Nova Law Review

Volume 40, *Issue* 3 2017 *Article* 1

Nova Law Review Full Issue

NOVA LAW REVIEW
NOVA SOUTHEASTERN UNIVERSITY

ARTICLES AND SPEECHES

VOLUME 40 2016 NUMBER 3

NOVA LAW REVIEW

VOLUME 40 SPRING 2016 ISSUE 3

NOVA SOUTHEASTERN UNIVERSITY
SHEPARD BROAD COLLEGE OF LAW

ADMINISTRATION

OFFICE OF THE DEAN

Jon M. Garon, B.A., J.D. *Dean and Professor of Law*
Elena B. Langan, B.A., J.D., *Associate Dean for Academic Affairs & Associate Professor of Law*
Tracey-Ann Spencer Reynolds, *Executive Assistant to Dean Jon M. Garon*
Lynda Harris, *Executive Assistant to Associate Dean for Academic Affairs*

DEANS AND DIRECTORS

Lynn Acosta, B.A., M.S., *Assistant Dean for Student Services*
Catherine Arcabascio, B.A., J.D., *Associate Dean for International Programs & Professor of Law*
Timothy Arcaro, B.S., J.D., *Associate Dean for AAMPLE and Online Programs & Professor of Law*
Olympia R. Duhart, B.A., J.D., *Director of First-Year Lawyering Skills & Values Program & Professor of Law*
Jennifer Gordon, J.D., *Direct of Public Interest Programs*
linda f. harrison, J.D., *Associate Dean, Critical Skills Program & Associate Professor of Law*
Robert Levine, B.S., J.D., *Assistant Dean, Career & Professional Development & Adjunct Professor of Law*
Jennifer McIntyre, B.S., M.S., *Assistant Dean for Online Programs*
Joshua Metz, B.S., B.A., CPA, *Director of Administrative Operations*
Elena Rose Minicucci, B.A., J.D., *Director of Alumni Relations & Adjunct Professor of Law*
Frank A. Orlando, B.S., J.D., *Director of the Center for the Study of Youth Policy and Adjunct Professor*
William D. Perez, *Assistant Dean for Admissions*
Nancy Sanguigni, B.S., M.B.A., *Assistant Dean for Clinical Programs*
Susan Stephan, B.S., J.D., M.A., Director of Development
Michele Struffolino, B.A., M.Ed., J.D., *Assistant Dean of Students & Associate Professor of Law*

LAW LIBRARY & TECHNOLOGY CENTER ADMINISTRATION

Eric Young, B.A., M.L.S., J.D., *Assistant Dean for Law Library & Technology Center & Associate Professor of Law*

Karen Rose, *Assistant to the Assistant Dean of the Law Library & Technology Center*
Rebecca A. Rich, A.B., M.S., J.D., *Senior Associate Director, Law Library and Technology Center*
Alison Rosenberg, *Head of Outreach Services*
Rob Beharriell, B.A., J.D., *Outreach & Reference Services Librarian*
Carolyn J. Brown, B.A., M.L.S., J.D., *Outreach & Reference Services Librarian*
Mitchell L. Silverman, B.A., M.S., J.D., *Reference and Patron Services Librarian*
Craig Pharaoh, *Assistant Circulation Manager*
Nikki Williams, *Assistant Circulation Manager*
Mary Paige Smith, B.A., M.L.S., *Associate Director for Technical Services*
John Henderson, *Technical Services Assistant*
Danielle Ranalli, *Technical Services Assistant*
Chad Moulder, *Clinic & Audiovisual Technology Coordinator*

STAFF

Tresha Barracks, *Legal Assistant for Clinical Programs*
Mary Butler, *Coordinator of Advanced Lawyering Skills & Values*
Lakaye Carter, *Admissions Coordinator*
Wendy Clasen, *Administrative Assistant for Clinical Programs*
Natalia Enfort, B.S., *Graduation & Records Advisor for Student Services*
Robert Jacobs, *Secretary for Critical Skills Program*
Jessica Mcfarlane, *Secretary for Critical Skills Program*
Jesse Monteagudo, *Legal Secretary*
Kathleen Perez, *Assitant to the Director of Alumni & Development*
Nicole Rodriguez, *Building Operations Manager*
Catherine Zografos, *Administrative Assistant to the Career & Professional Development Office*
Naomi Scheiner, *Administrative Coordinator for Student Affairs*
Chantelle Spence, *Faculty Assistant*

FACULTY

FULL-TIME FACULTY

Catherine Arcabascio, B.A., J.D., *Associate Dean, International Programs & Professor of Law*
Timothy Arcaro, B.S., J.D., *Associate Dean for AAMPLE and Online Programs & Professor of Law*

Joel A. Mintz, B.A., J.D., LL.M., J.S.D., *Professor of Law*
Roma Perez, B.A., J.D., *Professor of Law*
Michael L. Richmond, A.B., M.S.L.S., J.D., *Professor of Law*
John Sanchez, B.A., J.D., LL.M., *Professor of Law*
Florence Shu-Acquaye, LL.B., LL.M., J.S.M., J.S.D., *Professor of Law*
Michele Struffolino, B.A., M.Ed., J.D., *Assistant Dean of Students & Associate Professor of Law*
Fran L. Tetunic, B.A., J.D., *Director, Alternative Dispute Resolution Clinic & Professor of Law*
Marilyn Uzdavines, B.A., J.D., *Associate Professor of Law*
Kathryn Webber, B.A., J.D., *Associate Professor of Law*
James D. Wilets, B.A., M.A., J.D., *Professor of Law*
Eric W. Young, B.A., M.L.S., J.D., *Assistant Dean, Law Library & Technology Center & Associate Professor of Law*

EMERITUS FACULTY

John Anderson, J.D., *Professor Emeritus of Law*
Marilyn Cane, B.A., J.D., *Professor Emeritus of Law*
Lynn A. Epstein, B.S., J.D., *Professor Emeritus of Law*
Joseph Harbaugh, B.S., LL.B., LL.M, *Dean Emeritus & Professor Emeritus of Law*
Howard Messing, A.B., J.D., *Professor Emeritus of Law*
Gail Richmond, A.B., M.B.A., J.D., *Professor Emeritus of Law*
Bruce S. Rogow, B.B.A., J.D., *Professor Emeritus of Law*
Marc Rohr, B.A., J.D., *Professor Emeritus of Law*
Michael Rooke-Ley, J.D., *Professor Emeritus of Law*
Joseph Smith, J.D., *Professor Emeritus of Law*
Steven Wisotsky, B.A., J.D., LL.M., *Professor of Law*

CRITICAL SKILLS PROGRAM INSTRUCTORS

Meg Chandelle, *Critical Skills Instructor*
Robert Gregg, B.A., J.D., *Critical Skills Instructor*
Heddy Muransky, B.A., M.Ed., J.D., *Critical Skills Instructor*
Marlene Murphy, *Critical Skills Instructor*
Rodney Rawls, B.S., J.D., LL.M., *Critical Skills Instructor*

ADJUNCT FACULTY

Andrew L. Adler, *Adjunct Professor of Law*
Edward R. Almeyda, *Adjunct Professor of Law*
Antoinette Appel, B.A., M.A., Ph.D., J.D., *Adjunct Professor of Law*
Scott Atherton, *Adjunct Professor in the Master of Science Program*
Ross L. Baer, B.A., J.D., *Adjunct Professor of Law*
Denise L. Baker, *Adjunct Professor in the Master of Science Program*
Steven Ballinger, *Adjunct Professor in the Master of Science Program*
Roshawn Banks, B.S., J.D., *Adjunct Professor of Law*
Courtney Jared Bannan, *Adjunct Professor of Law*
Rob Beharriell, J.D., M.L.I.S., *Outreach and Reference Services Librarian*
Richard H. Bergman, *Adjunct Professor of Law*
Johnny Clark Burris, *Adjunct Professor of Law*
Robert Campbell, *Adjunct Professor in the Master of Science Program*
Laura Cancilla-Miller, *Adjunct Professor of Law*
Marilyn Blumberg Cane, *Adjunct Professor of Law*
Lydia B. Cannizzo, *Adjunct Professor in the Master of Science Program*
Jayme Cassidy, B.S., J.D., *Adjunct Professor of Law*
Meg Chandelle, B.S., M.B.A., J.D., *Critical Skills Instructor*
Michele Chang, *Adjunct Professor in the Master of Science Program*
Tracey L. Cohen, J.D., B.A., *Adjunct Professor of Law*
Jude Cooper, *Adjunct Professor of Law*
Arthur T. Daus III, B.A., J.D., *Adjunct Professor of Law*
Hon. Robert F. Diaz, A.A., B.A., J.D., *Adjunct Professor of Law*
Ken S. Direktor, *Adjunct Professor of Law*
Susan Dubow, *Adjunct Professor of Law*
Cynthia Henry Duval, B.A., J.D., *Associate Director of Career and Professional Development*
Lynn Epstein, *Adjunct Professor of Law*
Rebecca Feinberg, *Adjunct Professor in the Master of Science Program*
Hon. Rex J. Ford, B.S., J.D., *Adjunct Professor of Law*
John A. Frusciante, *Adjunct Professor of Law*
Myrna Galligano-Kozlowski, *Adjunct Professor of Law*
Andrew Garofalo, B.S., J.D., *Adjunct Professor of Law*
Jason A. Glusman, *Adjunct Professor of Law*
Adam Scott Goldberg, B.S., J.D., LL.M., *Adjunct Professor of Law*
Evan J. Goldman, *Adjunct Professor of Law*
Anthony Gonzales, *Adjunct Professor of Law*
Carlos F. Gonzalez, *Adjunct Professor of Law*
Shanika A. Graves, B.A., J.D., *Adjunct Professor of Law*
Arthur Green, *Adjunct Professor in the Master of Science Program*

Robert Gregg, *Critical Skills Instructor*
Tonja Haddad-Coleman, J.D., *Adjunct Professor of Law*
Joseph D. Harbaugh, *Adjunct Professor of Law*
Ross Hartog, B.S., J.D., *Adjunct Professor of Law*
A. Margaret Hesford, B.A., J.D., *Adjunct Professor of Law*
Peter Homer, B.A., J.D., M.B.A., *Adjunct Professor of Law*
Hon. Alfred Horowitz, B.A., J.D., LL.M., *Adjunct Professor of Law*
Julie E. Hough, J.D., *Adjunct Professor of Law*
Jacqueline F. Howe, Esq., *Adjunct Professor of Law*
G. Yasmin Jacob, B.A., J.D., *Adjunct Professor of Law & M.S.Emp.L. Program*
Nick Jovanovich, *Adjunct Professor of Law*
Kimberly Kanoff Berman, *Adjunct Professor of Law*
Neil Karadbil, *Adjunct Professor of Law*
Jason Katz, B.S., J.D., *Adjunct Professor of Law*
Daniel Kaufman, B.S., J.D., *Adjunct Professor of Law*
Kamran Khurshid, B.A., J.D., *Adjunct Professor*
Warren Kwavnick, *Adjunct Professor of Law*
Allan M. Lerner, B.A., J.D., *Adjunct Professor of Law*
Robert C. Levine, B.S., J.D., *Assistant Dean, Career & Professional Development & Adjunct Professor of Law*
James Lewis, *Adjunct Professor of Law*
Rochelle Marcus, B.S., M.Ed., J.D., *Adjunct Professor of Law*
Chance Meyer, B.S., J.D., *Adjunct Professor of Law*
Catherine M. Michael, *Adjunct Professor in the Master of Science Program*
Daniel Mielnicki, *Adjunct Professor*
Elena R. Minicucci, B.A., J.D., *Director of Alumni Relations & Adjunct Professor of Law*
Gerald M. Morris, B.A., J.D., LL.M, *Adjunct Professor of Law*
Charles B. Morton, Jr., B.A., J.D., *Adjunct Professor of Law*
Marlene Murphy, *Critical Skills Instructor*
John Napolitano, *Adjunct Professor of Law*
Robert N. Nicholson, B.A., J.D., *Adjunct Professor of Law*
Michelle M. Parker, Esq., *Adjunct Professor*
Vanessa L. Prieto, Esq., *Adjunct Professor of Law*
Becka Rich, B.A., M.S., J.D., *Senior Associate Director, Law Library & Technology Center*
Gail L. Richmond, *Professor Emerita of Law*
Michazel J. Rocque, *Adjunct Professor of Law*
Jose A. Rodriguez-Dod, B.S., J.D., *Adjunct Professor of Law*
Bruce Rogow, *Adjunct Professor of Law*
Mac Rohr, *Professor Emeritus of Law*

Morgan Rood, *Adjunct Professor in the Master of Science Program*
Thomas E. Runyan, Esq., B.S., J.D., *Adjunct Professor of Law*
Maria Schneider, B.A., J.D., *Adjunct Professor of Law*
Robert H. Schwartz, *Adjunct Professor of Law*
Stacy Schwartz, B.S., J.D., *Adjunct Professor of Law*
Neal B. Shniderman, B.A., J.D., *Adjunct Professor of Law*
Jodi Siegel, *Adjunct Professor in the Master of Science Program*
Scott Smiley, BSEE, J.D., *Adjunct Professor of Law*
Charlene Smith, *Adjunct Professor of Law*
Mindy F. Solomon, B.S., J.D., *Adjunct Professor of Law*
Athornia Steele, *Adjunct Professor of Law*
Susan Stephan, *Director of Development & Adjunct Professor of Law*
Richard Stone, *Adjunct Professor of Law*
Maxine K. Streeter, B.A., J.D., *Adjunct Professor of Law*
Meah Tell, Esq., B.A., M.B.A., J.D., LL.M., *Adjunct Professor of Law*
Steven Teppler, *Adjunct Professor of Law*
Damian Thomas, J.D., *Adjunct Professor of Law*
Emilie M. Tracy, Esq., *Adjunct Professor of Law*
Dawn Traverso, B.A., J.D., *Adjunct Professor of Law*
Laura Varela, *Adjunct Professor of Law*
Marilyn Vestal, *Adjunct Professor from Coll of Arts, Humanities & Soc Sci (MLAW Temp)*
Ethan Wall, *Adjunct Professor*
Lee Weintraub, B.S., B.A., J.D., *Adjunct Professor of Law*
Steven Wisotsky, *Adjunct Professor of Law*
Camille L. Worsnop, B.S., J.D., LL.M., *Adjunct Professor of Law*

NOVA LAW REVIEW

NON-DISCRIMINATION STATEMENT

It is the policy of *Nova Law Review* to support equality of opportunity. No person shall be denied membership in *Nova Law Review* or participation in any of its activities on the basis of race, color, religion, national or ethnic origin, sex, sexual orientation, age, or disability.

