarten student who has a temper tantrum be viewed by her teachers as a risk or threat to other, and then handcuffed, shackled, and forced to sit in a police cruiser for three hours? Third, who gets affected by zero tolerance? At present, it appears that black and Latino students, especially if they have learning disabilities and if they tend to do poorly on high stakes testing, will face a disproportionately higher risk of either expulsion or suspension. Advocates who oppose the zero-tolerance policy argue strongly that by expelling or suspending students, black and Latino students are apt to fall behind their grade, fail to graduate on time, drop out of public school all together, or, in the worst cases, find themselves caught up in juvenile or criminal circumstances. Black or Latino students, who become involved in criminal circumstances, will eventually, with near certainty, land in jail – either as juveniles or as adult criminals.

For scholars, teachers, and parents, zero tolerance had granted public school officials too much power.¹⁰⁹ Depending on the state and its laws, school boards have great, but not unchecked, power to discipline students. That power comes bounded by due process and nondiscrimination requirements.¹¹⁰ For example, in Wisconsin, school officials may *suspend* a student if she disobeys rules, threatens or lies about others, if she threatens school property, if she endangers school property, or if she poses a health or safety risk to others at the school.¹¹¹ Before a student can be suspended, school officials must tell students why they face suspension, and school officials must promptly tell the students' parents or guardians of the suspensions and the underlying reasons. Such suspensions can be up to five school days.¹¹² Yet, if the school sends a notice of a suspension hearing, the student could risk a suspension of 15 consecutive days. But if the student has received special education services, then school officials can only give her a max suspension of 10 days.¹¹³ A parent or guardian may file a nonreviewable appeal of any suspension to a school district administrator. Due to the lack of review, parents or guardians rarely seek this appeal.¹¹⁴

Likewise, Wisconsin school officials can *expel* a student if she repeatedly refuses or neglects to obey rules, if she threatens to destroy the school's property by explosives, if she engages in conduct that endangers school property or health and safety of school officials, employees, or students. A student can also be expelled if she engages in conduct, including threats to other's health or safety, that endangers people or property.¹¹⁵ The school board can expel a student who has reached at least 16 years if she has repeatedly disobeyed rules and regulations, or if, while under a teacher's supervision, she also has prevented or interfered with an authority's duty to maintain "order or an

¹⁰⁹ See, e.g., Jeffrey D. Spitzer-Resnick, *Children in School: Student Discipline and the School-to-Prison Pipeline*, WIS. LAW. 39, 39 (Sept. 2014).

¹¹⁰ See *id.* at 39.

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ *Id.* at 39-40.

educational atmosphere at school or at an activity supervised by a school authority.”¹¹⁶ In the end, the school board must hold an expulsion hearing, and the board may expelled her for one year or more if she possessed a gun on school property.¹¹⁷ The board has flexibility and faces no statutory compulsion to expel a student if she has possessed a gun on school property, and can decide on a case-by-case basis whether the school’s best interest gets served by expelling the student.¹¹⁸

From a policy perspective, school districts needed a tool to prevent violence. To prevent violence, they can rely on zero tolerance to provide students with a consistent and clear disciplinary message.¹¹⁹ Eventually, school boards have used zero tolerance, not only to deal with guns, drugs, and gangs, but also to cope with other issues like threats, swearing, and drinking. Even where school boards had the statutory flexibility to soften disciplinary decisions, they have embraced the zero tolerance philosophy, thus “punishing both major and minor disruptions relatively equally.”¹²⁰ With such “treatment integrity or fidelity,” teachers and principal could remove disruptive, disrespectful, and violent students, thus creating an appropriate learning environment.¹²¹ With discipline or punishment arriving swiftly, zero tolerance, they thought, might deter other students from misbehaving. With treatment integrity and with swift discipline, parents wanted zero tolerance too because “they fear[ed] that their children’s safety [was] at stake.”¹²² By 1999, the Columbine rampage drove this point home,¹²³ as does the recent Parkland, Florida shooting.¹²⁴ However, because zero tolerance policies and practices have

¹¹⁶ *Id.* at 40.

¹¹⁷ *Id.*

¹¹⁸ *See id.*

¹¹⁹ AM. PSYCHOL. ASS’N. ZERO TOLERANCE TASK FORCE, *supra* note 26, at 853.

¹²⁰ *Id.* at 852.

¹²¹ *Id.* at 854.

¹²² *Id.*

¹²³ John Cloud, *The Columbine Effect*, TIME (Nov. 28, 1999), <http://content.time.com/time/magazine/article/0,9171,35098,00.html>.

¹²⁴ *See, e.g.*, Elizabeth Chuck, Alex Johnson, & Corky Siemaszko, *17 Killed in Mass Shooting at High School in Parkland, Florida*, NBC News, <https://www.nbcnews.com/news/us-news/police-respond-shooting-parkland-florida-high-school-n848101>.

disproportionately impacted poor, black, Latino, learning disabled, and LGBTQ students,¹²⁵ scholars, advocates, and parents have criticized this harsh, exclusionary discipline as *causing* students to enter the juvenile and criminal justice systems, *viz.*, the STPP problem.¹²⁶

B. *School-to-Prison Pipeline Problem.*

The STPP problem refers to punitive, educational policies and practices that push students out of public schools and into the juvenile and criminal justice systems.¹²⁷ In 2016, the *ABA Preliminary Report* claimed that the STPP problem “is one of our nation’s most formidable challenges.”¹²⁸ One scholar described the STPP problem as “a devastating process through which many of our children – particularly males and students of color – receive an inadequate education and are then pushed out of public schools and into the criminal punishment system.”¹²⁹

Despite the zero tolerance philosophy of the 1994 Act, school districts began applying this exclusionary rule to *nonaggressive* and *noncriminal* conduct. For examples, they applied zero tolerance to drugs, alcohol, threats, and swearing.¹³⁰ In other school districts, administrators and teachers were unwilling to

¹²⁵ See Redfield & Nance, *supra* note 22, at 10 (“This disproportionality manifests itself all along the educational pipeline from preschool to juvenile justice and even to adult prison for students of color, for students with disabilities, for LGBTQ students, and for other groups in particular settings.”).

¹²⁶ See, e.g., *Complaint against the Fall River Public Schools under Title VI of the Civil Rights Act of 1964 and Section 504 of the Rehabilitation Act of 1973*, AM. CIV. LIBERTIES UNION OF MASS., 1-2, (June 20, 2012), available at <https://www.civilrightsproject.ucla.edu/resources/projects/center-for-civil-rights-remedies/racial-inequity-in-special-education/administrative-advocacy/complaint-against-the-fall-river-public-schools-by-aclum-and-crr/2012-aclum-crr-fall-river-complaint.pdf>; *Test, Punish, and Push Out: How “Zero Tolerance” and High-Stakes Testing Funnel Youth into the School-to-Prison Pipeline*, ADVANCEMENT PROJECT, 7, 10, 24, 35-36, https://b.3cdn.net/advancement/d05cb2181a4545db07_r2im6caqe.pdf (rev. Mar. 2010) [hereinafter *Test, Punish, and Push Out*].

¹²⁷ See AM. CIVIL LIBERTIES UNION, *Locating the School-to-Prison Pipeline*, <https://www.aclu.org/node/29079%C2%A0> (last visited Aug. 19, 2017); see also Redfield & Nance, *supra* note 22, at 14, 22, 27, 51, 54-55.

¹²⁸ Redfield & Nance, *supra* note 22, at 14.

¹²⁹ Judith A.M. Scully, *Examining and Dismantling the School-to-Prison Pipeline: Strategies for a Better Future*, 68 ARK. L. REV. 959, 959 (2016).

¹³⁰ *Id.* at 962.

tolerate the slightest disruptions or disrespect or modest degrees of apparent aggressiveness. For example, a kindergarten girl had a temper tantrum, and the teachers deemed her behavior aggressive and called the police. Unable to immediately reach the child's mother, the police shackled and placed her in the police cruiser until her mother arrived.¹³¹ A first-grader kissed a peer's hand, and the school charged him with sexual assault, although the charges were later dropped.¹³² In one school district, a first grader arrived at school with a baby Mohawk, and he was immediately suspended. Across the country, school districts either suspend or expel students who fart, doodle, whisper, say "yes" as opposed to "yes, ma'am," arrive tardy, play hooky, suck on cough drops, sip sangria, doze off and refuse a visit to the school nurse, punk a French teacher by saying she lacked fluency in French, or write "ok" on [their] desk.¹³³ Had these behavioral offenses been commensurate with smoking marijuana, weapons possession like a shotgun, or an injurious fist fight, few scholars, advocates, or parents would complain about the great risk such behavior might pose for administrators, teachers, staff, and students. But by applying such harsh disciplinary action to students who bring a nail clipper or a toy axe to school, school district officials appear to treat *nonaggressive* and *noncriminal* conduct by students with the same severity as serious acts like threatening a teacher, destroying school property, or carrying a loaded or unloaded concealed weapon.¹³⁴ Despite the need to create safe, learning environments for students and staff, these scholars, advocates, and parents might plausibly argue that they

¹³¹ *Ga. Police Handcuff, Arrest Kindergartner for Tantrum*, CBS NEWS (Apr. 17, 2012, 11:01 AM), <http://www.cbsnews.com/news/ga-police-handcuff-arrest-kindergartner-for-tantrum/>.

¹³² *Sexual Harassment? 6-year-old Suspended for Kiss on Hand*, USA TODAY, <https://www.usatoday.com/story/news/nation/2013/12/10/first-grade-kiss-suspension/3963813/> (last updated Dec. 10, 2013, 4:28 PM).

¹³³ See Scully, *supra* note 129, at 971; Skiba, *supra* note 7, at 5-6; *Zero Tolerance and Exclusionary School Discipline*, *supra* note 7, at 2.

¹³⁴ See Skiba, *supra* note 7, at 3-4 (after a student received a ten-day suspension for loaning a nail clipper with an attached nail file to a friend, the school principal said, "Life goes on. You learn from your mistakes. We are recommending expulsion").

cannot understand why school district officials impose such strict “obedience training” on children.¹³⁵

Initially, policymakers intended zero tolerance to impose harsh discipline not just on disobedient children but principally on students who had guns and drugs, who threatened staff, or who damaged school property. Under zero tolerance, students for example who possessed guns or drugs suffered two-year suspensions, and the school district referred them to the juvenile courts. Such suspensions and referrals make perfect sense. Yet, some argue that public schools intensified the link between public education and juvenile courts by closely monitoring students through “security technology, security personnel, and profiling, especially in high minority, high poverty school districts,” including School Resource Officers (“SRO”).¹³⁶ Some argue that SROs don’t replace the guidance counselors of bygone days who had an inclination to treat youthful exuberance as mischievous folic and play. Unlike those bygone guidance counselors, police officers tend to view human behavior through criminal and non-criminal lens. In addition, if SROs possess experiences that dispose them to profile troublemaking students,¹³⁷ they might view repeat offenders of rules and regulations as having a deep disrespect for civil and institutional authorities.¹³⁸ Moreover, like SROs, teachers, who may have just lost their patience for unruly, disrespectful, disruptive, noncompliant, and aggressive students, may for legitimate reasons and implicit biases want these students out of the building. It may be their view that if these students were suspended or expelled, other students could learn. After all, “teachers cannot teach and students cannot learn in a climate marked by chaos and disruption.”¹³⁹

¹³⁵ See Alice Miller, *The Childhood Trauma* (Oct. 22, 1998) (transcript available at http://www.vachss.com/guest_dispatches/alice_miller2.html) (stating that obedience training, a method of parenting by which children are taught unquestioning obedience through physical punishment, leads to a lack of empathy and compassion in adulthood).

¹³⁶ AM. PSYCHOL. ASS’N. ZERO TOLERANCE TASK FORCE, *supra* note 26, at 855-56.

¹³⁷ *Id.*

¹³⁸ See, e.g., *Test, Punish, and Push Out*, *supra* note 126, at 14.

¹³⁹ AM. PSYCHOL. ASS’N. ZERO TOLERANCE TASK FORCE, *supra* note 26, at 852.

For those who fight against the zero tolerance policy, the STPP problem simply means that school districts suspend or expel students, all in the vain hope of instilling fear in and promoting strict obedience by students, and whether school districts have actually instilled more fear and garnered more obedience, suspended and expelled students sooner or later become involved in the juvenile and criminal justice systems. In the short run, depending on their externalizing behavior, SROs may arrest them and take them to juvenile court. In some very poor school districts, the public schools have police processing facilities on site.¹⁴⁰ These arrests become the most direct route into the pipeline. Advocates also argue that suspensions and expulsions, including referrals to alternative education centers, increase the likelihood that public schools have pushed these students closer to the juvenile and criminal justice systems.¹⁴¹ During 2011-2012, schools forced students into the juvenile or criminal justice system by referring “approximately 260,000 students to law enforcement.”¹⁴² During this same period, SROs or other law enforcement officials arrested approximately 92,000 “on school property during the school day or at a school-sponsored event.”¹⁴³ Moreover, according to the data of the Civil Rights Data Collection of the U.S. Department of Education, “3.45 million students were suspended at least one time during the 2011-2012 school year, and approximately 130,000 were expelled from school during the same time period.”¹⁴⁴ Public schools suspended or expelled students for “only trivial infractions of school rules or offenses, not for offenses that endangered the physical well-being of other students.”¹⁴⁵ Likewise, students who were referred to law enforcement officials had only broken trivial rules or engaged

¹⁴⁰ See *Ending The School-to-Prison Pipeline: Hearing Before the Subcomm. on the Constitution, Civil Rights, & Human Rights of the Comm. on the Judiciary*, 112th Cong. 590 (2012) (statement of Joseph B. Tulman, Professor of Law and Institute Director, Took Crowell Institute for At-Risk Youth).

¹⁴¹ See, e.g., *Test, Punish, and Push Out: How “Zero Tolerance” and High-Stakes Testing Funnel Youth into the School-to-Prison Pipeline*, *supra* note 126, at 4-5.

¹⁴² See Redfield & Nance, *supra* note 22, at 14.

