

Beyond Bias: Cultural Capital in Anti-Discrimination Law

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This Article explores race and class inequality in the distribution of special education benefits pursuant to the Individuals with Disabilities Education Act (“IDEA”). Scholarship in this area has focused on the disproportionately high representation of black children in special education and in the most stigmatized disability categories. The consensus view is that racial differences in disability prevalence are due mainly to teachers’ discrimination against black children. Little noticed is middle-class white children’s disproportionately high representation in autism, a category associated with relatively greater resources and more advantageous educational outcomes than are associated with the categories in which black children are disproportionately represented.

This article argues that to understand the disproportionate allocation of special education resources by race and class—and other distributional disparities like it—scholars and policy makers alike must shift focus from a preoccupation on bias toward investigating the precise mechanisms for how legal benefits are allocated. In special education, no child simply “receives” special education services because a teacher wants him to. Under the IDEA, children receive appropriate benefits only when their parents take on the role of ardent advocate, using special education knowledge and behavioral strategies. Only parents with these sets of knowledge and behavioral strategies—what sociologists call “cultural capital”—will be best able to navigate the process. In predominately white, relatively affluent school districts, schools where the racial disparities in special education are most pronounced, middle-class white parents are best able to convert their economic and social capital into the cultural capital needed to secure preferable diagnoses and resources.

Using special education as an example, this Article argues that when a legal scheme requires beneficiary action as a prerequisite to receiving benefits, stratification in cultural capital will influence which individuals, and consequently which groups, receive the benefit to which they are entitled. Cultural capital helps scholars and policymakers understand how groups come to disproportionately capture scarce legal resources and benefits, moving us beyond a sole focus on discrimination against groups to a more complex and nuanced focus on how privilege is reproduced.

INTRODUCTION	382
I. A PROBLEMATIC IDEA	392
A. <i>Disrupting Disability Discrimination</i>	393
B. <i>Reproducing Stratification</i>	395
1. <i>Disproportionality</i>	396

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2. <i>Collateral Correlations</i>	400
C. <i>The Bias Explanation</i>	404
II. RESOURCE DISTRIBUTION AND EDUCATIONAL STRATIFICATION	406
A. <i>Distributing the IDEA</i>	406
B. <i>Distributing Stratification</i>	410
1. <i>Class Stratification</i>	414
2. <i>Racial Stratification</i>	415
III. RATIONING DISABILITY EDUCATION BENEFITS	419
A. <i>Economic Capital (Wealth)</i>	420
B. <i>Social Capital</i>	421
C. <i>Cultural Capital</i>	423
1. <i>Communication</i>	424
2. <i>Knowledge</i>	425
3. <i>Strategies</i>	427
4. <i>Disposition</i>	429
IV. CONSIDERING CULTURE IN DISTRIBUTING LAW	432
A. <i>Stratified Cultural Resources, not Values</i>	432
B. <i>How Law Assumes Culture</i>	435
C. <i>Tentative Thoughts on How to Consider Culture</i>	436
1. <i>Increasing the Capital or Changing the Rules</i>	437
2. <i>Title VI Enforcement</i>	438
3. <i>Enlarging the Pie or Shrinking the Eligible</i>	441
CONCLUSION	442

INTRODUCTION

The Individuals with Disabilities Education Act (“IDEA”)¹ guarantees a “free appropriate public education” (“FAPE”) for all children with disabilities.² Not all children with disabilities, however, have equal access to appropriate education; race and class disparities abound.³ Scholars have long shown that black children are over-represented in the disability categories that rely heavily on professionals’ discretion and biases, as well as those that carry the most stigma.⁴ Bias against non-white children, and particularly black children, is the consensus explanation for racial disproportionality in the IDEA’s benefits (as measured by disability category and services costs).⁵ Special education is a “dumping ground” for black children that teachers deem uncontrollable, unmotivated, or unintelligent.⁶ For many black children, placement in special education represents a distinct disadvantage be-

¹ 20 U.S.C. §§ 1400–82.

² 20 U.S.C. § 1401(9).

³ See *infra* Part I.

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

cause they are separated from their non-disabled peers, receive few educational supports, and experience high rates of discipline, akin to a new form of school segregation in subversion of *Brown v. Board*.⁷

Scholars have noted white middle-class overrepresentation in receiving special education services particularly associated with the learning disabled label.⁸ But scholars have largely neglected another perplexing racial problem in special education. White middle-class⁹ children are overrepresented among children receiving special education resources for autism. The consequences of an autism label typically include certain advantageous outcomes for children compared to the consequences of the emotional disturbance and intellectual disability labels that are typically given to black children: more educational resources, such as special aides and expensive therapies, higher high school graduation rates and lower rates of suspensions and expulsions.¹⁰ Yet, autism too relies on professional biases and subjective opinions, and carries a stigma.¹¹ Autism, as a spectrum disability with “a wide range . . . of

⁷ Beth A. Ferri & David J. Connor, *In the Shadow of Brown: Special Education and Overrepresentation of Students of Color*, 26 TEACH. COLL. REC. 93, 95 (2005) [hereinafter Ferri & Connor, *Shadow of Brown*]; Beth A. Ferri & David J. Connor, *Special Education and the Subverting of Brown*, 8 J. GENDER, RACE & JUSTICE 57, 60 (2004) [hereinafter Ferri & Connor, *Subverting of Brown*].

⁸ See, e.g., MARK KELMAN & GILLIAN LESTER, JUMPING THE QUEUE: AN INQUIRY INTO THE LEGAL TREATMENT OF STUDENTS WITH LEARNING DISABILITIES 75–78 (1998); Colin Ong-Dean, *High Roads and Low Roads: Learning Disabilities in California, 1976-1998*, 49 SOC. PERSP. 91, 92 (2006); Daniel J. Losen & Kevin G. Welner, *Disabling Discrimination in Our Public Schools: Comprehensive Legal Challenges to Inappropriate and Inadequate Special Education Services for Minority Children*, 36 HARV. C.R.-C.L. L. REV. 407, 407 (2001). All three pieces note how different groups experience special education, including the “racially differential use of special education: the use by schools to isolate difficult minority children versus the use by white parents to gain additional resources and advantages for their children.” Losen & Welner, *supra*, at 419.

⁹ Defining the “middle class” in the United States is wrought with ambiguity and is the subject of a large literature. In this Article, I follow the convention of many sociologists by considering class to be a combination of education, income and occupation. Thus, I categorize a family as middle class if “at least one of the parents is college educated and at least one of the parents is employed in a professional or creative capacity or is the owner of a business.” Maia Bloomfield Cucchiara & Erin McNamara Horvat, *Perils and Promises: Middle-Class Parental Involvement in Urban Schools*, 46 AM. EDUC. RES. J. 974, 1000 (2009); see also Annette Lareau & Erin McNamara Horvat, *Moments of Social Inclusion and Exclusion Race, Class, and Cultural Capital in Family-School Relationships*, 72 SOC. EDUC. 37, 40 (1999).

¹⁰ See *infra* Part I.

¹¹ The social-psychological definition of stigma involves “labeling, stereotyping, separation, status loss, and discrimination within the context of power differential.” Sara Green et al., *Living Stigma: The Impact of Labeling, Stereotyping, Separation, Status Loss, and Discrimination in the Lives of Individuals with Disabilities and Their Families*, 75 SOC. INQUIRY 197, 197 (2005). For more on the specific stigma associated with autism, see generally David E. Gray, *Perceptions of Stigma: The Parents of Autistic Children*, 15 SOC. HEALTH & ILLNESS 102 (1993); Ginny Russell & Brahm Norwich, *Dilemmas, Diagnosis and De-stigmatization: Parental Perspectives on the Diagnosis of Autism Spectrum Disorders*, 17 CLINICAL CHILD PSYCHOL. & PSYCHIATRY 229 (2012). For a more complete explanation of stigma, see generally Erving Goffman, *STIGMA: NOTES ON THE MANAGEMENT OF SPOILED IDENTITY* (1963) and Bruce G. Link & Jo C. Phelan, *Conceptualizing Stigma*, 27 ANN. REV. SOC. 363 (2001).

symptoms, skills and levels of disability,”¹² shares symptoms with many other disorders¹³ and little research suggests that “actual” rates of autism are higher in whites than in other racial groups.¹⁴ Thus a puzzle emerges: why has autism come to be coded as “white,” while other disabilities, such as intellectual disability and emotional disturbance, are coded as “black”?

Rather than attribute this state of affairs to school bias alone, either against black children or in favor of white children, I argue that scholars should pay more attention to the special education allocation process.¹⁵ The IDEA and accompanying regulations allocate resources according to a cultural expectation of ardent parental advocacy.¹⁶ The statute and regulations

¹² *Autism Spectrum Disorder*, Nat’l Inst. of Mental Health Info. Resource Ctr., <https://www.nimh.nih.gov/health/topics/autism-spectrum-disorders-asd/index.shtml> [<https://perma.cc/5QDQ-XWRD>] (last visited Mar. 2, 2018).

¹³ See B. J. Casey et al., *DSM-5 and RDoC: Progress in Psychiatry Research?*, 14 NATURE REVIEWS NEUROSCIENCE 810, 812 (2013) (suggesting that DSM “categories have the bizarre property of being both too broad (in the sense that they identify remarkably heterogeneous populations) and too narrow (in the sense that, given the large number of arbitrary DSM diagnostic silos, many if not most patients with a single DSM diagnosis actually qualify for two or more”).

¹⁴ See *infra* Part I.

¹⁵ KELMAN AND LESTER, *supra* note 8, make a somewhat similar argument in their book, *JUMPING THE QUEUE*. This Article, while touching on similar themes to Kelman and Lester, differs in a few respects. For example, while they do recognize the phenomenon of a disproportionate share of educational resources going to white middle class boys in lower-stigma disability labels like learning disabled compared to black children receiving services associated with higher-stigma categories like emotional disturbance, they tend to refer to these children as being “shunted” or “placed,” *id.* at 68, without an adequate picture of the role of the parent in allowing the shunting and placement. With respect to parents, they also state that they consider the “most important” procedural safeguard given to parents is the ability to bring complaints, *id.* at 41, while I focus on the role of parents earlier in the process, specifically at diagnosis and evaluation, as well as developing the Individualized Education Plan. Furthermore, Kelman and Lester are primarily concerned with the IDEA’s effect on non-disabled student, *id.* at 68, while my analysis takes as a given that some children have “actual” disabilities and the question is which children with disabilities get “better” and more expensive services than others. See *infra* Part I. Perhaps the most significant difference with Kelman and Lester is that they state clearly upfront that their analysis is “prospective and normative, rather than historical and descriptive.” KELMAN AND LESTER, *supra* note 8, at 15. They do not “attempt[] to account for the actual practices that have emerged” in special education. *Id.* My goal in this Article is fundamentally different. I do attempt to document in detail some of the actual practices that have the effect of creating racial and class disparities under the IDEA.

¹⁶ There is some legal scholarship that looks at parents in the special education process. *E.g.*, Eloise Pasachoff, *Special Education, Poverty, and the Limits of Private Enforcement*, 86 NOTRE DAME L. REV. 1413, 1413 (2011) (examining the “appropriate balance between public and private enforcement of statutes seeking to distribute resources or social services to a socioeconomically diverse set of beneficiaries through a case study of the [IDEA] . . . focus[ing] particularly on the extent to which the Act’s enforcement regime sufficiently enforces the law for the poor”); Karen Syma Czapanisky, *Special Kids, Special Parents, Special Education*, 47 U. MICH. J.L. REFORM 733, 786–87 (2014) (arguing for special education reforms that are more “parent-oriented” to “support[] parental competence and conserv[e] parental resources”); Philip T. K. Daniel, *Education for Students with Special Needs: The Judicially Defined Role of Parents in the Process*, 29 J.L. & EDUC. 1, 9–12 (2000) (examining the role of parents in determining the methods of education and suggesting ways in which parents can influence methodology); Note and Comment, *Challenging Disparities in Special Education: Moving Parents from Disempowered Team Members to Ardent Advocates*, 3 Nw. J. L. & Soc. POL’Y 263, 277 (2008) (arguing that “[p]arental enforcement, although a potentially effective

grant parents extensive formal procedural rights to ensure their active influence over the allocation process.¹⁷ But a parent's ability to effectively use those formal procedures requires what sociologists term cultural capital—communication patterns, knowledge, behavioral strategies, and dispositions¹⁸—to successfully navigate the cumbersome process and capture what are scarce benefits hidden behind a general guarantee of appropriate education.

As used here, culture does not refer to values.¹⁹ Rather, I draw on the work of several sociologists to present a view of culture not often encoun-

mechanism for enforcement, currently is weak because parents do not know their rights under the IDEA, do not feel competent to be equal team members, do not feel confident about bringing due process claims, and do not have the ability to get legal assistance” and “[t]he root of minority overrepresentation is likely found in low-quality instruction, teachers’ unconscious cultural biases, and heavy reliance on intelligence tests”); Julie F. Mead & Mark A. Paige, *Parents as Advocates: Examining the History and Evolution of Parents’ Rights to Advocate for Children with Disabilities Under the IDEA*, 34 J. LEGIS. 123, 156 (2008) (arguing that “[p]arents’ rights to be informed, consent to special treatment, participate in decision making and challenge the system whenever they believe their child has been denied equal educational opportunity are important means of holding schools accountable for meeting the needs of children with disabilities”); Daniela Caruso, *Bargaining and Distribution in Special Education*, 14 CORNELL J.L. & PUB. POL’Y 171, 172–73 (2005) (arguing that “[t]he current system [of special education] yields lower payoffs for needier families, which are on average less endowed with bargaining power and therefore less capable of taking advantage of participation opportunities”); Joseph Fluehr, Note, *Navigating Without a Compass: Incorporating Better Parental Guidance Systems into the IDEA’s Dispute Resolution Process*, 8 DREXEL L. REV. 155, 180 (2015) (arguing that “parents’ lack of knowledge . . . can make parents’ use of the statutory dispute resolution processes less effective. This problem particularly affects lower-income families in states that have not voluntarily adopted additional alternative dispute resolution processes aimed at parental assistance.”); Erin Phillips, Note, *When Parents Aren’t Enough: External Advocacy in Special Education*, 117 YALE L.J. 1802, 1836 (2008) (arguing that the IDEA assumes that “parents possess the tools to advocate for their children” and briefly noting that the gaps between the ideal and the reality are compounded by distributional concerns influenced by “risk factors [such as] poverty, greater likelihood of experiencing abuse, social isolation, and problems obtaining medical care”); Elisa Hyman et al., *How IDEA Fails Families Without Means: Causes and Correctors from the Frontlines of Special Education Lawyering*, 20 AM. J. GENDER, SOC. POL’Y & L. 107, 132–135 (2011) (arguing that the IDEA disproportionately serves children living in or marginally above the poverty line and whose families have “limited resources” and “that do not have access to legal services”). This Article differs from previous examinations by critiquing the influence of white middle-class parents on racial disparities, focusing more on how privileged parents actively use the IDEA to reproduce their race and class position on the social hierarchy.

¹⁷ 20 U.S.C. §§ 1400–1482.

¹⁸ See *infra* Part III.

¹⁹ See Mario Luis Small et al., *Reconsidering Culture and Poverty*, 629 ANN. AM. ACAD. POL. & SOC. SCI. 6, 18 (2010). A values concept of culture “specif[ies] the ends toward which behavior is directed (as opposed to the means to achieve them or the lens through which to interpret behavior).” *Id.* at 9. Other definitions used include “frames,” which holds that “how people act depends on how they cognitively perceive themselves, the world, or their surroundings,” *id.*; “repertoires,” premised on the idea that “people have a list or repertoire of strategies and actions in their minds . . . [and] that people are unlikely to engage in an action unless the strategy to perpetuate it is part of their repertoire,” *id.* at 10; “narratives,” which “contain causally linked sequences of events . . . becoming ‘part of a stream of socio-cultural knowledge about how structures work to distribute power and disadvantage,’” *id.* at 11; and “symbolic boundaries,” which “operate as a ‘system of rules that guide interactions by affecting who comes together to engage in what social act,’” *id.* A recent explication of culture as

tered in legal scholarship.²⁰ Cultural behaviors are akin to what sociologist Ann Swidler called “strategies of action,” behavioral modes individuals in stratified groups employ to engage in social spaces familiar to the group.²¹ Sociologist William Julius Wilson describes culture as

the sharing of outlooks and modes of behavior among individuals who face similar place-based circumstances . . . or have the same social networks. Therefore, when individuals act according to their culture, they are following inclinations developed from their exposure to the particular traditions, practices, and beliefs among those who live and interact in the same physical and social environment.²²

In other words, groups differ in culture because they differ in their structural constraints,²³ characterized by the non-random distribution of key resources, including economic capital (wealth), social capital (social connections) and the “goodwill, fellowship, mutual sympathy and social inter-

“script” is reminiscent of culture as “narrative.” See, e.g., Jeffrey Fagan & Amanda Geller, *Following the Script: Narratives of Suspicion in “Terry” Stops in Street Policing*, 82 U. CHI. L. REV. 51, 64 (2015) (defining a script as “a cognitive structure or framework that organizes a person’s understanding of typical situations, allowing the person to have expectations and to make conclusions about the potential result of a set of events. . . . Over time, these ideas and scripts become socially contagious within and then across social networks, spreading from person to person and across nodes of people.”); Daria Roithmayr, *The Dynamics of Excessive Force*, U. CHI. LEGAL F. 407, 429 (2016) (“Importantly, although scripts consist of fairly regular component behaviors or prescribed steps, like program-level learning, scripts in script theory also allow for a fair amount of flexible adaptation.”).

²⁰ For two notable exceptions, see Alan Freeman, *Racism, Rights, and the Quest for Equality of Opportunity: A Critical Legal Essay*, 23 HARV. C.R.-C.L. L. REV. 295, and Kevin Woodson, *Derivative Racial Discrimination*, 12 STAN. J. C.R.-C.L. 335 (2016).

²¹ Ann Swidler, *Culture in Action: Symbols and Strategies*, 51 AM. SOC. REV. 273, 273 (1986) (explaining that the “reigning model [culture as values] used to understand culture’s effects on action is fundamentally misleading. It assumes that culture shapes action by supplying ultimate ends or values toward which action is directed, thus making values the central causal element of culture . . . [instead] culture consists of such symbolic vehicles of meaning, including beliefs, ritual practices, art forms, and ceremonies, as well as informal cultural practices such as language, gossip, stories, and rituals of daily life. These symbolic forms are the means through which ‘social processes of sharing modes of behavior and outlook within [a] community’ take place.”).

²² WILLIAM JULIUS WILSON, *MORE THAN JUST RACE: BEING BLACK AND POOR IN THE INNER CITY* 4 (2009).

²³ *Id.* at 4–5 (defining social structure as “the way in which social positions, social roles and networks of social relationships are arranged in our institutions, such as the economy, polity, education, and organization of the family”); see also William H. Sewell, Jr., *A Theory of Structure: Duality, Agency, and Transformation*, 98 AM. J. SO. 1, 4 (1992) (describing structure as “dual” in nature: “structures shape people’s practices, but it is also people’s practices that constitute (and reproduce) structures.” For example, he provides the following useful analogy: “A factory is not an inert pile of bricks, wood, and metal. It incorporates or actualizes schemas, and this means that the schemas can be inferred by the material form of the factory. The factory gate, the punching-in station, the design of the assembly line: all of these features of the factory teach and validate the rules of the capitalist labor contract.”).

course” necessary “to influence decisions and to develop sustained, interest enhancing relationships with others.”²⁴

Sociologist Pierre Bourdieu and his intellectual followers developed the concept of culture as capital.²⁵ Culture as capital refers to the sets of knowledge, behaviors, and dispositions which are valuable in a social space because they can be converted or exchanged for scarce resources in the competitive social space.²⁶ These spaces—known as “fields”—allocate resources according to formal and informal knowledge and behavioral rules;²⁷ thus, what an individual knows and how she behaves will allow her to convert that knowledge and those behaviors into other resources valuable in the space. Culture helps us understand the sociology of elites, or those “with vastly disproportionate control over or access to a resource.”²⁸ This Article argues that elites use cultural capital to reproduce advantage despite the leveling effects of an anti-discrimination legal scheme and seemingly neutral rules governing benefits allocation.

Consider an analogy: a social setting that allocates a scarce resource operates like a card game where “some groups will be excluded and others included.”²⁹ Many games are not just games of chance; to win, players must have not only the appropriate cards, but an understanding of the rules, and strategies to employ their cards within the rules to their benefit³⁰ Social stratification by race and class, etc., determines the non-random distribution of the cards; some groups have more access to and accumulation of economic resources and social capital through their embeddedness in resource-rich social networks. Accordingly, those with “better” cards start out the game in a

²⁴ R.A. Lenhardt, *Understanding the Mark: Race, Stigma, and Equality in Context*, 79 N.Y.U. L. REV. 803, 845–46 (2004).

²⁵ Pierre Bourdieu, *The Forms of Capital*, in HANDBOOK OF THEORY AND RESEARCH FOR THE SOCIOLOGY OF EDUCATION 241–58 (John Richardson ed., 1986).

²⁶ *Id.* at 245–46 (“Thus the capital, in the sense of the means of appropriating the product of accumulated labor in the objectified state which is held by a given agent, depends for its real efficacy on the form of the distribution of the means of appropriating the accumulated and objectively available resources; and the relationship of appropriation between an agent and the resources objectively available, and hence the profits they produce, is mediated by the relationship of (objective and/or subjective) competition between himself and the other possessors of capital competing for the same goods, in which scarcity—and through it social value—is generated.”).

²⁷ *Id.* at 246 (“The structure of the field, i.e., the unequal distribution of capital, is the source of the specific effects of capital, i.e., the appropriation of profits and the power to impose the laws of functioning of the field most favorable to capital and its reproduction.”).

²⁸ Shamus Rahman Khan, *The Sociology of Elites*, 38 ANN. REV. SOC. 361, 362 (2012).

²⁹ ANNETTE LAREAU, *UNEQUAL CHILDHOODS* 277 (2003).

³⁰ PIERRE BOURDIEU, *OUTLINE OF A THEORY OF PRACTICE* 58 (1977) (illustrating that in the game, “the outcome depends partly on the deal, the cards held (their value itself being defined by the rules of the game, characteristic of the social formation in question), and partly on the players’ skill: that is to say, firstly on the material and symbolic capital possessed by the families concerned, their wealth . . . and secondly on the competence which enables the strategists to make the best use of this capital, [and] practical mastery of the (in the widest sense) economic axiomatics being the precondition for production of the practices regarded as ‘reasonable’ within the group and positively sanctioned by the laws of the market in material and symbolic goods”).

more advantageous position than other players. The rules matter, however; a player may have two great cards that will win in blackjack, but if the game is Uno, their cards are worthless. Even if a player has the right cards and knows the rules to the right game, they may still lose the game because they did not have the right strategy to win.