PERMISSION

MANUSCRIPTS

Nova Law Review invites submissions of unsolicited manuscripts. Articles submitted to *Nova Law Review* should conform to the guidelines set forth in *The Bluebook: A Uniform System of Citation* (20th ed. 2015). Articles may be submitted via mail, or e-mail and must be available on Microsoft Word. E-mail submissions may be sent to the Assistant Lead Articles Editor, accessible at http://nsulaw.nova.edu/students/orgs/lawreview/. All articles not chosen for publication are discarded after consideration. *Nova Law Review* does not assume responsibility for the return of any materials.

SUBSCRIPTIONS

The *Nova Law Review* is published three times per year by students of the Shepard Broad Law Center. The current annual subscription rate is $35.00. Single issues are available for $12.00. Canadian subscribers should add $5.00 for postage fees. Foreign subscribers should add $20.00 for postage fees. Subscriptions are automatically renewed unless notification to the contrary is received by *Nova Law Review*.

Please notify *Nova Law Review* of any changes of address at least 30 days prior to issue release for the change to take effect. The postal service will not forward your copies unless extra postage is provided by the subscriber. Duplicate copies will not be sent free of charge. Subscribers should report non-receipt of copies within 1 month of the expected mailing date. Address any correspondence to:

Nova Law Review
Shepard Broad College of Law
3305 College Avenue
Fort Lauderdale, Florida 33314
Phone: (954) 262-6196

NOVA LAW REVIEW

VOLUME 40 SPRING 2016 NUMBER 3

ARTICLES AND SPEECHES

RAISING OUR CHILDREN: THE VILLAGE HAS WORK TO DO

JUSTICE PEGGY QUINCE*

PRELUDE

On behalf of the Gwen S. Cherry Black Women Lawyers Association, I am so grateful that you all have come, and I thank you for coming. I thank all the panelists and speakers—will the board of Gwen S. Cherry Black Women Lawyers Association please stand and be recognized? [applause]

An association of black women—some mothers and many of us not—our advocacy around this issue is pretty obvious, but when we decided to reach out to people, we were so very quickly joined by a huge, broad community of people who believe in raising each other's children. There are just too many people who have been involved in this from the very beginning to thank individually, but I do want to give a very special "thank you" to Dean Garon for his leadership and NSU's Law Review for their tremendous work and vision—thank you very much. [applause]

I have the pleasure of introducing a woman, who in addition to her own two beautiful daughters, is known for minding other people's children. So it is very fitting that we have Justice Quince with us today. In 1998, Justice Quince was appointed to the Florida Supreme Court, becoming the very first African American woman to hold that role. From 2008 to 2010, she served as the Court's Chief Justice, becoming the first African American woman to head any branch of Florida government. She has been a relentless advocate who believes that the law could and should be used to combat social injustice. We could not agree more, and it is with great pride and honor that I introduce you to Justice Peggy Quince.

RAISING OUR CHILDREN: THE VILLAGE HAS WORK TO DO

Good Afternoon. It is really my pleasure to be here with you today and to talk with you about the subject of this symposium. But first, I have to thank Nova Southeastern University Shepard Broad College of Law and the

---

* Justice Peggy Quince is an Associate Justice of the Supreme Court of Florida, having previously served as Chief Justice from July 1, 2018 until June 30, 2010. During this time, she became the first African American woman to head any branch of FLorida government. She received her Juris Doctor from the Columbus School of Law at the Catholic University of American in 1975.

Gwen Cherry Black Women Lawyers Association for putting the symposium together. In my estimation, there is no topic more important to us than the topic of our children because the children represent the future of this state. And, without a healthy respect and response to the needs of the children of this state, we are not going to have a healthy state. So, thank you for putting on this symposium. And, I have been sitting here in awe at some of the topics that have been discussed and gathering some of the information that I have gathered because I do not actually work on this topic on a daily basis, but I am a citizen of the State of Florida. I am a part of the Village of the State of Florida, and so, this topic is vitally important to me. And, this topic is vitally important to the judiciary of this state.

We are concerned with the number of children that go through our juvenile justice system, and so we want to partner with those that we can see what we can do. Our role is helping to reduce the children going through our system. We do not want to see this, and I especially—as Cynthia just said—as a black woman, with children and concern for our black community, want to continue to see our black young people, and especially our black young men, go through this kind of process. I look at all the statistics, and I see that we do not have young men available to go to our medical schools. We do not have young men available to go to our law schools, to become architects, and engineers, and teachers, and all of the things that make for a good, healthy community. And so, we have to start—we have to start, my friends, at ground zero: to try to change what is going on in our system. This whole school-to-prison pipeline, the policies that have resulted from this have got to change. And we have to change it because we have so many children who are at risk, and they are the ones who, for the most part, have this problem. National studies will show that children of color are disproportionately suspended, expelled, and arrested in comparison to their white classmates. It is also the children—and I am sure you heard much of this this morning—it is also the children in our foster care system who are disproportionately impact[ed] by these policies. And here, in Florida, we see a number of children referred to our criminal justice system from the school system, and most of those referrals—two thirds of those referrals—are for misdemeanor offenses, and fifty-eight percent of them are for first time offenses. We have got to do something about this, and it is going to take all of us who are part of this village to raise our children.

And then let me just lay down for you some of the statistics that I have seen about what is really going on. African American students make forty-four percent, and maybe even higher by now, of the students receiving out-of-school suspensions—forty-four percent. African American and Hispanic children put together make up about a sixty-five percent of the out-of-school suspensions. Students with disabilities are disproportionately

affected, and you heard, one of the people here today [at the symposium] talk about thirty-eight percent. And a lot of these out-of-school suspensions began at a very young age, in the seventh grade—the seventh grade. We are talking about children who are twelve and thirteen years old—maybe, eleven even—who are just beginning to get into that puberty. And I do not know if we talked about that kind of science of what is going on when kids get to puberty, but those are the children who have been suspended. And once you are suspended, you are more likely to drop out of school. And school dropouts are more likely to happen when you have been arrested. And foster kids are twice as likely to be suspended. And this is a statistic that really bothered me substantially: By the third grade, eighty-three percent of the children and foster care had been retained. About half of the children in foster care never graduate. We all should be concerned about these kinds of numbers. And most likely, the children who are suspended are suspended—a lot of them are suspended for, especially talking about minority students—for conduct that their white counterparts are never suspended for. And we should be concerned. Another population that is disproportionately suspended and expelled are gay, lesbian and, bisexual children. And, I was looking at an article recently, and in some school districts, a third of the black males have been suspended. A third of the black males in that school population—this is still in the urban areas—have been suspended.[1] And you heard earlier, that there are multiple causes of it, and some of it is, in fact, explicit and implicit bias. For the same conduct, they give many of the white students a pass, but the pass for the black student is to call the police.

We need to do something about that. And I also noted that the Department of Justice and Education issued last year a letter to school administrators indicating that, and I quote: "[R]acial discrimination in school discipline is a real problem."[2] And one of the commentators said that kids from suburban white America do not get arrested for cursing at a teacher, or throwing a book. These are the things they go to counselors for, but children of color get suspended or expelled. All of you have heard that it takes a village to raise a child, and in the Village of Florida, we have a lot of work to do. We need to come together and stem the tide of why we have so many children suspended and expelled. We are all in this together: The parents, the teachers, the community, law enforcement, the courts—we are all in this together. We make up a village that needs to raise these children.

1. W. DAVID STEVENS ET AL., DISCIPLE PRACTICES IN CHICAGO SCHOOLS: TRENDS IN THE USE OF SUSPENSIONS AND ARRESTS 2 (Ann Lindner ed. 2015).

2. CATHERINE E. LHAMON & JOCELYN SAMUELS, U.S. DEP'T OF JUSTICE & U.S. DEP'T OF EDUC., DEAR COLLEAGUE LETTER ON THE NONDISCRIMINATORY ADMINISTRATION OF SCHOOL DISCIPLINE 4 (2014), http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201401-title-vi.pdf.

How did we even get to this point that we are at? A lot of it—all of us have a part to play in this. Parents of the parents: Some of them have children too early, too young, so they have no idea what they are doing. They are still children themselves, and they have no clue about how to raise children. In other situations, we found parents who work long hours just to make ends meet, and so they leave their children virtually unsupervised to raise themselves or be raised by people in the street who mean them no good. In other households, we have parents who are incarcerated and who are left to raise them are just squeaking by, and the children often end up in a dependency system—and that is why we have so many of the foster care children that we are talking about. So, I think that parents, when they get overwhelmed and overburdened, need to know that there is some place they can go for help. Do we do a good job of letting parents know that there is some help for them? The only time we talk about really helping them is once they get to the dependency system, and sometimes it is too late at that point. We need to make sure that these kids have a place where they can do their homework, places they can go after school. None of us are born knowing how to parent. We have all had our ups and downs—I have two children myself—so I know that for a fact. We need to help those that are struggling. We as a community—as a part of the village—need to help these parents. And, I used to do mentoring, and I must confess that I have become very slack in my obligations to our community and to the village. I used to do mentoring and then I mentored in all levels—the elementary, the junior high, the high school level—but then I found myself really busy, I stopped doing it, and once you do, it is hard to get back into it. So, I need to personally look at what I can do to help our village.

Our schools: I know that our schools are under tremendous pressure. We have pressure from funding. And, we have pressure, and of course, funding means we do not have money for the counselors, and the special education that we really need. And the schools are under pressure for testing accountability; we talked about that earlier. So I am not really blaming the teachers for this crisis—I call it a crisis that we are in, per se—but teachers are part of the village and have to be a part of the solution. I admire teachers. I think that the teachers are the most underpaid professionals that there are. How in the world do we continue to ask people to help educate and in some cases raise our children when we pay them essentially peanuts? But, we pay so much to have ourselves entertained. It is just amazing to me that there has not been a really national outcry to do more about teacher pay. I grew up in a single-parent household. My father was a single parent, and he worked as many hours as he could possibly work to raise, clothe, food, educate five children. And so, my teachers stepped in where they could and helped out. I can remember we used to go on a lot of fields trips. I grew up in Virginia,

and there are a lot of historic places in Virginia—Williamsburg, Jamestown, Yorktown—all of those places. And, we would often go on field trips, and my father could not afford it; he just could not afford it. An uneducated person, a civilian worker for the Navy, which was a good job—a lot of people in the rural area I grew up in worked in the fields and did that kind of labor, so my father really had a good job for those times, but he could not afford a lot of those extras. I had teachers who actually stepped in and would pay for me to go on these field trips. With very little resources themselves, they would do that, and so I admire what teachers are doing. But the teachers really have to step up to the plate also—and I know you are under all this pressure—but sometimes you need to stop and think: Do I really need to call that resource officer to handle the situation? You have to stop and think about that because one minute might make a real difference in that child's life. Because once they start down that track, it is very, very difficult to roll it back. So yes, you have some work to do—teachers also. And, that testing—oh, that testing—it has made, I think, teachers kind of paranoid. There is that incentive there then to push out those who are bringing down those test scores, and often, they are the same children we are talking about. They are the ones who have the low test scores and they are the disciplined part, and so there seems to be an incentive to push them out.

And, zero tolerance policies:—you cannot have a policy that is a one size fit all. There has to be some room for some individuality, and let me give you an example. This is something that happened very recently in Texas. And, I do not know if you have heard about it or not. There was a young man named Ahmed Mohammed: A brilliant student interested in robotics, engineering, those kinds of things. And so, he built a clock at home, he takes it to school, and the first teacher he shows it to says, "You really shouldn't show this to anybody else." But for some reason, he did. The police was called. He ended up with a three-day suspension, even after all the discussion—of what, that he had built this—no bomb was found.[3] When we talk about minorities disproportionately dealt with—he was interrogated four times by the sheriff—or four sheriffs, I should say, interrogated him. Zero tolerance. We know what happens when children are suspended and expelled, don't we? They go unsupervised; there is no constructive activities; they fall behind in their schoolwork; they get back to school and they are behind; they become discouraged; and they drop out. And then, there [is] juveniles out on the streets as prey to any of those adults out there who are looking for others to do their dirty work. We have a lot of work to

3. Krishnadev Calamur, *Inventing While Muslim*, THE ATLANTIC (Sep. 16, 2015, 1:13 PM), http://www.theatlantic.com/national/archive/2015/09/inventing-while-muslim/405586.

do. And, once the children fall, and too many children, who have fallen into juvenile crime, fall into adult crime. And that is how we get that prison-industrial complex going. These are the children who later populate the adult prisons. And, I think that in response to things that have gone on in our school systems, we brought in these resource officers who were supposed to be a connection between the community, and the things that were going on in the school. And yet what ends up happening in a lot of situations is that they end up arresting children for really minor things. And they end up being the disciplinarians that the teachers used to be. It is easier to call a resource officer to come and deal with the situation that teachers used to be able to deal with.