¹⁴³ *Id.*

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

in minor offenses.¹⁴⁶ Ultimately, the STPP problem has had little to do with guns, drugs, and the endangerment of students, staff, or school property and more to do with minor offenses like disrespect or disobedience.

As a result, and without a present-day justification, zero tolerance's harsh, exclusionary policies apply equally to major violations and to minor offenses, and when school officials refuse or fail to exercise discretion or flexibility when they apply this policy, they push students, who engage in minor but increasingly intolerable conduct and who were not initially the targets of zero tolerance policy, into the juvenile and criminal justice systems. For example, a student who took a knife from a suicidal peer and placed it in his locker was found "heroic," "noble," and a defiler of the zero tolerance policy.¹⁴⁷ A school expelled a first grader who kissed a girl's hand, and it charged him with sexual assault.¹⁴⁸ After the family filed suit, the school dropped the sexual assault charges against him.¹⁴⁹ However, both of these instances show us how zero tolerance policies have reached minor offenses that should be beyond the scope of the more egregious conduct they had hoped to target and that produce absurd, unintended results.

Although the *ABA Preliminary Report* asserts that causes of the STPP problem "are many, complex, and interrelated,"¹⁵⁰ it argues explicitly that these students' actions have been viewed through criminalizing norms and SROs who are limited by their implicit biases and by the lack of discretionary decisions. If school districts had not criminalized what historically had been the actions and antics of exuberant youths, if SROs had no place in public schools and didn't have criminalizing lenses through which they assess students' actions and interactions, and if zero

¹⁴⁶ *See id.*

¹⁴⁷ *Ratner v. Loudoun Cty. Pub. Schs.*, 16 Fed. App'x 140, 141 (4th Cir. 2001) (violating a school board policy against possessing a knife in school).

¹⁴⁸ AP, *Sexual harassment? 6-Year-Old Suspended for Kiss on Hand*, USA TODAY (Dec. 10, 2013, 4:11 PM), <http://www.usatoday.com/story/news/nation/2013/12/10/first-grade-kiss-suspension/3963813/> (violating a school policy against unwanted touching).

¹⁴⁹ Stephen Rex Brown, *School Bows to Pressure Over 6-Year-Old's Kiss*, N.Y. DAILY NEWS (Dec. 12, 2013, 8:51 AM), <http://www.nydailynews.com/news/national/colorado-school-bows-pressure-6-year-old-boy-kissed-student-article-1.1545351> (reducing his offense to misconduct).

¹⁵⁰ *See* Redfield & Nance, *supra* note 22, at 12.

tolerance policies had built-in discretionary decision-taking, then we might not have the STPP problem. As argued, whether schools criminalize prankish or rough play, whether SROs view students as human beings or would-be criminals, and whether zero tolerance grant teachers and administrators some discretion and flexibility get presented as external, objective social forces over which poor black students, for example, have no control. By presenting these factors of zero tolerance and the STPP in this way, scholars and advocates prefer to view the poor, black, Latino, learning disabled, and LGBTQ as having little to no control over their existence moment to moment. Under the view that social institutions like public schools and school districts victimize and marginalize poor black students, scholars and advocates more than suggest that whites, policymakers, and powerful social institutions have created a problem, where it need not exist. It must be modestly true that zero tolerance policies and changing policing policy have altered what qualifies as criminal conduct and how must such conduct be punished and staunched. Accordingly, if federal and state policies hadn't adopted a zero tolerance policy but perhaps other ways of coping with externalizing behavioral issues,¹⁵¹ we could focus our attention on improving academic achievement; increasing graduation rates; decreasing routine suspensions, expulsions, and referrals; and decreasing racial and ethnic disparities in how disciplinary policies were applied, all of which would dismantle the STPP problem.¹⁵² By focusing our attention on these factors of zero tolerance policies, scholars and advocates impliedly tell us that self-perpetuating pathologies *a la* Daniel Patrick Moynihan's *Report* don't correlate with STPP. By taking this approach, we, especially white liberal scholars, loathe faulting historical marginalized citizens like poor blacks, and so they

¹⁵¹ See, e.g., Katherine Reynolds Lewis, *What If Everything You Knew About Disciplining Kids Was Wrong?*, MOTHER JONES (Jul. 7, 2015), <http://www.motherjones.com/politics/2015/07/schools-behavior-discipline-collaborative-proactive-solutions-ross-greene/> (discussing how Dr. Ross Greene's Collaborative and Proactive Solutions (or CPS) work to teach children with externalizing behavioral issues how to self-regulate their arousal states, how to learn to describe what they are feeling, and how teachers' roles have changed from adversary to helper).

¹⁵² Redfield & Nance, *supra* note 22, at 12.

would rather strengthen parental rights¹⁵³ and blame institutional forces.¹⁵⁴ According to liberal scholars and advocates, without regard to intrafamily dynamics, the STPP problem originates not from within families but from historical, external, and objective social forces like white racism or institutional power.

In the *ABA Preliminary Report*, these forces factored into its recommendations. But these recommendations signaled how society has come to understand the STPP problem. Based on this *ABA Preliminary Report*, this problem thus originates out of federal policies that empowered states to pass legislations and regulations, so that school districts have the power to ensure that students learned in an environment that continued to free from drugs, weapons, violence, aggression, disruptive behavior, and threats to persons and property. In this way, the *ABA Preliminary Report's* findings, recommendations, training, and legislative initiatives¹⁵⁵ failed to discuss how school-age children would get prepared for public school by the attuned, good enough caregiving from their earliest neonatal experiences with caregivers through their enrollment in elementary schools. By failing to note any negative impact on children's earliest relationships with their caregivers, the *ABA Preliminary Report* wrongly implies that we can effectively evaluate, analyze, and dismantle the STPP problem by focusing our attention not on how suspended and expelled students were raised,¹⁵⁶ but on how

¹⁵³ See, e.g., *Santosky v. Kramer*, 455 U.S. 745, 102 S. Ct. 1388 (1982) (even though parents were found to have permanently neglected their children, the Court held that in order to destroy the parent's right to her natural child, due process requires that the State must meet its burden of proof by clear and convincing evidence).

¹⁵⁴ See, e.g., *Nicholson v. Scopetta*, 344 F.3d 154 (2d Cir. 2003) (holding that it is unconstitutional for New York State's ACS agents to use *ex parte* removal of children from the homes where mothers have suffered domestic violence, and where such removal fails to satisfy the imminent harm standards as redefined by the Appellate Court).

¹⁵⁵ See *id.* at 10-13; see also Scully, *supra* note 129, at 990-1003 (discussing strategies to dismantle the school-to-prison pipeline); Russell J. Skiba & Kimberly Knesting, *Zero Tolerance, Zero Evidence: An Analysis of School Disciplinary Practice*, 92 *NEW DIRECTIONS FOR YOUTH DEV.* 17, 36-38 (2001) (making no mention or discussion of parenting styles and their impact on children who are subject to the zero tolerance policies).

¹⁵⁶ See, e.g., Bessel A. van der Kolk, *The Neurobiology of Childhood Trauma and Abuse*, 12 *CHILD ADOLESC. PSYCHIATRIC CLIN. N. AM.* 293, 293 (2003) ("Trauma exposure affects what children anticipate and focus on and how they organize the way they

historical, external, and objective forces like state-backed zero tolerance policies usher young citizens into the juvenile and criminal justice systems through suspensions, expulsions, referrals, and school-based arrests.

C. *Traditional Socio-Economic Analysis and its Limitations.*

Dylan [Klebold] did not do this because of the way he was raised.

He did it in contradiction to the way he was raised.

Susan Klebold¹⁵⁷

I haven't done anything for which I need forgiveness.

Susan Klebold¹⁵⁸

In the STPP context, scholars, advocates, and parents have engaged in traditional socio-economic analyses by linking zero tolerance policies and NCLB to the STPP problem. By so doing, they have argued that states, which enacted zero tolerance, and public school's policies, and which enforced harsh, exclusionary discipline, have harmed and failed our children by suspending them, expelling them, referring them to juvenile court, and by arresting them.¹⁵⁹ Based on the erstwhile NCLB mandate, they also point to how professional assessments of teacher effectiveness and high stakes testing led to actions that forced children to drop out, that caused them to fall behind their grade level, or that recommended that they attend alternative educational centers.¹⁶⁰ Simply put, they claim that zero tolerance policies have driven their children out of school and

appraise and process information. Trauma-induced alterations in threat perception are expressed in how they think, feel, behave, and regulate their biologic systems.)”.

¹⁵⁷ David Brooks, *Columbine: Parents of a Killer*, N.Y. TIMES (May 15, 2004), <http://www.nytimes.com/2004/05/15/opinion/columbine-parents-of-a-killer.html?mcubz=3> (quoting Susan Klebold, mother of one of the Columbine high school shooters: Dylan Klebold).

¹⁵⁸ *Id.* (quoting Susan Klebold, who was responding with insistence to the following statement: “I forgive you for what you have done”).

¹⁵⁹ See, e.g., *Zero Tolerance and Exclusionary School Discipline Policies Harm Students and Contribute to the Cradle to Prison Pipeline*, *supra* note 7, at 7.

¹⁶⁰ See, e.g., *Test, Punish, and Push Out*, *supra* note 126, at 3.

directly or indirectly into the juvenile and criminal justice systems.¹⁶¹

Given these claims, these scholars, advocates, and parents would argue that if we wish to rend the STPP problem, then we must look at zero tolerance policies as the external, objective forces that push our children from the classroom, and into state detention centers or penitentiaries. Stated differently, they refer to political, social, economic, and historical policies and practices that operate beyond the direct control of poor, black, Latino, learned disabled, and LGBTQ students and that impact them and their families unfairly and grievously. By approaching the STPP problem in this way, these scholars, advocates, and parents argue implicitly that beyond a student's actual behavior, attitude, or cognitive abilities, public school authorities have used race, ethnic, class, and institutional biases to determine objectively and subjectively how zero tolerance policies will impact students.¹⁶² In sum, under traditional socio-economic analyses, these scholars, advocates, and parents must view the STPP problem through what Orlando Patterson called "a deep-seated dogma"¹⁶³ that rejects any analysis of the STPP problem as a function also of poor, black children's "distinctive attitudes, values and predispositions, and the resulting behavior of its members."¹⁶⁴

By traditional socio-economic analyses, zero tolerance policies and the resulting STPP problem victimize poor, blacks, Latinos, learning disabled, and LGBTQ students, and in this way, such analyses seek to explain the present effects of past racial discrimination and oppression, one example of which must be the disproportionate rate at which public school authorities suspend

¹⁶¹ See, e.g., *Federal Policy, ESEA Reauthorization, and the School-to-Prison Pipeline*, *supra* note 31, at 1.

¹⁶² See, e.g., MONIQUE W. MORRIS, RACE, GENDER, AND THE SCHOOL-TO-PRISON PIPELINE: EXPANDING OUR DISCUSSION TO INCLUDE BLACK GIRLS 6 (2013) ("[O]bserved patters [sic] of racial disproportion do not correlate with higher incidence of disruptive behavior by Black students and, therefore, conclude that [Disproportionate Minority Contact] in school discipline is due in part to differential treatment of [students of color] by teachers and administrators.").

¹⁶³ Orlando Patterson, *The Poverty of the Mind*, N.Y. TIMES (Mar. 26, 2006), <http://www.nytimes.com/2006/03/26/opinion/a-poverty-of-the-mind.html>.

¹⁶⁴ *Id.*

and expel poor, black students.¹⁶⁵ To this extent, the STPP problem would operate as a precursor to the mass incarceration of black men and women.¹⁶⁶ For example, Race Critics would argue that race, law, and power work to privilege whites and marginalize blacks or historically oppressed minority citizens.¹⁶⁷ In the STPP context, scholars like Kimberlé Williams Crenshaw sees this problem as part of a pattern and practice that reproduces racial inequality in a post-racial world.¹⁶⁸ For Crenshaw and other Race Critics, structural forces still operate disproportionately against students of color, even though America had elected its first black president.¹⁶⁹ By extension, then, scholars like Crenshaw would view zero tolerance policies as regulatory mechanisms and the STPP problem as the actual practice of racial injustice, so that as early as possible people of color, i.e., poor, raced and ethnic students, find themselves cemented at the lowest rungs, where society denies them access not only to a proper, formal education, but also to the labor and employment opportunities.

Beneath traditional socio-economic analysis, we'll find not only leftist dogmatism, but also the structural oppression of people of color. In this way, people of color, despite their efforts to rise above their material privations, beginning with well-intentioned and culturally attuned parenting practices, cannot alter a social narrative that continuously pushes them under. In reducing this oppressive reality to a principle, Crenshaw at the very least has argued, "Black people do not create their oppressive worlds moment to moment but rather are coerced into living in worlds

¹⁶⁵ Cf. Anne C. Kubisch, *Why Structural Racism? Why a Structural Racism Caucus?*, 15 *POVERTY & RACE* 1, 1 (2006) ("The academic origins [of structural racism] lie in critical race theory and studies of whiteness, power, and privilege. These have focused on the notion of race as a social and political construct that works to maintain the advantages associated with whiteness and the burdens associated with color, even as laws, policies and practices change.").

¹⁶⁶ See generally MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* (2012).

¹⁶⁷ See generally *CRITICAL RACE THEORY: THE KEY WRITING THAT FORMED THE MOVEMENT* (Kimberlé Crenshaw, et al., ed. 1995); DERRICK BELL, *FACES AT THE BOTTOM OF THE WELL: THE PERMANENCE OF RACISM* (1992).

¹⁶⁸ See Kimberlé Williams Crenshaw, *Twenty Years of Critical Race Theory: Looking Back to Move Forward*, 43 *CONN. L. REV.* 1253, 1337-40 (2011).