Now, legal scholars studying inequality typically avoid attributing resource disparities to culture, hoping to avoid victim-blaming.³¹ Unfortunately, a key insight from sociology argues that ignoring culture incompletely accounts for the *processes* contributing to the staying-power of categorical inequality and stratification.³² Furthermore, this scholarly reticence is unwarranted if we want to understand the complexities of the social reproduction of *privilege*.³³ Anti-discrimination law³⁴ sometimes misses how

³¹ See Lucille A. Jewel, *Merit and Mobility: A Progressive View of Class, Culture, and the Law*, 43 U. MEMPHIS L. REV. 239, 256 (2012) (explaining how “[f]or progressives seeking to theorize about social inequality and social change, ‘culture’ has become somewhat of an anathema” because conservatives turned cultural explanations for inequality using a “blame the victim” approach that attributed “poverty on defective individual cultural choices rather than focusing on structural realities such as the exodus of manufacturing jobs from the inner city, the inner city’s crumbling and still-segregated public schools, and a lack of advancement opportunities”); WILSON, *supra* note 22, at 3 (explaining that his book “will likely generate controversy because I dare to take culture seriously as one of the explanatory variables in the study of race and urban poverty—a topic that is considered off-limits in academic discourse because of a fear that such analysis can be construed as ‘blaming the victim’”).

³² Categories are social divisions “based on a combination of achieved and acquired traits. Achieved characteristics are those acquired in the course of living [e.g., education], whereas acquired characteristics are set at birth [e.g. race, gender].” DOUGLAS S. MASSEY, *CATEGORICALLY UNEQUAL: THE AMERICAN STRATIFICATION SYSTEM 1* (2007).

³³ PRUDENCE L. CARTER AND SEAN F. REARDON, *INEQUALITY MATTERS* 14 (2014) (arguing that “much of [the] scholarship asks ‘why are people poor?’ or ‘why do the children of the poor remain poor?’ Yet, in order to understand inequality and the forces that create and maintain it, it is arguably equally or more important to study the operation and reproduction of wealth and privilege than to study the operation and reproduction of poverty. Scholarship should be just as interested in asking ‘Why are the rich rich and how do they and their children stay that way?’”).

³⁴ I assume in this Article that an anti-subordination approach to anti-discrimination law is preferable to one focused on anti-classification or anti-differentiation. While an anti-differentiation approach argues that individuals should not be treated differently based on an irrelevant ascribed identity, an anti-subordination approach argues “that it is inappropriate for certain groups in society to have subordinated status because of their lack of power in society as a whole. This approach seeks to eliminate the power disparities between men and women, and between whites and non-whites, through the development of laws and policies that directly redress those disparities.” Ruth Colker, *Anti-Subordination Above All: Sex, Race, and Equal Protection*, 61 N.Y.U. L. REV. 1003, 1007 (1986); see also Adrien K. Wing, *Is There a Future for Critical Race Theory?*, 66 J. LEGAL EDUC. 44, 47 (2016). Professor David Strauss argues against an anti-differentiation, colorblind approach as well, challenging the notion that race is an irrelevant characteristic: “The one option that is not open is the ideal of colorblindness—treating race as if it were, like eye color, a wholly irrelevant characteristic. That is because it is not a wholly irrelevant characteristic. Race correlates with other things: that is what forces on us the choice of either generalizing on the basis of race (and thereby being race-conscious in one way) or deliberately refusing to engage in the natural process of generalizing, and thereby being race-conscious in another way.” David Strauss, *The Myth of Colorblindness*, 1986 SUP. CT. REV. 99, 114 (1986).

privilege is reproduced because of its focus on disadvantage, discrimination, and bias.

Being attentive to culture requires more than understanding what Professor Charles Lawrence named “unconscious racism,”³⁵ or what others have described as structural racism,³⁶ white privilege,³⁷ or implicit bias,³⁸ all of which have their own causal power in perpetuating stratification. Culture, however, plays a theoretically distinct role in accounting for race and class stratification by focusing on how people who interact with the law differ in their own behaviors and relationships with others in the social space while attempting to capture legal benefits.

Being attentive to cultural capital can help legal scholars and policy makers reimagine laws meant to combat stratification, not just discrimination. Stratification “refers to the unequal distribution of people across social categories that are characterized by differential access to scarce resources.”³⁹

³⁵ Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 336–44 (1987) (explaining that unconscious racism derives from a psychological process by which individuals act according to unrecognized prejudices; these prejudices reflect racism embedded in our collective cultural consciousness).

³⁶ Eduardo Bonilla-Silva, *Rethinking Racism: Toward a Structural Interpretation*, 62 AM. SOC. REV. 465, 469 (1997) (explaining “racialized social systems” as “societies in which economic, political, social, and ideological levels are partially structured by the placement of actors in racial categories or races.” A structural approach to “racism” considers racism as an ideology separate from the structure itself. A structural approach allows scholars to move beyond racism as in the minds of racists to understanding race as a central organizing principle of daily life in a racially stratified system.).

³⁷ White privilege, first named by Peggy McIntosh, see Peggy McIntosh, *White Privilege and Male Privilege: A Personal Account of Coming to See Correspondences through Work in Women’s Studies*, in PRIVILEGE: A READER (Michael S. Kimmel & Abby L. Ferber eds., 2009), refers to “an invisible weightless knapsack of special provisions, assurances, tools, maps, guides, codebooks, passports, visas, clothes, compass, emergency gear, and blank checks” afforded to white people that advantage them as they move through society. The knapsack’s contents are unearned, the birthright of being born white. I do not deny that white privilege plays a role in how whites come to understand themselves as “normal” and their experiences as the universal standard by which all else is judged. However, I would consider white privilege to be a component of white, middle-class cultural behaviors.

³⁸ Implicit racial bias refers to the unconscious tendency to associate blackness with deviance or negativity. Christine Jolls & Cass R. Sunstein, *The Law of Implicit Bias*, 94 CAL. L. REV. 969, 970–71 (2006). Research suggests that the power of implicit bias is not in the bias itself, but how it predicts individual discriminatory behavior. See Linda Hamilton Krieger & Susan T. Fiske, *Implicit Bias and Disparate Treatment*, 94 CAL. L. REV. 997, 1030–33 (2006); Samuel Bagenstos, *Implicit Bias, Science and Antidiscrimination Law*, 1 HARV. L. & POL. REV. 476, 480, 492 (2007); Jerry Kang & Kristin Lane, *Seeing Through Colorblindness: Implicit Bias and the Law*, 58 UCLA L. REV. 465, 473 (2010). The weakness of the implicit bias literature is that implicit bias predicts individual “bad actors” behavior, even though they do not realize they are bad actors. See Stephen M. Rich, *Against Prejudice*, 80 GEO. WASH. L. REV. 1, 4 (2011) (explaining that “implicit social cognition theory defines prejudice to include negative—and even ambivalent—group-based attitudes attributable to automatic mental processes capable of influencing cognition and behavior beyond the agent’s conscious awareness or control”). Implicit bias does not help us to understand how the victims of discrimination use law or fail to use law to reduce the impact of discrimination in their everyday lives.

³⁹ MASSEY, *supra* note 32, at 1.

As explained later in this Article, neither the discriminatory intent⁴⁰ nor disparate treatment⁴¹ doctrines are equipped to interrogate cultural privilege as a key aspect of inequality. By paying attention to culture, legal scholars can question the hidden cultural assumptions embedded in the law and the ways in which cultural capital is unequally distributed.

This Article proceeds as follows. Part I describes the IDEA as a successful anti-discrimination scheme that disrupted educational discrimination against children with disabilities. This Part also highlights the problem of racial and class stratification in the IDEA's resource distribution. Part I details how the law has failed many black children, especially those labeled as emotionally disturbed or intellectually disabled. In contrast, the Part describes the different racial pattern for autism. Part I ends with questioning the consensus view that these racial patterns arise solely due to teacher and school bias or discrimination.

Part II describes the cultural landscape of special education, providing a detailed explanation of the cumbersome special education process that every parent must face to receive special education benefits. It shows how, even in a legal scheme that guarantees a "free appropriate public education"⁴² to all designated as a "child with a disability"⁴³ schools must develop a way to ration those benefits because many do not have adequate resources to effectuate the federal entitlement. Part II also situates the IDEA's assumptions about culture in a broader sociological discussion of how elite parents reproduce their privilege through schools. In schools with significant racial achievement and opportunity gaps, white middle-class children tend to bene-

⁴⁰ David Strauss, *Discriminatory Intent and the Taming of Brown*, 56 U. CHI. L. REV. 935, 956–57 (1989) (explaining the "discriminatory intent standard requires that race play no role in government decisions. That is, the government decision maker must act as if she does not know the race of those affected by the decision; otherwise she violates the discriminatory intent standard." Strauss calls this test the "reversing the groups" test. The court applying the standard "should ask: suppose the adverse effects of the challenged government decision fell on whites instead of black, or on men instead of women. Would the decision have been different? If the answer is yes, then the decision was made with discriminatory intent").

⁴¹ Olatunde C. A. Johnson, *Disparity Rules*, 107 COLUM. L. REV. 374, 376 (2007) (explaining the disparate impact standard as "requiring some or all actions producing a disproportionate impact on minority groups to be justified by government actors").

⁴² 34 C.F.R. § 300.17 ("Free appropriate public education or FAPE means special education and related services that—(a) Are provided at public expense, under public supervision and direction, and without charge; (b) Meet the standards of the SEA, including the requirements of this part; (c) Include an appropriate preschool, elementary school, or secondary school education in the State involved; and (d) Are provided in conformity with an individualized education program (IEP) that meets the requirements of §§ 300.320 through 300.324."); see also 20 U.S.C. § 1401(9).

⁴³ 20 U.S.C. § 1401(3)(A) ("The term 'child with a disability' means a child—(i) with intellectual disabilities, hearing impairments (including deafness), speech or language impairments, visual impairments (including blindness), serious emotional disturbance (referred to in this chapter as 'emotional disturbance'), orthopedic impairments, autism, traumatic brain injury, other health impairments, or specific learning disabilities; and (ii) who, by reason thereof, needs special education and related services.").

fit from expectations of parental engagement and participation, forms of cultural capital that find its corollaries in special education.

Part III provides details of how white middle-class parents may come to acquire cultural knowledge about disability and the IDEA and how they may use it strategically to secure scarce resources for their children.

Part IV makes the normative argument that legal scholars should pay closer attention to the role of cultural capital in stratification, and especially in the reproduction of privilege. While law is understandably concerned with bias and discrimination, it has paid relatively little attention to the ways in which elites can reproduce privilege through effective use of anti-discrimination or entitlement legal schemes. This Part ends by suggesting legal reforms to reduce the influence of culture on how legal institutions allocate scarce resources.

Before continuing, four points. First, the reader may be thinking about an age-old question: is not this really *only* about class, especially in the highly legalized special education context? Part II dives into this question in earnest, but the short answer is that race and class can rarely be separated, even when comparing the experiences of the “middle-class.” The middle-class experience is not homogenous within the class or within race.⁴⁴ Ultimately, class and race are inextricably bound in any discussion of stratification.⁴⁵

Second, while I am oversimplifying the world as it relates to race and class, I attempt to be careful to not make essentialist claims about either race or class. Blackness is not a monolith, nor is whiteness. Not all people we categorize as black (white) experience their blackness (whiteness) in the same way.⁴⁶ To the extent I do so, it is unintentional. However, I do maintain that while how blacks and whites “experience existing racial structure varies . . . all still experience them.”⁴⁷

Third, I am not arguing that racism, in all its forms—implicit bias, white privilege, unconscious bias, etc.—does not affect the distribution of special

⁴⁴ See Devah Pager, *The Mark of a Criminal Record*, 108 AM. J. SOC. 937, 959 (2003) (showing that, in an audit study of black and white job applicants with and without criminal records, the effect of incarceration on black job applicants was 40% greater than the effect on white job applicants); S. Michael Gaddis, *Discrimination in the Credential Society: An Audit Study of Race and College Selectivity in the Labor Market*, 93 SOC. FORCES 1451, 1466 (2015) (showing that human capital alone (highly correlated with class) cannot account for black un- and underemployment; black job applicants with college degrees from elite universities do only as well as white job applicants with college degrees from less selective universities); *id.* at 1453 (showing that when employers respond to black applicants, those employers offer black applicants jobs with lower starting salaries and lower prestige than employers offer to white applicants with similar credentials).

⁴⁵ Olatunde C. A. Johnson, *Inclusion, Exclusion, and the “New” Economic Inequality*, 94 TEX. L. REV. 1647, 1652 (2016) (arguing that “segregation, geography, and spatial isolation—which are caused and perpetuated by a confluence of race and class exclusion—help maintain inequality”).

⁴⁶ Amanda Lewis, “What Group?” *Studying Whites and Whiteness in the Era of “Color-Blindness,”* 22 SOC. THEORY 623, 626–27 (2004).

⁴⁷ *Id.* at 627.

education resources. It does, and in powerful ways already explicated by the racial disproportionality literature. My argument is that cultural capital is a direct mechanism through which societal stratification comes to influence the distribution of special education resources. Racism plays a role in culture, as culture arises from social positioning which itself is characterized by unequal access to resources and power and inequality driven by bias and discrimination. But my claim is about how race and class injury can be derived from how beneficiaries interact with legal allocative *processes* that are neither products of unconscious racism nor overt discrimination. Here, the question is about how stratified groups acquire knowledge and employ strategic behavior to take advantage of the law's benefits.

Fourth, although my critique is grounded in race and special education, the phenomenon I describe can occur within any axis of stratification in any social space where dominant groups and subordinate groups compete for resources. Race and disability, therefore, are simply "types" of the phenomenon.

I. A PROBLEMATIC IDEA

In this Part, the Article discusses the problem the IDEA sought to correct: school districts' exclusion of children with disabilities from receiving a public school education, as well districts' failure to provide an adequate education to millions more children with disabilities.⁴⁸ But despite the general success of IDEA in correcting the above miseducation, the law's benefits skew toward white children, a phenomenon that can be seen in the resource inequalities by disability category. Traditional explanations for racial disparities in education—in particular, black overrepresentation in the most stigmatized categories—focus on racial bias.⁴⁹ Such an exclusive focus fails to capture the full scope of the mechanisms by which schools distribute special education labels and resources.

⁴⁸ 20 U.S.C. § 1400(c)(2) ("Before the date of enactment of the Education for All Handicapped Children Act of 1975 (Public Law 94-142), the educational needs of millions of children with disabilities were not being fully met because—(A) the children did not receive appropriate educational services; (B) the children were excluded entirely from the public school system and from being educated with their peers; (C) undiagnosed disabilities prevented the children from having a successful educational experience; or (D) a lack of adequate resources within the public school system forced families to find services outside the public school system.").

⁴⁹ Yet, the problem of black disproportionality in the most stigmatizing categories of disability for the purposes of exclusion began long before the IDEA, starting with the advent of compulsory education in the early 1900s. See RUTH COLKER, *DISABLED EDUCATION* 20 (2013). Aptitude tests developed in the early 1900s and normed on the experiences of white, native-born men were used to "perpetuate the notion that immigrants and Blacks were intellectually inferior for genetic reasons." Daria Roithmayr, *Deconstructing the Distinction between Bias and Merit*, 85 CALIF. L. REV. 1449, 1489 (1997). See generally STEVEN SELDEN, *INHERITING SHAME: THE STORY OF EUGENICS AND RACISM IN AMERICA* (1999).

A. *Disrupting Disability Discrimination*

Prior to 1975, many states (although not all)⁵⁰ routinely denied millions of children with disabilities an appropriate public education, including excluding children with disabilities from school altogether.⁵¹ Prior to 1975, the federal government provided a patchwork of small grants to states for educating some children with disabilities, primarily for children deemed deaf or “mentally retarded.”⁵² While in the mid-1960s through the early 1970s Congress increased its efforts to provide education to children with disabilities,⁵³ by 1975, many states still did an abysmal job of educating its young, disabled citizens. Thus, frustrated with the slow improvement in the educational lives of children with disabilities, parents and advocates in the early 1970s took their concerns to the federal courts and won two key victories in cases that would set the foundation for the federal special education law in 1975.⁵⁴

⁵⁰ COLKER, *supra* note 49, at 17 (explaining that as early as 1911, some states, especially those in the northeast, had laws on the books requiring schools to educate children with disabilities, “but enforcement of those . . . laws was generally ineffective”). In addition, disability advocates Thomas Gallaudet and Samuel Howe created schools for the deaf and blind, as well as some intellectually disabled children. Those schools did not cater to all children with disabilities. *Id.* at 18.

⁵¹ Prior to Section 504 of the 1973 Rehabilitation Act, in many states neither federal, state, nor local law protected people with disabilities from discrimination. In language that mirrors the Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (1964), and Title IX of 1972, 20 U.S.C. § 1681 (1972), Section 504 protects people with disabilities from discrimination by state agencies receiving federal funds, including public schools. 29 U.S.C.A. § 794 (2016).

⁵² COLKER, *supra* note 49, at 23.

⁵³ *See* Pub. L. No. 89-10, 79 Stat. 27 (1965) (codified at 20 U.S.C. §§ 6301-6304); Pub. L. 89-750, 80 Stat. 1191 (1966); Pub. L. 91-230, 84 Stat. 121 (1970); COLKER, *supra* note 49, at 22–24.

⁵⁴ The first case, *Pennsylvania Ass’n for Retarded Children v. Commonwealth of Pennsylvania (PARC)*, 334 F. Supp. 1257 (E.D. Pa. 1971), concerned four Pennsylvania statutes that allowed school districts to deny children with mental retardation from school. The complaint alleged that Pennsylvania school districts denied a class of disabled children, including thirteen black children named in the lawsuit, an education because of their disability, contrary to the guarantees of the 14th Amendment’s equal protection clause. *Id.* at 1258–59. The parties settled the case, agreeing by consent to the general legal principle, lifted from *Brown v. Board*, that “[h]aving undertaken to provide a free public education to all of its children, including its mentally retarded children, the Commonwealth of Pennsylvania may not deny any mentally retarded child access to a free public program of education and training.” *Id.* at 1259. The consent decree also provided for extensive parental participation, including the right to be notified, in writing, of any change in a child’s educational program and the right to contest such a change in front of a hearing officer. *Id.* at 1263. The notice should inform parents of their right to a hearing, and the right to be accompanied by an attorney and to present evidence. *Id.* The second case, *Mills v. Board of Education*, 348 F. Supp. 866 (D.D.C. 1972), involved a class action against the District of Columbia’s public schools. *Id.* at 868. As was the case in *PARC*, all the *Mills* named plaintiffs (including Peter Mills) were black children. *Id.* at 869–70. Their blackness, however, was not a factor in the court’s decision. *Id.* at 870. *Mills* held that denying a child with a disability a free public education while providing a public education to non-disabled children violated the Fifth Amendment’s due process clause. *Id.* at 875. Importantly, *Mills* ruled that school districts could not justify denying a disabled child an education due to funding constraints: “The inadequacies of the District of Columbia Public School System whether occasioned by insufficient funding or administrative inefficiency, certainly cannot be permitted to bear more heavily on the ‘exceptional’ or handicapped child than

After over two years of congressional hearings, in 1975 Congress enacted the Education for All Handicapped Children Act (“EAHCA”) (renamed the IDEA in 1991).⁵⁵ The EAHCA required schools receiving federal education funds to provide a “free appropriate public education” (“FAPE”) to all children with disabilities and to do so in the least segregated context. Such an education was meant to provide children with disabilities access to education “designed to meet their unique needs.”⁵⁶ The legislation was also meant to “assure that the rights of [disabled] children and their parents or guardians are protected.”⁵⁷ It also required that schools include parents in creating the child’s educational plan.⁵⁸

The IDEA has, in many regards, been a success. Prior to the IDEA, controversial mental and medical institutions served as homes for many children with severe disabilities.⁵⁹ States routinely provided those children with little access to educational programs.⁶⁰ Today, 90 percent fewer children with disabilities live in institutions.⁶¹ States are required to find children with disabilities to ensure that they are fulfilling their obligation under IDEA.⁶² Now, schools deny virtually no child with a disability some access to public education.⁶³

on the normal child.” *Id.* at 876. Colker notes, however, that even though *Mills* was a pivotal case in the movement for educational rights for disabled children, D.C. public schools continue to struggle with providing a free appropriate public education to children with disabilities. In 1999 advocates brought a federal suit against the district, alleging gross noncompliance with the federal law. A federal court judge appointed a special master to oversee the District’s special education. The case did not end until 2011. *See* COLKER, *supra* note 49, at 207–08.

⁵⁵ Education for All Handicapped Children Act of 1975, Pub. L. No. 94-142, 89 Stat. 773 (EAHCA).

⁵⁶ *Id.* at 774.

⁵⁷ *Id.*

⁵⁸ *Id.* at 776.

⁵⁹ ROBERT L. OSGOOD, *THE HISTORY OF SPECIAL EDUCATION: A STRUGGLE FOR EQUALITY IN AMERICAN PUBLIC SCHOOL* 104–06 (2008).

⁶⁰ *Id.* at 104 (arguing that during the rapid expansion of mental institutions in the 1950s and 1960s, “while many of these institutions were renamed ‘training schools’ or ‘developmental centers’ in an attempt to improve their public image and indicate a return to a more educative purpose and function . . . [n]evertheless, most continued to provide [no] more than custodial care”).

⁶¹ COLKER, *supra* note 49, at 6.

⁶² 34 C.F.R. § 300.111(a)(1) (“The State must have in effect policies and procedures to ensure that—(i) All children with disabilities residing in the State, including children with disabilities who are homeless children or are wards of the State, and children with disabilities attending private schools, regardless of the severity of their disability, and who are in need of special education and related services, are identified, located, and evaluated; and (ii) A practical method is developed and implemented to determine which children are currently receiving needed special education and related services.”); § 300.111(c) (“Other children in child find. Child find also must include—(1) Children who are suspected of being a child with a disability under Sec. 300.8 and in need of special education, even though they are advancing from grade to grade; and (2) Highly mobile children, including migrant children.”).

⁶³ Yet this educational access has not always led to better socioeconomic outcomes. Susan L. Parish et al., *Assets and Income: Disability-based Disparities in the United States*, 34 Soc. WORK RES. 71, 71 (2010) (noting that people with disabilities still earn less income and hold fewer assets than people without disabilities).