When I was going to school, I do not ever remember seeing a police officer on our school campus. Teachers dealt with the disciplinary issues, or they sent them to the principal's office, who dealt with the disciplinary issues. I know that a lot of things have changed; there are a lot more drugs, and all of that, in our communities, but there still has to be some room for the teacher being disciplinarian as opposed to resorting to other forces. And with the increase of, of course, law enforcement, we get the increase of arrests, we get the increased interventions of our court systems, and we have more young people in our juvenile justice system than ever before. And often the children get there, they have no lawyers, they end up in detention for minor issues, and the cycle goes on, and it goes on, and it goes on. And we should really think about the fact that we have a monetary issue in stopping this: It costs about five thousand dollars to process a juvenile case. That means that this state spends between sixty nine million to seventy-five million dollars a year processing kids who have been sent to out a court from schools. That is a lot of money—sixty-nine to seventy-five million dollars. Let's think about this: If the cycle goes on, we spend—I believe, approximately—I think the last numbers I saw—is about forty thousand dollars a year to house a prisoner. How much do we spend a year on children in school? Seven thousand, maybe? You do the math. We spend so much money to house prisoners. If we could use that money in our school systems, just think about what good can be done.

It is just unfathomable to me that we, as a whole community, do not see the need for true reform. Parents need to stop expecting the school systems to raise their children, and they need to take a more active part in their children's lives. Get help if you need help. Do not blame your children's conduct necessarily on the teacher. When I was growing up—I keep referring to that because it just seems like the school system has changed so much—if my father got a call from a teacher—you know what was going to happen next—I needed to find a pad for a certain part of my anatomy because my father took the position that there was no excuse for a

teacher to have to call him, except if she was calling him to tell him I made all A's that six weeks. Often, we see the parents berating the teacher. Parents, you need to take a lot more responsibility, and those of us in the community, we need to take more responsibility. In addition to the help of mentoring people, I have to tell you lawyers—lawyers in this room—you need to step up to the plate also. You are part of this community. You are part of this village. And, we just heard a presentation from Professor Pinkney about the things that she has been able to accomplish. Well, if you would take—lawyers—some of these cases at this end of it, when the child is about to be suspended or expelled, maybe you will not have to represent them at the other point when we are talking about the juvenile justice system.

You are part of the village. You need to help raise our children. This to me is vitally important. There is a legal aspect to this because you also heard them say that parents do not understand what their rights are. So, if we make ourselves a bit—all of us are supposed to do some pro-bono work—make it a point of doing pro-bono work in this particular area and helping to keep our children in school. And schools, with the help of the rest of us, you need to really look at, or re-think, some of the policies that you have. We need to . . . rethink some of the policies that you have. I would suggest—because I was listening to the presentation earlier about bias, implicit and explicit—we need to make sure some of our teachers go through diversity training. I do not know if you have it in the school system, we try to do it in the court system. We make our judges have diversity training so we understand even what we are feeling because no one is beyond bias and prejudice. But I think if you recognize that that's what it is, it will help you to deal with this situation better. And, I would ask that you look at—I think they have program going in Palm Beach County—the school-justice partnership, where people are coming together and they are beginning to reduce some of those numbers that we have talked about. One size does not fit all, and we cannot allow our schools to continue to use that kind of method when dealing with our children. If we can help our children; if we can reduce this school-to-prison pipeline, then we know that our village is going to thrive in the future. We need to give care and attention to what is going on in our school system. The same kind of care and attention we give to our individual children. We need to make sure that our school systems are working for all of our children.

I am going to leave you with the words of one of my favorite all-time singers. That is Marvin Gaye, and he had a song that I really loved, and that song says, "Save the children." Thank you so much. [applause].

MIRANDA IN MENTAL HEALTH: COURT ORDERED CONFESSIONS AND THERAPEUTIC INJUSTICE FOR YOUNG OFFENDERS

JENNIFER A. BROBST*

> Coercing the supposed state's criminals into confessions and using such confessions so coerced from them against them in trials has been the curse of all countries. It was the chief iniquity, the crowning infamy of the Star Chamber, and the Inquisition, and other similar institutions. The Constitution recognized the evils that lay behind these practices and prohibited them in this country.[1]

* Jennifer A. Brobst, J.D., LL.M., is an Assistant Professor and Director of the Center for Health Law and Policy at Southern Illinois University (SIU) School of Law. Many thanks to the law student editors and staff at the Nova Law Review for their patience and editorial assistance and for the opportunity to participate in the timely and wide-ranging Symposium, *Shutting Down the School to Prison Pipeline*, sponsored by the Nova Law Review and Gwen S. Cherry Black Women Lawyers Association at Nova Southeastern University Shepard Broad College of Law on September 18, 2015. Thoughtful editorial perspectives were provided by valued faculty colleagues, particularly Dr. Jan Hill-Jordan, Research Instructor at the SIU School of Medicine, Department of Psychiatry, and Professor William A. Schroeder, SIU School of Law. Also, a special thanks is extended to my daughter, Scout, for providing an astute and willing sounding board for the ideas expressed herein regarding her constitutional rights as a minor and those of her peers.

1. Fisher v. State, 110 So. 361, 365 (Miss. 1926).

I. INTRODUCTION

There is a certain sadness accompanying the hopeful tone of the promotion of juvenile brain science to ameliorate harsh juvenile justice policies.[2] For some offenders, the courts' improved understanding of why youth express themselves with impulsivity and violence at times makes little, if any, difference on the legal outcomes of these juvenile offenders, and may even exacerbate the harsh remedies accorded them in the criminal justice system.[3] The appeal of therapeutic justice,[4] embracing both scientific advancement and compassion for the young, may be dangerously deceptive, leading to higher sentences and longer confinement in a system ill-equipped to manage the mental health needs of either young or old.[5]

Specifically, court-ordered therapy[6] that seeks to elicit disclosures of additional criminal activity may place violent but vulnerable juvenile

---

2. *See, e.g.*, Graham v. Florida, 560 U.S. 48, 68, 73 (2010). "[D]evelopments in psychology and brain science continue to show fundamental differences between juvenile and adult minds. For example, parts of the brain involved in behavior control continue to mature through late adolescence." *Id.* at 68; *see also* Cheryl B. Preston & Brandon T. Crowther, *Legal Osmosis: The Role of Brain Science in Protecting Adolescents*, 43 HOFSTRA L. REV. 447, 451 (2014) (asserting that MRI advances show that "teenagers may have the *ability* to reason like adults, but do so with *vexing inconsistency*"); Deana Pollard Sacks, *Children's Developmental Vulnerability and the Roberts Court's Child-Protective Jurisprudence: An Emerging Trend?*, 40 STETSON L. REV. 777, 777 (2011) (advocating Supreme Court expansion of juvenile protection under the Eighth Amendment to child welfare and the First Amendment). *But see* Terry A. Maroney, *The False Promise of Adolescent Brain Science in Juvenile Justice*, 85 NOTRE DAME L. REV. 89, 174 (2009) ("[A] disproportionate focus on the teen brain tends to support a false notion that teens' propensity to offend is *hard-wired*, a view that not only makes societal reform seem pointless but, by implying the impossibility of deterrence, could support needless incapacitation of many youth until their brains *grow up*.") (emphasis added).

3. Maroney, *supra* note 2, at 113–15, 117–18, 122–23.

4. *See* Susan Daicoff, *Law as a Healing Profession: The "Comprehensive Law Movement"*, 6 PEPP. DISP. RESOL. L.J. 1, 3 n.9, 11–12 (2006) (noting that therapeutic jurisprudence "is represented by numerous books and hundreds of law review articles that apply [therapeutic jurisprudence] to all areas of the law."); David B. Wexler, *International Network on Therapeutic Jurisprudence*, U. ARIZ., http://www.law2.arizona.edu/depts/upr-intj (last visited Feb. 23, 2016) (defining therapeutic jurisprudence as a practice focusing on "the law's impact on emotional life and [on] psychological well-being" while ensuring that other values such as justice and due process are fully respected).

5. Daicoff, *supra* note 4, at 11–12; Stanton Peele, *Court-Ordered Treatment for Drug Offenders Is Much Better Than Prison. Or Is It?*, RECONSIDER Q., Winter 2000–01, at 20, 22–23.

6. *See* Peele, *supra* note 5, at 20. Note that the term therapy may generally include a variety of treatment forms, but for the purposes of this Article, it is used interchangeably with psychotherapy, a form that involves conversation between mental health clinician and client.

offenders at risk of additional charges.[7] A small but emerging body of state and federal case law scrutinizes therapeutic justice practices that may coerce disclosures in the name of treatment, potentially violating the constitutional due process rights of offenders.[8] While this emerging body of law addresses adult inmates, increasing reliance on therapeutic jurisprudence with regard to juvenile offenders warrants examination of its constitutional impact on juveniles offered mental health treatment in the juvenile justice system. As was said with respect to the authority of the early juvenile court system, "those who labor to shield the young from evil influences benefit humanity; but benevolent enterprises must be carried out in a constitutional manner."[9]

Too many convicted offenders have been both offenders and crime victims since youth,[10] creating a substantial need for access to effective mental health services due to trauma, mental illness, and addiction.[11] These are simultaneously some of the most dangerous, unstable, and vulnerable offenders in the system.[12] To address this, the national conversation suggests that court-ordered mental health assessment and therapy should be increasingly relied on for the purpose of rehabilitation, protecting both society and offender from the risk of recidivism, while demonstrating a more

---

7. *See* People v. Rebulloza, 184 Cal. Rptr. 3d 548, 560–61 (Ct. App.), *review granted*, 349 P.3d 1066 (Cal. 2015); Maroney, *supra* note 2, at 91–94; Marc McCulloch, *Still Between a Rock and a Hard Place . . . Victim or Delinquent: Dual Status Minors in California — An Illusory Promise?*, 28 J. JUV. L. U. LA VERNE C.L. 118, 118–21 (2007) (identifying the tension in California's systemic efforts to serve the needs of youth who qualify as both dependents and delinquents).

8. *See* Parham v. J.R., 442 U.S. 584, 620–21 (1979); *In re* Gault, 387 U.S. 1, 20–21 (1971); *Manfield's Case*, 22 Pa. Super. 224, 234–35 (1902).

9. *Manfield's Case*, 22 Pa. Super. at 235.

10. *See* McCulloch, *supra* note 7, at 118–19, 123.

11. *See id.* at 120–21, 135–36. For example, 23% of all perpetrators of child sexual abuse are juvenile offenders, and 40% to 80% of juvenile sex offenders have been victims of sexual abuse themselves. *Statistics on Perpetrators of Child Sexual Abuse*, NAT'L CTR. FOR VICTIMS CRIME, http://www.victimsofcrime.org/media/reporting-on-child-sexual-abuse/statistics-on-perpetrators-of-csa (last visited Feb. 23, 2016). Nationally, two-thirds of juvenile arrests are of males and one-third of females, and "nearly half of [all] male and female juvenile detainees had a substance [abuse] disorder," many with co-occurring histories of child abuse. BENNETT W. FLETCHER ET AL., U.S. DEP'T OF HEALTH & HUMAN SERVS., PRINCIPLES OF DRUG ABUSE TREATMENT FOR CRIMINAL JUSTICE POPULATIONS: A RESEARCH-BASED GUIDE 13, 29–30 (2014).

In a study of over eighteen hundred juvenile inmates in Cook County, Illinois in 2002, nearly two-thirds of male and three-fourths of female inmates "met diagnostic criteria for one or more psychiatric disorders." Linda A. Teplin et al., *Psychiatric Disorders in Youth in Juvenile Detention*, 59 ARCHIVES GEN. PSYCHIATRY 1133, 1133–34 (2002).

12. *See* Thomas Grisso, *Adolescent Offenders with Mental Disorders*, FUTURE CHILD., no. 2, Fall 2008, at 143, 145–46 (noting the common intersection of depression and anger among incarcerated juvenile offenders, which may manifest as aggression toward others or self-harm and suicidality).

I. INTRODUCTION

There is a certain sadness accompanying the hopeful tone of the promotion of juvenile brain science to ameliorate harsh juvenile justice policies.[2] For some offenders, the courts' improved understanding of why youth express themselves with impulsivity and violence at times makes little, if any, difference on the legal outcomes of these juvenile offenders, and may even exacerbate the harsh remedies accorded them in the criminal justice system.[3] The appeal of therapeutic justice,[4] embracing both scientific advancement and compassion for the young, may be dangerously deceptive, leading to higher sentences and longer confinement in a system ill-equipped to manage the mental health needs of either young or old.[5]

Specifically, court-ordered therapy[6] that seeks to elicit disclosures of additional criminal activity may place violent but vulnerable juvenile

---

2. *See, e.g.*, Graham v. Florida, 560 U.S. 48, 68, 73 (2010). "[D]evelopments in psychology and brain science continue to show fundamental differences between juvenile and adult minds. For example, parts of the brain involved in behavior control continue to mature through late adolescence." *Id.* at 68; *see also* Cheryl B. Preston & Brandon T. Crowther, *Legal Osmosis: The Role of Brain Science in Protecting Adolescents*, 43 HOFSTRA L. REV. 447, 451 (2014) (asserting that MRI advances show that "teenagers may have the *ability* to reason like adults, but do so with *vexing inconsistency*"); Deana Pollard Sacks, *Children's Developmental Vulnerability and the Roberts Court's Child-Protective Jurisprudence: An Emerging Trend?*, 40 STETSON L. REV. 777, 777 (2011) (advocating Supreme Court expansion of juvenile protection under the Eighth Amendment to child welfare and the First Amendment). *But see* Terry A. Maroney, *The False Promise of Adolescent Brain Science in Juvenile Justice*, 85 NOTRE DAME L. REV. 89, 174 (2009) ("[A] disproportionate focus on the teen brain tends to support a false notion that teens' propensity to offend is *hard-wired*, a view that not only makes societal reform seem pointless but, by implying the impossibility of deterrence, could support needless incapacitation of many youth until their brains *grow up*.") (emphasis added).