¹⁶⁹ See *id.* at 1337-40.

created and maintained by others. Moreover, the ideological source of this coercion is not liberal legal consciousness, but racism.”¹⁷⁰ Put neatly, structure oppresses the socialized others like poor, black, and ethnic students. It victimizes them by directly and indirectly pushing them into the juvenile and criminal justice systems, and scholars can most effectively bring an end to zero tolerance and the STPP problem by engaging in traditional socio-economic analyses that focus their intellectual energies not on how poor black parents have raised their children, which raises the specter of Moynihan’s concepts of “self-perpetuating pathologies,”¹⁷¹ but on how teachers and administrators, i.e., institutional agents, use legal and regulatory tools to force children out of school and eventually into the juvenile and criminal court systems.

By principally looking to external, objective forces like zero tolerance policies, these scholars, advocates, and parents believe that they’ve had no direct role in why some children, who are poor, from a particular racial or ethnic background, learning disabled, and LGBTQ, fall prey to zero tolerance policies, and thus become at risk for the STPP problem. Accordingly, most parents, especially poor black ones, would align themselves with Susan Klebold, agreeing with her words: Dylan’s killing of those teachers and students *contradicted* how Susan raised him. Given this premise, most if not all parents would declare: *I don’t need your forgiveness!* Like Susan, these poor, black caregivers’ declarations come with a twist: *We did our very best to teach our children how to behave at home and to survive in a world that hates and fears them.* To support this claim, they would cite a brutal, tragic, and traumatic history of white hatred and violent racial oppression by whites against blacks.¹⁷² During Jim Crow,

¹⁷⁰ Kimberlé Williams Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331, 1357 (1988).

¹⁷¹ See U.S. DEP’T OF LABOR, OFFICE OF POLICY PLANNING AND RESEARCH, THE NEGRO FAMILY: THE CASE FOR NATIONAL ACTION (1965) [hereinafter MOYNIHAN REPORT], <http://web.stanford.edu/~mrosenfe/Moynihan%20The%20Negro%20Family.pdf>. See also GREGORY ACS, ET AL., URBAN INST., THE MOYNIHAN REPORT REVISITED (2013), <http://www.urban.org/UploadedPDF/412839-The-Moynihan-Report-Revisited.pdf>. See generally Robinson, *A Dark Secret Too Scandalous*, *supra* note 47.

¹⁷² See, e.g., LEON F. LITWACK, TROUBLE IN MIND: BLACK SOUTHERNERS IN THE AGE OF JIM CROW 25 (1998). See also MOYNIHAN REPORT, *supra* note 171.

they would argue, black children had to learn racial etiquette,¹⁷³ the homeopathic dose of which was then, as today, the “severe beating.”¹⁷⁴ Less others have forgotten Ferguson, MO, and the *Black Lives Matter* movement, they would say that “they must hit their children so that they don’t get into trouble outside the home by falling prey to gang violence or getting shot by police.”¹⁷⁵ Given this violent history against blacks and their families, they believe, despite the evidence-based literature on the impact of spanking, abuse, and neglect on infants’ and toddlers’ brain development, that physical discipline makes good, obedient children.¹⁷⁶ For example, in 2017, in a failed effort to ban corporal punishment in public schools, Senator Alan Clark rhetorically asked Senator Joyce Elliott, the bill’s sponsor, if corporal punishment “never works.”¹⁷⁷ Answering with a personal story, Senator Clark said: “I found [such beatings] to be quite effective.”¹⁷⁸

In a second, successful bill, Senate Bill 609 would prevent public schools from suspending a child in grades K through fifth, unless the child “poses a physical risk to him or herself or others, or causes a series [of] disruption[s] that cannot be addressed through other means.”¹⁷⁹ Elliott favored this approach because it would require public school authorities to find ways to discipline students without a facile resort to harsh, exclusionary discipline like suspensions.¹⁸⁰ To the point, she thought that adults, who

¹⁷³ Patton, *supra* note 21.

¹⁷⁴ See RALPH ELLISON, *SHADOW AND ACT* 84 (1995) (“One of the Southern Negro family’s method of protecting the child is the severe beating – a homeopathic dose of the violence generated by black and white [Jim Crow] relationships.”).

¹⁷⁵ Patton, *supra* note 21 (“It is especially pernicious in a culture in which, during the Jim Crow era, black parents beat their children to try to enforce lessons about racial etiquette.”).

¹⁷⁶ See ELLISON, *supra* note 174, at 91 (“Within the ambit of the black family this [mis-education] takes the form of training the child away from curiosity and adventure, against reaching out for those activities lying beyond the borders of the black community. And when the child resists, the parent discourages him; first with the formula, ‘That there’s for white folks. Colored can’t have it,’ and finally with a beating.”).

¹⁷⁷ Iby Caputo, *Bill to Ban Corporal Punishment Fails*, ARK. MATTERS (Mar. 15, 2017), <http://www.arkansasmatters.com/news/local-news/bill-to-ban-corporal-punishment-fails/672577475>.

¹⁷⁸ *Id.*

¹⁷⁹ *Id.*

¹⁸⁰ *Id.*

should be smarter than children, ought to discipline children without “physical contact between an adult and a kid.”¹⁸¹ That is, they should alter a child’s behavior without intentionally inflicting pain through physical force on a child’s body. Why? According to a report by National Conference of State Legislators, Senator Elliott learned that public school officials were more likely to physically beat students of color and learning disabled students “at higher rates than students without disabilities.”¹⁸² Moreover, according to this report called “*State Policies Addressing Child Abuse and Neglect*,” this bipartisan nongovernmental organization wrote that “[s]ubstantial research shows negative long-term outcomes for children who are disciplined through corporal punishment.”¹⁸³ This foregoing research outcome requires that we ask: do these negative, long-term outcomes correlate more with toxic stress and adversities than with external, objective and institutional forces like zero tolerance and new policing policies?¹⁸⁴

It would appear that within the black families, the external, objective forces that harm black children have *everything* to do with the way in which black parents and caregivers have raised and disciplined their children. Since before slavery, West African culture embraced physically beating children as a critical part of teaching, learning, and surviving, especially due to obedience training.¹⁸⁵ During and since slavery, black caregivers have relied on hard beatings to ensure that black children not only

¹⁸¹ *Id.*

¹⁸² *Id.*

¹⁸³ *Id.*

¹⁸⁴ See Reginald Leamon Robinson, *Seen But Not Recognized: Black Caregivers, Childhood Cruelties, and Social Dislocations in an Increasingly Colored America*, 117 W. VA. L. REV. 1273, 1292 (2015) (asking “To a child born in [1989], can slavery or Jim Crow explain why his black caregiver caused him to suffer cruelties?”) [hereinafter cited as Robinson, *Seen But Not Recognized*].

¹⁸⁵ See June Ellis, *The Child in West African Society*, in WEST AFRICAN FAMILIES IN BRITAIN: A MEETING OF TWO CULTURES 39, 48 (June Ellis ed., 1978) (according to Ga society, “punishment is a very important part of caring and a necessary part of good parenthood.”). See also Robinson, *A Dark Secret Too Scandalous*, *supra* note 47, at 153 (“As part of a very strict traditional upbringing, West African parents, and even extended family members, use harsh physical discipline to enforce norms of parental respect, hard work, and morality, effectively saying that infants, toddlers, and children have none of these values because they are not naturally good, respectful, or willing to work.”).

obeyed¹⁸⁶ but also exhibited the proper deportment around white folks.¹⁸⁷ As a result, it's highly likely that smart, professionally successful black folks like Senator Elliott cannot link what substantial research tells us about the cognitive, behavioral, and developmental impact of spanking, abuse, neglect, and shaming on an infant's or toddler's brain architecture,¹⁸⁸ and how black caregivers parent and discipline their children. Accordingly, Senator Elliott, a black female, can sponsor a bill to ban corporal punishment in public schools, and she can still argue black parents ought to have the statutory and exclusive privilege to beat their children with the intent to cause them physical pain to correct or to punish their behavior.¹⁸⁹ Thus, to Senator Elliott, we cannot fault black caregivers, who spank and hard beat their children, who can as a result cause them to suffer toxic stress, and who can by necessity alter their optimal brain development, for risking harm to their children cognitively, behaviorally, and

¹⁸⁶ See MARIE JENKINS SCHWARTZ, *BORN IN BONDAGE: GROWING UP ENSLAVED IN THE ANTEBELLUM SOUTH* 101 (2000) ("When one little girl in Virginia accidentally came upon some adults preparing to eat lamb, a food normally unavailable to slaves, an old man took her 'out back of the quarter house' and whipped her severely, explaining: 'Now what you see, you don't see, and what you hear, you don't hear.'"). See Reginald Leamon Robinson, *Dark Secrets: Obedience Training, Rigid Physical Violence, Black Parenting, and Reassessing the Origins of the Instability in the Black Family Through a Re-Reading of Fox Butterfield's ALL GOD'S CHILDREN*, 55 HOWARD L.J. 393, 418-419 (2012) ("Finding Butch hiding under the steps to the house, she demanded that he come out. She prepared a 'switch out of a big branch of the tree in the backyard.' She beat him, while saying: 'Boy, why you so bad? You ain't going to school.' Of course, Butch lied. Frances continued: 'No, you ain't. You got the devil in you, just like your grand-daddy and your daddy.' She continued to beat him. Despite her best intentions and her rigid violent discipline, Frances was powerless to alter Butch's 'evil' conduct, which she more than likely deepened into darker rage and resentment, thus morphing an intelligent child into a 'bad nigger,' antisocial personality, who was eventually convicted of double homicide.").

¹⁸⁷ See WILMA A. DUNAWAY, *THE AFRICAN-AMERICAN FAMILY IN SLAVERY AND EMANCIPATION* 78 (2003) ("All mothers were stric' . . . 'that made children stand in fear everywhere they went.' . . . To prevent worse discipline from the whites, William Mead's mother would whip him 'for sassing' the master."); SCHWARTZ, *supra* note 186, at 98 ("her Alabama master tried to punish Eliza Evans for sassing him, the young girl ran to her grandmother for protection, only to be whipped by the older woman. The master left satisfied that Eliza's insolence had been suitably punished.").

¹⁸⁸ See, e.g., LOUIS COZOLINO, *THE NEUROSCIENCE OF HUMAN RELATIONSHIPS: ATTACHMENT AND THE DEVELOPING SOCIAL BRAIN* 234 (2006) ("[S]hame is the visceral experience of being shunned and expelled from social connectedness. Social exclusion is painful and even stimulates the same areas of the brain that become active when we experience physical pain."); id. ("Prolonged and repeated shame states result in a physiological dysregulation that negatively impacts the development of networks of affective regulation and attachment circuitry.").

¹⁸⁹ See Caputo, *supra* note 177.

developmentally. If so, then black folks like Senator Elliott believe physical and emotional discipline works, alters negative behavior, and promotes actions and attitudes that lower a black child's risk of harm by racist whites and state agents like police officers.¹⁹⁰ By delinking "appropriate" physical and emotional discipline like spankings and hard beatings by black parents, which can be associated with toxic stress,¹⁹¹ from corporal punishment in public schools, black folks like Senator Elliott can still straight faced point their fingers at public school authorities' use of zero tolerance policies as the principal objective, external force that drives poor, black, Latino, learning disabled, and LGBTQ into the STPP.

Black folks like Senator Elliott don't differ from scholars, advocates, and parents who believe that traditional socio-economic analyses of the STPP problem will expose not just the *cause* but also the *means* that will dismantle the STPP problem. Unfortunately, as I will argue below, these scholars, advocates, and parents will find that their insights will yield nothing useful if they simply believe that, without regard to the earliest disruption of the caregiver-infant relationship, structural oppression has destroyed, and will continue to destroy, any viable sense of black agency and culture. Consider Turner who sought to analyze black-on-black violence through a structural-cultural perspective.¹⁹²

Adopting William Oliver's framework,¹⁹³ Turner argued that we can best understand why blacks hurt each other by examining patterns of American socialization because such patterns reveal how America has organized its political, economic, social, and cultural institutions to "perpetuate White superiority and Black

¹⁹⁰ Patton, *supra* note 21 ("Vestiges of this tradition endure, as has become obvious in my conversations with black parents who think that discipline must be physically forceful to be effective, a sentiment that is echoed in the NAACP statements.").

¹⁹¹ See, e.g., Elizabeth T. Gershoff, *Spanking and Child Development: We Know Enough Now to Stop Hitting Our Children*, 7 CHILD. DEV. PERSPECT. 133, 135 (2013).

¹⁹² See generally Roger D. Turner, *Black on Black Violence: Moving Towards Realistic Explanations and Solutions*, in BLACK ON BLACK CRIME: FACING FACTS – CHALLENGING FICTIONS 1-24 (P. Ray Kedia ed., 1994).

¹⁹³ See generally William Oliver, *Black Males and Social Problems: Prevention through Afrocentric Socialization*, 20 J. OF BLACK STUD. 15 (1989); William Oliver, *Sexual Conquest and Patterns of Black-on-Black Violence: A Structural-Cultural Perspective*, 4 VIOLENCE & VICTIMS 257 (1989).

inferiority.”¹⁹⁴ Without regard to how poor, black caregivers raised their children from infancy through young adulthood, especially from age zero to six, white structural oppression causes blacks to engage in dysfunctional adaptation.¹⁹⁵ Despite the poor, black caregivers’ well-intentioned physical discipline, e.g., hard beatings, this dysfunction must invade black households when the black infant’s brain would be rapidly developing during the critical period, i.e., zero to two years old. Again, without regard to whether poor, black parents engaged in attuned attachment, thus creating a optimal environment, in which the infant would feel completely loved, secure, and wanted, white racial oppression has caused a dysfunctional adaptation by blacks that “results in . . . self-hatred.”¹⁹⁶ Burdened by such self-hatred, young blacks, including school-age children, “may . . . strike out at others who resemble them.”¹⁹⁷ Along with rage and aggression, blacks have a “free floating anger” that flows out of global, structural factors like white racism, joblessness, limited employment opportunities, and ghetto conditions,¹⁹⁸ which Turner argued could be countered by an “Afrocentric cultural ideology.”¹⁹⁹ In making this argument, Turner explained why scholars need not drill down into black cultural norms. By doing so, we would only find poisonous traces of white racism. For him, a scholar’s time would be best served if she viewed not only black-on-black violence but also black anger, anxiety, and aggression through a traditional socio-economic analysis. Such an analysis would reveal that external, objective forces like dysfunction adaptation might best explain why blacks had externalizing behavioral problems.