But the relatively dismal outcomes for children of color with disabilities, especially black children, has been an intractable problem, one that pre-dates the IDEA.

B. *Reproducing Stratification*

In 1967, federal judge Skelly Wright strongly indicted the District of Columbia's special education program. Finding that D.C. schools routinely segregated black children into low academic "tracks," and especially the special education track, Judge Wright ruled that D.C. schools unconstitutionally denied black children equal protection. Professor Ruth Colker notes that educational psychologist Lloyd Dunn strongly endorsed Judge Wright's opinion,⁶⁴ as he saw the increasing segregation of black children into self-contained classes for the "mentally retarded"⁶⁵ as a response to the increasing racial integration of the nation's public schools.⁶⁶

Unfortunately, the 1975 version of the IDEA did not address these concerns, focusing only on the general guarantee that children with disabilities be afforded an appropriate public education. In 1975, Congress's goal was to provide children with disabilities a federal guarantee of some schooling, thus forbidding school districts from excluding them completely. In doing so, it ignored the warnings of 1970s advocates, who lamented that schools were already placing black children into highly stigmatized special education programs.⁶⁷

Only since 1997 has Congress indicated that it is taking serious notice of this problem. In the 1997 reauthorization of the IDEA and subsequent authorizations, Congress noted that school districts disproportionately identify black children and other racial minority children for special education beyond their distribution in the public school enrollment.⁶⁸ It also noted that the over-representation was largely in the categories of emotional distur-

⁶⁴ *Hobson v. Hansen*, 269 F. Supp. 401, 493 (D.D.C. 1967).

⁶⁵ The over-identification of black children as "mentally retarded" also faced federal indictment in California. In 1972, a federal judge forbid San Francisco Unified Public School District (SFUSD) from using intelligence tests to identify black children as "mentally retarded." See *Larry P. v. Riles*, 343 F. Supp. 1306, 1315 (N.D. Cal. 1972), *aff'd*, 502 F.2d 963 (9th Cir. 1974). In SFUSD, while black children comprised less than 30% of the public school enrollment, over 60% of children identified as mentally retarded were black. *Id.* at 1311.

⁶⁶ COLKER, *supra* note 49, at 21; see also Lloyd M. Dunn, *Special Education for the Mildly Retarded: Is Much of It Justifiable?*, 35 EXCEPTIONAL CHILDREN 5, 5 (1968).

⁶⁷ COLKER, *supra* note 49, at 22.

⁶⁸ Individuals with Disabilities Education Act Amendments of 1997, Pub. L. No. 105-17, 111 Stat. 41, 20 U.S.C. § 1400(c)(12)(B) (2004) ("More minority children continue to be served in special education than would be expected from the percentage of minority students in the general school population."). Racial disproportionality exists with other racial and ethnic groups depending on category. This Article deals exclusively with racial disparities between blacks and whites because (1) this is the most commonly used comparison when discussing the effect of "race" on a social process; and (2) the relationship between blacks and whites in schooling is heavily documented and historically contingent in ways that other racial pairings are not.

bance and intellectual disability (previously referred to as “mental retardation”),⁶⁹ and most prominent in majority-white school districts.⁷⁰

Assuming no *a priori* reason to suspect that disability determinations should vary by race,⁷¹ we would expect to see children represented in disability categories at rates similar to their distribution in the public school population. Thus, scholars refer to racial disparities in a disability category as an issue of proportionality; given a group’s public school enrollment, is that group’s representation in special education generally, or in specific disability categories, proportionate?

1. *Disproportionality*⁷²

Of special concern is black overrepresentation in so-called “high-incidence” categories. Labeled as such because they are the most often-used disability labels in schools,⁷³ speech and language impairments, learning disabilities, emotional disturbance, intellectual disability, and attention-deficit disorder are high-incidence categories that, comprised 80% of all children served under the IDEA in the 2014-2015 academic year.⁷⁴

⁶⁹ *Id.* at § 1400(c)(8)(C) (“Poor African-American children are 2.3 times more likely to be identified by their teacher as having mental retardation than their white counterpart.”). In 2005, the findings acknowledged the racial disparities existed not in the “mental retardation” category, but also in the emotional disturbance category. Individuals with Disabilities Education Improvement Act of 2004, Pub. L. No. 108-446, 118 Stat 2647, 20 U.S.C. §1400(c)(12)(C) (2010).

⁷⁰ 20 U.S.C. § 1400(c)(12)(E) (effective July 1, 2005 to Oct. 4, 2010) (“Studies have found that schools with predominately White students and teachers have placed disproportionately high numbers of their minority students into special education.”). The current findings state the same. 20 U.S.C. § 1400 (effective Oct. 5, 2010).

⁷¹ See *infra* note 86 (discussing why one should not expect rates of autism to be higher among some racial groups than others).

⁷² This data, unless otherwise noted, reflect school district data with regards to “children with disabilities” as defined by statute. See *supra* note 43. There are likely children with disabilities not reflected in this data because they were not deemed to have a disability that adversely affected access to education.

⁷³ Rebecca Vallas, *The Disproportionality Problem: the Overrepresentation of Black Students in Special Education and Recommendations for Reform*, 17 VA. J. SOC. POL’Y & L. 181, 183–84 (2009). In contrast, the so-called “low-incidence” disabilities deaf-blindness, developmental delay, hearing impairment, orthopedic impairment, traumatic brain injury, and visual impairment together affect less than 20% of children identified as disabled. *Id.* at 182.

⁷⁴ DEP’T OF EDUC. NAT’L CTR. FOR EDUC. STAT., DIG. EDUC. STAT. 2015 121 tbl. 2014.50 (51st ed. 2016) [hereinafter DIGEST], <https://nces.ed.gov/pubsearch/pubsinfo.asp?pubid=2016014> [<https://perma.cc/9A2W-LPF8>]. These categories are also sometimes referred to as “judgmental” categories. Vallas, *supra* note 73, at 183–84. That term reflects the subjective nature of the diagnosis, given that the evaluator must rely on his or her professional judgment (instead of more objective medical criteria) to distinguish those with the disability from those without the disability. *Id.* The term also suggests that the diagnosis is made by comparing children to one another to decide if an impairment is present. *Id.* While experts traditionally considered autism to be low-incidence, in 2014-2015 autism comprised almost nine percent of children identified as disabled, a higher percentage than some traditionally-identified high-incidence categories. Nicholas A. Gage et al., *Characteristics of Students With High-Incidence Disabilities Broadly Defined*, 23 J. DISABILITY POL’Y STUD. 168 (2012); Daniel Losen et al., *Disturbing Inequities: Exploring the Relationship Between Racial Disparities in Special*

One method of identifying disproportionate representation is to compare the racial composition of a disability category with the racial composition of the public school enrollment. For example, in the 2014-2015 school year while black children comprise only 16% of public school enrollment, they represent approximately one-quarter of children receiving special education services for intellectual disabilities and one-quarter of children receiving special education services for an emotional disturbance.⁷⁵

Composition, however, does not allow us to compare across groups, which is often the substantive question being asked: between whites and blacks, which group has a greater likelihood of receiving special education resources due to being labeled with a disability category?⁷⁶

In the 2014-2015 academic year, a black child was 50% more likely than was a white child to be identified as emotionally disturbed (1.55 times) and was almost twice as likely as a white child to be identified as intellectually disabled (1.9 times).⁷⁷ Yet a black child with a disability is about 20% less likely than is a white child with a disability to be given an autism label (0.80 times).⁷⁸ Among children served by IDEA, a black child is 30% less likely to be identified with autism than is a white child (0.70 times).⁷⁹

While autism was originally described as early as 1943,⁸⁰ the Diagnostic and Statistical Manual of Mental Disorders (“DSM”) did not include autism until its third revision in 1980.⁸¹ Thus, prior to the late 1980s, children currently designated with autism would have been diagnosed with a non-autistic mental disorder, a phenomenon known as “diagnostic substitution.”⁸² For example, the DSM once included a distinct disorder, “childhood

Education Identification and Discipline, 5 J. APPLIED RES. ON CHILD. 1, 7 (2014) (arguing that the last decade’s increasing autism prevalence means that the disability category is no longer “low-incidence”).

⁷⁵ DIGEST, *supra* note 74, at 108, 121.

⁷⁶ “Risk ratios” represent the relative likelihood that a child in the racial group will be identified in a disability category (enrollment in category divided by total public school enrollment or total special education enrollment), as compared to the likelihood of a child in the other racial group being identified in the special education enrollment. Julie Bollmer et al., *Using the Risk Ratio to Assess Racial/Ethnic Disproportionality in Special Education at the School-District Level*, 41 J. SPECIAL EDUC. 186, 187 (2007).

⁷⁷ Using data from the DIGEST, *supra* note 74, at 108, 121, I calculated these risk ratios based on the methodology for a Bollmer et al., *supra* note 76, at 187.

⁷⁸ Author calculations. *See id.*

⁷⁹ Author calculations. *See id.*

⁸⁰ JOHN J. PITNEY, THE POLITICS OF AUTISM: NAVIGATING THE CONTEST SPECTRUM 16 (2015) (explaining how in “1943, Dr. Leo Kanner of Johns Hopkins University became the first to publish an English language article describing autism as a distinct order”).

⁸¹ *Id.* at 25 (“Whereas the first (1952) and second (1968) editions did not even include autism as a separate diagnostic category, the third edition (DSM-III) did so in 1980, listing six symptoms necessary for a diagnosis of ‘infantile autism.’”).

⁸² P. T. Shattuck, *The Contribution of Diagnostic Substitution to the Growing Administrative Prevalence of Autism in US Special Education*, 117 PEDIATRICS 1028, 1028 (2006) (arguing that “prevalence findings from special education data do not support the claim of an autism epidemic . . . [t]he growing administrative prevalence of autism from 1994 to 2003 was associated with corresponding declines in the usage of other diagnostic categories”); Helen Coo et al., *Trends in Autism Prevalence: Diagnostic Substitution Revisited*, 38 J. AUTISM DEV.

onset pervasive developmental disorder,” but merged it with autism in the 1987 revision.⁸³ The IDEA added autism as a category in the 1991 Amendments.⁸⁴ Yet it is unclear exactly who is realizing the benefit of this “diagnostic substitution.”

Congress’s approach (as well as that of scholars) to the racial disproportionality problem for emotional disturbance and intellectual disabilities categorizes the problem as “mislabeling.” In 2005 and in the current version of the IDEA, Congress recognized a need to exert “[g]reater efforts . . . to prevent the intensification of problems connected with mislabeling” minority children with disabilities.⁸⁵

It is possible that mislabeling is the cause of racial differences in autism; white children may be appropriately labeled, while black children are

DISORDERS 1036, 1036 (2008) (finding that, in British Columbia, Canada, during the time period 1996-2004, 52% of the increase in children receiving an autism label was attributable to switching from one diagnostic label to autism); Helen Leonard et al., *Unpacking the Complex Nature of the Autism Epidemic*, 4 RES. AUTISM SPECTRUM DISORDERS 548, 552 (2010) (finding that the increase in autism can, in part, be supported by changes in diagnostic criteria); Lisa A. Croen et al., *The Changing Prevalence of Autism in California*, 32 J. AUTISM DEV. DISORDERS 207, 207 (2002) (finding that in California between 1987-2004, as prevalence in autism increased by an absolute change of 9.1/10,000, the prevalence of intellectual disabilities decreased by 9.3/10,000); Dhaval M. Dave & Jose M. Fernandez, *Rising Autism Prevalence: Real or Displacing Other Mental Disorders? Evidence from Demand for Auxiliary Healthcare Workers in California*, 53 ECON. INQUIRY 448, 448 (2015) (finding that one in every three new autism diagnoses is supplanting intellectual disability diagnoses); Gil Eyal, *For a Sociology of Expertise: The Social Origins of the Autism Epidemic*, 118 AM. J. SOC. 863, 865-868 (2014) (arguing that autism remained rarely identified until parents and professionals of children identified as intellectually disabled were able to mobilize to construct new avenues of disability expertise that included autism). Other scholars note that other factors, such as social proximity, social class and race, impact professionals’ autism diagnoses. See generally Ka-Yuet Liu et al., *Social Influence and the Autism Epidemic*, 115 AM. J. SOC. 1387, 1424-25 (2010) (finding a “negative effect of proximity to children with autism on subsequent sole [intellectual disability] diagnosis”); David S. Mandell et al., *Disparities in Diagnosis Received Prior to a Diagnosis of Autism Spectrum Disorder*, 37 J. AUTISM DEV. DISORDERS 1795, 1797-98 (2007) (finding that among Medicare-eligible children eventually diagnosed with autism, black children were 2.6 times less likely than white children to receive an autism diagnosis at a first speciality care visit); Tanya Karapurkar Bhasin & Diana Schendel, *Sociodemographic Risk Factors for Autism in a US Metropolitan Area*, 37 J. AUTISM DEV. DISORDERS 667, 672-73 (2007) (finding that, among children with autism as identified through a Centers for Disease Control surveillance program for one metropolitan area, professionals tended to identify children of higher socioeconomic background as autistic compared to children of a lower socioeconomic background); Soumya Mazumdar et al., *Spatial Clusters of Autism Births and Diagnoses Point to Contextual Drivers of Increased Prevalence*, 95 SOC. SCI. MED. 87, 95 (2013) (finding that, among other findings, that children who move to an area with more diagnostic resources than their previous area, they are more likely to receive an autism diagnosis than children whose residence does not change); Carrie Arnold, *Autism’s Race Problem*, PAC. STANDARD, May 25, 2016, <https://psmag.com/news/autisms-race-problem> [<https://perma.cc/F3UR-LPJW>] (quoting the clinical director for research at an autism center: “In minority children, people tend to see behavior problems rather than an impaired kid”).

⁸³ PITNEY, *supra* note 80, at 25.

⁸⁴ Individuals with Disabilities Education Act Amendments of 1991, Pub. L. No. 102-119, 105 Stat. 587.

⁸⁵ 20 U.S.C. § 1400(c)(12)(A) (2005); 20 U.S.C. § 1400(c)(12)(A) (2010).

not.⁸⁶ Nevertheless, contextual factors seem to be driving much of the disproportionate representation of white children with autism. Autism tends to “cluster” in wealthier and whiter areas.⁸⁷ Proximity to a child with autism

⁸⁶ Of course, if autism is more prevalent in white children than in black children, law would have little to do with these disparities. There are several reasons, however, to suggest that actual differences in prevalence are not driving the disproportionate resources white children receive from special education due to autism. First, existing evidence suggests that one reason it may appear that white children are more likely to have autism is that clinicians often fail to recognize autism in non-white children. See David S. Mandell et al., *Racial/Ethnic Disparities in the Identification of Children with Autism Spectrum Disorders*, 99 AM. J. PUB. HEALTH 483, 483 (2009). Another study shows that, controlling for race, ethnicity and nativity, autism with comorbid intellectual disability is more prevalent in foreign-born mothers who are black, Central/South American, Filipino, and Vietnamese, as well as U.S.-born Hispanic and black mothers, compared to U.S.-born white mothers. This suggests that black children are only being diagnosed with autism when it appears to be a low-functioning manifestation of autism. See Tracy A. Becerra et al., *Autism Spectrum Disorders and Race, Ethnicity, and Nativity: A Population-Based Study*, 134 PEDIATRICS 63, 63 (2014). These studies suggest that because autism is diagnosed not based on any widely-accepted biomarker (although there is some evidence of genetic predisposition), but rather on the subjective experience of the evaluator. Second, childhood disability may be due to adverse perinatal experiences, including exposure to environmental toxins like lead, mercury and chemicals in plastics and pesticides, which is correlated with income. See NAT'L RES. COUNCIL, SCIENTIFIC FRONTIERS IN DEVELOPMENTAL TOXICOLOGY AND RISK ASSESSMENT I (2000). Yet the impact of environmental toxins on fetal and childhood brain development more often negatively affect black children, who have an increased exposure to such toxins both prior to birth and in childhood. We would, thus, expect rates of autism to be higher in black children; indeed, some studies suggest that fetal exposure to air pollution increases the likelihood of autism. See Ondine S. von Ehrenstein et al., *In Utero Exposure to Toxic Air Pollutants and Risk of Childhood Autism*, 25 EPIDEMIOLOGY 851, 851 (2014). A black pregnant woman's experience of blackness has been shown to adversely affect infants across income levels. Cynthia G. Colen et al., *Maternal Upward Socioeconomic Mobility and Black-White Disparities in Infant Birthweight*, 96 AM. J. PUB. HEALTH 2032, 2038 (2006); Michele Norris, *Why Black Women, Infants Lag in Birth Outcomes*, NPR (July 8, 2011 4:06 PM), <http://www.npr.org/2011/07/08/137652226/the-race-gap> [<https://perma.cc/H5HW-CX3W>]. It is unclear why autism would be contrary to this prediction. Lastly, some researchers are coming to doubt the Centers for Disease Control's (CDC) prevalence statistics. David Mandell & Luc Lecavalier, *Should we believe the Centers for Disease Control and Prevention's autism spectrum disorder prevalence estimates?*, 18 AUTISM 482, 482 (2014). Mandell and Lecavalier point to a foundational flaw in the CDC's prevalence research methodology: the data that generates prevalence rates depends on a primary clinician observing and documenting information that is either suggestive of autism or that forms the basis of a diagnosis. When the CDC clinician examines the records—and not the child—she is only evaluating the information the primary clinician has documented. *Id.* “In a ‘true’ prevalence study, the information a child has in their clinical or educational record is irrelevant. Researchers identify some population or population-based sample and clinically assess individuals in person to determine the presence of ASD.” *Id.* at 483. As the authors note, “Simply put, without direct assessments of children, we will not know the extent to which the CDC-determined ‘cases’ include false positives, or the extent to which children who it was determined do not have autism are really false negatives. Social impairments and repetitive behaviors are present in many other childhood psychiatric disorders and developmental disabilities [citation omitted]. The flaws in this methodology certainly could explain the great variation in prevalence, clinical presentation, and racial disparities by site.” *Id.*

⁸⁷ Jon Hamilton, *Autism “Clusters” Linked to Parents’ Education*, NPR (2010), <http://www.npr.org/templates/story/story.php?storyId=122256276> [<https://perma.cc/W6BA-QR39>] (reporting on a University of California at Davis study showing that “clusters of children diagnosed with autism tend to occur in places where parents are older, more educated, and white”).

increases a child's likelihood of being diagnosed with autism,⁸⁸ supporting a social explanation for increasing autism prevalence among white families. Estimates of autism prevalence by geography strongly suggest that "local policies, resources and awareness . . . drive observed differences in prevalence."⁸⁹

These disparities matter beyond "mislabeling." Disability labels are correlated with in-school and out-of-school outcomes. While it is not currently possible to establish a causal connection between the label and the outcomes, the differences in outcomes are, nonetheless, stark and concerning.

2. Collateral Correlations

Classroom racial integration. The IDEA requires that children with disabilities be served in the least restrictive environment ("LRE") that enables them to benefit from special education services, which is presumptively the general education classroom.⁹⁰ In the 2012-2013 academic year, almost 50% of children identified as intellectually disabled spent less than 40% of their day in a general educational classroom, compared to only 33% of autistic students.⁹¹ Thirteen percent of students identified as emotionally disturbed were not in regular school compared to 6-7% of autistic and intellectually disabled students.⁹² While children with autism were more likely than children with intellectual disabilities to be educated in an environment in which they spent less than 40% of their time in a general education classroom with non-disabled students,⁹³ some consider those classrooms to be more therapeutic; one educational expert opined that "[h]aving the [autism] label can make the difference between being closely attended to in a class of four versus being lost in a class of 40. Kids who need special attention can often get it only if they are labeled autistic."⁹⁴

Post-school outcomes. In the 2012-2013 academic year, while 80% of all children with disabilities graduated with regular diplomas or received an alternative certificate, only 64% and 76% of children labeled emotionally disturbed and intellectually disabled did, respectively.⁹⁵ In contrast, students diagnosed with autism were more likely to graduate with a diploma or certificate than were all other children with high-incidence disabilities: 87% of children with autism received a diploma or certificate.⁹⁶ Only 7% of students with autism failed to graduate; 35% and 18% of students that schools labeled

⁸⁸ Liu et al., *supra* note 82, at 1387.

⁸⁹ Mandell & Lecavalier, *supra* note 86, at 483.

⁹⁰ 20 U.S.C. § 1412(a)(5).

⁹¹ DIGEST, *supra* note 74, at 122 tbl. 204.60 .

⁹² *Id.*

⁹³ *Id.*

⁹⁴ PITNEY, *supra* note 80, at 37.

⁹⁵ DIGEST, *supra* note 74, at 253 tbl. 219.90.

⁹⁶ *Id.*

as emotionally disturbed and intellectually disabled, respectively, dropped out.⁹⁷ In general, 72% of white students with disabilities graduated with a regular diploma; only 55% of black children with disabilities achieved the same feat.⁹⁸ Almost a quarter of black children with disabilities failed to graduate altogether.⁹⁹

*Discipline and punishment.*¹⁰⁰ Schools discipline children with disabilities far more often than they do students without disabilities.¹⁰¹ Scholars link school discipline to the infamous school-to-prison pipeline,¹⁰² where children who face even one out-of-school suspension are more likely to have contact with the criminal justice system than are children without such a suspension.¹⁰³ Furthermore, the data suggests that it is the consequences of suspension itself, and not the fact of the maladaptive behavior, that leads to the contact.¹⁰⁴ In other words, among children exhibiting the same problematic behaviors, children who are suspended (compared to in-school discipline) are more likely to have the contact than those whose discipline came short of suspension.

In the 2009-2010 school year, schools suspended children labeled as emotionally disturbed at a rate seven times that of children labeled autistic (32.88% versus. 4.32%).¹⁰⁵ Schools suspended children labeled intellectually disabled at a rate more than twice that of children labeled autistic (10.17% versus. 4.32%).¹⁰⁶ In that time period, suspension rates for black boys with disabilities were highest in schools with a black enrollment of 30-40%.¹⁰⁷ As a school identified a greater percentage of children as emotionally disturbed, the suspension rate for all students, both black and white, with disabilities and without, increased.¹⁰⁸ A flipped pattern is observed for autism: “a 1-point increase in the rate of identification for autism predicted a 1% and 5%

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ In general, schools discipline black children at rates that far outpace their school enrollment. In the 2011-2012 academic year, while black children comprised 16% of the public school enrollment, they were 32% of students receiving an in-school suspension; 33% of students receiving a single out-of-school suspension; 42% of students receiving multiple out-of-school suspensions; and 34% of students expelled from school. DEPT OF EDUC. OFFICE FOR CIVIL RIGHTS, SNAPSHOT: SCHOOL DISCIPLINE 2 (2014) [hereinafter SNAPSHOT]. In the same time period, white students, 51% of the public school enrollment, comprised 40% of students receiving an in-school suspension; 36% of students receiving a single out-of-school suspension; 31% of students receiving multiple out-of-school suspensions; and 36% of students expelled from school. *Id.*

¹⁰¹ Students with disabilities are twice as likely to receive an out-of-school suspension as their non-disabled peers. SNAPSHOT, *supra* note 100, at 2.