3. Maroney, *supra* note 2, at 113–15, 117–18, 122–23.

4. *See* Susan Daicoff, *Law as a Healing Profession: The "Comprehensive Law Movement"*, 6 PEPP. DISP. RESOL. L.J. 1, 3 n.9, 11–12 (2006) (noting that therapeutic jurisprudence "is represented by numerous books and hundreds of law review articles that apply [therapeutic jurisprudence] to all areas of the law."); David B. Wexler, *International Network on Therapeutic Jurisprudence*, U. ARIZ., http://www.law2.arizona.edu/depts/upr-intj (last visited Feb. 23, 2016) (defining therapeutic jurisprudence as a practice focusing on "the law's impact on emotional life and [on] psychological well-being" while ensuring that other values such as justice and due process are fully respected).

5. Daicoff, *supra* note 4, at 11–12; Stanton Peele, *Court-Ordered Treatment for Drug Offenders Is Much Better Than Prison. Or Is It?*, RECONSIDER Q., Winter 2000–01, at 20, 22–23.

6. *See* Peele, *supra* note 5, at 20. Note that the term therapy may generally include a variety of treatment forms, but for the purposes of this Article, it is used interchangeably with psychotherapy, a form that involves conversation between mental health clinician and client.

may be out of reach for some of the most vulnerable youth in the system: young violent offenders with challenging and complex needs.[17] Policy advocates for reform of the juvenile justice and child welfare systems must take a more realistic view of the legal risks of court-ordered therapy, including violations of the Fifth Amendment privilege against self-incrimination.[18] This Article will then address which juvenile defendants are most at risk, what constitutional protections in therapy may be available, and whether balancing a juvenile defendant's rights and the public interest in safety may yet create possibilities for intermediate therapeutic options.[19]

II. JUVENILE OFFENDERS AND THE MODERN THERAPEUTIC STATE

Therapeutic modalities addressing violent recidivism may request or even require an offender's disclosure of additional crimes or victims.[20] For example, *evidence-based* treatments for posttraumatic stress disorder ("PTSD") may require the juvenile offender to produce a trauma narrative, fully disclosing the circumstances surrounding the traumatic event, which may involve the offender's previously undisclosed culpable acts.[21] Sex offender treatment for juveniles and adults may require waivers of confidentiality[22] or regular use of polygraphy to motivate truthful

17. *See infra* Part III.

18. U.S. CONST. amend. V; *In re* Gault, 387 U.S. 1, 49–50 (1967); *see also* McKune v. Lile, 536 U.S. 24, 48 (2002); *infra* Part III.

19. *See infra* Part IV.

20. *See McKune*, 536 U.S. at 30; Douglas C. Maloney, Comment, *Lies, Damn Lies, and Polygraphs: The Problematic Role of Polygraphs in Postconviction Sex Offender Treatment (PCSOT)*, 84 TEMP. L. REV. 903, 904, 907 (2012).

21. CHILD WELFARE INFO. GATEWAY, U.S. DEP'T OF HEALTH & HUMAN SERVS., TRAUMA-FOCUSED COGNITIVE BEHAVIORAL THERAPY FOR CHILDREN AFFECTED BY SEXUAL ABUSE OR TRAUMA 5 (2012), http://www.childwelfare.gov/pubPDF/trauma.pdf (including the trauma narrative as a required protocol for trauma-focused cognitive behavioral therapy, defined as "[g]radual exposure exercises, including verbal, written, or symbolic recounting of abusive events, and processing of inaccurate [or] unhelpful thoughts about the abuse"); Esther Deblinger et al., *Trauma-Focused Cognitive Behavioral Therapy For Children: Impact of the Trauma Narrative and Treatment Length*, 28 DEPRESSION & ANXIETY 67, 68 (2011) ("Exposure-based cognitive behavioral interventions are generally recommended for treating adults as well as youth with PTSD," but noting parental and child hesitancy to fully disclose the details of the traumatic event).

22. *E.g.*, Ambrose v. Godinez, 510 F. App'x 470, 472 (7th Cir.), *cert. denied*, 134 S. Ct. 270 (2013) ("In Illinois a threshold step for participating in sex-offender treatment—or even being *evaluated* for treatment—is signing what the parties call a "waiver"—more accurately, a release—authorizing a participant's therapist to disclose information obtained during treatment."); Doe v. Heil, 781 F. Supp. 2d 1134, 1143 (D. Colo. 2011) (denying the Fifth Amendment claim of an incarcerated prisoner whose demand for assurances of immunity for mandatory disclosures in sex offender treatment was refused); *see also* CTR. FOR SEX OFFENDER MGMT., UNDERSTANDING TREATMENT FOR ADULTS AND

empathetic approach to mentally ill and addicted youth.[13] Yet, the availability of mental health treatment and care for juvenile offenders and the enforcement of due process rights for offenders with serious mental health needs remain lacking.[14] For example, the availability of services and beds in state hospitals has not kept up with court demand, nor have they been made equally available for all mental health needs, in part due to selective legislative policies:

> The situation is also worse than it appears because the majority of beds remaining in the state mental hospitals are not available for all the individuals with serious mental illness who need to be hospitalized. The reason these beds are not available is because they are occupied by long-stay forensic patients and sex offenders who have been sent to the state hospital by court order. Thus, the 356,000 mentally ill inmates in prisons and jails are there by court order, and the majority of patients in state mental hospitals are there by court order.[15]

In Part II, Juvenile Offenders and the Modern Therapeutic State, this Article will discuss why court-ordered therapy in an increasingly therapeutic-focused juvenile justice system may present a legally impossible approach for rehabilitating the juvenile offenders most in need of such services.[16] After identifying the legal and research history supporting court-ordered therapy, Part III, Constitutional Considerations for Juvenile Offenders in Therapy, will reveal why the unfortunate, but necessary, practical result is that certain advances in mental health research and adolescent neuroscience

---

13. *See* Mark Soler et al., *Juvenile Justice: Lessons for a New Era*, 16 GEO. J. ON POVERTY L. & POL'Y 483, 525–29 (2009) (recommending policy changes in juvenile justice services for at risk youth based on new evidence-based mental health and prevention practices).

14. *See* People v. Davis, 871 N.W.2d 392, 394 (Mich. Ct. App. 2015) (addressing the court's interest but lack of authority in dismissing unarmed robbery charges against a seventeen-year-old cognitively-impaired young man who although incompetent to stand trial, was held in jail for two months because no vacancies opened up at a psychiatric facility); Michael L. Perlin, *"Yonder Stands Your Orphan with His Gun": The International Human Rights and Therapeutic Jurisprudence Implications of Juvenile Punishment Schemes*, 46 TEX. TECH. L. REV. 301, 316–17 (2013) (addressing the continuing lack of safe and adequate mental health resources for juvenile offenders since the 1980s).

15. E. FULLER TORREY ET AL., TREATMENT ADVOCACY CTR., THE TREATMENT OF PERSONS WITH MENTAL ILLNESS IN PRISONS AND JAILS: A STATE SURVEY 101–02 (2014), http://www.tacreports.org/storage/documents/treatment-behind-bars/treatment-behind-bars.pdf.

16. *See infra* Part II. Note that expungement of lesser offenses for minors may ameliorate the legal challenges discussed herein, but this approach is beyond the scope of this Article.

may be out of reach for some of the most vulnerable youth in the system: young violent offenders with challenging and complex needs.[17] Policy advocates for reform of the juvenile justice and child welfare systems must take a more realistic view of the legal risks of court-ordered therapy, including violations of the Fifth Amendment privilege against self-incrimination.[18] This Article will then address which juvenile defendants are most at risk, what constitutional protections in therapy may be available, and whether balancing a juvenile defendant's rights and the public interest in safety may yet create possibilities for intermediate therapeutic options.[19]

II. JUVENILE OFFENDERS AND THE MODERN THERAPEUTIC STATE

Therapeutic modalities addressing violent recidivism may request or even require an offender's disclosure of additional crimes or victims.[20] For example, *evidence-based* treatments for posttraumatic stress disorder ("PTSD") may require the juvenile offender to produce a trauma narrative, fully disclosing the circumstances surrounding the traumatic event, which may involve the offender's previously undisclosed culpable acts.[21] Sex offender treatment for juveniles and adults may require waivers of confidentiality[22] or regular use of polygraphy to motivate truthful

17. *See infra* Part III.

18. U.S. CONST. amend. V; *In re* Gault, 387 U.S. 1, 49–50 (1967); *see also* McKune v. Lile, 536 U.S. 24, 48 (2002); *infra* Part III.

19. *See infra* Part IV.

20. *See McKune*, 536 U.S. at 30; Douglas C. Maloney, Comment, *Lies, Damn Lies, and Polygraphs: The Problematic Role of Polygraphs in Postconviction Sex Offender Treatment (PCSOT)*, 84 TEMP. L. REV. 903, 904, 907 (2012).

21. CHILD WELFARE INFO. GATEWAY, U.S. DEP'T OF HEALTH & HUMAN SERVS., TRAUMA-FOCUSED COGNITIVE BEHAVIORAL THERAPY FOR CHILDREN AFFECTED BY SEXUAL ABUSE OR TRAUMA 5 (2012), http://www.childwelfare.gov/pubPDF/trauma.pdf (including the trauma narrative as a required protocol for trauma-focused cognitive behavioral therapy, defined as "[g]radual exposure exercises, including verbal, written, or symbolic recounting of abusive events, and processing of inaccurate [or] unhelpful thoughts about the abuse"); Esther Deblinger et al., *Trauma-Focused Cognitive Behavioral Therapy For Children: Impact of the Trauma Narrative and Treatment Length*, 28 DEPRESSION & ANXIETY 67, 68 (2011) ("Exposure-based cognitive behavioral interventions are generally recommended for treating adults as well as youth with PTSD," but noting parental and child hesitancy to fully disclose the details of the traumatic event).

22. *E.g.*, Ambrose v. Godinez, 510 F. App'x 470, 472 (7th Cir.), *cert. denied*, 134 S. Ct. 270 (2013) ("In Illinois a threshold step for participating in sex-offender treatment—or even being *evaluated* for treatment—is signing what the parties call a "waiver"—more accurately, a release—authorizing a participant's therapist to disclose information obtained during treatment."); Doe v. Heil, 781 F. Supp. 2d 1134, 1143 (D. Colo. 2011) (denying the Fifth Amendment claim of an incarcerated prisoner whose demand for assurances of immunity for mandatory disclosures in sex offender treatment was refused); *see also* CTR. FOR SEX OFFENDER MGMT., UNDERSTANDING TREATMENT FOR ADULTS AND

disclosures.[23] As the Supreme Court of the United States stated in *McKune v. Lile*,[24] upholding the constitutionality of compelled disclosures in sex offender therapy: "Mental health professionals seem to agree that accepting responsibility for past sexual misconduct is often essential to successful treatment and that treatment programs can reduce the risk of recidivism by sex offenders."[25]

Juvenile offenders are more likely to have committed violent crimes against juvenile victims, as most juvenile violence involving physical assault relates to group fights among youth.[26] Juvenile sex offenders tend to target young children as early adolescents and other teenage victims in later adolescence.[27] Depending on the level of ongoing risk to others, disclosures in therapy may impose mandatory child abuse reporting or other duty to warn requirements upon the mental health clinician.[28] Therefore, juvenile offenders engaged in court-ordered therapeutic interventions, possibly relying on promised privileges of confidentiality, should understand that mandatory reporting of a risk of child abuse[29] or a duty to warn others of

---

JUVENILES WHO HAVE COMMITTED SEX OFFENSES 2 (2006), http://www.csom.org/pubs/treatment_brief.pdf.

> However, for individuals who commit sex offenses, the routine involvement of the courts and multiple agencies—e.g., corrections, probation or parole, social services, juvenile justice, child welfare, victim advocacy, and law enforcement—often necessitates collaboration and critical information sharing in order to support accountability, enhance management strategies, and ultimately promote public safety. Therefore, those who enter sex offender treatment programs are often expected to waive some or all of the typical confidentiality protections that exist for most other clients who are involved in mental health or medical treatments . . . .

Id. (citation omitted).

23. *See* Mary Ann Farkas & Gale Miller, *Sex Offender Treatment: Reconciling Criminal Justice Priorities and Therapeutic Goals*, 21 FED. SENT'G REP. 78, 78 (2008) (noting fourteen states use polygraphy as a regulatory standard or discretionary component of sex offender treatment for assessment and periodic monitoring); *see also* Ashley J. Fausset, Comment, *Answer Me or Go to Jail: Why Court Ordered Polygraph Testing to Treat Probationers Violates the Fifth Amendment*, 21 AM. U.J. GENDER SOC. POL'Y & L. 455, 460–63 (2012); Maloney, *supra* note 20, at 911–12; *e.g.*, Allison v. Snyder, 332 F.3d 1076, 1079 (7th Cir. 2003) ("It is not clearly established—indeed, it is not the law—that self-accusatory programs and polygraph machines are forbidden when treating sex offenders.").