Today, we could say that in the STPP problem, zero tolerance policies ensnare poor, black students, for example, who lack a sense of self, and by not knowing who they are, or how “to respond to the pressures of life,” poor, black students engage in aberrant, dysfunctional actions, thus falling prey to harsh,

¹⁹⁴ Turner, *supra* note 192, at 13.

¹⁹⁵ *Id.*

¹⁹⁶ *Id.*

¹⁹⁷ *Id.*

¹⁹⁸ *Id.*

¹⁹⁹ *Id.* at 13-14.

exclusionary discipline like suspension, expulsion, and thus juvenile or criminal justice system. Unfortunately, even if Turner would agree with how I presented his argument and I applied his thinking to the STPP problem, he never explained how “dysfunctional adaptations” shapes an infant’s “*selfobject*” of herself and her social world.²⁰⁰

Based on Turner’s structural-cultural perspective, it would follow that if poor, black caregivers, however well-intentioned, had adopted parenting styles that caused toxic stress and suboptimal brain development during critical periods in the infant’s and toddler’s life, we can fault by necessity the present effects of past racial oppression, i.e., slavery and Jim Crow, for the infrafamily dynamics in black life. Yet, it’s my view that those scholars, advocates, and parents who refuse to account for the direct, interpersonal harm caused by poor, black caregivers, for example, do so because they suffer from “emotional blindness,”²⁰¹ because they have an inability or unwillingness to access their own personal childhood experiences,²⁰² and because they simply refuse to believe that poor, black cultural norms around childrearing practices can damage black children long

²⁰⁰ See Allan N. Schore, *Relational Trauma and the Developing Right Brain: An Interface of Psychoanalytic Self Psychology and Neuroscience*, 1159 ANN. N.Y. ACAD. SCI. 189, 191-192 (2009). Citing Heinz Kohut’s *The Analysis of the Self* (1971), *The Restoration of the Self* (1977), and *How Does Analysis Cure?* (1984), Schore writes:

Indeed, self psychology is built upon a fundamental developmental principle – that parents with mature psychological organizations serve as selfobjects that perform critical regulatory functions for the infant who possesses an immature, incomplete, psychological organization. The child is thus provided, at nonverbal levels beneath conscious awareness, with selfobject experiences that directly effect the vitalization and structural cohesion of the self. The selfobject construct contains two important theoretical components. First, the concept of the mother-infant pair as a self – selfobject unit emphasizes that early development is essentially an interdependence between self and objects in a system. . . . The second component of the selfobject construct is the concept of regulation. . . . These regulating self – selfobject experiences provide the particular intersubjective affective experiences that evoke the emergence and maintenance of the self.

²⁰¹ See MILLER, *THE BODY NEVER LIES*, *supra* note 75, at 168 (“Children cannot escape their own parents, so they cannot afford to see through them either. Blindness makes it possible to survive. This is the way the abuse of children has functioned since time immemorial. *Blindness and forgiveness are essential to survival*. But at the same time they lead to repetition and they perpetuate cycles of cruelty.”).

²⁰² See, e.g., MILLER, *BANISHED KNOWLEDGE*, *supra* note 58, at 132; JANOV, *supra* note 40, at 26.

before the children have suffered racism directly through white racial oppression.²⁰³ By attributing abuse, neglect, humiliation, and manipulation by poor, black caregivers to the present effects of past racial oppression, scholars like Turner and Crenshaw have argued unpersuasively that society cannot require poor blacks to account for the toxic stress and early childhood adversities that they inflict on their children. Yet, based on Miller's concept of "emotional blindness," black caregivers, who have repressed their own early childhood experiences with toxic stress that attends abuse and neglect, intergenerationally transmit to their children the horribly disfiguring maltreatment that they've carried epigenetically for generations,²⁰⁴ so that they can prepare them to live in a white-racist, cop-killing America. In the end, these scholars would argue that we can best help poor, black parents who seek to teach their children strict obedience through hard beatings by focusing not on black parenting culture, but on external, objective forces like zero tolerance policies and the STPP problem by which America privileges white needs over those of poor, black, Latino, learning disabled, and LGBTQ students.

As Orlando Patterson would posit about traditional socio-economic analyses, scholars like Turner and Crenshaw don't wish to give mainstream society, including teachers and administrators, the insights to see, find, and analyze the self-perpetuating pathologies within the black family.²⁰⁵ As Jim Crow's body laid dying on the altar of America justice under the Civil Rights Act of 1964,²⁰⁶ Moynihan gave whites, especially those still feeding at the trough of white superiority, the critical gaze into the probable, dysfunctional workings of the black family,²⁰⁷ even though he too premised that the history of slavery

²⁰³ See, e.g., Robinson, *A Dark Secret Too Scandalous*, *supra* note 47, at 120-21.

²⁰⁴ See MILLER, *THE BODY NEVER LIES*, *supra* note 75, at 15 ("Individuals who believe that they feel what they ought to feel and constantly do their best not to feel what they forbid themselves to feel will ultimately fall ill – unless, that is, they leave it to their children to pick up the check by projecting onto them the emotions they cannot admit to themselves.").

²⁰⁵ See generally THE MOYNIHAN REPORT, *supra* note 171.

²⁰⁶ See generally Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (codified as amended at 42 U.S.C.A. § 2000(a) (West 2014)).

²⁰⁷ See Robinson, *A Dark Secret Too Scandalous*, *supra* note 47, at 147-48.

and Jim Crow had caused little black children to enter public school already cognitively, academically, and developmentally behind their white peers.²⁰⁸ He also told us that most crimes within the black community had been carried out by blacks.²⁰⁹ For exposing such pathologies to white gazes, black civil rights leaders and left scholars pilloried him personally and his *Report* substantively. By pillorying Moynihan, black, left, and liberal scholars hoped that shame and humiliation would dig a putrid moot around poor, black family life and its self-perpetuating pathologies, the persistence of which didn't require white agents and their ignorance. Shortly after the *Report* became public, scholar-shock troops like William Ryan and Joyce Ladner soon called Moynihan's black cultural gazing "blaming the victim,"²¹⁰ and white sociology.²¹¹ As a result, white left and liberal scholars veered away from critiquing black family's attitudes, values, and resulting behavior, and instead they engaged in traditional socio-economic analyses by focusing on structural factors like poverty, low incomes, community violence, or racism to explain why the black family remains dysfunctional.²¹²

And according to Orlando Patterson and James T. Patterson, the gambit worked, sealing off black family life and culture from close intellectual scrutiny for near 15 years.²¹³ For example, we can see this gambit at work in Emmadene T. Winston's *Black on*

²⁰⁸ See THE MOYNIHAN REPORT, *supra* note 171, at 31.

²⁰⁹ *Id.* at 105.

²¹⁰ See generally WILLIAM RYAN, BLAMING THE VICTIM (1971).

²¹¹ See generally JOYCE LADNER, TOMORROW'S TOMORROW: THE BLACK WOMAN (1972).

²¹² See Robinson, *Seen But Not Recognized*, *supra* note 184, at 1293 ("arguing that "Rather than faulting black caregivers who engage in physical, emotional, and psychological cruelty, scholars have faulted remote historical moments that cannot immediately and physically threaten or harm a black infant. By doing so, they have kept the 'scandalous truth' hidden, . . . thus constituting what I have called the 'dark secrets.'") (citations omitted).

²¹³ See Patterson, *supra* note 163 ("The main cause for this shortcoming is a deep-seated dogma that has prevailed in social science and policy circles since the mid-1960's: the rejection of any explanation that invokes a group's cultural attributes – its distinctive attitudes, values and predispositions, and the resulting behavior of its members – and the relentless preference for relying on structural factors like low incomes, joblessness, poor schools and bad housing."); see also JAMES T. PATTERSON, FREEDOM IS NOT ENOUGH: THE MOYNIHAN REPORT AND AMERICA'S STRUGGLE OVER BLACK FAMILY LIFE – FROM LBJ TO OBAMA 87-107 (2010).

Black Aggression,²¹⁴ in which she studied assaultive violence by middle school children, *viz.*, 6 to 12 years old. In seeking the predictors for middle school violence, Winston posited that environmental factors correlated positively with aggression behavior. Yet, she didn't study whether poor, black parents' abuse, neglect, humiliations, or cruelty would be statistically significantly correlated with middle school violent aggression. On this point, Winston wrote that "[aggressive] behavior and early childhood abuse and other exposure to violence within and outside of the family" were not studied,²¹⁵ even though she was aware that "[c]hild abuse, neglect, and witnessing violence are found to increase the risk for violent behavior in adolescence and young adulthood."²¹⁶ Winston studied middle school aggression and violence because in the early 1990, black-on-black violence had become a public health issue,²¹⁷ because blacks were disproportionately more likely than whites to be injured from assault,²¹⁸ and because students at school were victimized by drugs, alcohol, suicide, rape, robbery, assault, threats of assault, gun-related violence, and gun-shot wounds.²¹⁹

Although in 1993 more than 3 million crimes were committed in or near 85,000 public schools, although she knew that research revealed that child abuse, neglect, and witnessing at home violence were strong predictors for adolescent aggression and violence, and although poor, black children were six times more likely than their white peers to experience or witness interpersonal violence from parent to child, from parent to parent, or from friend to friends,²²⁰ Winston omitted poor, black caregivers' parenting styles as predictors or independent variables, focusing instead on failing to learn "social skills that

²¹⁴ See generally Emmadene T. Winston, *Black on Black Aggression Behavior Among Middle School Age Children: Implication for Prevention*, in BLACK ON BLACK CRIME: FACING FACTS – CHALLENGING FICTIONS 205-231 (P. Ray Kedia ed., 1994).

²¹⁵ *Id.* at 223.

²¹⁶ *Id.*

²¹⁷ *Id.* at 205.

²¹⁸ *Id.*

²¹⁹ See *id.* at 206. But see Aaron Kase, *How Childhood Stress and Trauma Spark Drug Dependence*, RESET (May 26, 2015), <http://reset.me/story/doctor-explains-how-childhood-stress-and-trauma-sparks-drug-dependence/> (explaining that "the heart of addiction is always emotional loss").

²²⁰ Winston, *supra* note 214, at 207.

mitigate aggressive behavior,” hours of unsupervised time after school, seeking and needing peer approval, etc.²²¹ Although she knew that a child who experiences violence or who acts aggressively at an early age will have a higher risk for adolescence violence,²²² Winston attributed such an early experience of violence not to parental abuse, neglect, cruelty, or humiliation, but to non-parental environmental factors, which were structural because they gave different opportunities between lower SES and middle or upper-income children to learn to develop a social brain.²²³ Unlike Moynihan and his *Report*, Winston avoided critiquing the poor, black parents’ culture, values, attitudes, and resulting behavior, thus arguing implicitly that black parents could not be key environmental factors that strongly predict for black-on-black violence among middle-school children, and arguing explicitly that, through a traditional socio-economic analysis, such violence correlate robustly with external, objective forces like poverty, peer pressure, education, and community violence and aggression.

In effect, scholars and advocates, or “adult children,”²²⁴ have falsely described the STPP problem’s predictive pathways. By so doing, they continue to argue with a high degree of “moral obliquity”²²⁵ and emotional blindness that external, objective forces cause the STPP problem. For such scholars, the STPP problem disproportionately harm minorities, and they have

²²¹ *Id.* at 208.

²²² *Id.*

²²³ *Id.*

²²⁴ See STEVEN FARMER, ADULT CHILDREN OF ABUSIVE PARENTS: A HEALING PROGRAM FOR THOSE WHO HAVE BEEN ABUSED PHYSICALLY, SEXUALLY, AND EMOTIONALLY 4 (1989) (“Adult Children were all abused when they were growing up. They may want to minimize the issue and deny the effects, but the conclusion is inescapable: The abuse they suffered in childhood continues to substantially affect them . . . Conflict and struggle dominate their lives, as do persistent feelings of being victimized, exploited, and betrayed by others.”); ARTHUR JANOV, WHY YOU GET SICK AND HOW YOU GET WELL: THE HEALING POWER OF FEELINGS 84 (1996) (“Every neurotic is by definition a child-not a real child, but someone with a child’s needs . . . Acting helpless at age thirty or forty and getting someone to take care of you is a good example. So is acting as if you needed no one to take care of you, pretending that you are wholly self-sufficient and without needs.”).

²²⁵ See *Desert Equities, Inc. v. Morgan Stanley Leveraged Equity Fund*, 624 A.2d 1199, 1208 n.16 (Del. 1993) (quoting Black’s Law Dictionary on the meaning of bad faith).

focused on institutional remedies, including federal strategies.²²⁶ Other scholars argue that STPP flows for a number of complex factors, including the pressure placed on teachers and administrators by the No Child Left Behind Act,²²⁷ which caused them to push low-performing, learning disabled, and bad students out of public schools through transfers, suspension, and expulsion.²²⁸ Again, by default, scholars have excluded any role that might be played by the children's earliest exposures to suboptimal primary caregivers. Others argue that the STPP problem must be addressed through either constitutional challenges or through congressional legislation, so that we can create safe schools without criminalizing our children.²²⁹ As I argue beyond, zero tolerance policies and the STPP problem constitute converging co-factors or secondary factors. Likewise, racism and implicit bias must be co-factors or secondary factors. But zero tolerance policies and new policing practices don't create etiologic pathways for externalizing behavioral issues. If we can exclude such racism and biases, thus eliminating subjective violations of school rules and regulations, how do we explain why some students simply can't self-regulate, cooperate with teachers and peers, or control their aggressive or violent behavior? In this way, we can arguably say that we cannot clearly, perhaps honestly, reduce most suspensions and expulsions to racism or bias. And if so, it would follow that we can say with some degree of comfort that a child's in-school experiences flow inexorably from the manner in which she had been consistently made to feel loved, nurtured, touched, validated, and secure by her caregiver – or not. Unfortunately, despite the heavy intellectual investment by scholars, advocates, parents, and schools in the STPP problem, none of them has accounted intentionally for the negative impact of caregivers on children's externalizing

²²⁶ See, e.g., Allison R. Brown, *Federal Spotlight on the School-to-Prison Pipeline*, A.B.A. (Jan. 17, 2013), <https://apps.americanbar.org/litigation/committees/childrights/content/articles/01-17-13-federal-spotlight-school-to-prison-pipeline.html>.