¹⁰² Russell J. Skiba et al., *More Than a Metaphor: The Contribution of Exclusionary Discipline to a School-to-Prison Pipeline*, 47 EQUITY & EXCELLENCE IN EDUC. 546, 546 (2014).

¹⁰³ *Id.* at 551.

¹⁰⁴ *Id.* at 552.

¹⁰⁵ Losen et al., *supra* note 74, at 7 tbl. 2.

¹⁰⁶ *Id.*

¹⁰⁷ *Id.* at 9, tbl. 5.

¹⁰⁸ *Id.* at 10, tbl. 7.

decrease in the rate of suspension” for black and white students, respectively.¹⁰⁹ Higher rates of autism seemed to benefit all children when it came to discipline.

*Spending.*¹¹⁰ In the 1999-2000 academic year, states spent approximately 32% more on children with autism than they did for children diagnosed as emotionally disturbed, and 17% more than they did for children labeled intellectually disabled (\$18,790 versus \$14,147 and \$15,992, respectively).¹¹¹ This extra spending included greater funding for special education services such as school psychologists, social workers, school nurses, speech/language specialists, physical/occupational therapists, audiologists, vision specialists, other therapists, and personal health aides, as well as community-based training, extended time services, and summer school.¹¹²

Perceptions. Children labeled as emotionally disturbed and intellectually disabled are often thought to be uneducable, and their special education services are programs of control, not education. As Professor Theresa Glennon remarks,

The school lives of children with emotional disabilities are often marked by confusion, disjuncture, change, and rejection. These children are passed from one teacher and administrator to another, sent home for discipline, or shipped away to a residential school or hospital following a crisis. At these transition points, children may lose important instructional time. Even worse, these children receive repeated messages from the educational system that they are not wanted. Perceiving their school careers as failures, many children with emotional disabilities drop out. Stories of discontinuity

¹⁰⁹ *Id.* at 13, tbl. 9. These trends are disturbing given the IDEA’s requirements regarding discipline of students with disabilities. The law requires that schools must determine if a child’s disability was the cause of the misbehavior, and if so, to provide an education environment that gives the child the appropriate behavioral and academic supports. 20 U.S.C. § 1415(k)(1)(D–F). The disproportionate suspension of children with disabilities as compared to their non-disabled peers suggest that schools are not following the law. On the other hand, black children who are false negatives for special education services are denied the protections of the law, perhaps leading to the overrepresentation of black children without disabilities being suspended. I am grateful to an anonymous reviewer for raising this latter point.

¹¹⁰ States differ in how they fund special education programs. Thirty-three states fund through the state’s primary funding formula, while 12 states fund with categorical funds, and five fund through reimbursements. MARIA MILLARD & STEPHANIE ARAGON, STATE FUNDING FOR STUDENTS WITH DISABILITIES, 50-STATE DATABASE 1 (2014). Funding formulas typically allot funds for children with disabilities at a specific multiple of the standard allotment for children in general education. *Id.* at 2. States that fund via categorical funds give educational agencies a set amount of money that can only be spent on special education. *Id.* Reimbursement plans reimburse educational agencies for a portion of actual special education spending. *Id.*

¹¹¹ JAY G. CHAMBERS ET AL., TOTAL EXPENDITURES FOR STUDENTS WITH DISABILITIES, 1999-2000: SPENDING VARIATION BY DISABILITY SPECIAL EDUC. EXPENDITURE PROJECT 28 (2003).

¹¹² *Id.*

and failure are familiar and depressing to these children and their parents, as well as to school personnel and student advocates.¹¹³

On the other hand, children with autism (and no comorbid intellectual disability)¹¹⁴ are praised for their special gifts in environments that nurture their academic promise.¹¹⁵ A few studies point to a genetic connection between autism and prodigy and genius. Professors Ruthsatz et al., studied “prodigy families” and purportedly found chromosome-level evidence for a link between autism and prodigy.¹¹⁶ A similar study by the some of the same authors suggest that this link should prompt moving away from a perception that autism as an unwanted disorder:

The current study is a small one, and much more research needs to be done to elucidate the connections between highly gifted children and those with autism spectrum conditions. But the findings strongly suggest that such connections exist. They also caution against characterizing the genetic roots of conditions like autism—or other potentially disabling problems like mood disorders, which have been linked with exceptional creativity—as wholly negative. If the same “risk” genes may lead to both debilitating autism and great intellectual gifts, we need to understand them far better before we label them as unwanted.¹¹⁷

Increasingly, even entertainment and popular culture are adopting a similar view, portraying autism as a source of extraordinary gifts. TV shows such as *The Good Doctor* and *Atypical* both seek to normalize autism¹¹⁸ as well as cement a link between autism and extraordinary talents. Few mainstream and well-known normalization efforts exist for intellectual disabilities or emotional disturbances. Furthermore, the classic picture of the autism and genius link is a white, middle-class male.¹¹⁹ And perhaps because autism is “color-coded” as white, extensive attention and research is paid to the

¹¹³ Theresa Glennon, *Disabling Ambiguities: Confronting Barriers to the Education of Students with Emotional Disabilities*, 60 TENN. L. REV. 295, 295 (1992).

¹¹⁴ Jose M. Valderas et al., *Defining comorbidity: implications for understanding health and health services*, 7 ANNALS OF FAM. MED. 357, 358 (2009) (defining comorbidity as “the presence of more than 1 distinct condition in an individual”).

¹¹⁵ Such students are known as “twice-exceptional,” meaning they are both disabled and gifted. Renae D. Mayes & James L. Moore, III, *The Intersection of Race, Disability, and Giftedness*, 39 GIFTED CHILD TODAY 98, 98 (2016).

¹¹⁶ See Joanne Ruthsatz et al., *Molecular Genetic Evidence for Shared Etiology of Autism and Prodigy*, 79 HUM. HEREDITY 53, 53–59 (2015).

¹¹⁷ Maria Szalavitz, *What Genius and Autism Have in Common*, TIME (July 10, 2012) (reporting on JOANNE RUTHSATZ & KIMBERLY STEPHENS, *THE PRODIGY’S COUSIN: THE FAMILY LINK BETWEEN AUTISM AND EXTRAORDINARY TALENT* (2016)).

¹¹⁸ Even Sesame Street now has a Muppet living with autism. See David Folkenflik, *Julia, A Muppet With Autism, Joins The Cast Of ‘Sesame Street’*, NPR (Mar. 20, 2017, 5:02AM), <https://www.npr.org/2017/03/20/520577117/julia-a-muppet-with-autism-joins-the-cast-of-sesame-street> [<https://perma.cc/QKS6-VTPT>].

¹¹⁹ See *Atypical* (Robia Rashid, Netflix 2017); *The Good Doctor* (American Broadcasting Company 2017).

disorder, detracting from the other disorders that have been color-coded as black.¹²⁰

C. *The Bias Explanation*

All else being equal, the data suggests that parents of a child struggling with behavior and other challenges would prefer an autism categorization over other high-incidence labels. Likewise, given the scarce resources available in school districts for special education, schools are understandably resistant toward large outlays of resources associated with one disability label. As a result, the existing data suggests a dynamic: parents who know better seek an autism diagnosis both for its material and psychic benefits, while schools that know better resist both the label and resources due to the financial constraints.

As discussed above, Congress and the Department of Education consider institutional bias against black children to be the primary driver of racial disproportionality. The scholarly literature on the overrepresentation of black children in special education suggests the same.¹²¹

¹²⁰ How societal response to “epidemics” differs depending on the perceived race of the victims is apparent in the response to the opioid crisis. Many have noted the difference in response to the opioid crisis, color coded as white, to the War on Drugs response to the crack epidemic of the 1980s and 1990s. See German Lopez, *When a drug epidemic’s victims are white: How racial bias and segregation molded a gentler rhetorical response to the opioid crisis*, VOX (Feb. 11, 2018), <https://www.vox.com/identities/2017/4/4/15098746/opioid-heroin-epidemic-race> [https://perma.cc/2RF3-LSYA]; see also Wendell Pierce, *“The Wire” star: Opioids treated differently from crack because they affect white people*, THE HILL (Feb. 11, 2018), <http://thehill.com/blogs/blog-briefing-room/357366-the-wire-star-opioids-treated-differently-from-crack-because-it> [https://perma.cc/MYE8-2ZNP]; Vann R. Newkirk II, *What the ‘crack baby’ panic reveals about the opioid epidemic: Journalism in two different eras of drug waves illustrates how strongly race factors into empathy and policy*, THE ATLANTIC (Feb. 11, 2018), <https://www.theatlantic.com/politics/archive/2017/07/what-the-crack-baby-panic-reveals-about-the-opioid-epidemic/533763/> [https://perma.cc/W6ZE-APTX].

¹²¹ See, e.g., Ray McDermott et al., *The Cultural Work of Learning Disabilities*, 35 J. EDUC. RES. 12, 12 (2006) (arguing that institutional biases manifest in how educational spaces are “run by the survival-of-the-show-off-smartest logic of American education,” whereby teachers “interpret and explain children as disadvantaged, deprived, at risk, slow, LD, ELL (English Language Learner), ADD (Attention Deficit Disorder), emotionally disturbed, and so forth”); Aydin Bal et al., *A Situated Analysis of Special Education Disproportionality for Systemic Transformation in an Urban School District*, 35 REMEDIAL & SPECIAL EDUC. 3, 4 (2014) (summarizing existing literature that sees disproportionality as “multiply mediated educational phenomenon that results from the interactions of larger social and structural forces (e.g., race, class, access to high quality teachers), education policies (e.g., zero tolerance or English-only legislation), biases in referral and evaluations processes, and local school cultures (e.g., racialization of school discipline or culture of referral . . .”). Losen & Welner, *supra* note 8, at 412–17 (documenting trends in special education disproportionality that suggest systemic racial discrimination); Ong-Dean, *supra* note 8; Zanita E. Fenton, *Disabling Racial Repetition*, 31 J. L. INEQ. 77, 77 (2013) (“Because of institutionalized racism, combined with institutionalized ableism, extreme numbers of Black boys receive inadequate education.”); Carla O’Connor & Sonia D. Fernandez, *Race, Class, and Disproportionality: Reevaluating the Relationship Between Poverty and Special Education Placement*, 35 EDUC. RES. 6, 9 (2006) (arguing that reports that blame black overrepresentation in special education “lose sight of how schools systematically marginalize the developmental expressions and competencies of these children.

For many children, referral represents the first step in the special education process.¹²² The Department of Education's Office for Civil Rights ("OCR") places the problem of racially disproportionate referrals on in-school bias, reporting that their investigations have "uncovered instances in which similarly situated students of different races are treated differently in the referral process":

For example, district staff may refer only Latino and black students for evaluation, while not referring white students in the same class with similar behavior and academic records. Alternatively, district staff may fail to refer Latino or black students who are experiencing behavioral and academic difficulties that might be related to disability while referring white students with similar behavior and academic records in the same class.¹²³

Of course, because special education "has always served as a place for students who cannot or will not be assimilated,"¹²⁴ racial bias is likely to play an important causal role in how special education resources are allocated. The plethora of evidence documenting institutional bias in special education leaves little room for doubt that these factors work against black children.¹²⁵ Schools socialize black children into roles as "troublemakers" by disciplining black children more severely than they do white children for the same behaviors.¹²⁶ Labeling black children as troublemakers serves as a

Schools thereby fail in practical and pedagogical terms to build on the capacities with which the children enter school. Thus the underachievement of minority students is not a function of deficient parenting practices but is rooted in the "arbitrary" standards of schools that are represented as if they were rational and culturally neutral." (citations omitted).

¹²² 34 C.F.R. § 300.306.

¹²³ DEPT. OF EDUC., OFFICE FOR CIVIL RIGHTS, DEAR COLLEAGUE LETTER: PREVENTING RACIAL DISCRIMINATION IN SPECIAL EDUCATION 11 (Dec. 28, 2016) [hereinafter DEAR COLLEAGUE LETTER]; see also Sarah E. Redfield & Theresa Kraft, *What Color is Special Education?*, 41 J. L. & EDUC. 129, 133 (2012) ("Of course, color is certainly not the criterion for separation as it was in Brown, or even a stated criterion for referral, identification, or placement in special education—in fact, it is particularly not a criterion. But a growing research base shows that color is likely a factor considered at least implicitly when finding and making those first critical referrals and subsequent educational decisions as to minority children.").

¹²⁴ Ferri & Connor, *Subverting of Brown*, *supra* note 7, at 60.

¹²⁵ *But see* Paul L. Morgan & George Farkas, *Evidence and Implications of Racial and Ethnic Disparities in Emotional and Behavioral Disorders Identification and Treatment*, 41 BEHAV. DISORDERS 122, 122 (2016) (arguing that when "controlling for individual-level academic achievement and behavior, which are known to strongly predict children's likelihood of receiving special education services," it is white children who are overrepresented in special education); see also Jacob Hibbel et al., *Who Is Placed into Special Education?*, 83 SOC. EDUC. 312 (2010) (arguing the same); Paul L. Morgan & George Farkas, *Are We Helping All the Children That We Are Supposed to be Helping?*, 45 EDUC. RES. 226 (2016) (arguing the same, and responding to criticism). If it is the case that schools underidentify black children for special education, then the autism disparities in favor of white children is even more distressing.

¹²⁶ ANN A. FERGUSON, BAD BOYS: PUBLIC SCHOOLS IN THE MAKING OF BLACK MASCULINITY 79–80, 216–21 (2000); Kimberlé Crenshaw, *Black Girls Matter: Pushed Out, Overpoliced and Undeprotected*, AFRICAN AM. POL'Y F. 1, 6 (2014).

self-fulfilling prophecy.¹²⁷ In one study, Yale University researchers showed that teachers tend to “look” for misbehavior in black children more than in white children, even when no misbehavior is apparent.¹²⁸ Black children’s overrepresentation in the categories of emotional disturbance and intellectual disability may reflect a new form of intentional racial segregation and punishment;¹²⁹ special education is an alternative to getting rid of black children from white schools all together.

Thus, the bias explanation for racial disparities in special education is likely significant, and I am not challenging that finding. Given what we know about how black children are treated in schools, it is not inconceivable that schools already hostile to black children are using special education as a dumping ground. But the bias explanation is necessarily incomplete because it fails to address the procedural requirements of the IDEA, which determine how a child is both identified for special education and the services to which she is entitled. A complete explanation must reckon with that process, and consider the primary drivers of that process: parents.

II. RESOURCE DISTRIBUTION AND EDUCATIONAL STRATIFICATION

A. *Distributing the IDEA*

In the first case requiring the Supreme Court to interpret the IDEA’s substantive guarantee of a free appropriate public education, the Court decided the case of Amy Rowley, a deaf child whose parents were fighting their school district to provide a sign language interpreter.¹³⁰ Perhaps because Amy could read lips, and “‘despite the fact that she understands considerably less of what goes on in class than she could if she were not deaf’ and thus ‘is not learning as much, or performing as well academically, as she would without her’ disability,¹³¹ the Court declined to “impos[e] any particular substantive educational standard upon the States.”¹³² Instead, the Court read the IDEA’s “emphasis on compliance with procedures giving parents and guardians a large measure of participation at every stage of the administrative process . . . demonstrates the legislative conviction that adequate compliance with the procedures prescribed would in most cases assure much

¹²⁷ Ray Rist, *Student Social Class and Teacher Expectations: The Self-Fulfilling Prophecy in Ghetto Education*, 40 HARV. EDUC. REV. 411, 413 (1970).

¹²⁸ WALTER S. GILLIAM ET AL., DO EARLY EDUCATORS’ IMPLICIT BIASES REGARDING SEX AND RACE RELATE TO BEHAVIOR EXPECTATIONS AND RECOMMENDATIONS OF PRESCHOOL EX-PULSIONS AND SUSPENSIONS? 11–12 (2016).

¹²⁹ See Fenton, *supra* note 121, at 97 (“One can only wonder if, in fact, labeling Black males as having an intellectual disability is a form of punishment that furthers the tacit objective of educating as few Black male children as possible.”).

¹³⁰ Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist., Westchester Cty. v. Rowley, 458 U.S. 176, 209 (1982).

¹³¹ *Id.* at 185.

¹³² *Id.* at 200.

if not all of what Congress wished in the way of substantive content in an IEP.”¹³³

Those procedures begin when a parent or teacher refers a child upon suspicion of a disability.¹³⁴ If referred by the school, the school must notify and receive consent from the child’s parent for an evaluation.¹³⁵ An evaluation must include assessments in all areas of possible disability.¹³⁶ After evaluation, a team of teachers,¹³⁷ administrators and clinicians, together with the parent, determine whether the child is eligible for special education services.¹³⁸ The team must make two determinations: one, does the child live with one or more of thirteen disabilities; and two, does that disability adversely affect her academic progress.¹³⁹

If the parent disagrees with the team’s decision, either that the child is not eligible because she fails either part of the eligibility test, or because the team finds she is eligible, but the parent disagrees with the disability determination, she can request the school district pay for an independent educational evaluation (“IEE”).¹⁴⁰ The school can agree to pay, or can file a due

¹³³ *Id.* at 205.

¹³⁴ 34 C.F.R. § 300.300.

¹³⁵ 20 U.S.C. § 1414(a)(1)(A) (“A State educational agency, other State agency, or local educational agency shall conduct a full and individual initial evaluation in accordance with this paragraph and subsection (b), before the initial provision of special education and related services to a child with a disability under this subchapter.”).

¹³⁶ 34 C.F.R. § 300.304(4).

¹³⁷ 20 U.S.C. § 1414(d)(1)(B) (“The term ‘individualized education program team’ or ‘IEP Team’ means a group of individuals composed of (i) the parents of a child with a disability; (ii) not less than 1 regular education teacher of such child (if the child is, or may be, participating in the regular education environment); (iii) not less than 1 special education teacher, or where appropriate, not less than 1 special education provider of such child; (iv) a representative of the local educational agency who (I) is qualified to provide, or supervise the provision of, specially designed instruction to meet the unique needs of children with disabilities; (II) is knowledgeable about the general education curriculum; and (III) is knowledgeable about the availability of resources of the local educational agency; (v) an individual who can interpret the instructional implications of evaluation results, who may be a member of the team described in clauses (ii) through (vi); (vi) at the discretion of the parent or the agency, other individuals who have knowledge or special expertise regarding the child, including related services personnel as appropriate; and (vii) whenever appropriate, the child with a disability.”).

¹³⁸ 20 U.S.C. § 1401(3) (“The term “child with a disability” means a child—(i) with intellectual disabilities, hearing impairments (including deafness), speech or language impairments, visual impairments (including blindness), serious emotional disturbance (referred to in this chapter as “emotional disturbance”), orthopedic impairments, autism, traumatic brain injury, other health impairments, or specific learning disabilities; and (ii) who, by reason thereof, needs special education and related services.”).

¹³⁹ *Id.*

¹⁴⁰ 20 U.S.C. § 1414; 34 C.F.R. § 300.502(a)(2) (“Each public agency must provide to parents, upon request for an independent educational evaluation, information about where an independent educational evaluation may be obtained, and the agency criteria applicable for independent educational evaluations . . . Independent educational evaluation [at public expense] means an evaluation conducted by a qualified examiner who is not employed by the public agency responsible for the education of the child in question and . . . Public expense means that the public agency either pays for the full cost of the evaluation or ensures that the evaluation is otherwise provided at no cost to the parent.”).

process complaint to argue that the second evaluation is not necessary.¹⁴¹ A parent can introduce evidence from an independent source at any time, regardless of whether the school pays or not.¹⁴²

Once a child is found eligible and the team agrees on the disability label, the team moves to developing the child's Individualized Education Plan ("IEP"). Developing the IEP entails a "fact-intensive exercise . . . informed not only by the expertise of school officials, but also by the input of the child's parents or guardians."¹⁴³ The team documents the child's strengths and weaknesses and determines measurable goals and timelines for meeting those goals.¹⁴⁴ The IEP should document the extent to which the child will be included in the general education classroom, with the goal being the child will be educated in the least restrictive environment ("LRE").¹⁴⁵ An educational agency has fulfilled its substantive obligation under the IDEA if it offers to the child with a disability "an IEP reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances."¹⁴⁶

Schools are required to include parents in all aspects of the special education process. Those requirements include making sure IEP meetings are held at a time convenient to the parent, and providing language interpreters if necessary.¹⁴⁷ If the school district refuses to provide the special educa-

¹⁴¹ 34 C.F.R. § 300.502 (b)(2) ("If a parent requests an independent educational evaluation at public expense, the public agency must, without unnecessary delay, either—(i) File a due process complaint to request a hearing to show that its evaluation is appropriate; or (ii) Ensure that an independent educational evaluation is provided at public expense, unless the agency demonstrates in a hearing . . . that the evaluation obtained by the parent did not meet agency criteria.").

¹⁴² 34 C.F.R. § 300.502 (b)(3) ("If the public agency files a due process complaint notice to request a hearing and the final decision is that the agency's evaluation is appropriate, the parent still has the right to an independent educational evaluation, but not at public expense.").

¹⁴³ *Andrew F. v. Douglas Cty. Sch. Dist.*, 137 S. Ct. 988, 999 (2017).

¹⁴⁴ 20 U.S.C. § 1414 (d)(3)(A) (2016) ("In developing each child's IEP, the IEP Team, subject to subparagraph (C), shall consider—(i) the strengths of the child; (ii) the concerns of the parents for enhancing the education of their child; (iii) the results of the initial evaluation or most recent evaluation of the child; and (iv) the academic, developmental, and functional needs of the child."); 20 U.S.C. § 1414(d)(1) (2016).

¹⁴⁵ 34 C.F.R. § 300.114 (a)(2) ("Each public agency must ensure that—(i) To the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, are educated with children who are nondisabled; and (ii) Special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only if the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.").

¹⁴⁶ *Andrew F.*, 137 S. Ct. at 988.