24. 536 U.S. 24 (2002).

25. *Id.* at 48, 68 (Stevens, J., dissenting).

26. JAMES C. HOWELL, PREVENTING & REDUCING JUVENILE DELINQUENCY: A COMPREHENSIVE FRAMEWORK 7–8, 12 (2003).

27. DAVID FINKELHOR ET AL., U.S. DEP'T OF JUSTICE, JUVENILES WHO COMMIT SEX OFFENSES AGAINST MINORS 2 (2009), http://www.ncjrs.gov/pdffiles1/ojjdp/227763.pdf.

28. *See* Reena Kapoor & Howard Zonana, *Forensic Evaluations and Mandated Reporting of Child Abuse*, 38 J. AM. ACAD. PSYCHIATRY & L. 49, 50 (2010).

29. *See id.*

threats of harm[30] may override their confidentiality.[31] Juvenile offenders receiving treatment may also be concerned that their disclosures will result in criminal charges against parents or guardians.[32] Many offenders refuse to accept treatment or fail to complete it after initially consenting to treatment.[33] The ethical dilemmas for clinicians working with offenders include concerns that court-ordered treatment may be a trap for their clients, another form of punishment disguised as rehabilitation.[34]

For the young offender, mandatory reporting based on disclosures in court-ordered therapy may result in additional criminal investigations, charges, sentencing, forced medication, and the possibility of involuntary commitment.[35] Even if the state-employed mental health clinician were to

30. People v. Kailey, 333 P.3d 89, 91 (Colo. 2014) (en banc) (holding that exercise of the statutory duty to warn removes the protections of the psychologist-patient privilege); Expose v. Thad Wilderson & Assocs., P.A., 863 N.W.2d 95, 105–06 (Minn. Ct. App. 2015) (defining the scope of the licensed psychologist's immunity when exercising the duty to warn a potential victim of a threat of harm); *see also* Volk v. Demeerleer, 337 P.3d 372, 395 (Wash. Ct. App. 2014), *review granted*, 352 P.3d 188 (Wash. 2015) (defining the common law duty of care owed by a therapist to third parties to protect against foreseeable dangers from mental health patients); Charles E. Cantu & Margaret H. Jones Hopson, *Bitter Medicine: A Critical Look at the Mental Health Care Provider's Duty to Warn in Texas*, 31 ST. MARY'S L.J. 359, 362–63, 365 (2000). "*Tarasoff* has been widely accepted by both legislatures and courts as the basis for imposing the duty of reasonable care upon mental health care professionals to provide a warning to likely victims of their dangerous patients." Cantu & Hopson, *supra* note 30, at 362–63; *see also* Tarasoff v. Regents of the Univ. of Cal., 529 P.2d 553, 558 (Cal. 1974), *vacated en banc*, 551 P.2d 334 (Cal. 1976).

31. *Kailey*, 333 P.3d at 95.

32. *See generally* Jill Levenson, *Incorporating Trauma-Informed Care into Evidence-Based Sex Offender Treatment*, 20 J. SEXUAL AGGRESSION 9, 11 (2014) (noting that because many juvenile sex offenders are victims of abuse, trauma treatment should be added as a component of sex offender treatment).

33. Sarah J. Brown & Ruth J. Tully, *Components Underlying Sex Offender Treatment Refusal: An Exploratory Analysis of the Treatment Refusal Scale — Sex Offender Version*, 20 J. SEXUAL AGGRESSION 69, 69 (2014) (finding in a British study that "half of sex[] offenders in prison and community settings refuse . . . treatment."); Melissa D. Grady et al., *Increasing Retention Rates in Sex Offender Treatment: Learning from Expert Clinicians*, 20 SEXUAL ADDICTION & COMPULSIVITY 171, 172 (2013) (summarizing studies finding that 15% to 86% of American sex offenders do not complete sex offender treatment).

34. Levenson, *supra* note 32, at 11 (addressing arguments that "sex offender treatment is simply punishment, citing the coercive and paternalistic nature of some [programs] that may seemingly contradict ethical codes of mental health treatment" while others suggest "a paradoxical double-bind for clients who wish to change but fear the consequences of disclosure"); *see also* David R. Katner, *The Ethical Struggle of Usurping Juvenile Client Autonomy by Raising Competency in Delinquency and Criminal Cases*, 16 S. CAL. INTERDISC. L.J. 293, 293–94 (2007) (describing the tension between protective and autonomous policies for juvenile offenders).

35. *See infra* Section III.C.

provide *Miranda* warnings[36] to the young offender—respecting all of the constitutional rights attending the state supervised therapeutic session—juvenile defense attorneys must consider whether it is ethical to counsel mentally unstable youth against participating in therapy.[37]

A. *Evolution of the Modern Therapeutic State in Juvenile Justice*

When reflecting on the balance of interests between violent juvenile offenders in rehabilitation and the state in public protection, consider that the modern therapeutic state has emerged from several intertwining threads of history.[38] A traditionally rehabilitative juvenile justice system appears naturally primed to embrace the proliferation of specialized mental health and drug courts,[39] as well as the new advances in evidence-based mental health treatments.[40] And yet, the rise in judicial reliance on therapeutic interventions for juvenile offenders calls to mind criticism of the 1960s policies of court-ordered treatment and excessive institutionalization of the mentally ill.[41]

Such criticism of undue reliance on mandatory mental health treatment as a *form of social control* brought about calls for deinstitutionalization and greater autonomy measures, including consent to

---

36. *See* Miranda v. Arizona, 384 U.S. 436, 444 (1966).

37. *See* Estelle v. Smith, 451 U.S. 454, 467–71 (1981).

38. *See id.* at 467; Matthew J. D'Emic, *The Promise of Mental Health Courts: Brooklyn Criminal Justice System Experiments with Treatment As an Alternative to Prison*, CRIM. JUST., no. 3, Fall 2007, at 24, 25, 27–28; Peggy Fulton Hora & Theodore Stalcup, *Drug-Treatment Courts in the Twenty-First Century: The Evolution of the Revolution in Problem-Solving Courts*, 42 GA. L. REV. 717, 725 (2008); *National Child Traumatic Stress Network Empirically Supported Treatments and Promising Practices*, NAT'L CHILD TRAUMATIC STRESS NETWORK, http://www.nctsn.org/resources/topics/treatments-that-work/promising-practices (last visited Feb. 23, 2016).

39. *See, e.g.*, D'Emic, *supra* note 38, at 25, 28 (identifying more than 150 mental health courts in the United States); Hora & Stalcup, *supra* note 38, at 725 (identifying "1621 operational drug treatment courts in the United States" as of 2004 since the first adult treatment court in 1989).

40. *See, e.g.*, *National Child Traumatic Stress Network Empirically Supported Treatments and Promising Practices*, *supra* note 38; *Substance Abuse Treatment Evidence-Based Practices (EBP)*, SUBSTANCE ABUSE & MENTAL HEALTH SERVS. ADMIN., http://www.samhsa.gov/ebp-web-guide/substance-abuse-treatment (last updated Apr. 8, 2015).

41. *See* PAUL S. APPELBAUM, ALMOST A REVOLUTION: MENTAL HEALTH LAW AND THE LIMITS OF CHANGE 5 (1994); Mona Paré, *Of Minors and the Mentally Ill: Re-positioning Perspective on Consent to Health Care*, 29 WINDSOR Y.B. ACCESS TO JUST., no. 1, 2001, at 107, 112–13. "Thus, in the late 1950s and early 1960s, they began to question whether there was anything more to mental illness than an arbitrary decision by those with power in society to classify as ill various persons who displayed annoying behaviors and thus, to facilitate their confinement and control." APPELBAUM, *supra* at 5.

treatment, at a time when children's autonomy needs were also beginning to gain traction.[42] Today, the loss of mental health resources has led to increasing reliance on incarceration of the mentally ill, also calling into serious question whether certain categories of persons with mental illness are more likely to be incarcerated, specifically poor and homeless youth, and young men of color.[43]

Again, in the 1960s, the increasing focus on the rights of the mentally ill paralleled the expanding juvenile justice movement.[44] In 1967, Justice Fortas in *In re Gault*[45] outlined procedural rights for juvenile defendants, including the right to notice of charges, to counsel, to confrontation and cross-examination of witnesses, and most importantly, for the purpose of this Article, the privilege against self-incrimination.[46] By 1979, the Court upheld a juvenile's right to contest involuntary commitment decisions in *Parham v. J.R.*,[47] concluding: "[P]arents cannot always have absolute and unreviewable discretion to decide whether to have a child institutionalized. They, of course, retain plenary authority to seek such care for their children, subject to a physician's independent examination and medical judgment."[48]

In the 1980s and 1990s, a temporary spike in youth violence[49] led to more punitive state reform of juvenile justice policies, such that one critic argued "the juvenile [justice] system became indistinguishable from the adult one."[50] Dramatic advances in neuroscience since the 1990s revealed that the adolescent brain undergoes a phenomenal developmental transformation impacting impulsivity and emotional control while logical processes are near

42. *See* Paré, *supra* note 41, at 112–13.

43. *See* Camille A. Nelson, *Racializing Disability, Disabling Race: Policing Race and Mental Status*, 15 BERKELEY J. CRIM. L. 1, 3, 6 (2010) (interpreting greater rates of excessive police use of force against persons of color with mental illness); Thomas Insel, *Director's Blog: A Misfortune Not a Crime*, NIH.GOV (Apr. 11, 2014), http://www.nimh.nih.gov/about/director/2014/a-misfortune-not-a-crime.shtml ("Of course, this new report begs the question of whether racial and ethnic minorities, young men, or poor people are more likely to end up in jails and prisons rather than a bona fide health care setting.").

44. *See In re* Gault, 387 U.S. 1, 14 (1967); Paré, *supra* note 41, at 113.

45. 387 U.S. 1 (1967).

46. *Id.* at 3, 10 (applying the Due Process Clause of the Fourteenth Amendment to juvenile proceedings).

47. 442 U.S. 584 (1979).

48. *Id.* at 604.

49. HOWELL, *supra* note 26, at 3, 6 (noting that after the peak in 1994, violent juvenile crime rates decreased for the next six years).

50. Maroney, *supra* note 2, at 101–02.

their height in functioning for adolescents.[51] Research in PTSD gained traction at this time, resulting in significant federal funding under the Substance Abuse and Mental Health Service Administration and the creation of the National Child Traumatic Stress Network in 2001, which included a strong focus to educate the child welfare and juvenile justice systems on the connection between PTSD and delinquency.[52]

The legal system responded accordingly. In 2005, in *Roper v. Simmons*,[53] the Supreme Court of the United States prohibited capital sentencing of juvenile offenders pursuant to the Eighth and Fourteenth Amendments.[54] As stated by the Court, with a nod toward juvenile brain science and other mental health research, "[t]he differences between juvenile and adult offenders are too marked and well understood to risk allowing a youthful person to receive the death penalty despite insufficient culpability."[55] Since *Roper* and its progeny, *Graham v. Florida*[56] and *Miller v. Alabama*,[57] state policy makers interested in public safety have been hesitant to expand categorical consideration of minority status beyond the Eighth Amendment or to sentencing for lesser crimes.[58]

---

51. *See* Mark Hansen, *What's the Matter with Kids Today: A Revolution in Thinking About Children's Minds Is Sparking Change in Juvenile Justice*, A.B.A. J., July 2010, at 50, 52 (noting that there are "no studies contradicting all the neurological and behavioral research that shows the brain is still maturing during adolescence, and that the maturation process continues well into adulthood."); Maroney, *supra* note 2, at 93, 98–99.

52. *See* Robert S. Pynoos et al., *The National Child Traumatic Stress Network: Collaborating to Improve the Standard of Care*, 39 PROF. PSYCHOL.: RES. & PRAC. 389, 390 (2008); *The NCTSN Mission and Vision*, NAT'L CHILD TRAUMATIC STRESS NETWORK, www.nctsn.org/about-us/mission-and-vision (last visited Feb. 21, 2016) (including in its vision statement, "[w]orking with established systems of care including the health, mental health, education, law enforcement, child welfare, juvenile justice, and military family service systems to ensure that there is a comprehensive trauma-informed continuum of accessible care").

53. 543 U.S. 551 (2005).

54. *Id.* at 578; *see also* U.S. CONST. amends. VIII, XIV. Subsequent cases prohibited harsh sentencing of juvenile offenders for other serious crimes. *See* Miller v. Alabama, 132 S. Ct. 2455, 2475 (2012); Graham v. Florida, 560 U.S. 48, 82 (2010).

55. *Roper*, 543 U.S. at 569, 572–73.

56. 560 U.S. 48 (2010) (prohibiting life imprisonment without possibility of parole for a non-homicide offense).

57. 132 S. Ct. 2455, 2469 (2012) (prohibiting mandatory life imprisonment without possibility of parole for homicide).

58. *See* U.S. CONST. amend. VIII; *Miller*, 132 S. Ct. at 2471, 2475; *Graham*, 560 U.S. at 79, 82; *Roper*, 543 U.S. at 562, 572–73; *e.g.*, State v. Riley, 110 A.3d 1205, 1214, 1218 (Conn. 2015) (noting the state split in authority with some but not all jurisdictions reforming sentencing procedures to require consideration of youth-related mitigation factors pursuant to *Miller*); Bun v. State, 769 S.E.2d 381, 383 (Ga. 2015) (holding that sentencing a juvenile to a non-mandatory life sentence without the possibility of parole does not violate the Eighth and Fourteenth Amendments); People v. Banks, 36 N.E.3d 432, 436 (Ill. App. Ct.