²²⁷ See Every Student Succeeds Act, Pub. L. No. 114-95, 129 Stat. 1802 (2015) (replacing No Child Left Behind).

²²⁸ See, e.g., Scully, *supra* note 129, at 959-61.

²²⁹ See Elizabeth E. Hall, *Criminalizing Our Youth: The School-to-Prison Pipeline v. the Constitution*, 4 S. REGIONAL BLACK L. STUDENTS ASS'N L.J. 75, 92-93 (2010).

behavior, e.g., aggression or violence, during their K through 12 educational experience.

For advocates like Marian Wright Edelman, the STPP problem originates from a broader context. Using the term “Cradle-to-Prison Pipeline”²³⁰ metaphor, the Children Defense Fund (“CDF”) argues that it’s more than just criminalizing students’ behavioral issues, but the manner in which poverty, drugs, poor parenting, etc., exacerbate class differences. According to the CDF, such differences, which it presents as anthropomorphic, operating thus without regard to how caregivers might strongly influence the infants’ and toddler’s brain architecture, direct children away from college and the benefits of an excellent education and toward criminal acts, juvenile courts, detentions, and ultimately federal or state prison.²³¹ For the CDF, the “cradle” implicitly constitutes *Les Miserables*’ Inspector Javert who would hound poor, black children for example into the juvenile and criminal justice systems, based on the simplest sociological premise that once a poor black child arrives in the cradle of poverty, she can never avoid her destiny of crime, violence, and appropriately prison.²³²

Like the CDF, some advocates like movement lawyers argue that communities can organize to eliminate the zero tolerance policy that contributes to the STPP problem through political action, social media, grassroots support, and legal action.²³³ Regardless, the CDF and some movement lawyers posit that the STPP problem owes its origins to dominant external, objective forces, over which the families of poor, black children, for example, have not power, and on which power institutional interests rely to oppress the poor and the marginalized. In short, to end STPP, scholars and advocates ward us, especially the state, away from peering beyond the doctrinal moot called the

²³⁰ See generally CHILDREN’S DEF. FUND, AMERICA’S CRADLE TO PRISON PIPELINE (2007).

²³¹ Hall, *supra* note 229, at 77 (discussing Cradle-to-Prison Pipeline).

²³² See generally VICTOR HUGO, *LES MISERABLES* (1862) (2015); DONALD W. BLACK, *BAD BOYS, BAD MEN: CONFRONTING ANTISOCIAL PERSONALITY DISORDER (SOCIOPATHY)* (rev. & updated 2013).

²³³ See, e.g., Alexi Nunn Freeman & Jim Freeman, *It’s About Power, Not Policy: Movement Lawyering for Large-Scale Social Change*, 23 *CLINICAL L. REV.* 147, 164-66 (2016).

doctrine of family privacy, for by so peering we simply blame those who have been historically hobbled by racial and class oppression.

Given the foregoing, scholars and advocates who have been deeply committed to understanding and analyzing zero tolerance policies and how they contribute to the STPP problem have relied almost exclusively on traditional socio-economic analyses. By so doing, they have drawn our attention appropriately, but incompletely, to external, objective forces that depend on a dogmatic view of what explains the personal experiences and social realities of poor, black life, for example. For these scholars and advocates, they assert that through traditional socio-economic analyses, they can expose how zero tolerance policies work objectively and subjectively to impact poor, black, Latino, learning disabled, and LGBTQ students disproportionately. They also believe that through such analyses, they can expose the injustice that must be robustly associated with zero tolerance and what they call the failure of public school to educate their children. That's the classic anti-plank to STPP problem, purporting to guide but obfuscating in one inventive tone.

To their credit, such scholars, advocates, and parents laudably seek to deconstruct and dismantle zero tolerance policies, so that teachers will support children; children will view teachers as allies; and with proper guidance, children through peer-to-peer relations will develop the kinds of social skills like self-regulation and non-violent conflict resolution that will permit them to get an education and to grow into well-adjusted adults.²³⁴ Along the way, I've argued against the implied perspective that such an analytical framework suggests: poor, black parenting styles, e.g., abusive, neglectful, and toxic, would provide insights toward explaining why poor, black children, for example, appear to be unfairly and repeatedly targeted by zero tolerance policies. In the next section, I'll argue that interpersonal neurobiology and neurobiological precursors can show us why the earliest relationship between caregiver-infant conceptually draws our intellectual and appropriate gaze not just to external, objective forces like racism, but by necessity to parenting and toxic stress

²³⁴ See Lewis, *supra* note 151.

that disrupt the earliest relationship between caregiver and child.

III. THE HISTORICAL BRAIN AND ITS TOXIC STRESS: HOW THE EARLIEST CHILDHOOD CRUELTY CONSCIOUSLY AND UNCONSCIOUSLY INFLUENCE A CHILD'S BRAIN DEVELOPMENT AND LATER EXTERNALIZING BEHAVIOR IN PUBLIC SCHOOL

Once risked the remark, "There is no such thing as a baby" – meaning that if you set out to describe a baby, you will find you are describing a baby and someone. A baby cannot exist alone, but is essentially part of a relationship. The mother, too, has to be considered. If the continuity of her relationship to her own baby is broken something is lost that cannot be regained. It shows incredible lack of understanding of the mother's role to take away her baby for a few weeks, then to hand the baby back, and expect the mother to continue just where she left off.

Donald Woods Winnicott²³⁵

To truly understand the hidden origins of the so-called STPP problem, we must accept, as the noted child psychologist Donald Woods Winnicott did, that "individual development is inextricably tied to the social environment. Although the individual represents a biological potential, the development of a person depends on a facilitating environment in which to grow."²³⁶ To consider the child, we must thus consider the caregiver. Without the caregiver, as the central figure in the perinatal environment of the infant or toddler, we cannot begin to assess how the infant's environment actualizes or suppresses a child's potentialities. Perinatally, the caregiver, even if not the birth mother, will play a key role in shaping the fetus' brain, especially in the last trimester, not only through her own emotional states, but also through the outer environments into which she will bring her unborn child. And given that five-sixth of the infant's brain develops after birth,²³⁷ we must factor into

²³⁵ WINNICOTT, *supra* note 67, at 88-89.

²³⁶ STEPHEN R. SHIRK & ROBERT L. RUSSELL, CHANGE PROCESSES IN CHILD PSYCHOTHERAPY: REVITALIZING TREATMENT AND RESEARCH 16 (1996).

²³⁷ ALLAN N. SCHORE, AFFECT DYSREGULATION AND DISORDERS OF THE SELF 131 (2003) ("The human brain growth spurt, which is at least 5/6 postnatal, begins in the third trimester in utero and continues to about 18 to 24 months of age. During this period

this developmental equation the role of key adults in the perinatal life of the infant. In sum, the caregiver becomes a key, critical environmental factor in the infant's "developmental origins."²³⁸

Taken together, the infant's perinatal environmental experiences, especially revolving around the earliest caregiver-infant relationship, "directly affects gene-environment interactions and, thereby, has long-enduring effects."²³⁹ Accordingly, in the context of the STPP problem, before we can definitely conclude or persuasively argue that zero tolerance's harsh, exclusionary discipline correlates with and acts as a robust predictor for children and adult children directly or indirectly entering the juvenile and criminal justice systems, we must know a great deal about children's earliest relationship with their caregivers.²⁴⁰ Based on the research by John Bowlby,²⁴¹ Mary Ainsworth,²⁴² and others,²⁴³ we know that toxic stress in the earliest relationship between infant and caregiver can correlate with negative consequences for school-age children's cognition, development, and behavior.²⁴⁴

the brain is rapidly generating nucleic acids that program developmental processes at a rate that will never again be attained.").

²³⁸ Schore, *supra* note 48, at 204.

²³⁹ *Id.*; see ROBERT J. COPLAN & KATHLEEN MORTIZ RUDASILL, QUIET AT SCHOOL: AN EDUCATOR'S GUIDE TO SHY CHILDREN 27 (2016) (citing Sigmund Freud as guiding significance and primacy to the infant-parent relationship before John Bowlby and Mary Ainsworth developed Attachment Theory, and arguing that it "is now widely accepted that the quality of young children's early relationships with parents (and other important people) have substantial and long-term implications for their development").

²⁴⁰ See Schore, *supra* note 48, at 205 ("Currently, there is an intense focus on the human brain growth spurt, which begins in the last trimester of pregnancy and continues to 18 to 24 months of age.").

²⁴¹ See generally JOHN BOWLBY, A SECURE BASE: PARENT-CHILD ATTACHMENT AND HEALTHY HUMAN DEVELOPMENT (1988); JOHN BOWLBY, ATTACHMENT: ATTACHMENT AND LOSS (2d ed. 1983); JOHN BOWLBY, LOSS: SADNESS AND DEPRESSION (reprt. 1982).

²⁴² See generally Mary D. Salter Ainsworth & John Bowlby, *An Ethological Approach to Personality Development*, 46 AM. PSYCHOLOGIST 333 (1991).

²⁴³ See, e.g., DISORGANIZED ATTACHMENT AND CAREGIVING (Judith Solomon & Carol George, eds. 2011); DAVID SHEMMINGS & YVONNE SHEMMINGS, DISORGANIZED ATTACHMENT: THEORY AND PRACTICE FOR WORKING WITH CHILDREN AND ADULTS (2011).

²⁴⁴ See Robert F. Anda, et al., *The Enduring Effects of Abuse and Related Adverse Experiences in Childhood*, 256 EUR ARCH PSYCHIATRY CLIN NEUROSCI 174, 175 (2006) ("Now, converging evidence from neurobiology and epidemiology suggests that early life stress such as abuse and related adverse experiences cause enduring brain dysfunction that, in turn, affects health and quality of life throughout the lifespan.").

In schools that rigidly apply their zero tolerance policies, school-age children with poor cognition, delayed development, and externalizing behavior would likely be suspended or expelled more than once. In some reports, advocates had stated that in calculating suspensions, for example, they noted that some students have been kicked out of school more than once.²⁴⁵ One of the conclusions that advocates assert has been that zero tolerance policies were “unfair, contrary to developmental needs of children, denied children educational opportunities, and often resulted in the criminalization of children.”²⁴⁶ In later studies, advocates have argued “zero tolerance policies are ‘derailing students from an academic track in schools to a future in the juvenile justice system.’”²⁴⁷ Yet, as I’ve already argued, why does it follow that zero tolerance policies must by necessity push a child with an optimal social brain out of school and into juvenile delinquency? Are these advocates arguing that teachers and administrators do “serious harm” in their efforts to build “‘connectedness,’ a critical element in preventing truancy and school dropout”?²⁴⁸ By implication, then, do teachers and administrators target students who comply with rules and regulations, or students who objectively and habitually breach rules and regulations? If the former, then schools have been engaging in illegal conduct, and perhaps criminal violations. If the latter, then schools foolishly may be using their zero tolerance policies to regulate the behavior of students who have been reared by caregivers in abusive, neglectful, cruel, and humiliating environments,²⁴⁹ and who may lack the capacity “to integrate sensory, emotional and cognitive information into a cohesive whole.”²⁵⁰

Conceptually, then, we poorly assess how to deal with zero tolerance policies and the so-called STPP problem when we

²⁴⁵ Anne J. Atkinson, *Zero Tolerance Policies: An Issue Brief*, VA. BOARD OF EDUC., at 7 (Nov. 2005), http://www.doe.virginia.gov/administrators/superintendents_memos/2006/inf003a.pdf.

²⁴⁶ *Id.*

²⁴⁷ *Id.*

²⁴⁸ *Id.*

²⁴⁹ *See, e.g.*, van der Kolk, *supra* note 15, at 2.

²⁵⁰ *Id.* at 3.

simply say that these policies lack efficacy because schools have not become safer and students still aggress against others and disrespect teachers and administrators.²⁵¹ In this essay, I posit conceptually that the underlying, critical factor in the effect of zero tolerance, even if teachers and administrators apply the policy beyond the narrowly defined federal law against guns and drugs, must be disruption in the earliest relationship between caregiver and infant/toddler.

One argument against my premise would be that schools should not apply zero tolerance policies to nail clippers, nail files, water guns, or pellet guns.²⁵² I'll concede that point easily. Other also argue that it would help students stay in school, so that they would not fall behind in classwork, and would engaged in learning, if they felt less alienated from school, making them less likely to dropout. We know that those students who dropout become likely prospects for jail and perhaps for prison time.²⁵³ I'll concede that argument, too. And some parents have argued that schools have sole discretion when they apply zero tolerance, and as a result, many teachers and administrators "never get to the root of the problem, never taking the time to understand what went wrong in the first place."²⁵⁴ In the end, I'll concede these arguments because I argue conceptually that poor, black caregivers for example who have not properly attune to their children and who have thus exposed them to chronic and toxic interpersonal adversities like abuse and neglect have already shaped the brain architecture of the very students who will most likely be ensnared by zero tolerance policies and who may find themselves in the juvenile or criminal justice system. In short, by the time these poorly regulated children matriculate at public schools, they bring human brains that have been historically structured to cope with adversities, toxic stress, or cruelty.

Whether they stand before a juvenile court judge or await sentencing after a jury convicts them of an adult crime, these children have historical brains. In the worst case of complex

²⁵¹ Atkinson, *supra* note 245, at 8.

²⁵² *Id.*

²⁵³ See, e.g., *Ending the Schoolhouse to Jailhouse Track*, ADVANCEMENT PROJECT, <http://safequalityschools.org/pages/get-involved-parents> (last visited Oct. 9, 2017).