¹⁴⁷ 34 C.F.R. § 300.501(b) ("(1) The parents of a child with a disability must be afforded an opportunity to participate in meetings with respect to—(i) The identification, evaluation, and educational placement of the child; and (ii) The provision of FAPE to the child. (2) Each public agency must provide notice . . . to ensure that parents of children with disabilities have the opportunity to participate in meetings described in paragraph (b)(1) of this section. (3) A meeting does not include informal or unscheduled conversations involving public agency personnel and conversations on issues such as teaching methodology, lesson plans, or coordination of service provision. A meeting also does not include preparatory activities that public agency personnel engage in to develop a proposal or response to a parent proposal that will be discussed at a later meeting"); 34 C.F.R. § 300.501 (c) ("(1) Each public agency must ensure

tional services that a parent requests, the IDEA provides extensive procedural protections to unhappy parents.¹⁴⁸ If a parent believes that the school district has violated any aspect of the law, she may file a due process complaint to obtain a hearing or an administrative complaint to obtain an investigation by the state educational agency.¹⁴⁹ Schools and parents can agree to mediation in either forum.¹⁵⁰ Parents also have the option of filing a civil action in state or federal court following the exhaustion of administrative remedies.¹⁵¹ Schools must resolve parents' claims within 60 days,¹⁵² unless the parent agrees to a longer timeline. Schools and parents can alternatively agree to mediation.¹⁵³ Parents also have the option of filing a civil complaint in federal court,¹⁵⁴ and can represent themselves.¹⁵⁵ If a parent places a child in a private school without the consent of the school district, but a hearing officer or court finds that the IEP the school offered was inappropriate, a court can order a school district to pay for private school tuition.¹⁵⁶

that a parent of each child with a disability is a member of any group that makes decisions on the educational placement of the parent's child. . . . (3) If neither parent can participate in a meeting in which a decision is to be made relating to the educational placement of their child, the public agency must use other methods to ensure their participation, including individual or conference telephone calls, or video conferencing. (4) A placement decision may be made by a group without the involvement of a parent, if the public agency is unable to obtain the parent's participation in the decision. In this case, the public agency must have a record of its attempt to ensure their involvement.”).

¹⁴⁸ 34 C.F.R. §§ 300.506–300.517.

¹⁴⁹ 34 CFR §§ 300.151–300.153.

¹⁵⁰ 34 C.F.R. § 300.506.

¹⁵¹ 20 U.S.C. § 1415 (Parents must have an opportunity to present a complaint “with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to such child.”).

¹⁵² 34 C.F.R. § 300.152(a) (“Each SEA [State Educational Agency] must include in its complaint procedures a time limit of 60 days after a complaint is filed under § 300.153 to—(1) Carry out an independent on-site investigation, if the SEA determines that an investigation is necessary; (2) Give the complainant the opportunity to submit additional information, either orally or in writing, about the allegations in the complaint; (3) Provide the public agency with the opportunity to respond to the complaint, including, at a minimum—(i) At the discretion of the public agency, a proposal to resolve the complaint; and (ii) An opportunity for a parent who has filed a complaint and the public agency to voluntarily engage in mediation consistent with § 300.506; (4) Review all relevant information and make an independent determination as to whether the public agency is violating a requirement of Part B of the Act or of this part; and (5) Issue a written decision to the complainant that addresses each allegation in the complaint and contains—(i) Findings of fact and conclusions; and (ii) The reasons for the SEA's final decision.”).

¹⁵³ *Id.*

¹⁵⁴ 34 C.F.R. § 300.516(a) (“Any party aggrieved by the findings and decision made under §§ 300.507 through 300.513 or §§ 300.530 through 300.534 who does not have the right to an appeal under § 300.514(b), and any party aggrieved by the findings and decision under § 300.514(b), has the right to bring a civil action with respect to the due process complaint notice requesting a due process hearing under § 300.507 or §§ 300.530 through 300.532. The action may be brought in any State court of competent jurisdiction or in a district court of the United States without regard to the amount in controversy.”).

¹⁵⁵ See *Winkelman v. Parma City School District*, 550 U.S. 516, 533 (2007).

¹⁵⁶ 20 U.S.C. § 1412 (subject to some limitations, “[i]f the parents of a child with a disability, who previously received special education and related services under the authority of a public agency, enroll the child in a private elementary school or secondary school without the consent of or referral by the public agency, a court or a hearing officer may require the

To effectuate these procedures and fulfill its substantive requirement to provide every child with a disability a free appropriate public education, schools are tasked with distributing federal, state, and local funds across a wide range of children classified as a child with a disability. Although the Department of Education devotes almost one-third of its budget to special education,¹⁵⁷ Congress has never lived up to its funding promise,¹⁵⁸ leaving the States and local educational agencies to foot the rest of the bill.

It is not surprising, then, that school districts fail to make public and widely available the different services available to children with disabilities in their schools. Indeed, it is likely that if every child who was entitled to special education's substantive guarantee of a free appropriate public education received that individualized guarantee, the system may collapse. Without enlarging the pie of funds, bringing more children to the table would mean that all children would get less, and perhaps no child would receive a free appropriate public education fully tailored to her circumstances. Thus, schools have little choice but to ration as best they can.

Historically, educational benefits have largely gone to the most privileged in our society. Contemporarily, those benefits are conferred according to the advocacy of individual parents for individual children, reproducing stratification in a process sociologists call social reproduction.

B. *Distributing Stratification*

Social reproduction theories comprise much of the work surrounding the role of parenting and schools in maintaining inequality over generations. Social reproduction theories attempt to explain how and why the social order at time one relates to the social order at time two. Specifically, social reproduction theories seek to uncover how social institutions contribute to "the reproduction of the structure of power relationships and symbolic relationships" between social groups.¹⁵⁹

Almost all reproduction theories begin with the premise that socioeconomic advantage or disadvantage alone cannot account for the intergenerational reproduction of status hierarchies without also considering the socialization role of schooling.¹⁶⁰ Nor can differences in cognitive abilities or

agency to reimburse the parents for the cost of that enrollment if the court or hearing officer finds that the agency had not made a free appropriate public education available to the child in a timely manner prior to that enrollment").

¹⁵⁷ For the 2015 fiscal year, the Department of Education's \$37.3 million elementary and secondary special education on-budget funds included \$12.5 million for special education. DIGEST, *supra* note 74, at 769 tbl. 401.30.

¹⁵⁸ Michelle Diament, *White House Urged to Fully Fund IDEA*, DISABILITY SCOOP (Feb. 18, 2014), <https://www.disabilityscoop.com/2014/02/18/white-house-fund-idea/19120/> [<https://perma.cc/J2S5-H27H>].

¹⁵⁹ Pierre Bourdieu, *Cultural Reproduction and Social Reproduction*, in 3 CULTURE: CRITICAL CONCEPTS IN SOCIOLOGY 63, 63 (Chris Jenks ed., 2003).

¹⁶⁰ See, e.g., Samuel Bowles & Herbert Gintis, *Schooling in Capitalist America Revisited*, 75 SOCIOLOGICAL EDUCATION 1, 1 (2002) (arguing that while schools contribute to the cognitive develop-

human capital (skills) fully account for the intergenerational reproduction of inequality.¹⁶¹ Thus, reproduction theories tend to focus on the role of schooling as mediating between parental status and that of their children because schooling applies to all children, plays a primary role in economic success, and directly relates to children's life chances.

The work of French sociologist Pierre Bourdieu and his intellectual offspring set the foundation for a *cultural* account of social reproduction in schools.¹⁶² Before delving into the sociological theory, let me first illustrate Bourdieu's theory with an analogy that will be familiar to legal audiences.

Students come to law school with different degrees of cultural skills appropriate for law school.¹⁶³ Some, perhaps those with lawyers in their families or those with a middle-class or affluent background, may be fully prepared to engage in classrooms where a certain amount of hubris and confidence is valued; where conversation is structured in a particular form;¹⁶⁴ and where students are expected to not only be recipients of knowledge, but to be co-facilitators of knowledge production in the classroom. In addition, some students seem to know the informal rules of law school, such as going to office hours "just to talk," knowing that these informal relationships with professors could lead to professional opportunities not widely publicized to the rest of the law school. Many of them (but not all) may also seem to recognize that thin line between engaged student and "gunner," a line that, if crossed, might alienate a professor.

Other students, perhaps those who are women, first-generation college students or law students, or students from racial minority groups, may enter law school either unaware of these informal rules or without the disposition

ment of students, schools also "prepare people for the adult work rules by socializing people to function well and without complaint in the hierarchical structure of the modern corporation").

¹⁶¹ See SAMUEL BOWLES & HERBERT GINTIS, *SCHOOLING IN CAPITALIST AMERICA: EDUCATIONAL REFORM AND THE CONTRADICTIONS OF ECONOMIC LIFE*, 102–22 (1976); Bowles & Gintis, *supra* note 160, at 1 (arguing that while cognitive skills are important in the economy and in predicting individual economic success, the contribution of schooling to individual economic success could be explained only partly by the cognitive development fostered in schools).

¹⁶² See generally PIERRE BOURDIEU, *DISTINCTION: A SOCIAL CRITIQUE OF THE JUDGMENT OF TASTE* (1984); Bourdieu, *supra* note 25; BOURDIEU, *supra* note 30; Bourdieu, *supra* note 159.

¹⁶³ For a more complete explication of the many ways in which legal education reproduces status hierarchies, see Lucille A. Jewel, *Bourdieu and American Legal Education: How Law Schools Reproduce Social Stratification and Class Hierarchy*, 56 *BUFF. L. REV.* 1155 (2008).

¹⁶⁴ Jewel, *supra* note 163, at 1198 ("Law students learn to pick up 'mannerisms, ways of speaking, gestures, which would be 'neutral' if they were not emblematic of membership in the white middle class male universe of the bar.' A rational, measured tone is cultivated by observing law teachers comment, critique, and correct student case analyses in the Langellian/Socratic classroom"); *id.* at 1200 ("Law school stresses a measured, unemotional, and grammatically sound form of communication, which correlates to the preferred communication style of the upper-class. In so far as the use of good grammar and tone is an upper-class attribute, law schools teach students that proper grammar and a formal tone will cause readers to perceive text as legitimate, whereas bad grammar or a strident, emotional tone will cause the reader to view a text and its author with suspicion.").

to engage in the way that is expected.¹⁶⁵ These students might see the professor as an expert and see themselves as receptacles of the professor's knowledge. They may look with confusion as their peers challenge professors in ways that seem rude. They may only go to office hours if they have a content-related question. They may not dare to raise their hand in class unless they are sure of their answer, in fear of looking "stupid" or asking a "stupid question," no matter how often a professor tells them that their fear is unfounded.

On average, the latter set of students are likely not less intelligent than the former set, nor are they less capable of legal analysis. But law professors may inadvertently treat them as such. Law professors too are culturally disposed to engage in the classroom in a way that mirrors that of the former set of students; indeed, if they were not, it is unlikely that they would find themselves in legal academia at all. Law professors may be unaware of the benefits they confer on a certain set of students; for example, law professors may bestow coveted research assistantships to those students who come to office hours "just to talk." And sometimes, even when the latter students attempt to behave like the former, their efforts are rebuffed because they do not "fit" their perceived social position.

The law school example illustrates Bourdieu's argument that schooling practices privilege the culture of high-status groups.¹⁶⁶ The French social structure mostly concerned Bourdieu,¹⁶⁷ but the three main components—*habitus*, *field*, and *cultural capital*—form the crux of a theory that can be applied to any social topography. I supplement the fundamental contours of the theory with insights from other sociologists.

Bourdieu's *habitus* is a "system of dispositions which acts as a mediation between structures and practices."¹⁶⁸ An individual's *habitus* incorporates cultural knowledge, practices, and demeanors. In families, *habitus* is not instantaneously transmitted; parents transmit *habitus* through everyday experiences that socialize the child into the cultural group.¹⁶⁹ *Habitus* can also be thought to include what sociologist Ann Swidler called "strategies of action" that a group develops to solve problems specific to their social status.¹⁷⁰ *Habitus*, thus, "acts within [individuals] as the organizing principle of their actions[.]"¹⁷¹

¹⁶⁵ For a specific example of the foreignness of elite law school culture to some, especially women, see Lani Guinier et al., *Becoming Gentlemen: Women's Experiences at One Ivy League Law School*, 143 U. PA. L. REV. 1 (1994).

¹⁶⁶ Jewel, *supra* note 163, at 1157–58 (explaining why Bourdieu's work explains the experience of law school, where "despite its egalitarian and democratic ideals, western education contributes to inequality by allowing 'inherited cultural differences to shape academic achievement and occupational attainment'").

¹⁶⁷ BOURDIEU, *supra* note 159.

¹⁶⁸ *Id.* at 64.

¹⁶⁹ See LAREAU, *supra* note 29, at 276.

¹⁷⁰ Swidler, *supra* note 21, at 276 n.9.

¹⁷¹ BOURDIEU, *supra* note 30, at 17.

The *field* refers to a space of social interaction, where “social agents . . . act[] *relationally*”.¹⁷² The field is a “marketplace” where different *habitus* vary in exchangeability to other valuable resources. Those *habitus* that best fit with the rules of the field become cultural “capital,” which can then be exchanged for other resources in the field and beyond.¹⁷³

The field as a site of resource contestation is not fixed; the rules may change depending on who is playing, typically favoring the elites who shape the rules. Thus, what culture is capital depends on understanding the situated spaces in which actors behave and the resources for which they are competing. In other words, the “institutions in the field set the ‘rules of the game’ and capital gains its value only in the light of the specific field in which it is put to use.”¹⁷⁴

Cultural capital accumulates over time as social actors are inculcated into the *habitus* of their social group as it interacts with the social spaces the group typically finds themselves in. Culture is capital in competitive fields where evaluative standards of what is “right” or “best” are subjective and resources are scarce. Which *habitus* has value is not randomly distributed. Elites “impose the principle of hierarchization most favorable”¹⁷⁵ to themselves, thus set the field’s evaluative standards and, in turn, establish their own *habitus* as the culture with capital.¹⁷⁶ Because fields vary in resource composition and which group comprises the dominant group, the field is key in understanding how different institutions privilege culture in ways that contribute to social stratification.¹⁷⁷

Social reproduction through cultural capital offers legal scholars another way to explain enduring class and race stratification.

¹⁷² Annette Lareau et al., *The Rules of the Game and the Uncertain Transmission of Advantage: Middle-class Parents’ Search for an Urban Kindergarten*, 89 SOC. EDUC. 279, 281 (2016) (describing Bourdieu’s conceptualization of the field).

¹⁷³ Bourdieu, *supra* note 25, at 244–45.

¹⁷⁴ Lareau et al., *supra* note 172, at 281.

¹⁷⁵ PIERRE BOURDIEU AND LOIC J. D. WACQUANT, AN INVITATION TO REFLEXIVE SOCIOLOGY 101 (1992).

¹⁷⁶ Mads Meier Jæger & Richard Breen, *A Dynamic Model of Cultural Reproduction*, 121 AM. J. SOC. 1079, 1085 (2016) (explaining, for example, how “children who possess cultural capital are perceived as more academically gifted than children who do not (thus leading to better subjective evaluations by teachers and better grades.) Moreover, they are treated in a more favorable way by teachers, which may lead to a better learning environment and so to better educational performance.”).

¹⁷⁷ Furthermore, it is important to attend to the resources for which social groups are competing; not all forms of cultural capital, even in the same a field, will be useful to exchange depending on the resource. For example, sociologist Prudence Carter showed how low-income black youth used a *habitus* not valued by school officials to nonetheless create boundaries and stratification among themselves. The same *habitus* that school officials evaluated to be deficient was valuable when it came to generating esteem and respect within the peer group. Prudence L. Carter, “Black” Cultural Capital, Status Positioning, and Schooling Conflicts for Low-Income African American Youth, 50 SOC. PROBS. 136, 136 (2003).

1. *Class Stratification*

American sociologist Annette Lareau in her book, *Unequal Childhoods*, illustrated how parents transmit class-specific *habitus* to children in ways that reproduce class hierarchy, specifically through intensive parental involvement.¹⁷⁸ Intensive middle-class parental involvement in schools is a pervasive but relatively recent phenomenon;¹⁷⁹ many grandparents today would lament how much their children are involved in the grandchildren's academic and personal lives. Lareau argued that a parent's *habitus* worked both to transmit *habitus* to the child and to generate institutional favor for their child,¹⁸⁰ the latter of which I focus on in this paper. While parenting *habitus* is made possible or is constrained by a group's economic capital, which affords parents the time and resources to invest in cultural capital, Lareau's argument, like Bourdieu, did not depend solely on the fact of money. Rather, she showed that how people used money matters.

Lareau argued that parenting *habitus* falls along class lines, where middle-class parents engage in a time- and resource-intensive form of parenting where childhood is a time for "concerted cultivation." Concerted cultivation is made possible by money, education, and time for enrolling children in multiple activities, monitoring teachers and schools, advocating for special treatment, and imbuing children with a sense of entitlement.

On the other hand, working-class and poor parents engage in a more hands-off form of parenting, influenced by their tenuous position in the social hierarchy. Working class and poor parents engage in "natural growth" by allowing children to have autonomous relationships with other children (including managing conflict on their own), to manage their free time, but also to defer to adult authority, including school officials.¹⁸¹

Objectively, neither parenting *habitus* is superior to the other outside of the school and other elite institutions. Both types of parenting transmit important skills and attitudes to their children. For example, Lareau argued that, in contrast to middle-class children, poor and working-class children are more polite and respectful, had better relationships with their siblings, and enjoyed close ties with extended family.¹⁸² But in the field of schooling, teachers report that they want parents to be "partners"¹⁸³ in education and feel it is parents' "responsibility to provide enriching experiences, skill de-

¹⁷⁸ LAREAU, *supra* note 29.

¹⁷⁹ PETER N. STEARNS, *ANXIOUS PARENTS: A HISTORY OF MODERN CHILDREARING IN AMERICA* 1–5 (2003).

¹⁸⁰ LAREAU, *supra* note 29, at 163–64.

¹⁸¹ *Id.* at 36.

¹⁸² *Id.* at 39.

¹⁸³ ANNETTE LAREAU, *HOME ADVANTAGE: SOCIAL CLASS AND PARENTAL INTERVENTION IN ELEMENTARY EDUCATION* 15 (2d ed. 2000).

velopment, and advocacy.”¹⁸⁴ This expectation fits the parenting *habitus* of the middle class.

2. Racial Stratification

In her 2003 study, Lareau reported to find little racial differences among parents of the same class in the aspects of *habitus* she studied,¹⁸⁵ although she noted that black middle-class parents had racial concerns that white middle-class parents did not.¹⁸⁶ Others have extended her work to look closer at the influence of race on black middle-class cultural capital. Two themes arise from this work. One is that the black middle-class is itself not a monolith,¹⁸⁷ an important insight when attempting to compare the experiences of the white and black middle-class. It is an analytical mistake to attempt to “control” for class simply by comparing the “typical” black mid-

¹⁸⁴ Susan A. Dumais et al., *Concerted Cultivation and Teachers’ Evaluations of Students: Exploring the Intersection of Race and Parents’ Educational Attainment*, 55 SOC. PERSP. 17, 19 (2012); Joyce L. Epstein, *Attainable Goals? The Spirit and Letter of the No Child Left Behind Act on Parental Involvement*, 78 SOC. EDUC. 179, 180 (2005) (noting that the 1997 amendments to the Elementary and Secondary Education Act, and the 2004 amendments to the same (known as No Child Left Behind (NCLB)) pushed parents to take more responsibility for their children’s education. This requirement stressed the “shared responsibilities of educators and families for children’s learning and success”). While much of NCLB was abandoned in the 2010 reauthorization of the Elementary and Secondary Education Act, schools remained required to set aside at least one percent of their funds to encourage parental involvement in schools with high percentages of disadvantaged children (known as Title I schools). 20 U.S.C. § 6318(a)(3)(A). ESEA also requires low-income schools receiving Title I funding to implement specific plans to involve parents in all areas of their child’s education. 20 U.S.C. § 6318(d) (“As a component of the school-level parent and family engagement policy . . . each school served under this part shall jointly develop with parents for all children served under this part a school-parent compact that outlines how parents, the entire school staff, and students will share the responsibility for improved student academic achievement and the means by which the school and parents will build and develop a partnership to help children achieve the State’s high standards.”). See generally H. Rutherford Turnbull III, *Individuals With Disabilities Education Act Reauthorization: Accountability and Personal Responsibility*, 26 REMEDIAL & SPECIAL EDUC. 320 (2005) (noting that this focus on responsibility among the most vulnerable populations coincided with a general push toward accountability and responsibility in social welfare programs like the Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104–193, 110 Stat. 2105).

¹⁸⁵ LAREAU, *supra* note 29, at 240 (explaining that “[i]n terms of the areas . . . focused on—how children spend their time, the way parents use language and discipline in the home, the nature of the families’ social connections, and the strategies used for intervening in institutions—white and Black parents engaged in very similar, often identical, practices with their children”).

¹⁸⁶ *Id.* at 120–21 (highlighting how for one middle-class black family, the parents were “very concerned about the impact of race on [their child]. They monitor[ed] his experiences closely,” including making sure he was never the only black child in an activity.).

¹⁸⁷ KARYN LACY, *BLUE CHIP BLACK: RACE, CLASS AND STATUS IN THE NEW BLACK MIDDLE CLASS* 33 (2007); Karyn Lacy, *Race, Privilege and the Growing Class Divide*, 38 ETHNIC & RACIAL STUD. 1246, 1249 (2014) (“[T]he core [black] middle class enjoys many privileges—an individual income of at least \$50,000 annually, their own home in a safe neighborhood, a college degree, and a white-collar job, but money is tight and core middle-class blacks live on a budget, elevating needs over luxuries.”).

dle-class family with the “typical” white middle-class family, because what is typical of each group reflects different experiences of class.

Another insight, and the one on which I will focus here, is the racial differences in middle-class parents’ *habitus*. It is here that a focus on how bias may have significant explanatory value in understanding parents’ accumulation “efforts to activate their capital [accumulation and knowledge of the field], the skill at which they do so [strategic effectiveness], and the institutional response to the activation of resources.”¹⁸⁸

Cultural capital accumulation. Many aspects of *habitus* depend directly on economic capital. Mechanisms that contribute to the income and wealth divide between whites and blacks—housing discrimination,¹⁸⁹ disparities in educational attainment,¹⁹⁰ employment discrimination,¹⁹¹ health disparities, underfunded schools, among others—are instances of bias that influence a parent’s accumulation of economic capital and the ability to convert that capital into cultural capital. Economic capital allows its holder to spend time to accumulate cultural capital; for example, economic capital allows parents to take time off from work to volunteer in the classroom. But the typical black middle-class family is positioned in what sociologist Karyn Lacy calls the “core” black middle-class, a group with a more tenuous economic foothold in the middle-class than their white counterparts. Among families headed by a college graduate, the typical white family earns approximately 20% more than does the typical black family,¹⁹² and middle-class black families possess

¹⁸⁸ LAREAU, *supra* note 29, at 277.