However, according to juvenile neuroscience experts, recent scientific advances in imaging have not produced a uniform or bright line between adolescence and adult maturity.[59] Also, infantilizing adolescence worries some policy advocates that young offenders will not be given sufficient opportunity to learn to take responsibility for their actions.[60] The traditional substituted authority paradigm for the consent of minors would be reinforced by finding youth less criminally responsible in light of their immaturity and brain development patterns.[61] This paternalistic view would limit the choice of youth to either seek or reject mental health treatment in the juvenile justice system.[62] From a dystopian perspective in the juvenile offender's assumed best interests, the parent, guardian, or the state could more easily force treatment and medication despite the young offender's protests, hearkening back to the social control policies of the 1950s and 1960s.

One reasonable suggestion is to add to the current dichotomous approaches to a minor's autonomy or substituted adult authority, a model of supported authority.[63] That is, a juvenile offender could make health and mental health decisions with substantial guidance from a trusted authority, ideally from as young an age as possible, teaching children to make increasingly responsible decisions for themselves as they mature.[64] As benevolent an approach as this appears, serious chronic mental health conditions may always necessitate less autonomy.[65] For example, although many clinicians would recommend that juvenile justice policies place a greater emphasis on community diversion for juvenile offenders needing mental health services, a few offenders would still require smaller psychiatric inpatient programs.[66]

Returning full circle to the notion of mental health as a form of necessary social control, the Supreme Court of the United States'

2015) (holding that *Roper* and its sister cases did not extend to a due process challenge with respect to the Illinois automatic transfer statute for a juvenile committing homicide, where access to juvenile court is not a constitutional right, and the legislature legitimately sought to protect the public from "the most common violent crimes").

59. Maroney, *supra* note 2, at 98–100, 174; *see also Miller*, 132 S. Ct. at 2467–70 (noting the confluence of biological, developmental, and cultural factors in adolescents, necessitating a more flexible sentencing standard).

60. *See* Paré, *supra* note 41, at 113.

61. *See id.* at 112–13.

62. *See* Katner, *supra* note 34, at 307–08 (advocating reform of attorney ethics rules to better protect juvenile defendants' autonomous decision-making on important matters such as competency); Paré, *supra* note 41, at 112–13.

63. Paré, *supra* note 41, at 108, 123–24.

64. *Id.* at 124.

65. *See* Grisso, *supra* note 12, at 158.

66. *Id.* at 159.

acknowledgement of adolescent development—combined with the movement toward therapeutic justice and enhanced interest in mental health services for young offenders—poses a risk to juvenile autonomy.[67] The compassionate call for a therapeutic approach to juvenile delinquency appears to take into account the hard fought constitutional protections for juvenile defendants but rarely focuses on a defendant's autonomy—a defendant who may or may not want the mental health services offered by the justice system.[68]

Few could argue with the fact that the interwoven history of state mental health and criminal justice systems has resulted in offenders of all ages desperately needing greater access to quality mental health assessment and treatment.[69] Today, the criminal justice system has become the number one provider of mental health services in the United States[70] while law enforcement patrol officers with relatively little training are increasingly relied upon to serve as the primary first-responders in mental health crises.[71] According to *The Washington Post*, from January to June 2015, more than a quarter of the 462 persons shot dead by law enforcement were in the "throes of mental or emotional crisis" at the time they were killed.[72] Both sectors of the criminal justice system—pre- and post-conviction—are ill-equipped to

---

67. *See* Graham v. Florida, 560 U.S. 48, 68 (2010); Alan R. Felthous, *Enforced Medication in Jails and Prisons: The New Asylums*, 8 AM. J. L. & MED. 563, 565 (2015); Kamer, *supra* note 34, at 295; Perlin, *supra* note 14, at 335; Wexler, *supra* note 4.

68. *See* Paré, *supra* note 41, at 108, 109 n.6; Wexler, *supra* note 4. For a recent historical analysis of the interplay between American approaches to social control and care of persons with serious mental illness in asylums and the criminal justice system, see Alan Felthous's *Enforced Medication in Jails and Prisons: The New Asylums*. *See* Felthous, *supra* note 67, at 565–66, 570–73 (arguing that recent federal interpretation of *Vitek v. Jones*, 445 U.S. 480, 487, 491, 493–95 (1980) improperly justifies forced psychotropic medication of prisoners with mental illness in non-medical correctional facilities, for the purpose of stabilizing the prisoners and preventing their transfer to state mental hospitals).

69. *See* Felthous, *supra* note 67, at 565–66.

70. TORREY ET AL., *supra* note 15, at 37 (finding that in the District of Columbia and forty-four out of fifty states, at least one jail or prison in the state holds more persons with serious mental illness than the largest psychiatric hospital operated by the state); Thomas Insel, *Director's Blog: A Misfortune Not a Crime*, NIH.GOV (Apr. 11, 2014), http://www.nimh.nih.gov/about/director/2014/a-misfortune-not-a-crime.shtml ("Our current system, if these new numbers are accurate, treats mental illness for many, not as a misfortune but a crime with little promise of recovery.").

71. Michael Mayo, *Police Become First Responders in Mental-Health Crisis*, SUN-SENTINEL, Mar. 2, 2014, at 1A ("[I]f you have a disease of the mind and exhibit bizarre or dangerous behavior at home or in public, [it is] usually the police who must sort out what to do.").

72. Wesley Lowery et al., *Distraught People, Deadly Results: Officers Often Lack the Training to Approach the Mentally Unstable, Experts Say*, WASH. POST (June 30, 2015, 11:01AM), http://www.washingtonpost.com/sf/investigative/2015/06/30/distraught-people-deadly-results.

manage the mental health needs of arrestees and inmates.[73] Moreover, law enforcement and licensed qualified mental health professionals may not ameliorate this problem through broad collaboration without creating conflict of interest concerns.[74]

B. *Judicial Misuse of Adolescent Mental Health Services*

In light of the legal risks accompanying court-ordered therapy, discussed in Part III below, it is imperative that when mental health services are ordered or initiated with consent, they have a reasonable promise of assisting the young offender and protecting the public.[75] While mental health research—particularly with respect to juvenile brain development and child traumatic stress—has made tremendous strides,[76] findings from the nascent research on mental health therapy for violent juvenile offenders are uneven.[77]

Too often, the juvenile justice system has been insufficiently discriminating when crafting treatment orders in sentencing or in funding new programs.[78] For example, in a 2014 meta-analytical report on juvenile sex offender treatment programs by the U.S. Department of Justice, it was noted:

> While there is growing interest in crime control strategies that are based on scientific evidence, determining what works is not an easy task. It is not uncommon for studies of the same phenomena to produce ambiguous or even conflicting results, and there are many examples of empirical evidence misleading crime control policy and practice because shortcomings in the quality of the research were overlooked.[79]

More alarming is that many researchers had long warned of the immorality of a lack of research on treatment for juvenile sex offending,

---

73. Robert Rigg, *"Are There No Prisons?" Mental Health and the Criminal Justice System in the United States*, 4 U. DENV. CRIM. L. REV. 103, 109, 117 (2014); Lowery et al., *supra* note 72.

74. *See* Rigg, *supra* note 73, at 114–15.

75. *See id.* at 116–17; Lowery et al., *supra* note 72; *infra* Part III.

76. *See* CTR. FOR SEX OFFENDER MGMT., *supra* note 22, at 7–8, 11; Elizabeth J. Letourneau & Charles M. Borduin, *The Effective Treatment of Juveniles Who Sexually Offend: An Ethical Imperative*, 18 ETHICS & BEHAV. 286, 287, 293–94 (2008).

77. *See* Letourneau & Borduin, *supra* note 76, at 292–95; Diane L. Zosky, *Accountability in Teenage Dating Violence: A Comparative Examination of Adult Domestic Violence and Juvenile Justices Systems Policies*, 55 SOC. WORK 359, 360–61 (2010).

78. *See* Letourneau & Borduin, *supra* note 76, at 290–91.

79. Roger Przybylski, *Chapter 5: Effectiveness of Treatment for Juveniles Who Sexually Offend*, SMART.GOV, http://www.smart.gov/SOMAPI/sec2/ch5_treatment.html (last visited Feb. 23, 2016).

identifying the propagation of ineffective or even harmful treatments and their embrace by the courts:

> Indeed, there has been an almost complete lack of rigorous research on effective interventions for juvenile sexual offenders. The research community's failure—our failure—to subject the most widely used models of treatment to empirical investigation means that we have consigned vulnerable youth to untested and possibly ineffective or even iatrogenic procedures.[80]

Other examples abound with respect to lack of efficacy in treatment programs for young offenders.[81] The unknown impact of providing common evidence-based treatment, such as cognitive behavioral therapy, to patients with developmental delays is an ongoing and serious concern, as the evidence-based treatments in use were researched and developed for persons without these diagnoses.[82] An average of studies places the number of juvenile offenders with mild to moderate mental retardation at 10%, which is deeply troubling when this population has some of the highest rates of child abuse victimization.[83] Some argue that the new frontier in mental health treatment must redesign known treatment models to include *criminogenic* factors among offender populations because what is currently shown to be effective for persons outside of the system is not equally effective for those within the criminal justice system.[84] Female juvenile offenders are offered

---

80. Letourneau & Borduin, *supra* note 76, at 287; *see also* CTR. FOR SEX OFFENDER MGMT., *supra* note 22, at 11 ("[T]he current research on [sex offender] treatment effectiveness remains somewhat equivocal . . . .").

81. CTR. FOR SEX OFFENDER MGMT., *supra* note 22, at 10–11.

82. *See* Michael Hubbard, *Sex Offender Therapy: A Battle on Multiple Fronts*, COUNSELING TODAY, Apr. 2014, at 58–60.

83. *See* ROBERT B. RUTHERFORD JR. ET AL., YOUTH WITH DISABILITIES IN THE CORRECTIONAL SYSTEM: PREVALENCE RATES AND IDENTIFICATION ISSUES 16 (2002), http://cecp.air.org/juvenilejustice/docs/Youth%20with%20Disabilities.pdf; Sue Burrell et al., *Incompetent Youth in California Juvenile Justice*, 19 STAN. L. & POL'Y REV. 198, 220–21 (2008) (citing a survey of California juvenile offenders, finding 17.5% of wards under probation supervision had been diagnosed with developmental disabilities); Leigh Ann Davis, *Abuse of Children with Intellectual Disabilities*, THE ARC, http://www.thearc.org/document.doc?id=3666 (last revised Mar. 1, 2011) (stating that "[o]ne in three children with an identified disability for which they receive special education services" has been the victim of child maltreatment, compared to one in ten children without a disability).

84. *See* Amy Blank Wilson et al., *Criminal Thinking Styles Among People with Serious Mental Illness in Jail*, 38 LAW & HUM. BEHAV. 592, 593 (2014) (noting higher rates of childhood conduct disorders and adolescent antisocial personality disorders among convicted offenders).

> When the findings of these studies are looked at collectively, it becomes clear that therapeutic programs for justice-involved persons with SMI [serious mental illness] must develop a multiprong treatment approach that integrates interventions for

very few substantially researched mental health programs for violent behavior, despite their high rates of physical aggression in the juvenile justice system.[85] Among adult men in court-ordered batterer treatment programs, one study indicated that 42% met criteria for alcohol dependence,[86] and yet the juvenile justice system notes high rates of addiction[87] but rarely addresses teenage dating violence.[88] What these research gaps among court-ordered treatment strategies reveal is that the judicial system needs to exhibit greater patience and care before forcing unknown, ineffective, and potentially harmful mental health treatment on young offenders.[89]

Looking for evidence-based treatments for the purpose of sentencing is not enough. Despite an increased popularity in use and adoption of the term evidence-based by the courts,[90] few treatment programs would even meet the low standard of a qualifying evidence-based practice, according to the Office of Juvenile Justice and Delinquency Prevention.[91] Indeed, clinical researchers acknowledge that research is still in its infancy in understanding what treatment practices are based on sufficient evidence to constitute an evidence-based practice, and which are not:

---

individuals' criminal thinking and antisocial attitudes specifically, and likely criminogenic risk—e.g., associates—with treatment for their mental illness and substance abuse issues.

Id. at 599 (internal citations omitted).

85. *See* Naomi E.S. Goldstein et al., *Development of the Juvenile Justice Anger Management Treatment for Girls*, 20 COGNITIVE & BEHAV. PRAC. 171, 171 (2013).

86. Gail Gilchrist et al., *Should We Reconsider Anger Management When Addressing Physical Intimate Partner Violence Perpetration by Alcohol Abusing Males? A Systematic Review*, 25 AGGRESSION & VIOLENT BEHAV. 124, 125 (2015).

87. *See* OFFICE OF JUVENILE JUSTICE & DELINQUENCY PREVENTION, U.S. DEP'T OF JUSTICE, ALCOHOL AND DRUG PREVENTION AND TREATMENT/THERAPY 1–2, (2015), http://www.ojjdp.gov/mpg/litreviews/Alcohol_and_Drug_Therapy_Education.pdf.

88. *See* Zosky, *supra* note 77, at 365–67 (arguing that dating violence fell in the gap between rehabilitative juvenile justice and punitive adult justice systems with a need for "zero tolerance [and mandated] accountability" for juvenile dating violence, along with mandatory juvenile abuser treatment program participation).