²⁵⁴ *Id.*

trauma, the principal architects of the children's antisocial brains have been caregivers. According to neuropsychiatrists, primary caregivers shape the infant's brain, and expose her to toxic stress. During the earliest period of the infant's rapid brain development, "the cellular architecture of the cerebral cortex is sculpted by input from the social environment."²⁵⁵ As a result, through the principal mover within the infant's primary environment, the caregiver has contoured the infant's brain, especially through the personal subjective history of security and insecurity.²⁵⁶ According to Perry and Szalavitz,

The brain is an historical organ. It stores our personal narrative. Our life experiences shape who we become by creating our brain's catalog of template memories, which guide our behavior, sometimes in ways we can consciously recognize, more often via processes beyond our awareness Since much of the brain develops early in life, the way we are parented has a dramatic influence on brain development. And so, since we tend to care for our children the way we were cared for ourselves during our own childhoods, a good "brain" history of a child begins with a history of the caregiver's childhood and early experience.²⁵⁷

According to Robert L. Nix, Ellen E. Pinderhughes, Kenneth A. Dodge, John E. Bates, Gregory S. Pettit, and Steven A. McFadyen-Ketchum, this study showed that a caregiver's harsh physical discipline strongly relates to her belief that her child had been bad or needed a hard beating, and these beliefs and

²⁵⁵ See Schore, *supra* note 35, at 205.

²⁵⁶ See generally ROBIN KARR-MORSE & MEREDITH S. WILEY, *TRACING THE ROOTS OF VIOLENCE* ix (1997) (premising this book on psychoanalyst Selma Fraiberg's notion that parents have a tendency to bring to the rearing of their children unresolved "issues from their own childhoods. . . . [Hence] murderers and other violent criminals, who were once infants in our communities, are always accompanied by the spirits of the babies they once were together with the forces that killed their promise," i.e., their caregivers.).

²⁵⁷ BRUCE D. PERRY & MAIA SZALAVITZ, *THE BOY WHO WAS RAISED AS A DOG* 83 (2006); See Robert L. Nix, Ellen E. Pinderhughes, Kenneth A. Dodge, John E. Bates, Gregory S. Pettit & Steven A. McFadyen-Ketchum, *The Relation Between Mothers' Hostile Attribution Tendencies and Children's Externalizing Behavior Problems: The Mediating Role of Mothers' Harsh Discipline Practices*, 70 *CHILD DEVELOPMENT* 896, 906 (1999).

beatings strongly correlate to his “bad”, aggressive, or disrespectful behavior at home when he was 4 or younger and to his externalizing behavior, e.g., aggression, at school. In this way, a caregiver’s harsh beatings “caused” children to act badly at home and at school. They concluded:

Results of this study demonstrated that mothers’ hostile attribution tendencies, assessed prior to children’s entry into kindergarten, were related to children’s externalizing behavior problems at school; mothers’ hostile attribution tendencies were related concurrently to mothers’ harsh discipline practices; and mothers’ harsh discipline practices, assessed prior to children’s entry into kindergarten were related to children’s externalizing behavior problems at school. Results of this study also demonstrated that the relation between mothers’ hostile attribution tendencies and children’s externalizing behavior problems at school was mediated by mothers’ harsh discipline practices.²⁵⁸

Thus, primary caregivers who rely on physical discipline, even if not overly harsh or abusive, i.e., toxic, may sometimes create a hostile attributional bias. These toxic experiences with interpersonal violence from caregivers to children could cause school-age children to presume that “everyone behaves toward them with deliberately hostile intent.”²⁵⁹

According to scholar and researcher Elizabeth Gershoff, the best predictor of the STPP problem, so called, must be environmental factors like parental “causes.”²⁶⁰ According to her, school-age children from poor families tend to maladapt to

²⁵⁸ Nix et al., *supra* note 257, at 906.

²⁵⁹ Cynthia Hudley & Andrei Novac, *Environmental Influences, the Developing Brain, and Aggressive Behavior*, 46 *THEORY INTO PRACTICE* 121, 122 (2007).

²⁶⁰ Cf. Michael D. De Bellis & Abigail Zisk, *The Biological Effects of Childhood Trauma*, 23 *CHILD ADOLESC PSYCHIATRY CLIN N. AM.* 185, 187 (2014) (“Exposure to a traumatic event or series of chronic traumatic events (e.g., child maltreatment) activates the body’s biological stress response system. Stress activation has behavioral and emotional effects that are similar to individual PTSD symptoms. Furthermore, an individual’s biological stress response system is made up of different, interacting systems that work together to direct the body’s attention toward protecting the individual against environmental life threats and to shift metabolic resources away from homeostasis and toward a fight-or-flight (and/or freezing) reaction.”).

school environments because they have suffered “higher rates of physical punishment, physical abuse, and detrimental child outcomes.”²⁶¹ Gershoff didn’t use the term “maladapted.” Rather, she said that poor children have “heightened stress-response systems.”²⁶² At the very least, it means that due to physical hitting or beatings or traumatic cruelty, which can cause toxic stress, such children may have “aggressive, tantrum-like outbursts.”²⁶³ By toxic stress, researchers mean early life adversity from caregivers to children that form “part of a continuum of the physiologic stress response and has an important biological pathway linking early life adversities to negative health outcomes.”²⁶⁴ Due to toxic stress and to their increased sensitivity to the environment, such children may exhibit unexplainably disruptive behavior because they have a heightened “stress-response system,”²⁶⁵ and because “a pattern of stimulus leads to increased sensitivity to future similar stimulus.”²⁶⁶ Put bluntly, due to their earliest experiences with physical hitting, trauma, neglect, or toxic stress, especially from caregiver to infants or toddlers,²⁶⁷ these children stand ready to defend themselves at the slightest provocation, which may be more subjective than objective.²⁶⁸

In this way, a root cause of the STPP problem, which predicts whether zero tolerance policies and practices that will ensnare students, will be how they were raised. If these students were raised by poor, hitting-oriented parents, especially those who have their own childhood histories of cruelty, neglect, and

²⁶¹ Elizabeth T. Gershoff, *Should Parents’ Physical Punishment of Children Be Considered a Source of Toxic Stress That Affects Brain Development?*, 65 FAM. REL. 151, 157 (2016).

²⁶² *Id.*

²⁶³ PERRY & SZALAVITZ, *supra* note 257, at 42.

²⁶⁴ Bucci et al., *supra* note 10, at 404.

²⁶⁵ See generally Bessel van der Kolk, *The Compulsion to Repeat the Trauma: Re-Enactment, Revictimization, and Masochism*, 12 PSYCHIATRIC CLINICS OF N. AM. 389 (1989) (defining stress response system).

²⁶⁶ PERRY & SZALAVITZ, *supra* note 257, at 39.

²⁶⁷ See, e.g., Gershoff, *supra* note 191, at 135 (“Hitting, by its nature, causes physical pain, and it can be confusing and frightening for children to be hit by someone they love and respect, and on whom they are dependent. Children report fear, anger, and sadness when they are spanked, feelings that interfere with their ability to internalize parents’ disciplinary messages.”).

²⁶⁸ See PERRY & SZALAVITZ, *supra* note 257, at 39.

maltreatment, who struggle with depression, who suffered from posttraumatic stress disorder (PTSD), or other compensatory²⁶⁹ or antisocial behavior,²⁷⁰ then these caregivers' children will have a greater distrust for authority figures, will have a tendency to act out, or may be suffering from a heightened fight or flight response when they face distress, either by a teacher's elevated voice or a peer's apparently aggressive behavior.²⁷¹ According to Gershoff, "[c]hildren with a history of maltreatment are more attentive to angry cues than neutral ones."²⁷² In the end, the STPP problem depends as much on zero tolerance policies and practices as it does on children who've suffered physical hitting, neglect, humiliation, or complex trauma.

In Gershoff's work, she focuses on toxic stress, which has gained increased interest by researchers who want to "understand how harmful aspects of the environmental context in which children live affect their health and development."²⁷³ In many writings, scholars have argued that the family is one of the most violent environments for children, and they are likely to be harmed, raped, beaten, and killed at home and often at the hand of their caregivers.²⁷⁴ In this way, parent-child dynamics, especially if they are unstable, unpredictable, strained, tense, or violent "may be particularly harmful to children."²⁷⁵ Yet, Gershoff moves this point about harm into an aspect of the parent-child relationship, in which the parent relies on hitting or spanking, and she asked if such hitting or spanking constitutes "a source of [toxic] stress in the lives of children."²⁷⁶

Accordingly, Gershoff hypothesizes as follows: "*physical punishment of children by parents is a potential source of toxic stress that is linked with long-term detrimental changes to the*

²⁶⁹ See, e.g., Vincent J. Felitti et al., *Relationship of Childhood Abuse and Household Dysfunction to Many of the Leading Causes of Death in Adults*, 14 AM. J. OF PREVENTATIVE MED. 245, 251 (1998).

²⁷⁰ See, e.g., van der Kolk & Fislser, *supra* note 44, at 159.

²⁷¹ See, e.g., NAT'L CHILD TRAUMATIC STRESS NETWORK, *supra* note 50, at 7.

²⁷² Gershoff, *supra* note 191, at 156.

²⁷³ *Id.* at 151.

²⁷⁴ See generally *id.*

²⁷⁵ *Id.* at 152.

²⁷⁶ *Id.*

structure and functioning of the brain."²⁷⁷ From the literature, she knows that parental behavior and physical abuse and neglect "constitute[] a toxic stress in children's lives that affects their brain development and functioning."²⁷⁸ But what makes Gershoff's hypothesis so important is that she has not focused on traumatic maltreatment and neglect.²⁷⁹ Rather, she lowers the threshold for asserting her thesis: can simple hitting or a spanking be a source of toxic stress?²⁸⁰ Quite rightly, she acknowledges that "direct empirical evidence . . . is limited,"²⁸¹ and so by asking this question, she hopes to spur research that will test her hypothesis.²⁸²

Given that the human brain has always been historical,²⁸³ and through use-dependency, the infant's earliest experiences with attachment to her primary caregiver will influence her sense of sense, self-esteem, and the shaping of her *Imago* about the world,²⁸⁴ i.e., safe or unsafe. How then does toxic stress shape her brain architecture and perception of the world? According to Gershoff, when a caregiver threatens to hit an infant or toddler or spansks the child, the child suffers stress that activates her physiological system, i.e., elevated heart rate.²⁸⁵ Knowing that

²⁷⁷ *Id.*

²⁷⁸ *Id.*

²⁷⁹ *See id.*

²⁸⁰ *Id.*

²⁸¹ *Id.*

²⁸² *Id.*

²⁸³ *See* PERRY & SZALAVITZ, *supra* note 257, at 83 ("The brain is an historical organ. It stores our personal narrative. Our life experience shape who we become by creating our brain's catalog of template memories, which guide our behavior, sometimes in ways we can consciously recognize, more often via processes beyond our awareness."). *See also* Reginald Leamon Robinson, *Seen But Not Recognized: Black Caregivers, Childhood Cruelties, and Social Dislocations in an Increasingly Colored America*, 117 W. VA. L. REV. 100 (2015).

²⁸⁴ *See* JUDITH ANODEA EASTERN BODY WESTERN MIND: PSYCHOLOGY AND THE CHAKRA SYSTEM AS A PATH TO THE SELF 265 (1996) (Relying on Harville Hendrix's *Getting the Love You Want*, and writing about the internalized imago we have of our parents, Judith writes: "The imago is a "composite picture of the people who have influenced you most strongly at an early age." This image is not formed in the conscious mind. . . . It programs our reactions, defenses, behaviors, and interpretations of events. It becomes part of our character armor, part of our personality.").

²⁸⁵ *See* Gershoff, *supra* note 191, at 156 ("When a child is exposed to a frightening or threatening situation, exposure to the stressor activates the cardiovascular system, the metabolic system, the immune system, and the central nervous system, including the

the person on whom she might depend for her security and safety has threatened her, the child's brain will release stress hormones, her body will send more blood to the brain, and she will physiologically become more vigilant and fearful.²⁸⁶ It's the fight-or-flight response,²⁸⁷ except that the child knows that she cannot escape the threat of harm and violence she faces.²⁸⁸ Generally, infants, toddlers, and children experience stress caused either by new experiences or by learning. When the stress becomes not toxic but tolerable, they will seek out their primary caregivers (i.e., proximity seeking). Second, they will calm down. Third, they will learn to manage similar future stress,²⁸⁹ resilient.²⁹⁰ Yet, for children who repeatedly violate a school's reasonable rules and regulations, they more than likely have suffered chronic stress, or due to the nature of the stress, they cannot ramp down the aroused state. If so, then these children will suffer structural changes in their brains: [1] smaller prefrontal cortex, [2] smaller nerve endings and heightened fear response in the amygdala, and [3] smaller volume or impaired memory in hippocampus.²⁹¹

At base, infancy carries stress, especially related to learning, exploring, and proximity seeking, and through the attuned caregivers, which means Winnicott's concept of the "good enough" caregiver,²⁹² the infant will grow and thrive. By "good enough" caregiving, Winnicott meant what Stephen Shirk and Robert L. Russell described as "the deceptively simple concept of 'holding.'"²⁹³ According to Shirk and Russell, Winnicott, using

hypothalamic-pituitary-adrenal (HPA) axis, through the coordinated actions of the amygdala, hippocampus, and prefrontal cortex regions of the brain.").

²⁸⁶ *Id.*

²⁸⁷ *Id.*

²⁸⁸ See MILLER, *supra* note 135, at 171-72.

²⁸⁹ Gershoff, *supra* note 206, at 152.

²⁹⁰ See PERRY & SZALAVITZ, *supra* note 257, at 38-39 ("children are more vulnerable to trauma than adults; . . . Resilient children are made, not born. The developing brain is most malleable and most sensitive to experience – both good and bad – early in life. . . Children become resilient as a result of the patterns of stress and of nurturing that they experience early on in life."). See also van der Kolk & Fisler, *supra* note 44, at 147.).

²⁹¹ Gershoff, *supra* note 191, at 152.

²⁹² SHIRK & RUSSELL, *supra* note 236, at 16-17 (according to Winnicott, the achievement of a coherent self of self can only take place in the context of "good enough mothering.").