¹⁸⁹ Note, *The Creation of Homeownership: How New Deal Changes in Banking Regulations Simultaneously Made Homeownership Accessible to Whites and Out of Reach for Blacks*, 115 YALE L. J. 186 (2005) (showing how, historically, bias and discrimination in federal lending programs led to black families’ systematic exclusion in homeownership, a key wealth-building activity). Today, blacks continue to have relatively lower rates of homeownership than their white counterparts, see U.S. CENSUS BUREAU, QUARTERLY RESIDENTIAL VACANCIES AND HOMEOWNERSHIP, SECOND QUARTER 2017 tbl. 7 (July 27, 2017), <https://www.census.gov/housing/hvs/files/qtr217/Q217press.pdf> [<https://perma.cc/54TY-TJSP>]; and across all income groups, see David Rusk, THE “SEGREGATION TAX”: THE COST OF RACIAL SEGREGATION TO BLACK HOMEOWNERS, CENTER ON URBAN AND METROPOLITAN POLICY, THE BROOKINGS INSTITUTE (2001), <https://www.brookings.edu/wp-content/uploads/2016/06/rusk.pdf> [<https://perma.cc/V2SN-NNUZ>]; and their houses are typically worth less than a comparable white home, *id.*

¹⁹⁰ See CAMILLE L. RYAN & KURT BAUMAN, EDUCATIONAL ATTAINMENT IN THE UNITED STATES: 2015, UNITED STATES CENSUS BUR. 2 tbl. 1 (2016) (33% of whites have bachelor’s degrees or more, only 23% of blacks have bachelor’s degrees or more).

¹⁹¹ See Lincoln Quillian et al., *Meta-analysis of field experiments shows no change in racial discrimination in hiring over time*, 114 PROC. NATL. ACAD. SCI. 10870 (2017) (showing how, in a meta-analysis of 24-28 studies since 1989, employment discrimination against blacks has remained unchanged).

¹⁹² PEW RESEARCH CENTER, ON VIEWS OF RACE AND INEQUALITY, BLACKS AND WHITES ARE WORLDS APART 18 (2016) (“While education is widely viewed as the key to upward mobility for all races, the Pew Research Center analysis finds that the benefits of schooling often flow in unequal measure to blacks relative to whites. For example, among those with a bachelor’s degree, blacks earn significantly less than whites (\$82,300 for black householders vs. \$106,600 for whites). In fact, the income of blacks at all levels of educational attainment lags behind that of their white counterparts.”).

a fraction of middle-class white families' wealth.¹⁹³ These objective differences in material resources directly diverge the experiences of white middle-class families and black middle-class families in their attempt to accumulate cultural capital.

Knowledge of the field. Furthermore, culture is only capital to the extent that it conforms to the field's formal and informal requirements. That knowledge, however, is often generated in social networks from which some parents are systematically excluded. Groups engage in homophily, whereby "contact between similar people occurs at a higher rate than among dissimilar people."¹⁹⁴ These racially restrictive social networks "limit[s] people's social worlds in a way that has powerful implications for the information they receive, the attitudes they form, and the interactions they experience."¹⁹⁵

For example, Professors Stephen Caldas and Linda Cornigans explain how local PTAs systemically exclude racial minority parents:

The National PTA claims to be the "largest volunteer child advocacy association in the United States." However, minorities may not always feel so welcome at PTA or other parent meetings. Historically, the divisive desegregation battles that followed the *Brown* decision no doubt influenced the degree to which both Black and White parents participated in their local PTA units and contributed to the perception of the PTA as a White women's organization. Thus, Black and Latino parents may feel like outsiders at parent meetings dominated by Whites¹⁹⁶

In integrated schools, and due to this exclusion, black middle-class parents may lack what sociologists call "social capital": potential resources an individual can access by way of their investment in social relationships.¹⁹⁷ Social capital facilitates acquiring cultural capital by socializing parents into these knowledge-rich groups. But in diverse social networks that are never-

¹⁹³ Joshua Holland, *The Average Black Family Would Need 228 Years to Build the Wealth of a White Family Today*, THE NATION 25 (Aug. 8, 2016), <https://www.thenation.com/article/the-average-black-family-would-need-228-years-to-build-the-wealth-of-a-white-family-today/> [<https://perma.cc/7RYR-SLHG>] (explaining how in 2013, white net worth (assets less debts) amounted to 13 times that of black net worth and that economists estimate that it would take over 200 years for blacks to close the *existing* wealth gap).

¹⁹⁴ Miller McPherson et al., *Birds of a Feather: Homophily in Social Networks*, 27 ANN. REV. SOC. 415, 416 (2001).

¹⁹⁵ *Id.* at 415.

¹⁹⁶ Stephen J. Caldas and Linda Cornigans, *Race/Ethnicity and Social Capital Among Middle- and Upper-Middle-Class Elementary School Families: A Structural Equation Model*, 25 SCH. COMMUNITY J. 137, 141 (2015).

¹⁹⁷ Bourdieu, *supra* note 25, at 248. This is not the only definition of social capital used by sociologists. See generally Alejandro Portes, *Social Capital: Its Origins and Applications in Modern Sociology*, 24 ANN. REV. SOC. 1 (1998) (discussing different definitions of social capital).

theless majority-white, black middle-class parents are often isolated within their school populations.¹⁹⁸

Strategic effectiveness. Lastly, race and class will stratify the extent to which institutions will respond to a parent's activation of their cultural capital. For example, a recent study using a national data set¹⁹⁹ found support for Lareau's theory about white families' conversion of cultural capital into academic benefits for children. Teachers rated white children of college-educated parents who volunteered in the classroom as more highly skilled than they did white children of high-school-educated parents who merely attended parent-teacher conferences.²⁰⁰ However, schools evaluated the children of black college-educated parents who made requests of the school consistently negatively.²⁰¹

Furthermore, black middle-class mothers may be perceived as "pushy" or "angry" when using the same tools to advocate as a white, middle-class mother. The "angry black woman" stereotype "presumes all Black women to be irate, irrational, hostile, and negative despite the circumstances."²⁰² Such a perception may encourage decision makers to be dismissive of black middle-class mothers' attempts to activate their cultural capital, while receptive to white middle-class mothers' similar actions.

To this point, this Article has argued that the problem of skewed resources in special education cannot be explained solely by teachers' intentional or unconscious racial bias against children. Part I presented the main problem: the overrepresentation of white children in the preferred disability category of autism. It also presented the consensus explanation for racial overrepresentation, one that relies primarily on racial bias in schools with little attention to how parents respond to such bias, and why that explanation fails to completely diagnose the problem.

In Part II, I presented a social reproduction theory of educational stratification that may explain how special education resources come to be inequitably distributed by race and class, even in the absence of overt, direct

¹⁹⁸ See, e.g., Daniel J. McGrath & Peter J. Kuriloff, "They're Going to Tear the Doors Off this Place": Upper-Middle-Class Parent School Involvement and the Educational Opportunities of Other People's Children, 13 *EDUC. POL'Y* 603, 611–12 (1999) (showing how black mothers were excluded from parent groups comprised primarily of white middle-class, stay-at-home mothers); Christopher W. Munn, *The One Friend Rule: Race and Social Capital in an Interracial Network*, *SOC. PROBS.* 1, 2 (2017) (arguing that in racially-diverse networks, whites often maintain just one close interracial tie because they value diversity, but nevertheless restrict to that one friend access to personal resources).

¹⁹⁹ Dumais et al., *supra* note 184, at 23.

²⁰⁰ Furthermore, teachers tended to rate the children of white, working class-families lower the *more often* the parents attended conferences. *Id.* at 34–35.

²⁰¹ *Id.* at 32–33.

²⁰² Wendy Ashley, *The Angry Black Woman: The Impact of Pejorative Stereotypes on Psychotherapy with Black Women*, 29 *SOC. WORK & PUB. HEALTH* 27, 28 (2014).

discrimination on the part of educators and school administrators. White middle-class parents, due to their privileged hierarchical position, are best able to convert their wealth and social capital into the cultural capital needed to navigate the special education process.

In the next Part, I illustrate the cultural capital that parents need to successfully navigate the process. Drawing on parents' own words, as well as advice they give to other parents of children with autism, I show how a privileged position in wealth and social capital allows parents to convert those resources into cultural capital, and how parents deploy their cultural capital to secure resources for their individual children.

III. RATIONING DISABILITY EDUCATION BENEFITS

This Part provides some examples of the *habitus* that is needed in many school districts to get the autism label and services guaranteed to each child with a disability. In particular, this Part illustrates advice that parents of children with autism give other parents of children with autism for how to navigate both the formal and informal rules of the special education field.²⁰³ The argument here is one of inference: because white middle-class parents in schools have more access to cultural capital for the reasons explained in Part II, middle-class white parents will be best able to convert that cultural capital into both autism labels and accompanying resources.

Before delving into the content of cultural capital, it is first useful to understand how economic capital and social capital are converted into cultural capital in the special education field. By understanding the role of economic capital and social capital in the generation of cultural capital, one can better understand how race and class come to influence parents' ability to effectively advocate on behalf of their children.

²⁰³ These illustrations are drawn from two sources. First, as a part of my dissertation research, I interviewed 30 mothers of children with and without disabilities living in a relatively affluent suburb, majority white community. Of the 30 mothers, 14 of them had a child with a disability, and seven of them had a child living with autism or who exhibited what the mother considered to be autism-like characteristics. In brief, I conducted semi-structured interviews that ranged topics from their own childhood experiences to their experiences navigating educational institutions for their child. Interview questions explored day-to-day activities with children; perceptions of their child's school and educational progress; behaviors, thoughts, and feelings surrounding childrearing; and their childrearing priorities. Quotes used here may be altered slightly to protect the identity of the speaker. I refer to these quotes in the footnotes as "Dissertation Participant." The second set of examples comes from MyAutismTeam.com ("MAT"), a website that bills itself as "the social network for parents of kids with autism." On the site, parents ask questions and give advice, ranging from school-specific questions ("How do I prepare for my child's IEP?") to more day-to-day questions ("Does anyone have advice about self-soothing strategies to teach my child?") Parents also provide support, by commenting on whether they and their child had a good or bad day, and seeking affirmation from others on the site who are experiencing similar emotions. The site is password protected, but anyone can create a user name and access the site. While the site clearly warns that the comments are public and not private, I still wish to protect the identities of the site's users so I do not identify the specific question nor the speaker's user name. I refer to these quotes in the footnotes as "MAT comment."

A. Economic Capital (Wealth)

Wealth's role in generating cultural capital in special education is relatively straightforward. Parents with wealth can "purchase" cultural capital in the form of special education advocates and special education lawyers. These intermediaries can not only be helpful at the complaint and dispute resolution, but may often help parents avoid the complaint process altogether.

For example, a parent of a child with autism explained to me how she maintained a positive relationship with her school district through employing an advocate:

Parent: We didn't really have an adversarial relationship with the school district and I think part of it may have been that that we had Dr. ___ and she sort of set the bar . . . like, "All right, you know, this is what you can expect and these are your rights. . ."

Interviewer: So she taught you that?

Parent: She would go to our IEPs with us. She knew the ropes, and, you know, I think it's much harder when you don't have someone who knows what you can ask for and what you can expect. Because you can end up with nothing.

Interviewer: Is Dr. ___ expensive?

Parent: Well, she certainly isn't cheap, and I think her rates have gone up since we worked with her. It's been a while now. She's like somewhere around \$200 an hour.²⁰⁴

Here, this parent invested in the advocate to purchase the cultural capital needed to engage in the process. Rather than trying to learn everything on her own, this parent employed an advocate not only to teach her about the process, but to be an active intermediary in the process. The investment made sense; without the advocate, this parent believes she would have received nothing for her child. The \$200 an hour for the advocate was well worth it.

Parents also purchase cultural capital in the form of lawyers. Having a lawyer in the dispute resolution process increases a parent's overall satisfaction with outcomes when they bring claims against a school district.²⁰⁵ IDEA allows judges to grant attorney's fees to prevailing parents,²⁰⁶ but in some cases, lawyers may still require some upfront payment prior to taking a case,

²⁰⁴ Dissertation Participant, *supra* note 203.

²⁰⁵ Peter J. Kuriloff & Steven S. Goldberg, *Is a Mediation a Fair Way to Resolve Special Education Disputes First Empirical Findings*, 2 HARV. NEGOT. L. REV. 35 (1997).

²⁰⁶ 34 C.F.R. §300.517.

limiting the attorney's fees benefit to parents with financial means to pay initially out-of-pocket.

One online parent lamented, "We just spent [\$]6,000 for a neuropsych[ologist] and another [\$]1200 for our advocate, is the next step remortgaging [*sic*] the house for a lawyer? How does anyone who isn't a millionaire [*sic*] do this?"²⁰⁷ Obviously, these financial outlays are not trivial, even for middle-class white families with some wealth. But middle-class white parents, who are more likely to own their home than are black middle-class families, and who have more equity in homes that are more valuable, will benefit from this fee-shifting scheme because they are more likely to be able to pay upfront.²⁰⁸ As an online parent explained the rationale for investing in a lawyer: "We had to get a Special Ed Law Attorney to get our son the services he needed. We had to borrow to hire her, but part of our action was that the school would pay for our attorney if we won. A good Spec[ial] Ed[ucation] attorney won't take your money if they don't think you will win."²⁰⁹

In addition to wealth, middle-class white families also have an advantage in converting their social capital into cultural capital. The next section explains how.

B. Social Capital

As discussed above, and used here, social capital refers to potential resources an individual can access by way of their investment in social relationships.²¹⁰ In special education, social networks are key generators of cultural capital, often providing information about how special education processes work in specific school districts.

For example, I inquired of a knowledgeable parent how she knew what services and resources she could request of her school district when the information was not widely available, such as on a website:

Interviewer: I've often wondered, how do parents know what can be possible?

Parent: Just networking, you know . . . it's not even listed on any website or anything. . . .[A]ll the things we talk [about], we learn piecemeal through meetings with other parents. You know, we feel that it's the cards that the school district holds very closely. They want to hand out the cards. They don't want you coming to the

²⁰⁷ MAT comment, *supra* note 203.

²⁰⁸ *Id.*

²⁰⁹ *Id.*

²¹⁰ See Bourdieu, *supra* note 25, at 21.

table and saying, “I know this, this, and this is available and this is what I want for my child.” So, it’s constant research.²¹¹

Unfortunately, these networks are often not fully inclusive. They are populated by parents like the above parent: a white, middle-class, stay-at-home mother. As a result, these networks coalesce in environments that are most convenient to those parents.

For example, consider this mother’s explanation for how she finds parents with whom to network.

Interviewer: How did you find these parents? Where were they?

Parent: Well, some of them you meet through the preschool [a preschool for children with developmental disabilities]. I’ve been going to CAC [Community Advisory Committee for special education]²¹² meetings. . . . [Or] [s]ometimes you just meet them on the playground.²¹³

Parents often mentioned to me meeting other parents of children with disabilities on the playground. As innocuous as it may sound, those groups are exclusive for a simple reason: only parents either with flexible work schedules or families with a parent who stays at home are available to meet other parents on the playground after, or before, school.

Social capital can play another role in some parents’ experiences with their school district. When faced with resistance from the school district, parents sought to confirm whether the school district was telling the truth. A parent explained about her experience attempting to secure resources in her school district based on services her son received elsewhere:

[B]asically we showed the school district our IEP from [another state] and how many services he’d been getting. . . , and [our school district] outright said, “We don’t do [the service] here. We just don’t do [it] here.” So, then we looked into that a little bit and I mean generally speaking, talking to other parents, we found out that’s actually true. You know, the school district just does not seem to provide it.²¹⁴

Through her social capital, this parent learned that even if she were to push the school district, she would not get far. This is valuable information to

²¹¹ Dissertation Participant, *supra* note 203.

²¹² California law requires each Special Education Local Plan Area to create plans to “assure access to special education and services for all individuals with exceptional needs residing in the geographic area served by the plan.” Cal. Educ. Code § 56195.1. California education code also requires that each SELPA establish a Community Advisory Committee (“CAC”) to give input into that plan. Cal. Educ. Code § 56190.

²¹³ Dissertation Participant, *supra* note 203.

²¹⁴ *Id.*

avoid the time, money and energy spent in engaging in a direct confrontation with the school district.

These examples show a few ways in which parents can use their economic and social capital to convert it to cultural capital. Parents with wealth can spend their economic capital to purchase and invest in the cultural capital of advocates, who possess the knowledge needed to effectively advocate on behalf of any individual child. These advocates know both the formal rules of the IDEA, and have intimate knowledge of the child that is an advantage in the negotiation process. Social capital allows parents to tap into their various social networks for access to information they may not otherwise have access to, such as knowledge of whether a requested service is an actual limitation or a denial tactic used by the school district.

C. Cultural Capital

Middle-class white parents enjoy an advantage in a school district for seeking and receiving special education resources because of their privileged position both in terms of wealth and social capital. White middle-class parents have disproportionate access to wealth and how they construct racially homogenous social networks around schooling issues. In the next section, I show how the cultural capital generated from privileged positions of race and class could work to give middle-class white parents an advantage in securing resources for their children.

The earliest Supreme Court case to address the IDEA's substantive guarantees relied on the assumption that parents "will not lack ardor in seeking to ensure that handicapped children receive all of the benefits to which they are entitled by the Act."²¹⁵ In embodying that ardor, the IDEA *requires* parents to have "specific patterns of communication, an understanding of school practices and rules, [and] access to information from a variety of sources[.]"²¹⁶ Some parents may feel that their school district is working against them. As one online parent put it: "The system is so skewed against real parental involvement, it's not funny. I have been a legal secretary and paralegal for over 25 years, and even have a year of law school, and the process is nearly indecipherable. Ridiculous!"²¹⁷ In this section, I illustrate some of these aspects of cultural capital that middle-class white parents may use to effectively advocate for their children, aspects of cultural capital that non-white, non-middle-class families are likely unable to access because of race and class stratification in schools.

²¹⁵ Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist., Westchester Cty. v. Rowley, 458 U.S. 176, 178 (1982).

²¹⁶ Elizabeth B. Kozleski et al., *Where Differences Matter: A Cross-Cultural Analysis of Family Voice in Special Education*, 42 J. SPECIAL EDUC. 26, 28 (2008).

²¹⁷ MAT comment, *supra* note 203.

1. *Communication*

As gleaned from the experience of the parents with whom I spoke, and the online advice given by parents who consider themselves successful in advocating for their children with autism, effective parental communication patterns in the IDEA must at once be cordial and cooperative in tone, but also firm and determined.

Parents often advised each other that, at least in the beginning of the process, to be “diplomatic.”²¹⁸ As one online parent put it: “It is always better to be on the nicer side rather than combative so they [the school district] do not go on defense right away.”²¹⁹ When parents anticipated that what the school wanted to do might not work, they explained how they “let this [the school’s plan] all play out because we wanted to make sure the district knew we were trying to work with them the whole way and we would do what we asked.”²²⁰ As discussed above, white middle-class parents may be more likely than other parents to initially believe that the school could be trusted. They can engage in the parents- as- partners dynamic, at least until more confrontational methods are necessary.

Even when the parties agreed, one online parent encouraged other parents to “[t]ake control of the IEP meeting, don’t just sit back and take what they say as fact. You present the facts. You tell other participants when it is their turn to speak.”²²¹ But when the parties disagree, parents advise each other to take a different tack.

Despite Congress’s stated goal to provide “[p]arents and schools . . . expanded opportunities to resolve their disagreements in positive and constructive ways,”²²² IEP dispute resolutions are difficult because the statute *relies* on adversarial methods which require cultural capital to navigate. Many parents liken the IDEA process to a “battle;” an online parent described the process by which to resolve disputes with the school district as “suit[ing] up and go[ing] to war for your child[.]”²²³ Parents advise each other to not “give up the fight, [and] learn the laws.”²²⁴ This way of communicating likely advantages white middle-class families who can engage both from a position of trusting the school as well as in a confrontational style that does not work for other parents, especially black middle-class parents.²²⁵

²¹⁸ *Id.*

²¹⁹ *Id.*

²²⁰ *Id.*

²²¹ *Id.*

²²² 20 U.S.C. § 1400(c)(8) (2012).

²²³ MAT comment, *supra* note 203.

²²⁴ *Id.*

²²⁵ Dumais et al., *supra* note 184, at 40 (explaining that “when college-educated African American parents made a special request for a teacher, the result was that their children received lower teacher evaluations,” a finding that is contrary to the idea that middle-class cultural capital is similarly effective across racial groups).

2. Knowledge

Prior to dispute resolution and the specific norms that accompany that process, parents need to gather specialized knowledge to engage meaningfully in the IDEA process. Parents generate valuable knowledge from their social networks, converting their social capital into special education knowledge. The knowledge parents need in the special education process comes in two forms. First is the formal knowledge—what is the law and how does it relate to my child? The second is informal knowledge—how do I know what is possible?

Parents' differential access to both formal and informal knowledge is most evident in the IEP process. "Since the IEP [Individualized Education Plan] establishes the educational and related services a disabled child can expect to receive from a school district, the process of IEP formulation resembles a contract negotiation."²²⁶ Parents advise others to visit websites such as Wrights Law, an online depository of special education law, as well as a resource that links parents with legal resources in their communities.²²⁷

Some states specifically describe the IEP as a contract, urging parents that, "As with any contract, you should make sure you fully understand the terms to which you are agreeing and make certain that everything that was agreed to verbally is written in the contract."²²⁸ The IEP is a contract in practice, as many judicial actors consider the "four corners" of the IEP²²⁹ to be a legally enforceable agreement between the schools and parents. One parent ardently implored parents to "know the importance of this Federal Form [because it] weighs heavily in future services and/or educational needs."²³⁰

Parents who may not realize some of the finer points of the law are encouraged to pay close attention to the school district's actions. For example, some parents find that their child has been "moved" to a "504 plan" from having an IEP. Section 504 of the 1973 Rehabilitation Act requires schools to provide reasonable accommodations for children with disabili-

²²⁶ Steven Marchese, *Putting Square Pegs into Round Holes: Mediation and the Rights of Children with Disabilities Under the Idea*, 53 RUTGERS L. REV. 333, 351 (2001).