89. *See* Gilchrist et al., *supra* note 86, at 125, 129–30; Goldstein et al., *supra* note 85, at 171; Zosky, *supra* note 77, at 367.

90. *See* Philip H. Pennypacker & Alyssa Thompson, *Realignment: A View from the Trenches*, 53 SANTA CLARA L. REV. 991, 1009, 1014 (2013) ("Evidence-based practices [in sentencing] are a new approach to gathering and analyzing this information, backed by research, with the promise of better results so that more fitting outcomes can be guaranteed."); Wilson et al., *supra* note 84, at 592 (noting a purported lack of evidence-based mental health treatment providers in the criminal justice system).

91. *Model Programs Guide*, OFFICE OF JUVENILE JUST. & DELIQ. PREVENTION, http://www.ojjdp.gov/mpg (last visited Feb. 23, 2016) (categorizing only 22% of 252 youth offender and child welfare programs as evidence-based, 57% promising but unproven as effective, and 21% showing *no effects* or benefit).

> Psychology, in its scientific base, relies on evidence, and the discipline is making progress in differentiating science from pseudoscience, [evidence-based practices] from discredited practices. We ardently hope that our Delphi poll sparks a broader, overdue discussion within the profession about discredited practices in working with some of our most vulnerable populations. The risk to patients and practitioners in using discredited procedures is real . . . .[92]

This has not stopped the proliferation of mental health courts or the wide variety of juvenile offender rehabilitation programs.[93]

Yet, compulsory treatment programs are increasingly criticized within the mental health profession, not only for their lack of efficacy, but for the potential harm they cause to patients.[94] Twelve-step programs, in particular, have faced recent scrutiny.[95] Batterer treatment programs are regularly ordered as a term of sentencing for domestic violence offenders, despite the repeated lack of evidence that they can reasonably assure a reduction in recidivism.[96] Although not specifically related to mental health treatment, Scared Straight programs, briefly placing at-risk youth in jail or prison to frighten them from committing additional crimes, were well-

---

92. Gerald P. Koocher et al., *Discredited Assessment and Treatment Methods Used with Children and Adolescents: A Delphi Poll*, 44 J. CLINICAL CHILD & ADOLESCENT PSYCHOL. 722, 722–23, 728 (2015) (polling clinicians to gather survey data of their professional opinion of what constitutes a discredited practice).

93. *See* OFFICE OF JUVENILE JUSTICE & DELINQUENCY PREVENTION, *supra* note 87, at 1; Jake Flanagin, *The Surprising Failures of 12 Steps*, THE ATLANTIC (Mar. 25, 2014), http://www.theatlantic.com/health/archive/2014/03/the-surprising-failures-of-12-steps/284616; Ryan Schill, *Beyond Scared Straight: Experts Alarmed by New Show and Impact on Kids*, JUV. JUST. INFO. EXCHANGE (Jan. 11, 2011), http://www.jjie.org/scared-straight-story-2/8693.

94. *See* Peele, *supra* note 5, at 20 (criticizing twelve-step addiction programs led by non-clinicians). "We might need to run seminars with Americans whose lives have been ruined by coerced [twelve]-step treatment—just as we need to present to American[] people whose lives have been ruined by drug laws—to make clear the dangers of the therapeutic state." *Id.* at 23. New York is the first state to require non-violent drug offenders to be offered drug treatment instead of jail time, regardless of their addiction status or diagnosis. *Id.* at 20.

95. *See* Flanagin, *supra* note 93; Peele, *supra* note 5, at 20.

96. *See* PATRICIA CLUSS & ALINA BODEA, THE EFFECTIVENESS OF BATTERER INTERVENTION PROGRAMS: A LITERATURE REVIEW & RECOMMENDATIONS FOR NEXT STEPS 11–12, 15, 18, 39–40 (2011), http://www.fisafoundation.org/wp-content/uploads/2011/10/BIPsEffectiveness.pdf (noting that numerous state laws mandate batterer intervention programs, despite clinical recognition that common court-ordered programs "based on feminist-psychoeducational [or] cognitive-behavioral approaches lack empirical backing").

supported by the criminal justice system without a requirement of proof of efficacy—proof which never emerged after decades of implementation.[97]

Without doubt, assessment and treatment for traumatic stress, mental illness, and addiction—conditions frequently found among both juvenile and adult offender populations—can be beneficial, and ongoing research into creating better evidence-based modalities should be a high priority among policy makers.[98] For example, trauma-focused cognitive behavioral therapy for juveniles with PTSD has an increasingly strong research base,[99] as does certain treatment and medication for chronic anxiety and depression.[100] The problem is that insufficiently tested and other suspect therapeutic approaches tend to occur when the legal system itself financially supports and even generates programs, as shown above with batterer intervention, juvenile sex offender programs, and twelve-step programs.[101]

In general, court systems thus far have not had a good track record of understanding which treatments work best, and specifically whether they work in a criminal justice setting among young violent offenders most in need of rehabilitation.[102] It is too early to know whether specialized mental health and drug courts can improve on this state, but the criminal justice system was never equipped nor was it meant to serve as the primary provider

97. *See* Schill, *supra* note 93 (summarizing numerous research studies that found that Scared Straight programs actually increased criminal activity among youth).

98. *See* CHILD WELFARE INFO. GATEWAY, *supra* note 21, at 2–3, 6–7; Pennypacker & Thompson, *supra* note 90, at 1014–15, 1018; Wilson et al., *supra* note 84, at 598–99; *Treatments for Mental Disorders*, SUBSTANCE ABUSE & MENTAL HEALTH SERVS. ADMIN., http://www.samhsa.gov/treatment/mental-disorders (last updated Oct. 27, 2015).

99. CHILD WELFARE INFO. GATEWAY, *supra* note 21, at 2–3, 6–7 ("Based on systematic reviews of available research and evaluation studies, several groups of experts and Federal agencies have highlighted TF-CBT as a model program or promising treatment practice.").

100. *See* Lynn E. O'Connor, *The Myth of "Evidence-Based" Treatment of Depression: What's Wrong with the Outcome Studies of Treatment of Depression?*, PSYCHOL. TODAY (July 20, 2013), https://www.psychologytoday.com/blog/our-empathic-nature/201307/the-myth-evidence-based-treatment-depression (criticizing existing research studies comparing medication and *talking therapies* for treatment of depression); *Treatments for Mental Disorders*, *supra* note 98 (approving cognitive behavioral therapy, mindfulness therapies, and exposure therapies, as well as medication to treat anxiety and depression).

101. *See* N.C. COUNCIL FOR WOMEN, NORTH CAROLINA BATTERER INTERVENTION PROGRAMS: A GUIDE TO ACHIEVING RECOMMENDED PRACTICES 3, 19 (2013), http://www.councilforwomen.nc.gov/documents/publications/battererinterventionhandbook.pdf (noting that batterer treatment programs are not considered mental health treatment and are therefore not covered by health insurance, resulting in removal of participants who cannot afford to pay the program fees); Rick Brundrett, *Sex Offender Treatment Costs Skyrocket, Records Show*, THE NERVE (Dec. 27, 2011, 6:00 AM), http://www.thenerve.org/sex-offender-treatment-costs-skyrocket-records-show (noting sharp increases in the number of confined sex offender treatment participants, paid for almost entirely by state funding).

102. *See* Wilson et al., *supra* note 84, at 592–93, 599.

of mental health services in the United States.[103] Another serious concern is that juvenile offenders subject to untested, ineffective, or even harmful therapeutic approaches are likely to be the most vulnerable of all—young men and women with complex histories of trauma, addiction, mental illness, poverty, displacement, and exposure to harsh structural racism.[104] Court-ordered mental health treatment methods must be proven to be efficacious, for our most vulnerable youth in the juvenile justice system should not be the subjects of psycho-social experimentation.[105] If our justice system cannot provide these assurances, then the legal risks of court-ordered therapy identified in Part III below cannot be justified in the interests of rehabilitating young offenders.[106]

III. CONSTITUTIONAL CONSIDERATIONS FOR JUVENILE OFFENDERS IN THERAPY

For youth in need of mental health and substance abuse treatment, child welfare and public education systems may initiate their first brush with state oversight, yet the most vulnerable may also find themselves placed in the school-to-prison pipeline.[107] In effect, the juvenile justice system may provide offenders with their first experience of mental health care involving criminal justice enforcement.[108] However, even in a well-meaning, therapeutic-focused justice system, state government is not constitutionally permitted to overreach under *Gault*.[109] That is, the provision of therapeutic

---

103. *See id.*

104. *See* McCulloch, *supra* note 7, at 120–21, 123–24.

105. *See id.*; Wilson et al., *supra* note 84, at 599; Salerno v. Corzine, No. 06–3547, 2013 WL 5505741, at *8 (D.N.J. Oct. 1, 2013) (addressing claims by New Jersey civil committees who were denied privileges, including employment, when they refused to participate in sex offender treatment which showed little efficacy). Plaintiffs' *pro se* claims in *Salerno* included assertions that the treatment program "is a sham and that its real objective is to detain indefinitely, and not to rehabilitate," noting that from 1999 through 2011, less than 5% of residents had been released. *Salerno*, 2013 WL 5505741, at *8. The District Court of New Jersey was unconvinced, relying on the state's good intentions when stating: "The fact that successes in treatment sufficient for discharge are small in number does not mean that the goal is a sham nor that the treatment is unrelated to reaching for that goal." *Id.*

106. *See* McCulloch, *supra* note 7, at 120–21, 123–24; Wilson et al., *supra note 84, at 599*; *infra* Part III.

107. *See* Jonathon Arellano-Jackson, *But What Can We Do? How Juvenile Defenders Can Disrupt the School-to-Prison Pipeline*, 13 SEATTLE J. FOR SOC. JUST. 751, 753–54, 757 (2015) (reflecting on the school-to-prison pipeline as a significant cause of racial and economic inequality in the United States, with zero-tolerance school discipline and suspension policies, particularly for male students of color with unmet mental health treatment needs).

108. *See id.* at 788.

109. *In re* Gault, 387 U.S. 1, 4, 30–31 (1967) (upholding the due process rights of juvenile defendants). Recall that the trial court originally adjudicated fifteen-year old

justice to young vulnerable offenders must not violate their due process rights, including violations of the privilege against self-incrimination.[110] When treatment occurs in custodial settings, juvenile offenders may invoke constitutional protections against self-incrimination, including *Miranda* warnings.

A. *A Juvenile Offender's Fifth Amendment Due Process Right Against Self-Incrimination in Therapy*

A distinct line of state and federal case law applies Fifth Amendment due process protections against self-incrimination to some, but not all, court-ordered, state-supervised therapy provided as a term of sentencing.[111] Note that all involve cases with adult rather than juvenile offenders, taking into consideration that many states try youth under age eighteen as adults.[112]

Under the Fifth Amendment, no person "shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law."[113] The privilege against self-incrimination

---

Gerald Gault, a delinquent, imposing incarceration for the remainder of his minority for the misdemeanor of making a single lewd telephone call, with an added sentence of delinquent status for habitual involvement in *immoral matters*. *Id.* at 4, 7–9. Gault had a prior misdemeanor conviction for being found in the presence of a minor in possession of a stolen wallet and the sentencing judge had also happened to recall a prior accusation against Gault for having lied to the police about stealing a baseball glove from another boy. *Id.* at 4, 9.

110. *Id.* at 10.

111. *See* U.S. CONST. amend. V; *e.g.*, McKune v. Lile, 536 U.S. 24, 29–30, 33-35, 41, 48 (2002) (holding that sanctions imposed on an inmate who refuses to incriminate himself in court-ordered sex offender treatment is not subject to compulsion in violation of the Fifth Amendment); Estelle v. Smith, 451 U.S. 454, 456, 460, 472–73 (1981) (holding that court-ordered pretrial psychiatric evaluations are inadmissible under the Fifth Amendment to enhance sentencing); Russell v. State, 109 A.3d 1249, 1261–63 (Md. Ct. Spec. App. 2015) (following *McKune*, in holding that sanctions for refusal to answer questions in court-ordered polygraph examinations for a defendant on probation did not amount to compulsion in violation of the privilege against self-incrimination).

112. *See McKune*, 536 U.S. at 29 (holding that sanctions imposed on an inmate who refuses to incriminate himself in court-ordered sex offender treatment is not subject to compulsion in violation of the Fifth Amendment); *Estelle*, 451 U.S. at 456 (holding that under the Fifth Amendment court-ordered pretrial psychiatric evaluations are inadmissible for the purpose of enhancing sentencing); *Russell*, 109 A.3d at 1251 (following *McKune* in holding that sanctions against a probationer for refusal to answer questions in court-ordered polygraphy does not amount to compulsion in violation of the privilege against self-incrimination).

113. U.S. CONST. amend. V. The self-incrimination clause of the Fifth Amendment applies to the States through the Fourteenth Amendment. U.S. CONST. amends. V, XIV; Malloy v. Hogan, 378 U.S. 1, 6 (1964).