²⁹³ *Id.* at 17.

psychological terms, meant providing “ego support during that phase of development when the infant lacks the capacity to organize and modulate experience, and consequently is threatened by the experience of emotional disintegration.”²⁹⁴ In brief, then, “[g]ood enough mothering involves empathic attunement to the infant’s internal states. Overwhelming impulses or bodily needs disorganize the infant’s sense of continuity and create anxiety. The mother’s close identification with her baby, . . . as the ‘primary maternal preoccupation,’ facilitates her capacity to be sensitive and responsive to these disruptive ‘impingements.’”²⁹⁵ As such, “good enough” caregiving lacks perfection, but it resonates with high attunement, and even if the caregiver misses an attachment appointment created by the infant, who often initiates such appointment, the caregiver can repair that stress-inducing experience by how he or she actually responds to the infant.²⁹⁶ By repairing and reattuning to the infant, the caregiver’s “attunement to the child’s emotions and needs leads to the experience of security. This experience of connection becomes part of the developing infant’s sense of self and provides the basis for both increased autonomy and the capacity for relationship.”²⁹⁷

Unfortunately, according to Barry Silverstein and Ronald Krate,²⁹⁸ poor, black caregivers often threatened an infant’s or a toddler’s sense of self by not preoccupying themselves with providing “essential ego support.”²⁹⁹ For example, in parent-centered homes, the caregiver may require infants and toddlers to “react to the mother’s intrusive affective states or to an unpredictable pattern of caregiver.” Silverstein and Krate cite Rainwater’s observations of low-income black mothers in St. Louis:

²⁹⁴ *Id.*

²⁹⁵ *Id.*

²⁹⁶ *Id.* at 18 (“although the attachment system with its goal of proximity-seeking is built into the infant, the infant’s experience of relationship is shaped by the caregiver’s actual responses.”).

²⁹⁷ *Id.* at 17.

²⁹⁸ See generally BARRY SILVERSTEIN & RONALD KRATE, CHILDREN OF THE DARK GHETTO: A DEVELOPMENTAL PSYCHOLOGY 23 (1973).

²⁹⁹ SHIRK & RUSSELL, *supra* note 236, at 17.

Lower-class Negro women do not show the deep psychological involvement with infants and young children that is characteristic of higher social classes. They rarely manifest anxious attention to children, the sense of awesome responsibility, along with the pleasure, that is characteristic of many working-class women. Nor do they have the sense of the instrumental, almost occupational, challenge of rearing children properly that is characteristic of the middle class. Among lower-class Negro women, taking care of babies is regarded as a routine activity which is not at all problematic.³⁰⁰

Put differently, Lee Rainwater appears to argue that poor, black caregivers, either by choice or by circumstances, or by an unconscious need to repeat the cold, dismissive, or cruel manner in which they were raised,³⁰¹ lack the fundamental preoccupation with childrearing. This lack may reveal that they were not raised by highly attuned caregivers. As studies have shown, adult children rear their children in a manner that approximates how they were raised. Based on Rainwater's description, poor, black caregivers differ even from poor white caregivers, thus transmitting intergenerationally not only potentially disorganized caregiving but also experiences of toxic stress that can contribute suboptimal brain development.

But if she is exposed to early adverse experiences, especially interpersonal violence from caregiver to infant or toddler, the infant will suffer "long-term structural and functional changes to the brain . . . leading to the notion that this early stress becomes

³⁰⁰ SILVERSTEIN & KRATE, *supra* note 298, at 23, *citing* LEE RAINWATER, *BEHIND GHETTO WALLS: BLACK FAMILIES IN A FEDERAL SLUM* (1970).

³⁰¹ *See* ALICE MILLER, *FREE FROM LIES: DISCOVERING YOUR TRUE NEEDS* 48 (Andrew Jenkins, trans., 2007) (stating that children learn by imitation not by words but by their actual experiences, and discussing Dr. T. Berry Brazelton's experiment with the manner in which mothers held their children, which caused their children to hold their children "in exactly the same way as they had been held by their mothers, although of course they had no conscious memories from those early years."); MILLER, *BANISHED KNOWLEDGE*, *supra* note 58, at 38 (discussing the perfidious fairy who helps the wounded, maltreated child by repressing cruel experiences by their caregivers, but the price they pay for surviving and repressing their cruelty comes with intergenerational maltreatment toward their own children and others who serve as surrogates or stand-ins for my abusive caregivers).

'biologically embedded' in the child."³⁰² But if the interpersonal adversities caused the infant or toddler to experience toxic stress, it could lead to "permanent changes in brain functioning, behavior, and physiological responses to stress."³⁰³ For example, consider the student who has become aroused due the teacher raising her voice, and the child's conditioned physiological response is to freeze or to dissociate. If the teacher cannot recognize that the student is frozen with panic because his response to authority-induced stress has become biologically embedded, the teacher might conclude that the student has refused to respond because he is disrespectful.³⁰⁴ She may also conclude that his failure to respond has caused disruptions to the educational environment, and she may recommend that he be suspended.

Before making more of these connections between the earliest experience with toxic stress in the caregiver-infant relationship, let's consider Gershoff's argument that just simply spanking a child can cause toxic stress, which could cause long-term, suboptimal changes in the infant's or toddler's brain. Generally, physical punishment "is a stressor for children because it is chronic, negative, and uncontrollable."³⁰⁵ Black caregivers favor physical punishment, believing without to the intentional pain that they purposefully inflict on their children that hard beatings serve positive, childrearing goals. During the Adrian Peterson outcry, after the public learned that he had brutally beat his 4-year old son with a switch, or thin tree branch,³⁰⁶ blacks came to his defense, including other sports celebrates, arguing that spankings, hitting, and hard beatings were normal part of black upbringing. Peterson's mother also stepped forward to declare

³⁰² Gershoff, *supra* note 191, at 152.

³⁰³ *Id.*

³⁰⁴ *See id.*

³⁰⁵ *Id.* at 153.

³⁰⁶ *See, e.g.,* Michael Eric Dyson, Op-Ed, *Punishment or Child Abuse?*, N.Y. TIMES, Sept. 18, 2014, at A33, available at http://www.nytimes.com/2014/09/18/opinion/punishment-or-child-abuse.html?_r=0 ("The indictment last week of the N.F.L. player Adrian Peterson by a Texas grand jury for reckless or negligent injury to a child has set into relief the harmful disciplinary practices of some black families. Mr. Peterson used a 'switch,' a slim, leafless tree branch, to beat his 4-year-old son, raising welts on the youngster's legs, buttocks and scrotum. This is child abuse dressed up as acceptable punishment.").

that Adrian was doing what it is he had rightfully learned from her.³⁰⁷ Yet at no time during these often, heated exchanges, did anyone raise questions about how Peterson's 4-year child might have suffered a developmental setback, especially if this beating caused him toxic stress, and if since birth he has been exposed to this kind of abuse, neglect, or humiliation. Given that black homes tend to be mother-center, it is highly unlikely that poor, black caregivers who cause their children such stress think beyond this question: *is he now obedient?*³⁰⁸

Unfortunately, Gershoff reported that physical punishment was not just associated with physiological distress. But this distress was "over and above the association of physical abuse with more distress."³⁰⁹ Rather, when a caregiver engages in the simplest act of physical punishment, perhaps as simple as whacking the child on the back of her hand or hitting the child meaningfully on the buttocks, the child's distressful experience becomes "linked with children's general levels of distress independent of any experience of recognizably harmful physical abuse."³¹⁰ Put simply, without regard to a caregiver's assessment of whether a little whack on the child's hands or buttock ought to warrant crying, despair, and some degree of exaggerated attention getting, the child suffers real, physiological and perhaps harmful distress.

Yet, as Gershoff asks, can we say that such mere physical punishment and its distress qualify as brain changing toxic stress? An environment experience like physical discipline, i.e., slapped, pinched, paddled, causing a child to bend down and touch his toes, can be toxic stress. By toxic stress, Gershoff means that the physical punishment experience "must be chronic

³⁰⁷ See, e.g., *Peterson's Mom Comes to His Defense*, available at http://www.espn.com/nfl/story/_id/11544624/adrian-peterson-mother-not-abuse-love (Sept. 18, 2014) (Ms. Bonita Jackson defended her son's abusive beating of his 4-year old son, saying that he "wants to be a good father to [his six children]." She also stated, "I don't care what anybody says. . . . "Most of us disciplined our kids a little more than we meant sometimes. But we were only trying to prepare them for the real world. . . . When you whip those you love, it's not abuse, but love.").

³⁰⁸ *Id.* (Ms. Jackson, in defending her son, stated, "You want to make them understand that they did wrong.").

³⁰⁹ Gershoff, *supra* note 191, at 153.

³¹⁰ *Id.*

and severe, and it must occur in the absence of adult support.”³¹¹ Although physical punishment appears to lack the traumata of physical abuse, Gershoff argues that a caregiver who whips or straps a child can cause the child to experience the “three characteristics of toxic stress.”³¹²

First, spanking a child can be chronic and thus toxic stress. As Gershoff shows, a caregiver of a 3-year-old child who uses spanking, which has been the most reported form of physical punishment,³¹³ reported hitting their children at an average rate of twice per week.³¹⁴ As Lisa J. Berlin and other scholars stated, caregivers will use hitting as a form of punishment with the intent to cause physical pain, even though their children are infants and toddlers and even though such children are experiencing the golden developmental period of rapid brain development. They state that:

[A]mong U.S. parents of toddlers, both spanking and verbal punishment are common disciplinary practices. For example, a nationally representative phone survey of approximately 2,000 White, African American, Latino, and Asian families found that 29% of the parents of 10- to 18-month-olds, and 64% of the parents of 19- to 35-month-olds, reported using spanking to discipline their toddlers. In a smaller study based on face-to-face interviews with a racially diverse group of 182 mothers of toddlers, 54% reported spanking in the past three months.³¹⁵

Based on Gershoff and Berlin and other researchers, caregivers do not hit their children everyday. Yet, Gershoff argues that spanking constitutes chronic stress if it happens “an average of

³¹¹ *Id.*, citing J.P. Shonkoff, et al., *Neuroscience, Molecular Biology, and the Childhood Roots of Health Disparities: Building a New Framework for Health Promotion and Disease Prevention*, 301 *JAMA* 2252-2259 (2009).

³¹² *Id.*

³¹³ See, e.g., Lisa J. Berlin, et al., *Correlates and Consequences of Spanking and Verbal Punishment for Low-Income White, African American, and Mexican American Toddlers*, 80 *CHILD DEVE.* 1403-1420 (2009).

³¹⁴ Gershoff, *supra* note 191, at 153.

³¹⁵ Berlin, et al., *supra* note 313, at 1404.

100 times per year.”³¹⁶ And Berlin and other researchers study concluded that “spanking 1-year-olds leads to more aggressive behavior and less sophisticated cognitive development in the next two years.”³¹⁷

Second, Gershoff declares that caregivers who use physical punishment, including spanking, cause their infants and toddlers to suffer pain, which emotionally upsets them. Such caregivers either use their hands or an object, and they do so intentionally to cause their children to suffer pain.³¹⁸ In this way, given that states generally don’t criminally prosecute caregivers for this form of punishment and even harsher physical beatings,³¹⁹ such physical punishment like spanking “is thus a euphemism for a socially acceptable form of hitting that constitutes parent-to-child violence.”³²⁰ Regardless, caregiver-to-child violence, even if just a spanking, causes children to suffer pain and makes them “cry.”³²¹ In addition, when caregivers beat their children, the children react emotionally, “including feeling sad, angry, and scared.”³²² Moreover, such children feel “horrible inside.”³²³ On this second test of toxic stress, Gershoff concludes that “physical punishment causes physical and mental pain and distress which, given the chronic nature of many parents’ spanking, can accumulate over time.”³²⁴

Third, if caregivers chronically at the very least spank their children with the intent to cause them pain and suffering, then to whom can a beaten child turn for comfort, support, and self-

³¹⁶ Gershoff, *supra* note 191, at 153.

³¹⁷ See, e.g., *In Study of Low-Income Toddlers, Spanking Found to Have Negative Effects*, SOCIETY FOR RESEARCH IN CHILD DEVELOPMENT 1 (Sept. 15, 2009), available at https://childandfamilypolicy.duke.edu/pdfs/news/2009_9_15_Berlin.pdf

³¹⁸ Gershoff, *supra* note 191, at 153.

³¹⁹ See, e.g., *Willis v. State*, 888 N.E.2d 177, 183 (Ind. 2008) (using the ALI reasonableness standard to evaluate a defendant’s affirmative defense of the parental privilege and concluding even if the parent beat her teenage boy with a belt or extension cord 7 times for lying about stealing, her conduct was “reasonably necessary and appropriate to compel obedience to her insistence that he tell the truth,” and the punished was not disproportionate to the child’s offense).

³²⁰ Gershoff, *supra* note 191, at 153, quoting and citing MURRAY A. STRAUS, *BEATING THE DEVIL OUT OF THEM: CORPORAL PUNISHMENT IN AMERICAN FAMILIES* (2d. ed. 2001).

³²¹ *Id.*

³²² *Id.*

³²³ *Id.*

³²⁴ *Id.*

regulation? When a child faces distress or stress physically or emotionally, she will need an adult who can help her feel better.³²⁵ For Alice Miller, such an adult becomes the child's "helping witness"³²⁶ or what Allan Schore called the "maternal haven of safety."³²⁷ Without the caregiver *qua* helping witness, we can consider physical punishment to be toxic stress. However, caregivers who spank their children often say that they attempt to soothe and reconcile with their children "right after the spanking to reassure the children that they still love them."³²⁸ Yet, Gershoff speculates that even if caregivers who hurt their children intentionally attempt to reconcile with them, the children may over time experience "learned helplessness and mistrust."³²⁹ At the very least, "learned helplessness" means that given the early exposure of infants and toddlers to even spanking, which can be quite traumatic for them, and given the confusion that must follow when their caregivers attempt to reassure them after they've just beat them, such children "fail to learn escape behaviors and have exaggerated fear responses as well as social isolation and poor health."³³⁰ By attempting to reconcile with the crying, angry, and scared child, and by seeking to reassure the child that the caregiver still loves her, the caregiver implicitly seeks to get the child to discount how she really fears, and thus to take the caregiver's point of view, which must be: "*you broke a rule, and out of love, I beat you.*" However, Miller would call the caregiver's reconciliation efforts as "poisonous pedagogy,"³³¹ which manipulates the child away from her honest feelings, including feeling of distrust.