²²⁷ Wright's Law (www.wrightslaw.com) also offers books, guides, workshops and boot camps that parents and advocates (as well as lawyers) can purchase and attend all over the country.

²²⁸ Caruso, *supra* note 16, at 176 (citing the Massachusetts Department of Education, but also noting that the "IEP is not a contract in a formal sense. It is simply a statement produced by an educational agency at the end of a formalized collaborative process, defining the appropriate set of special education services for a given child."). There is no requirement in the IDEA itself that parents physically sign the IEP. However, schools must obtain a parent's written consent prior to providing special education services to the child. 34 C.F.R. § 300.300 (2008).

²²⁹ See generally Matthew Selah, *Public Policy, Parol Evidence and Contractual Equity Principles in Individualized Education Programs: Marking the "Four Corners" of the IEP to Mitigate Unequal Bargaining Power between Parent-Guardians and School Districts*, 43 J.L. & EDUC. 367 (2014).

²³⁰ MAT comment, *supra* note 203.

ties.²³¹ Substantively, 504 plans give fewer protections than the IDEA and, procedurally, its requirements for parental participation are less robust. One parent lamented that her child was moved to a 504 because she did not know better:

For the past two years in a row I have been fighting with my son's school to reinstate his IEP. He was transitioned to a 504 plan and I was not as engaged as I should have been and didn't understand the difference.²³²

An online parent warns of this:

This is what I warn people about all the time. A 504 and an IEP are far different and an IEP gives the child more. When the school pushes this it is mostly because they think they can get away with giving [less] thus saving money.²³³

The IDEA also requires schools to “document[] and carefully consider[]” “parent input” along with information from “a variety of sources” when deciding whether a child is eligible to receive services under the IDEA.²³⁴ Thus, parents of children with autism advise parents to present to the school district as many diagnostic materials as they are able. One parent explained her process of using this rule to influence decisions for her child:

We used both a psych[iatrist] and a neuro[logist] and got a DX [diagnosis] from both as well as the PCP [primary care physician]. Then all 3 wrote letters on what they suggested for therapy. . . . I would point out to the school that the doctors you have are actual medical professionals with certifications and degrees and the person they have cannot compare.”²³⁵

Of course, the material benefit of the autism determination lies in the expensive accompanying services, provided free of charge to parents; accordingly, parents have a “strong reason to seek a diagnosis of autism spectrum disorder, since it can trigger thousands of dollars in assistance,”²³⁶ including classroom aids and specialty therapies. Thus, the above parent not only advised using the formal rule (parental input and from multiple sources) to her advantage, but advised about an informal rule: that parents' sources should include highly-credentialed medical professionals as a counter to any school-based professional who resists the diagnosis.

In addition, understanding the rules and requirements of dispute resolution can determine a parent's likelihood of success in administrative proceed-

²³¹ 29 U.S.C. § 794 (2012).

²³² MAT comment, *supra* note 203.

²³³ *Id.*

²³⁴ 34 C.F.R. § 300.306(c)(1).

²³⁵ *Id.*

²³⁶ PITNEY, *supra* note 80, at 37.

ings and in court. In most states, when a parent challenges an IEP in court, she has the burden of persuasion.²³⁷ White middle-class parents' cultural capital pays off in judicial-like spaces due to "culturally shared expectations that people in prestigious occupations are trustworthy and capable of influencing authorities."²³⁸ As is the case in the IEP negotiation, parents with rich and varied sources of information can bring that information into court to prove their case. If one proceeds without a lawyer, prevailing in court requires deep knowledge of the law and interactional familiarity with legal systems. The IDEA requires that parents present their complaints in a formulaic manner.²³⁹ The statute requires the Department of Education to promulgate a model form,²⁴⁰ although it does not require parents to use the model.²⁴¹ The model used by many states, however, mimics the language of the statute,²⁴² making it difficult for the typical layperson to understand without a lawyer to "translate." Thus even if a parent possesses the knowledge to know what law was broken, she still may not be able to express her concerns within the confines of the law.

3. *Strategies*

Knowing the rules concerning IEPs and their content, for example, is helpful only to the extent that one can use those rules to the child's benefit. Although the law is seen by many as adversarial, parents sometimes advise each other that maintaining amicable relationships with schools may be the best strategy. As one parent put it, "Sometimes you have to fight for things and sometimes the school may be easier on you it all depends on your relationship with [t]hem [and] the documentation you have."²⁴³ Another ex-

²³⁷ *Schaffer v. Weast*, 546 U.S. 49, 51 (2005) (holding that states may place the burden of persuasion in an IDEA complaint on the parent, if the parent is the party seeking relief).

²³⁸ Karyl A. Kinsey & Loretta J. Stalans, *Which "Haves" Come out Ahead and Why? Cultural Capital and Legal Mobilization in Frontline Law Enforcement*, 33 *LAW & SOC'Y REV.* 993, 995 (1999).

²³⁹ 34 C.F.R. § 300.508(b) ("Content of complaint. The due process complaint required in paragraph (a)(1) of this section must include—(1) The name of the child; (2) The address of the residence of the child; (3) The name of the school the child is attending; (4) In the case of a homeless child or youth (within the meaning of section 725(2) of the McKinney–Vento Homeless Assistance Act (42 U.S.C. 11434a(2)), available contact information for the child, and the name of the school the child is attending; (5) A description of the nature of the problem of the child relating to the proposed or refused initiation or change, including facts relating to the problem; and (6) A proposed resolution of the problem to the extent known and available to the party at the time.").

²⁴⁰ 34 C.F.R. § 300.509(a).

²⁴¹ 34 C.F.R. § 300.509(b).

²⁴² Some states do attempt, in part, to break down the language of the statute in more understandable terms. For example, New York State's model form instructs the complainant to "describe the nature of the problem (the concerns that led you to request this hearing) including all specific facts relating to the problem." New York State Forms and Notices Related to Special Education—Sample Due Process Complaint. Notice Form (2014), <http://www.p12.nysed.gov/specialed/formsnotices/dueprocesscomplaint/notice-March2014.pdf> [<https://perma.cc/C62B-D7T2>].

²⁴³ MAT comment, *supra* note 203.

plained: “[W]e needed the school’s help, so it was best if we stayed diplomatic and not too aggressive.”²⁴⁴

Yet maintaining positive relationships with schools is easier for some parents than others. Black middle-class parents may approach schools with a sense of skepticism, especially in the IDEA process. Historically, schools have not welcomed black parents, even those in the middle-class, with the same warmth as they have white parents. Furthermore, black mothers are often confronted with a stereotype of *always* being aggressive. The “angry black woman”²⁴⁵ stereotype inflects interactions with a racial bias, such that even when black mothers are behaving as white mothers may, they may be judged negatively, to the disadvantage of their children. Being able to maintain a positive relationship with schools is easier for middle-class white parents.

At other times, parents must engage with schools in the IEP process in ways that position them as formidable opponents. Schools have a built-in advantage over the average parent, as repeat players²⁴⁶ negotiating on their own turf. Repeat player advantage includes “access to advance information, legal specialists, and informal relationships with institutional actors, as well as the ability to maximize the odds over a series of cases.”²⁴⁷

Both the parents I spoke with and online parents advised each other to engage in behaviors that lawyers will recognize as particularly “lawyer-like.” For example, one online parent advised others to “[t]ape all your meeting[s]! Don’t sign the paper till you read it, and if you don’t understand something no matter how small ask questions.”²⁴⁸ Parents often received this advice from their (retained) lawyer, as well as advice to “communicat[e]

²⁴⁴ *Id.*

²⁴⁵ See Ashley, *supra* note 202, at 28.

²⁴⁶ Pasachoff, *supra* note 16, at 1438 (“Schools are repeat players in the IEP game with all of the resources and accumulated expertise that that entails.”); Katherine McMurtrey, Comment, *The IDEA and the Use of Mediation and Collaborative Dispute Resolution in Due Process Disputes*, J. DISPUT. RESOL. 187, 192 (2016) (“Furthermore, schools can be “repeat players” within the special education dispute system”). *But see* Caruso, *supra* note 16 (arguing that, over time, “parents of children with disabilities are repeat players. Sooner or later they learn that traits of contractual autonomy may characterize the IEP process. They learn that their consent to a proposed set of educational services is essential to the school, and that they can withhold it if not satisfied with the proposal. The affirming language of rights informs the rhetoric of special-education advocates. Parents learn that someone, somewhere, has engaged the school district in intense negotiations and obtained either much better services within the same district or free placement of their child in sophisticated, expensive private schools capable of addressing that child’s special needs. Parents also learn that special education is a matter of federal rights, and that the IEP process is a just battle worth fighting until the very end for the sake of a deserving child—their own”); Jonathan A. Beyer, *A Modest Proposal: Mediating IDEA Disputes Without Splitting the Baby*, 28 J. LAW EDUC. 37, 41 fn. 27 (1999) (arguing that, “if the child remains in the school district for her educational career, the opportunity for future disputes may naturally increase”).

²⁴⁷ Lauren B. Edelman et al., *Legal Discrimination: Empirical Sociolegal and Critical Race Perspectives on Antidiscrimination Law*, 12 ANN. REV. L. SOC. SCI. 395, 405 (2016).

²⁴⁸ MAT comment, *supra* note 203.

through email only so there is a record of all conversations.”²⁴⁹ And when email is not practical, parents advised each other to “send ‘recap’ emails after phone conversations.”²⁵⁰

The next section illustrates how middle-class white parents can harness their privileged position in relation to this “dispositional” cultural capital to secure resources for their children with autism.

4. *Disposition*

While some strategies may be nominally available to all parents, white middle-class parents will be better able to employ the strategies because they are disposed to engage with schools in ways that signal their belonging in the social space. Black middle-class parents, less likely to be trustful of schools than their white counterparts, are less able to engage believing that schools will help them. Furthermore, they may suffer from perceptions of aggressiveness²⁵¹ such that even when trying to be agreeable, they are perceived as disagreeable.

A common refrain among both the white middle-class mothers I talked to and parents giving advice online was that parents are the “experts” on their child. Parents often expressed a willingness to question both educational and medical professional opinions.

Parents most need this disposition at diagnosis. Research suggests that some children are initially misdiagnosed with a conduct disorder prior to eventually being diagnosed with autism.²⁵² Online, parents who initially received conduct-based diagnoses like emotional disturbance advised others to keep looking until they get the diagnosis they sought. Consider the words of a parent who ultimately secured an autism determination by going to many different doctors, over a period of several years:

We had one diagnosis our child was ‘emotionally disturbed’—the person who diagnosed was probably qualified but I disagreed with the diagnosis which was primarily based on his being too young to diagnose accurately and her failure to see high functioning autism

²⁴⁹ *Id.*

²⁵⁰ *Id.*

²⁵¹ Ashley, *supra* note 82, at 28 (explaining “the ‘angry Black woman’ mythology [that] presumes all Black women to be irate, irrational, hostile, and negative despite the circumstances. . . . Angry Black women are typically described as aggressive, unfeminine, undesirable, overbearing, attitudinal, bitter, mean, and hell raising.”).

²⁵² Mandell et al., *supra* note 82 (finding black children were 2.6 times less likely than a similar white child to be given an autism diagnosis on their first specialist visit. The most likely diagnosis among all children who did not receive an initial autism diagnosis was ADHD. Among those children who did not get an ADHD diagnosis, black children were 5.1 times more like to receive an adjustment order and 2.4 times more like to receive a conduct disorder diagnosis.).

in a young child. I knew she was wrong intuitively, and I kept seeking help till we got the answer 4 years later.²⁵³

Although this example is out of school, this parent exhibited several skills parents cited as important to the IDEA process of ardent advocacy. First, she saw herself as an expert with the qualifications to disagree with another qualified professional; second, she knew enough about autism and how it may present (age, functioning levels) to credibly challenge the professional; and lastly, she persevered over an extended period of time until she received the diagnosis that she intuited to be true. Another online parent is more explicit about rejecting an intellectual disability label by relying on her own intuition: “I found a specialty [doctor] that deals with children with needs, but a psych[ologist] wanted to give him a [m]ental [r]etardation. . .label . . . HELL NO . . . another quack.”²⁵⁴

Seeing oneself as an expert on par with teachers and other administrators is a well-researched purview of white middle-class parents.²⁵⁵ One parent on the online group urged parents to adopt behavior that signaled equal expertise, imploring parents to recognize that “[t]hese people [school officials] are not God. They try to appear larger than life with their big words and pretend important jobs, but they are regular Joe’s just like the rest of us.”²⁵⁶ Parents advised each other to resist becoming “emotional” during their interactions with schools.²⁵⁷ For good reason; decision-making groups often discount the experience of women,²⁵⁸ especially if they are perceived as being “emotional” rather than rational.²⁵⁹ In response to a parent’s inquiry about how to conduct themselves in the IEP meeting, an online parent advised: “[D]on’t back down. Be business-like and don’t get emotional. You are Chairman of the Board of what your child needs. Act like one.”²⁶⁰ Of course, this language seems to be precisely what the *Rowley* Court expected

²⁵³ *Id.*

²⁵⁴ *Id.*

²⁵⁵ See LAREAU, *supra* note 183, at 8 (“[U]pper-middle-class parents forge relationships characterized by scrutiny and *interconnectedness* between family life and school life. These parents believe that education is a shared responsibility between teachers and parents, they have extensive information about their children’s schooling, and they are very critical of the school, including the professional performance of their children’s teacher(s).”).

²⁵⁶ MAT comment, *supra* note 203.

²⁵⁷ *Id.*

²⁵⁸ See Shelley J. Correll & Cecelia Ridgeway, *Expectation State Theory*, in HANDBOOK OF SOCIAL PSYCHOLOGY (John Delamater ed., 2003) (explaining that women tend to experience fewer opportunities to speak because they hold the devalued half (woman) of a status characteristic (gender), where they are constrained by consensual expectations of their social group”).

²⁵⁹ A recent blog post noted this stereotype often applies to black women, who are described as “passionate” and “unreasonable.” Rebecca Lais, *The Purposeful Silencing of Black Women in Educational Leadership*, THE BLACK WALL ST. TIMES (Feb. 8, 2018), <https://theblackwallstimes.com/2018/02/08/the-purposeful-silencing-of-black-women-in-educational-leadership/> [https://perma.cc/ZSH9-BM7V].

²⁶⁰ MAT comment, *supra* note 203.

of a parent—the ardor to protect their child’s rights within the reasonable confines of the IDEA’s procedures.

Behaving as the “chairman of the board” is relatively easier for white middle-class parents. Such parents have been taught to expect that people in power will consider them and their concerns. White middle-class people were likely raised with a sense of entitlement where one expects resources.²⁶¹

This Part illustrates how middle-class white parents may convert their wealth and social capital into the cultural capital needed to effectively advocate for their child. My claim is inferential: because white middle-class families have privileged access to the wealth and social capital valued in schools, they are also able to generate the cultural capital needed to secure special education resources for their individual children in the form of autism labels and related services.²⁶² If autism has arisen as a preferred disability category under the IDEA, then the provisions of the law for which cultural capital is vital (as explained by parents themselves) will work to systematically disadvantage non-white, non-middle-class parents in the pursuit of autism labels and related services.

The issue of cultural capital, then, complicates a story that racial differences in special education categorization and resources is primarily one of teacher and administrator overt and implicit bias against black children or in favor of white children. Children can neither be “placed” in special education nor receive benefits without the expressed consent of their parents and the participation of their parents in developing the individualized education plan. Nor can children benefit from the due process complaint procedures outside of their parents’ efforts.

Thus, this Article argues that the story of race and class inequalities in autism in schools—indeed the story of race in special education—may be at least as much about parental cultural capital as it is about race and class bias against children in school. Of course, parental capital is shaped by hierarchical race and class positioning. But cultural capital hides those influences within the confines of IDEA’s cultural assumptions about parental ardent advocacy, making it appear that some parents are just better advocates, but without acknowledging the systematic ways in which cultural capital too is stratified by race and class.

In addition to understanding how an anti-discrimination law can have racially-disparate distributional outcomes, the next part makes a bigger argument about why legal scholars should be paying closer attention to the role of culture in race and class stratification.

²⁶¹ LAREAU, *supra* note 29, at 60.

²⁶² Accordingly, the theoretical contribution of this article lends itself to being empirically tested.

IV. CONSIDERING CULTURE IN DISTRIBUTING LAW

Racial disparities in special education, including autism categorization and services, show how even in benevolent legal schemes aimed toward directing resources to the neediest and most in need of protection, race and class stratification can affect outcomes due to the structure and practical implementation of the law. When racial and class elites come to inequitably capture scarce resources, they are then able to reproduce their status as elites, even in the face of anti-discrimination schemes meant to level playing fields. In special education, as white, middle-class families come to dominate disability categories and resources, they can reproduce their privilege, making sure that their children, despite their limitations, will maintain some foothold in their place in the social hierarchy.

This Part makes the case for considering culture in legal scholarship concerned with the intergenerational reproduction of stratification through the inequitable distribution of legal resources.

A. *Stratified Cultural Resources, not Values*

First, legal scholarship concerned with stratification must broaden its concept of culture and evaluate its reliance on bias mechanisms, both direct and indirect, as the primary explanations for racially disparate outcomes within anti-discrimination schemes. Instead, scholars should also focus on the reproduction of privilege, embracing a conception of culture as strategies, knowledge and behaviors influenced by structural constraints.

In the IDEA, schools themselves need not be racially biased for racial disparities to emerge (although they surely are). Thus, the Civil Rights Division of the Department of Education's focus on one idea—a decision-maker's implicit or explicit bias²⁶³—in addressing racial disproportionality in IDEA will only do so much.

Having a knowledge and behavioral strategy approach to culture is key to addressing culture in law. Unfortunately, most policy makers approach culture as values, and thus attempt to level playing fields by “correcting” value differences between the privileged and the disadvantaged. An example of this is the push toward promoting marriage as a tool for fighting socioeconomic equality.²⁶⁴ Policy makers assumed that the reason young mothers

²⁶³ See, e.g., DEAR COLLEAGUE LETTER, *supra* note 123, at 11 (“In its investigations, OCR has found that the initial referral of a student for evaluation is one of a series of decision points that might generate Title VI concerns, especially to the extent that it entails the subjective exercise of unguided discretion in which racial biases or stereotypes (consciously or unconsciously held views about a certain group) may be manifested. Districts must ensure that district staff do not discriminate against students by relying, explicitly or implicitly, on stereotypes or biased perceptions in their decisions about students.”).

²⁶⁴ Bryce Covert, *Nearly A Billion Dollars Spent On Marriage Promotion Programs Have Achieved Next To Nothing*, THINK PROGRESS (Feb. 11, 2014), <https://thinkprogress.org/nearly-a-billion-dollars-spent-on-marriage-promotion-programs-have-achieved-next-to-nothing->

were having children outside of marriage was because they did not value the commitment and stability that marriage offered. But sociologists Kathryn Edin and Maria Kefalas found the opposite. Young, lower-class women valued marriage as much as middle-class women. But they assessed their marriage prospects to be relatively low and thus chose not to wait to be a mother.²⁶⁵ The differences between middle-class women's and lower-class women's marriage rates and out-of-wedlock births could not be addressed by promoting marriage because those messages were merely "trying to convince people of what they already believe."²⁶⁶ Instead, the policy needed to address the deep structural issues that make finding suitable "marriage material" partners particularly hard for young, relatively lower-class women. Those structural conditions impacted young women's behaviors, not values.

The liberal fallout of the Moynihan Report²⁶⁷ controversy rendered talking about culture taboo due to the ways in which some used the Report to blame black people for their own oppression.²⁶⁸ If legal scholars understood culture not as values but as context-specific behaviors and knowledge informed by structural and cultural constraints and opportunities, themselves a product of social stratification, analyzing culture should lead one far from a "blaming the victim" conclusion. Instead, culture should push us to question the system: how the law requires specific knowledge and strategic behaviors that are stratified by race and class to benefit from that law. This Article's focus on parents joins a sociological trend in attention to how parents' cultural know-how shapes educational outcomes both for their children and other people's children, and especially how cultural capital privileges race and class elites.²⁶⁹

Some focus on culture has been about filling assumed deficit in the parenting practices of poor and black parents. The argument goes that black parents are to blame for black children's poor outcomes because black parents do not appropriately value education. One need only remember when

e675f0d9b67/ [https://perma.cc/MB5J-WVK9] (explaining how the federal government has spent over \$800 million since 2001 on the Healthy Marriage Initiative).

²⁶⁵ KATHRYN EDIN & MARIA KEFALAS, PROMISES I CAN KEEP: WHY POOR WOMEN PUT MOTHERHOOD BEFORE MARRIAGE (2005).

²⁶⁶ Small et al., *supra* note 19, at 12.

²⁶⁷ DANIEL PATRICK MOYNIHAN, THE NEGRO FAMILY: THE CASE FOR NATIONAL ACTION (1965).

²⁶⁸ JAMES T. PATTERSON, FREEDOM IS NOT ENOUGH: THE MOYNIHAN REPORT AND AMERICA'S STRUGGLE OVER BLACK FAMILY LIFE—FROM LBJ TO OBAMA 65 (2010); *see also* Daniel Geary, *The Moynihan Report: An Annotated Edition*, THE ATLANTIC (Sept. 14, 2015) <https://www.theatlantic.com/politics/archive/2015/09/the-moynihan-report-an-annotated-edition/404632/> [https://perma.cc/2ES7-39KG] (noting that "[m]any liberals understood the report to advocate new policies to alleviate race-based economic inequalities. But conservatives found in the report a convenient rationalization for inequality; they argued that only racial self-help could produce the necessary changes in family structure. Some even used the report to reinforce racist stereotypes about loose family morality among African Americans. Meanwhile, left-wing critics attacked Moynihan for distracting attention from ongoing systemic racism by focusing on African Americans' family characteristics: Moynihan's leading critic, William Ryan, famously charged him with 'blaming the victim.'").