³²⁵ *Id.*

³²⁶ See MILLER, *FREE FROM LIES*, *supra* note 301, at 45-89 (without a helping witness, an abused and neglected child can become a destroyer later in life).

³²⁷ Allan N. Schore, *Right-Brain Affect Regulation: An Essential Mechanism of Development, Trauma, Dissociation, and Psychotherapy*, in *THE HEALING POWER OF EMOTIONS: AFFECTIVE NEUROSCIENCE, DEVELOPMENT & CLINICAL PRACTICE* 112, 120 (Diana Fosha, Daniel J. Siegel, & Marion Solomon, eds. 2009).

³²⁸ Gershoff, *supra* note 191, at 153.

³²⁹ *Id.*

³³⁰ *Cf.* De Bellis & Zisk, *supra* note 260, at 186 (citing to animal studies).

³³¹ See ALICE MILLER, *FOR YOUR OWN GOOD: HIDDEN CRUELTY IN CHILD-REARING AND THE ROOTS OF VIOLENCE* ix (Hildegard Hannum & Hunter Hannum trans., 4th ed. 2002).

According to researchers, when “a caregiver denies the child’s experiences, the child is forced to act as if the trauma did not occur. The child also learns that she cannot trust the primary caregiver and does not learn to use language to deal with adversity.”³³² By diverting the child’s attention away from her feelings and experiences, “the child may be adversely affected,”³³³ i.e., psychopathologies. Once the child has become hyperaroused and once she realizes that the very source of her threat to her safety, the child will likely dissociate because she will not want to accept that her primary caregiver is her assaulter. According to Schore and based on psychophysiological studies, the child who has suffered even perhaps a physical beating like spanking may be dealing with a stressed out caregiver who cannot attuned to her specific, emotional needs. Quoting part of a study, Schore writes:

stress is an important factor that may affect social interactions, especially the mother–child interaction. Mothers during stressful life episodes were less sensitive, more irritable, critical and punitive. . . . Moreover, stressed mothers showed less warmth and flexibility in interactions with their children. . . . Overall, stress seems to be a factor that has the power to disrupt parenting practices seriously and results in a lower quality of the mother–child interaction.³³⁴

And once the child has become hyperaroused and recognizes that “maternal haven of safety” has become the source of her stress, and perhaps toxic stress, the child’s autonomic nervous system (“ANS”) and limbic brain (“HPA”) will prepare her for imminent danger, even if the caregiver prompts the threat. As Schore writes:

the infant’s psychobiological reaction to traumatic stress is comprised of two separate

³³² *Complex Trauma in Children and Adolescents*, 21 FOCAL POINT 4, 6 (2007), available at <http://www.rtc.pdx.edu>

³³³ *Id.*

³³⁴ Schore, *supra* note 327, at 119 (citation omitted).

response patterns: *hyperarousal* and *dissociation*. In the initial hyperarousal stage, the maternal haven of safety suddenly becomes a source of threat, triggering an alarm or startle reaction in the infant's right hemisphere, the locus of both the attachment system and the fear motivational system. This maternal stressor activates the infant's hypothalamic-pituitary-adrenal (HPA) stress axis, thereby eliciting a sudden increase of the energy-expending sympathetic component of the infant's ANS, resulting in significantly elevated heart rate, blood pressure, and respiration—the somatic expressions of a dysregulated hypermetabolic psychobiological state of fear/terror.³³⁵

In response to the foregoing, Gershoff concludes that mere physical punishment can qualify as a source of children's toxic stress. In addition to its chronic nature, the pain and sadness from the pain, and the loss of the caregiver as a "haven of safety," the child may also become confused about the caregiver's role: threat or security.³³⁶ That confusion "can interfere with the quality of the parent-child relationship and engenders mental health problems,"³³⁷ i.e., psychopathologies.

In this way, emerging evidence exists that if physical punishment can be a source of toxic stress, then hypothetically such punishment "should be linked to changes in brain structure."³³⁸ Yet, only recently has researchers considered such punishment as having a "lasting impact on children's brains."³³⁹ At present, animal studies have revealed that "parents' everyday behaviors affect brain development."³⁴⁰ For example, rat mothers who lick and groom their pups less than a more attuned rat mother in the first week of life will have pups who "have more exaggerated glucocorticoid responses to stressful situations as adults than adult rats who were licked and groomed more as

³³⁵ *Id.* at 120.

³³⁶ Gershoff, *supra* note 191, at 153.

³³⁷ *Id.*

³³⁸ *Id.*

³³⁹ *Id.*

³⁴⁰ *Id.* at 154.

pups.”³⁴¹ The less licked and groomed rats behave differently when they encounter stress, having “more fearfulness and startle response.”³⁴² In short, rat pups who enjoyed high licking and grooming have an optimal brain architecture, which parallels human studies that reveal a correlation between “nurturance in early childhood and the volume of the hippocampus later in childhood and adolescence.”³⁴³

Given the foregoing, we can conclude that if chronic positive caregiver behavior like nurturing has an optimal effect on children’s brains, we can hypothesize that chronic negative behavior like “physical punishment may also affect the brain.”³⁴⁴ To provide support for this hypothesis, Gershoff writes: verbal “hostility at ages 4 to 7 has been found to predict smaller volume of the hippocampus several years later, and to mediate the impact of poverty of the hippocampus.”³⁴⁵ Moreover, the hippocampus remains susceptible to abuse between children’s ages of 3 and 5.³⁴⁶ Unfortunately, “physical punishment peaks at age 3.” In this way, some support exists for the hypothesis that “physical punishment may affect brain development.”³⁴⁷

In 2009, Tomoda and colleagues provided evidence to support the hypothesis that physical punishment might alter the structure of children’s brains. In this study, they compared gray matter of young adult who had been exposed to chronic, harsh physical punishment. Unlike Gershoff’s definition of physical punishment as averaging twice per week for one year, Tomoda and colleagues defined chronic and harsh punishment as “occurring at least once per month and involving the use of an

³⁴¹ *Id.*

³⁴² *Id.*

³⁴³ *Id.*, citing J.L. Luby, et al., *Maternal Support in Early Childhood Predicts Larger Hippocampal Volumes at School Age*, 109 PROCEEDINGS OF THE NATIONAL ACADEMY OF SCIENCES OF THE UNITED STATES OF AMERICA 2854-2859 (2012); H. Rao, et al., *Early Parental Care is Important for Hippocampal Maturation: Evidence from Brain Morphology in Humans*, 49 NEUROIMAGE 1144-1150 (2010).

³⁴⁴ *Id.*

³⁴⁵ *Id.*

³⁴⁶ *Id.*

³⁴⁷ *Id.*

object at least once per year.”³⁴⁸ This definition doesn’t include physical abuse, which they defined as “incidents that left a lasting injury or that involved areas of the child’s body other than the buttocks.”³⁴⁹ Based on their research, they found that “young adults subject to chronic physical punishment as children had significantly smaller gray matter volume in an area of the prefrontal cortex associated with social cognition than young adults who had not experienced chronic physical punishment.”³⁵⁰

This study’s findings help in two ways. First, the study links chronic physical punishment to suboptimal changes in the child’s brain, and confirms that such changes have lasting impact of a child’s developing brain. Second, the study identifies the region of the prefrontal cortex that physical punishment most affected, and researchers have implicated this region in a “range of mental health disorders, including depression, posttraumatic stress disorder, and addiction.”³⁵¹ Apart from these vital links and implications, we now know that physical punishment affects the structure and function of a child’s brain, and even those limited findings exist, we have some sense that physical punishment yields outcomes that track “the more robust literature on physical abuse.”³⁵²

Based on the foregoing study by Gershoff in which she hypothesizes that physical punishment can cause toxic stress in children. If so, then we know that toxic stress alters children’s brain. Once built suboptimally, these children become susceptible to behavioral issues like aggression, to mental health disorders like depression and posttraumatic stress disorders, to addictions like drugs and cigarettes, to a hypersensitivity to

³⁴⁸ *Id.* at 154, citing A. Tomoda, et al., *Reduced Prefrontal Cortical Gray Matter Volume in Young Adults Exposed to Harsh Punishment*, 47 *NEUROIMAGE* T66-T71 (Suppl. 2, 2009).

³⁴⁹ *Id.*

³⁵⁰ *Id.*

³⁵¹ *Id.* at 154-155.

³⁵² *Id.* at 155. *See id.* at 156 (discussing the evidence that correlates physical abuse with smaller gray matter in the hippocampus and the implications of the overactive amygdala, which directly detects threats, that results in a smaller amygdala and abused children have an overactive or hypersensitivity not to neural cues but to angry ones, all of which more than suggests that abused children have suboptimal brain architectures and they have adapted to abusive environments).

threat cues, and to exaggerated responses to cope with feelings anger or fear.

In the context of the so-called STPP problem, such susceptibilities means that young children who find themselves ensnared by zero tolerance policies and practices and at risk for suspension, expulsion, or referral more than likely find themselves unconsciously reacting to their public school environments – either to teachers or their peers. Regardless, if they’ve been minimally exposed either to physical punishment or to physical abuse, these students have been victimized at the least twice.

First, their caregivers have been key figures in their environments, and in that environment, they have contributed to their children’s downstream externalizing behavior because they had failed to be preoccupied or attuned to their needs of their children. In fact, in the physical discipline and abuse situations, they have been the source of the threat to their children. Citing a HHS study, Gershoff noted that “parents who harm the child cannot be used by the child as a resource to cope with the stress from the experience. Indeed, researchers and practitioners have proposed that the main reason physical abuse has harmful consequences is that it constitutes a source of toxic stress in the lives of children.”³⁵³

Second, scholars, advocates, and parents who pursue the dismantling of zero tolerance policies and practices have completely ignored by some students find themselves habitually suspended, expelled, or referred to juvenile courts. From one perspective, they might argue that by targeting some students more than others, school districts have engaged in some degree of profiling, thus attributing externalizing behavior to some students, and seeking to remove their from classrooms, where they had engaged in aggressive, disruptive, or disrespectful conduct. Yet, given Gershoff’s study, it’s entirely likely that such students have suboptimal brain architecture due almost exclusively to the manner in which her primary caregiver has

³⁵³ *Id.* at 156, citing *Child Maltreatment 2012*, Administration for Children and Families, U.S. DEPT OF HEALTH AND HUMAN SERVICES (2013), available at <http://www.act.hhs.gov/programs/cb/research-data-technology/statistics-research/child-maltreatment>

reared her – optimally and nonviolent or suboptimally and violent. And given that such students cannot easily regulate their thoughts and behaviors, and given that they are highly adapted to abusive environments, scholars, advocates, and parents continue to miss opportunities to ask: do suspended or expelled students have a history of childhood abuse by poor, black caregivers, for example, who have not made optimal childrearing a preoccupation? Without such an attunement by “good enough” caregivers, it’s likely that students who fall prey to zero tolerance policies have been handicapped by adversities in the earliest years of the caregiver-infant relationship.

VI. CONCLUSION

It is clear that scholars and advocates who have critiqued and attacked zero tolerance policies and who have associated its harsh, exclusionary discipline with juvenile and criminal justice systems fundamentally believe that by engaging in traditional socio-economic analyses, they can expose such policies as flawed and call for their dismantling. By engaging in this kind of analyses, they must hold to a degree to race and class dogma that completely ignores the role that primary caregivers play in shaping their children’s brain development and thus in influencing their cognitive, developmental, and behavioral responses to toxic stress. Far worse, they must simply fault external, objective forces for the disproportionate ways in which poor, black, Latino, learning disabled, and LGBTQ students become ensnared in the nets of zero tolerance.

Yet in this essay, I’ve argued that zero tolerance policies cannot be, in the absence of neurobiological precursors like abuse, neglect, and toxic stress, the central predictors of a school’s failure and the eventual entry of suspended and expelled students into the juvenile or criminal justice system. Rather, the best predictor for suspension and expulsion and even jail and penitentiary stays must be whether the primary caregivers have exposed infants and toddlers to very early experiences of “frequent, prolonged, or intensely negative” toxic stress.³⁵⁴ Such

³⁵⁴ Bucci, et al., *supra* note 10, at 403.

stress will have negative affects the optimal brain development and will suppress protein expressions that could affect the child's highest *potentia*.³⁵⁵

That view has been adopted and shared by leading psychologist and interpersonal neurobiologists like Elizabeth Gershoff and Daniel Siegel.³⁵⁶ But unfortunately, scholars and advocates who have criticized zero tolerance policies and the so-called STPP problem have not ventured into this theoretical and evidence-based literature. Yet, even though I don't rely on raw data that examine the social backgrounds and neurobiological precursors of children who were suspended and expelled, I have argued conceptually that caregivers' abuse and neglect, all of which can constitute toxic stress, must be the most robust predictors for the rate at which zero tolerance policies capture especially poor, black, Latino, learning disabled, and LGBTQ students. Despite the absence of data, it is highly likely that poor black students, for example, might eventually enter the criminal justice system, not just because school administrators have suspended or expelled, but also because, in the face of reasonable rules and regulations, these children lacked the brain architecture and the self-regulation due to their earliest exposure to toxic stress and adversities, thus causing them to engage in externalizing behavior, e.g., aggression and violence, toward others or their property.

³⁵⁵ See ROLLO MAY, *THE DISCOVERY OF BEING: WRITINGS IN EXISTENTIAL PSYCHOLOGY* 17 (1983) ("These potentialities will be partly shared with other persons but will in every case form a unique pattern in each individual.").

³⁵⁶ See generally DANIEL J. SIEGEL, *THE DEVELOPING MIND: HOW RELATIONSHIPS AND THE BRAIN INTERACT TO SHAPE WHO WE ARE* (2d ed. 2015).