²⁶⁹ *See supra* Part II.

then-Senator Barack Obama famously deriding black parents for their children's poor education outcomes: "Go into any inner-city neighborhood, and folks will tell you that government alone can't teach kids to learn. They know that parents have to parent, that children can't achieve unless we raise their expectations and turn off the television sets and eradicate the slander that says a black youth with a book is acting white."²⁷⁰ In a widely-discussed book, law professor Amy Chua championed a cultural values explanation for Asian success,²⁷¹ and she and professor Jed Rubenfeld penned a book touting the superior cultural values of other immigrant groups as the reason for their success over U.S.-born groups.²⁷²

In academic circles, oppositional culture theory encapsulates this common belief about black families' values toward education. According to the theory, black families are cynical toward education because "of their accurate assessment that, relative to white Americans, they do not receive comparable returns to their hard work in schools."²⁷³ While black parents "may teach children the abstract beliefs about the importance of education, . . . their own educational practices may convey contrary messages. In practice, children may observe very little cultural emphasis on striving to do well in school or to get good credentials."²⁷⁴ Thus, oppositional culture theory posits that "*one major reason* black students do poorly in school is that they experience inordinate ambivalence and affective dissonance in regard to academic effort and success."²⁷⁵

Yet oppositional culture theory finds little empirical support.²⁷⁶ In fact, because, across all income levels, "black parents . . . expect their children to

²⁷⁰ Senator Barack Obama, 2004 Democratic National Convention Keynote Address (July 27, 2004) (transcript available at The American Presidency Project).

²⁷¹ AMY CHUA, *BATTLE HYMN OF THE TIGER MOTHER* 25–29 (2011).

²⁷² AMY CHUA & JED RUBENFELD, *THE TRIPLE PACKAGE: HOW THREE UNLIKELY TRAITS EXPLAIN THE RISE AND FALL OF CULTURAL GROUPS IN AMERICA* 59–84 (2014).

²⁷³ Erin McNamara Horvat & Kristine S. Lewis, *Reassessing the "Burden of 'Acting White'": The Importance of Peer Groups in Managing Academic Success*, 1 SOC. EDUC. 265, 265 (2003). For circumstantial evidence that returns to hard work are not comparably rewarded, one need look no further than the downward mobility of children of the black middle-class compared to the upward mobility and stable class position of middle-class white children. See BENJAMIN P. BOWSER, *THE BLACK MIDDLE-CLASS: SOCIAL MOBILITY — AND VULNERABILITY* 131–34 (2007) (arguing that ironically, due to a lack of an upper class to move into, black middle-class children are more likely to experience downward mobility than are their white counterparts).

²⁷⁴ JOHN OGBU, *BLACK AMERICAN STUDENTS IN AN AFFLUENT SUBURB: A STUDY OF ACADEMIC DISENGAGEMENT* 147–48 (2003).

²⁷⁵ Signithia Fordham & John U. Ogbu, *Black Students' School Success: Coping with the "Burden of 'Acting White,'"* 18 URB. REV. 176, 177 (1986).

²⁷⁶ See James W. Ainsworth-Darnell & Douglas B. Downey, *Assessing the Oppositional Culture Explanation for Racial/Ethnic Differences in School Performance*, 63 AM. SOC. REV. 536, 536 (1998) (finding that the key assumptions of the oppositional culture theory fail when "systematically compar[ing] the perceptions of occupational opportunity and resistance to school access" across several racial groups); Douglas B. Downey and James W. Ainsworth-Darnell, *The Search for Oppositional Culture Among Black Students*, 67 AM. SOCIO. REV. 156, 156 (2002) (finding that "[c]ontrary to oppositional culture expectations, . . . high-achieving black students are especially popular among their peers"); Amanda Datnow & Robert Cooper,

experience racial discrimination, they place more value on education, have higher expectations for their children than white parents, and are just as involved in their education.²⁷⁷

As sociologist Bart Landry noted in the late 1980s:

While this may seem strange at first, social scientists have long observed the greater emphasis blacks have placed on education compared to whites. In part, this emphasis came from the belief that education was the only key to occupational success in a society that discriminated on the basis of color. In part, also, a college degree has historically earned greater prestige within the black community than in the white community because of the rarity of such an achievement among blacks. Black parents of all classes, then, encourage their children to strive for a college education as a means of pursuing the American dream of material and social success.²⁷⁸

It is true that because of their experience with racial discrimination,²⁷⁹ middle-class black parents may have difficulty expressing a completely positive view of educational institutions to their children.²⁸⁰ But that reticence to express unwavering optimism does not mean that black parents do not value education.

B. How Law Assumes Culture

Rather than equate culture with values, an understanding of culture as capital helps us to understand distributive disparities by uncovering institu-

Peer Networks of African American Students in Independent Schools: Affirming Academic Success and Racial Identity, 66 J. OF NEGRO EDUC. 56, 56 (1997) (finding that, within majority-white independent (private) schools, “the formal and informal peer networks of [black] students . . . support the[] students’ academic success”); Carla O’Connor, *Dispositions Toward (Collective) Struggle and Educational Resilience in the Inner City*, 34 AM. EDUC. RES. J. 593, 593 (1997) (finding that, among six low-income black students, recognition of race and class constraints on opportunity did not “curtail their academic success but may have contributed to their sense of human agency and facilitated their academic success”); Karolyn Tyson et al., *It’s Not “a Black Thing”: Understanding the Burden of Acting White and Other Dilemmas of High Achievement*, 70 AM. SOC. REV. 582, 582 (2005) (finding that social structure, not culture, may explain a burden of acting white for high-achieving black students who are generally achievement oriented); Horvat & Lewis, *supra* note 273, at 265 (finding that black adolescent peer groups vary in their orientation toward achievement, and that black students often “sustain an authentic black identity and . . . achieve academically by effectively managing their academic success among their peers”); Karolyn Tyson, *Debunking a Persistent Myth: Academic Achievement and the ‘Burden of Acting White’ among Black Students* (Aug. 19, 1998) (presented at the annual meeting of the American Sociological Association).

²⁷⁷ AMANDA E. LEWIS & JOHN B. DIAMOND, *DESPITE THE BEST INTENTIONS: HOW RACIAL INEQUALITY THRIVES IN GOOD SCHOOLS* 20 (2015).

²⁷⁸ BART LANDRY, *THE NEW BLACK MIDDLE CLASS* 99 (1987).

²⁷⁹ JOE R. FEAGIN & MELVIN P. SIKES, *LIVING WITH RACISM: THE BLACK MIDDLE-CLASS EXPERIENCE* 15 (1994); JENNIFER L. HOCHSCHILD, *FACING UP TO THE AMERICAN DREAM: RACE, CLASS, AND THE SOUL OF THE NATION* 42 (1995); BOWSER, *supra* note 273, at 27.

²⁸⁰ Lareau & Horvat, *supra* note 9, at 37.

tions' cultural assumptions about the modal beneficiary. For example, take the 2017 Supreme Court ruling in *Endrew F. v. Douglas County School District*.²⁸¹ At issue in *Endrew F.* was the heart of the IDEA: what is the level of education a school district must provide to a child with a disability to fulfill its obligation to provide the free appropriate public education that the law guarantees? Prior to this decision, the circuit courts struggled to reach a consensus as to how to judge a child's IEP when a parent argues that the IEP offered by the school was deficient.²⁸²

The *Endrew* Court resolved the circuit split and held that a school must offer an IEP "reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances."²⁸³ "The child's circumstances" implicates diagnosis; "make progress appropriate" implicates IEP development; and "reasonably calculated" suggests a standard by which a hearing officer can judge the IEP. This standard should be a boon to all children; one special education blog hailed the decision as a "huge victory for parents" because "it raises the standard for an education for students with special needs."²⁸⁴ But even in providing a more rigorous standard than the "de minimis" standard used in many circuits, the Court failed to account for how parents would be able to take advantage of the new standard: what knowledge is required to know if an IEP is "reasonably calculated"? Or what is "appropriate progress"? Even the most basic question requires cultural capital: what are the child's "circumstances"?

The *Endrew F.* opinion assumed a particularly ardent parent who could bring knowledge to bear on these questions. It failed to see how distributional inequalities form the basis for some of the basic questions in the IDEA: what is FAPE and how can a parent assess whether the child has received it? Rather than be a boon to all parents, the heightened substantive standard is truly only a victory to parents with the cultural capital needed to use it.

C. *Tentative Thoughts on How to Consider Culture*

So how should policy makers and legal scholars consider culture? On the one hand, policy makers can attempt to change individual *habitus* to

²⁸¹ *Endrew F. v. Douglas Cty. Sch. Dist.*, 137 S. Ct. 988 (2017).

²⁸² *Compare* *Endrew F. ex rel. Joseph F. v. Douglas County School Dist. Re-1*, 798 F.3d 1329, 1338–42 (10th Cir. 2015) (holding that "the educational benefit mandated by IDEA must merely be 'more than de minimis'" and because *Endrew* had made "some progress under [the school district's] tutelage. That is all that is required.") *with* *Cypress-Fairbanks Indep. Sch. Dist. v. Michael F. ex rel. Barry F.*, 118 F.3d 245, 248 (5th Cir. 1997) ("[T]he educational benefit to which the Act refers and to which an IEP must be geared cannot be a mere modicum or de minimis; rather, an IEP must be 'likely to produce progress, not regression or trivial educational advancement.'" (citations omitted)).

²⁸³ *Endrew F.*, 137 S. Ct. at 1000.

²⁸⁴ Charles P. Fox, *Endrew F. Decision: 8-0 Decision for Parents*, SPECIAL EDUC. L. BLOG (Feb. 12, 2018), <http://blog.foxspecialedlaw.com/2017/03/endrew-f-decision-8-0-decision-for-parents.html> [<https://perma.cc/98NE-H3NL>].

better match the relevant institution's requirements for capturing scarce resources. On the other hand, policy makers can change the institutional requirements themselves. Ultimately, however, any reform may be futile in the long run because (1) without increasing the pie of resources, while allowing more individuals to compete on a level-playing field may result in equality of funding, it may be at a level that does not fully meet any individual's actual needs; and (2) the very nature of cultural capital and stratification suggests that elites will find another way to remain elite.

1. *Increasing the Capital or Changing the Rules*

If the problem of cultural capital in the IDEA is characterized as a problem of not all parents having enough cultural capital, then one way to consider culture would be to increase all potential beneficiaries' cultural capital. Three ways to do so would be to (1) set up an ombudsman's office in each school district; (2) provide "navigators" to all parents who request one; and (3) provide individual legal assistance.

First, in the IDEA, an ombudsman's office could increase cultural capital for all parent beneficiaries by "act[ing] as a liaison between the family and the school, fostering understanding and developing communication between the parties as soon as a child is identified as having special education needs."²⁸⁵ While the IDEA requires school districts to disseminate information about procedures, the ombudsman's office could connect parents with outside resources regarding independent evaluations and available services.

Second, the IDEA could require school districts to provide "navigators" akin to those who are "trained and available to help consumers . . . as they look for health coverage through the [health care exchange]."²⁸⁶ Navigators for the IDEA could help not only in the initial process for diagnosis and eligibility concerns, but can also track a family through their entire K-12 experience, developing expertise on a family's situation through the years. Navigators would be trained to help with the formal, procedural aspects of the law, acting as translators for the procedural requirements. But they would also need to be community members with knowledge not only of the formal rules, but also the informal rules.

Third, the IDEA could provide funding to the states to give a legal representative or advocate to every family who requests one at the complaint stage, at the school district's expense. The IDEA now requires school districts to "inform the parent of any free or low-cost legal and other relevant services available in the area if—(1) The parent requests the information; or (2) The parent or the agency files a due process complaint under this sec-

²⁸⁵ Kuriloff & Goldberg, *supra* note 205, at 66.

²⁸⁶ Healthcare.gov, <https://www.healthcare.gov/glossary/navigator/> (Feb. 12, 2018), [<https://perma.cc/F69U-26MG>].

tion.”²⁸⁷ The statute does not, however, require school districts’ to pay for those services.

The model for publically funded representation would be one of a public defender. On the positive side, this would go a long way toward leveling the playing field between parents and schools, and might help with the distribution of resources among parents of children with disabilities by providing equal access to the courts and administrative decision makers. On the negative side, this reform would only help parents who want to initiate complaints. Many unhappy parents likely never consider legal action. Coupled with the navigators, however, these parents may be more inclined to use the public defender because they will know litigation is an option.

If the problem of cultural capital is about the institutional rules, then one way to reduce the impact of cultural capital on resource allocation is to change the institutional rules to be more inclusive. One option would be to simplify the process. While cultural capital will play a role whenever beneficiaries must do something to get the benefit, it is easier to navigate a simple form, for example, than needing to go to several offices and fill out many forms.

But simplification must be carefully designed; we could imagine that the IDEA simplified the process by completely removing parents from the process altogether. We could imagine if schools did all the diagnosing and service provision with no input from parents. But racial disparities would likely abound with no checks from parents; as discussed in Part I, overrepresentation of black children in the most stigmatized categories arise in part from teacher biases. Thus, if black children are currently being given special education services in the most stigmatized categories with the consent of their parents, a situation in which their parents had no control would not be preferable. On the other hand, such a system might give some school districts and administrators the opportunity to channel some of the resources away from elite students and toward less affluent, racial minority students. Assuming parents lose some control not only in special education but in the school more broadly (e.g., not being able to call the principal for special requests), taking parents out of special education has the potential to radically change the distribution of resources.

2. *Title VI Enforcement*

Another way to consider culture implicates Title VI. Title VI prohibits both intentional discrimination against a student because of race, color or national origin in federally funded programs, as well as unjustified race-neutral practices that have a disproportionate effect on a group of students.²⁸⁸ Primary Title VI enforcement regarding racial disparities in special educa-

²⁸⁷ 34 C.F.R. § 300.507(b).

²⁸⁸ 42 U.S.C. § 2000d et seq.

tion is the purview of the Office for Civil Rights (“OCR”) of the Department of Education.

In a 2016 Dear Colleague Letter, OCR gave several examples of racial disparities under which it would find a Title VI violation. Under an intentional discrimination standard, OCR would find a Title VI violation “if the district’s practice of referring students not suspected of having a disability and needing special education or related services is based on race.”²⁸⁹ For example, if in a classroom with 14 white students and 11 black students, a teacher referred five of the black students for behavior also exhibited by white students, but failed to refer those white students, OCR would “find sufficient evidence of a violation of Title VI if evidence supports the conclusion that any teacher relied on racial stereotypes in determining whether to refer students for general interventions and evaluation.”²⁹⁰

When it comes to the use of parents as the primary enforcers of the law for each individual child, it is unlikely that OCR would find using parental involvement to allocate educational resources as proof of discriminatory treatment. The IDEA’s procedural guarantees of parental involvement came about because of intentional discrimination; the States and their school districts could not be trusted to properly consider children with disabilities or educational needs. And because the law requires individual consideration, only a parent can fulfill that role for each individual child, short of assigning a public advocate for each child.

When evaluating disparate impact claims, the OCR will look at the challenged practice to

[c]onsider whether there is sufficient evidence to show that the school’s [practice] is necessary to advance a legitimate, nondiscriminatory educational goal. If the [practice] is not necessary to advance a legitimate, nondiscriminatory educational goal, then OCR would find a Title VI violation.²⁹¹

If OCR finds the practice or procedure to be necessary to advance a legitimate, nondiscriminatory educational goal, then it will consider whether

[t]here is a comparably effective alternative [practice] that would achieve the school’s goal with less disparate impact. If there is a comparably effective [practice] with less disparate impact, Title VI prohibits the district from implementing the [practice] with more adverse impact.²⁹²

For a disparate impact claim, OCR provides an example of American Indian disproportionate referrals compared to other groups.²⁹³ The vignette states

²⁸⁹ DEAR COLLEAGUE LETTER, *supra* note 123, at 14.

²⁹⁰ *Id.* at 12.

²⁹¹ *Id.* at 9.

²⁹² *Id.* at 9.

²⁹³ *Id.* at 13–14.

that teachers with disproportionate Native American referrals indicated they did so because they believed the students would get additional resources if they were in special education, even though the teachers suspected that the reason the students were underperforming was due to an insufficient academic preparation.²⁹⁴

The OCR will not likely consider the very use of parents in the process as having a disparate impact.

First, as discussed above, parental involvement in their children's education is a bedrock of educational policy and constitutional analysis.²⁹⁵ Practically, parents can help keep schools accountable to fulfill their obligations to provide education.²⁹⁶ Parents also assist with homework, volunteer in classrooms, and support the work of teachers at home. Intuitively, the law's requirement for parental participation is "necessary to advance a legitimate, nondiscriminatory educational goal."²⁹⁷ Second, the OCR would have a hard time finding another practice of less adverse impact—unless it took parents out of the process altogether. That would make it harder for the OCR to exert any enforcement against school districts.

In both the discriminatory treatment and disparate impact scenarios, the OCR relied on parent-initiated complaints to trigger investigations. But even if the OCR found that using parents as enforcers created a disparate impact, it is unclear whether they would ultimately find a Title VI violation. As it stands now, even OCR's enforcement relies on parents. In the examples given in the 2016 Dear Colleague letter, OCR would investigate only when a parent initiated a complaint. For example, in the Native American disparate impact vignette, OCR ends the vignette stating that "[a] parent of one of the American Indian students filed a complaint with OCR, alleging that the middle school discriminated against the American Indian students."²⁹⁸ Because of its focus on parents initiating complaints, OCR implores districts to "establish and implement a system of procedural safeguards for parents to appeal district actions regarding the identification, evaluation, or educational placement of students with disabilities. . . ."²⁹⁹ As discussed above, parents need cultural capital to take advantage of the built-in procedural avenues to challenge school district actions. Indeed, calling those procedures "safeguards" further belies the belief that parents—not the OCR—are the ultimate protectors of their children's rights.

²⁹⁴ *Id.*

²⁹⁵ See *Pierce v. Soc'y of Sisters*, 268 U.S. 510, 535 (1925) (holding that parents may place their children in private schools; "The child is not the mere creature of the state; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations").

²⁹⁶ See, e.g., Gavin Shatkin & Alec Ian Gershberg, *Empowering Parents and Building Communities: The Role of School-Based Councils in Educational Governance and Accountability*, 42 URB. EDUC. 582, 584 (2007).

²⁹⁷ DEAR COLLEAGUE LETTER, *supra* note 123, at 9.

²⁹⁸ *Id.* at 13–14.

²⁹⁹ *Id.* at 17.

While giving every child a lawyer to help initiate Title VI complaints or litigation under the IDEA is an option, perhaps lawyers could play a more systematic role in combating race and class disparities in special education, focusing specifically on the role of parents. Professor Olatunde Johnson argues that if Title VI continues to rely on private enforcement actions, it will be “relegated to the margins of civil rights discourse.”³⁰⁰ Professor Johnson argues that lawyers could strengthen Title VI’s promise by

bringing [class action] lawsuits and drafting administrative complaints, . . . proposing and drafting regulations, and working with policy experts and community-based organizations to advocate for best practices and policy solutions.³⁰¹

This type of lawyering holds some promise for addressing the issues introduced in this Article. Currently, lawyers primarily act as “cultural capital in the flesh,” helping individual parents to advance their individual interests. Organizations like Stanford Law School’s Youth and Education Law Project have been successfully in initiating class action lawsuits against school districts for systemic biases and failures to properly implement the IDEA.³⁰² One would hope that those lawsuits focus not just on the negative outcomes for racial minority children under the law, but also on the privileges white children are experiencing under the law, privileges that other children are being denied.

3. Enlarging the Pie or Shrinking the Eligible

Imagine that all parents have the cultural capital to engage in the IDEA process on a level playing field, and that the processes are simpler to navigate. But without more resources (i.e., money), schools would still face an uphill battle to provide to all children with disabilities Congress’s guarantee of a free appropriate public education. Congress has never fulfilled its funding commitment to special education.³⁰³ Accordingly, one of the reasons schools need to ration resources is a simple one: they do not have enough resources to go around for all the children deemed “a child with a disability.”

One way to work around the scarce resource problem is to change the eligibility requirements for the IDEA benefits. The IDEA could be more stringent with enforcing its eligibility rules and more stringent with what services are provided even if a child is found eligible. Distributing education

³⁰⁰ Olatunde C.A. Johnson, *Lawyering That Has No Name: Title VI and the Meaning of Private Enforcement*, 66 *STAN. L. REV.* 1293, 1293 (2014).

³⁰¹ *Id.* at 1312.

³⁰² See, e.g., *Emma C. et al. v. Delaine Eastin, et al.*, C:96-4179 TEH (N.D. Cal.), *STAN. L. SCH.*, <https://law.stanford.edu/cases/emma-c-et-al-v-delaine-eastin-et-al-c96-4179-teh-n-d-cal/> (last visited Feb. 12, 2018) [<https://perma.cc/N663-CXAF>].

³⁰³ Diament, *supra* note 158.

funds fairly is, as Professors Mark Kelman and Gilliam Lester argue, a question of how to “make decisions about which students deserve resources beyond those devoted to their classmates.”³⁰⁴ They further argue that the IDEA should be answering the following question, rather than relying on the IDEA as a “rights” legislation: “whether students with [disabilities] would benefit more from resource infusions than other pupils.”³⁰⁵ When answering such a question, consider whether to give a child with autism access to “social skills” playgroups at school. These groups are carefully constructed to teach children who have a hard time relating to their peers how to behave appropriately. A child with autism would be no more entitled to this resource than a non-disabled child who has a hard time getting along with his or her peers, and who could equally benefit from the resource.

CONCLUSION

This Article argues that culture matters. It makes a novel contribution by showing that distributional issues in law must question the ways in which access to cultural capital differentiate groups in their attempts to secure legal benefits. In other words, when a legal scheme requires beneficiaries to do something to receive benefits, cultural capital has the potential to shape distributional inequalities along familiar lines of race and class, even within an anti-discrimination scheme.

This Article aims to make a theoretical diagnosis of the problem of culture. Solutions to problems of culture in the law may not have a clean legal answer, let alone one that can be sufficiently explored in one Article. But, as sociologists Mario Small et al. suggest in their review of the literature on culture and poverty, the goal is to “work toward identifying new approaches and new questions that may result in more exhaustive, precise, and complex grasp of the processes and mechanisms that lead to the reproduction” of inequality.³⁰⁶ Furthermore, this work complements current approaches to inequality, because it does not

deny the importance of macrostructural conditions, such as the concentration of wealth and income, [or] the spatial segregation across classes and racial groups . . . Instead, we argue that since human action is both constrained and enabled by the meaning people give to their actions, these dynamics should be central to our understanding of the production and reproduction of . . . social inequality.³⁰⁷

³⁰⁴ KELMAN & LESTER, *supra* note 8, at 6.

³⁰⁵ *Id.*

³⁰⁶ Small et al., *supra* note 19, at 23.

³⁰⁷ *Id.*

A focus on culture also allows us to address non-racial problems. While this Article focused on race and class, the phenomenon concerns any set of dominant and subordinate groups in a social space of contested resources.