> not only permits a person to refuse to testify against himself at a criminal trial in which he is a defendant, but also "privileges him not to answer official questions put to him in any other proceeding, civil or criminal, formal or informal, where the answers might incriminate him in future criminal proceedings."[114]

The Supreme Court of the United States has held that the privilege against self-incrimination is designed to protect the fairness of parties in an accusatorial system and should be liberally construed.[115] Therefore, any coerced confession by the defendant in violation of the privilege against self-incrimination may not be admitted against him or her in a court of law.[116]

For many years, the Supreme Court of the United States has recognized that court-ordered mental health treatment in the criminal justice system may be a coercive environment invoking Fifth Amendment protections. Such protections are narrowly applied to the juvenile justice system through *Gault* as a matter of procedural due process in the adjudicatory phase of proceedings.[117] For decades, the Due Process Clause has been interpreted to require "that state action, *whether through one agency or another*, shall be consistent with the fundamental principles of liberty and justice which lie at the base of all our civil and political institutions."[118] Moreover, the burden to prove that statements may be incriminating is relatively low: "To sustain the privilege, it need only be evident from the implications of the question, in the setting in which it is asked, that a responsive answer to the question or an explanation of why it cannot be answered might be dangerous because injurious disclosure could result."[119] Whether the line of cases addressing the due process rights of adult offenders in court-ordered therapy will apply equally or similarly to juveniles, pursuant to *Gault*, *Roper*, and *Graham*, is far from clear.

---

114. Minnesota v. Murphy, 465 U.S. 420, 426 (1984) (quoting Lefkowitz v. Turley, 414 U.S. 70, 77 (1973)).

115. *See* Allen v. Illinois, 478 U.S. 364, 368, 375 (1986); Spevack v. Kline, 385 U.S. 511, 515 (1967) ("[C]onstitutional provisions for the security of person and property should be liberally construed."); *see also* U.S. CONST. amend. V.

116. *Malloy*, 378 U.S. at 6, 8, 13 (1964) (holding that the accused should *suffer no penalty* for affirming his or her right to remain silent); Brown v. Mississippi, 297 U.S. 278, 279, 281–82, 287 (1936) (addressing confessions obtained by torture, including whipping and attempted lynching, "extorted by officers of the [s]tate by brutality and violence"); *see also* U.S. CONST. amend. XIV.

117. *See* U.S. CONST. amends. V, XIV; *e.g.*, *In re* Gault, 387 U.S. 1, 13 (1967); PWG v. State, 682 So. 2d 1203, 1207 (Fla. 1st Dist. Ct. App. 1996) (interpreting *In re* Gault, 387 U.S. 1, 13, 31 n.48 (1967)).

118. *Brown*, 297 U.S. at 286 (emphasis added) (quoting Hebert v. Louisiana, 272 U.S. 312, 316 (1926) (interpreting the comparative authority of a state supreme court)); *see also* U.S. CONST. amends. V, XIV.

119. Hoffman v. United States, 341 U.S. 479, 486–87 (1951).

However, highlighting patterns among the adult cases may serve as a useful start to predicting their impact on court-ordered treatment of juvenile offenders.[120]

In 1972, the Supreme Court of the United States, in *McNeil v. Director, Patuxent Institution*,[121] held that an inmate who refused to cooperate with a psychiatric examination could not be held longer than his criminal sentence for assault in order to accomplish the examination.[122] Note that had the examination been completed, it could have led to a possible indeterminate stay in a state mental hospital.[123] When attempting to psychologically assess McNeil, he "was repeatedly interrogated not only about the crime for which he was convicted but for many other alleged antisocial incidents going back to his sophomore year in high school."[124]

Justice Douglas in his concurring opinion asserted that the inmate properly exercised his Fifth Amendment right to remain silent when avoiding psychiatric examination, for "[t]he questioning of McNeil is in a setting and has a goal pregnant with both potential and immediate danger."[125] Noting that more than half of the state hospital residents were held beyond the time of their original criminal sentences, Justice Douglas concluded:

> Whatever the Patuxent procedures may be called—whether civil or criminal—the result under the Self-Incrimination Clause of the Fifth Amendment is the same. As we said in *In re Gault*, there is the threat of self-incrimination whenever there is *a deprivation of liberty*; and there is such a deprivation whatever the name of the institution, if a person is held against his will.[126]

In *McNeil*, Justice Douglas would uphold a defendant's exercise of his right to remain silent in a psychiatric assessment.[127] However, a mental health assessment does not always need the defendant's cooperation. For example, in *Esquivel v. Smith*, the District Court of Ohio recently held that

---

120. *See generally* Graham v. Florida, 560 U.S. 48 (2010); Roper v. Simmons, 543 U.S. 551, 578–79 (2005); McKune v. Lile, 536 U.S. 24 (2002); Estelle v. Smith, 451 U.S. 454 (1981); *In re Gault*, 387 U.S.; Russell v. State, 109 A.3d 1249 (Md. Ct. Spec. App. 2015).

121. 407 U.S. 245 (1972).

122. *Id.* at 246.

123. *Id.*; *see also* Allison v. Snyder, 332 F.3d 1076, 1079 (7th Cir. 2003) (holding that detention of civil committees in prison rather than a mental institution does not violate the Illinois Sexually Dangerous Persons Act, for "they are pretrial detainees as well as civil committees: criminal charges against them are pending").

124. *McNeil*, 407 U.S. at 256 (Douglas, J., concurring).

125. *Id.*; *see also* U.S. CONST. amend. V.

126. *McNeil*, 407 U.S. at 257 (Douglas, J., concurring) (internal citation omitted).

127. *Id.* at 254–55, 257 (Douglas, J., concurring).

petitioner's selective refusal to answer 300 questions on a psychosexual evaluation provided evidence of a refusal to cooperate and a "refusal to take responsibility for his acts."[128]

Timing is important. Where the in-custody *pretrial* detainee in *Estelle v. Smith*[129] was ordered to undergo a psychiatric examination, the Supreme Court of the United States held he must be given a *Miranda* warning;[130] but the federal District Court of Idaho argued that *Estelle* was limited by its facts and should not have been extended to prosecutorial commentary on the meaning of silence at sentencing, such as a psychosexual evaluation conducted *post conviction*.[131]

Also, key to the Fifth Amendment analysis, for those criminal defendants who actually make incriminating disclosures in psychotherapy, a due process analysis must assess whether the disclosures were made under compulsion.[132] The primary focus is on the defendant, not the interrogator, whether investigator, probation officer, warden, or court-employed psychologist:

> [T]he constitutional inquiry is not whether the conduct of state officers in obtaining the confession was shocking, but whether the confession was "free and voluntary: [T]hat is, [it] must not be extracted by any sort of threats or violence, nor obtained by any direct or implied promises, however slight, nor by the exertion of any improper influence . . . ."[133]

The voluntariness test is objective and does not rely on the actual mindset of the suspect being questioned.[134]

If the defendant changes his or her mind about cooperating with court-ordered treatment services once they have begun, a waiver of Fifth

---

128. *Compare* Esquivel v. Smith, No. 1:11-CV-00030-BLW, 2013 WL 4433691, at *12 (D. Idaho Aug. 16, 2013), *with Kansas v. Cheever*, 134 S. Ct. 596 (2013) (providing that a psychiatric evaluation ordered by the state is admissible against a defendant, and not a violation of the privilege against self-incrimination under *Estelle*, when offered to rebut evidence of a later psychiatric evaluation voluntarily taken and offered by the defendant).

129. 451 U.S. 454 (1981).

130. *Id.* at 466–67.

131. *See Esquivel*, 2013 WL 4433691, at *13–14. *See generally Estelle*, 451 U.S. at 454.

132. *See* U.S. CONST. amend. V; McKune v. Lile, 536 U.S. 24, 35–36 (2002); Pennypacker & Thompson, *supra* note 90, at 1017.

133. Malloy v. Hogan, 378 U.S. 1, 7 (1964) (alternations in original).

134. J.D.B. v. North Carolina, 131 S. Ct. 2394, 2402 (2011); *see also Malloy*, 378 U.S. at 7.

Amendment rights carries the potential for punitive sanctions.[135] For example, in 2014, in *Prieto v. Davis*,[136] the defendant was described by the state psychologist as difficult and testy when administered a sex offender psychological assessment.[137] The defendant was made aware that under section 19.2-264.3:1(F)(2) of the Virginia Code, he had waived his Fifth Amendment privilege and that the court could sanction him by informing the jury of his refusal to cooperate with the assessment.[138]

Overall, the Fifth Amendment privilege against self-incrimination remains arguably broad and relatively easy to invoke if one is aware of the right.[139] As the Supreme Court of the United States stated in 1892, the privilege is "as broad as the mischief against which it seeks to guard."[140] A plea negotiation, for example, involving an agreement to obtain psychotherapy and probation in lieu of a higher sentence and incarceration, may arguably constitute coercion and create a legitimate fear of self-incrimination.[141] As the Court of Appeals of Alaska held in *James v. State*,[142] a defendant's Fifth Amendment right to remain silent was implicated when, if he refused to cooperate with court-ordered sex offender treatment he would face incarceration, but if he instead cooperated, he might lose his pending appeal.[143] Moreover, the social worker in *James* who conducted the initial court-ordered psychological assessments of sex offenders admitted "he had testified against former interviewees using information that came out during the interviews."[144]

The privilege against self-incrimination may also protect against post-conviction use of statements made previously to a mental health

---

135. Prieto v. Davis, No. 3:13CV849-HEH, 2014 WL 3867554, at *35 (E.D. Va. Aug. 5, 2014); *see also* U.S. CONST. amend. V.

136. No. 3:13CV849-HEH, 2014 WL 3867554 (E.D. Va. Aug. 5, 2014).

137. *Id.* at *35 ("Prieto was uncooperative in discussing the crimes—'particularly in areas where he might appear in an unfavorable light'—and that he was 'vague from time to time,' 'testy,' and evasive.").

138. *Id.*; *see also* U.S. CONST. amend. V; VA. CODE ANN. § 19.2-264.3:1(F)(2) (2014). This statutory section provides: "If the court finds, after hearing evidence presented by the parties, out of the presence of the jury, that the defendant has refused to cooperate with an evaluation requested by the Commonwealth, the court may admit evidence of such refusal or, in the discretion of the court, bar the defendant from presenting his expert evidence." VA. CODE ANN. § 19.2-264.3:1(F)(2).

139. Counselman v. Hitchcock, 142 U.S. 547, 562 (1892); *see* U.S. CONST. amend. V.

140. *Counselman*, 142 U.S. at 562.

141. *See* James v. State, 75 P.3d 1065, 1065, 1068, 1072 (Alaska Ct. App. 2003).

142. 75 P.3d 1065 (Alaska Ct. App. 2003).

143. *Id.* at 1068, 1072; *see also* U.S. CONST. amend. V.

144. *James*, 75 P.3d at 1068–69.

provider.[145] For example, the Court of Appeals for the Ninth Circuit has held that disclosures of other crimes made in a sexual psychopath treatment program under assurances of confidentiality, but admitted in evidence to enhance sentencing, would violate a defendant's Fifth Amendment privilege against self-incrimination.[146] Also, in a probation revocation proceeding, a defendant agreeing to terms of probation thereby waived any privilege against self-incrimination relating to practical disclosure of basic information necessary for monitoring the duration of his probation.[147] However, any information likely to incriminate the accused in a subsequent criminal prosecution would be subject to due process protections against self-incrimination.[148]

More recently, state statutory schemes that mandate sex offender treatment, including compelled disclosures of criminal activity, have been met with mixed responses by the courts.[149] For example, in *People v. Rebulloza*,[150] the Supreme Court of California granted review to consider whether a sentence of probation requiring completion of a sex offender treatment program may lawfully include a waiver of the Fifth Amendment privilege against self-incrimination.[151] The lower court, in 2015, held that mandatory categorical waiver of a criminal defendant's privilege against self-incrimination violated the Fifth Amendment.[152]

In this case, Rebulloza pled no contest to a single count of indecent exposure and was ordered to first "waive any privilege against self-incrimination and participate in polygraph examinations which shall be part of the sex offender management program;" and second, to "waive any

145. Pens v. Bail, 902 F.2d 1464, 1464–65 (9th Cir. 1990); *see also* U.S. CONST. amend. V.

146. *Pens*, 902 F.2d at 1464–66 (relying in part on Estelle v. Smith, 451 U.S. 454, 460, 468 (1981), for the proposition that the privilege against self-incrimination applies at the penalty phase); U.S. CONST. amend. V.

147. State v. Cass, 635 N.E.2d 225, 228 (Ind. Ct. App. 1994); *see also* U.S. CONST. amend. V.

148. *See Cass*, 635 N.E.2d at 226–27.

149. *See* McKune v. Lile, 536 U.S. 24, 30, 48 (2002); Allison v. Snyder, 332 F.3d 1076, 1079 (7th Cir. 2003); Reinhardt v. Kopcow, 66 F. Supp. 3d 1348, 1353, 1356–57 (D. Colo. 2014); People v. Rebulloza, 184 Cal. Rptr. 3d 548, 550–51 (Ct. App.), *review granted*, 349 P.3d 1066 (Cal. 2015).

150. 184 Cal. Rptr. 3d 548 (Ct. App.), *review granted*, 349 P.3d 1066 (Cal. 2015).

151. *Id.* at 551; *see also* U.S. CONST. amend. V.

152. *Rebulloza*, 184 Cal. Rptr. 3d at 551, 554 (relying on longstanding precedent, including Lefkowitz v. Cunningham, 431 U.S. 801, 805 (1977)); Lefkowitz v. Turley, 414 U.S. 70, 71–74 (1973); Gardner v. Broderick, 392 U.S. 273, 274, 276 (1968); Uniformed Sanitation Men Ass'n v. Comm'r of Sanitation, 392 U.S. 280, 282–83 (1968); *see also* U.S. CONST. amend. V.

psychotherapist/patient privilege to enable communication between the sex offender management professional and the probation officer."[153] The United States District Court for the District of Colorado also recently extended Fifth Amendment protections beyond *McKune* to convicted defendants ordered to participate in sex offender treatment, including polygraph testing, but only because their appeals were still pending.[154] The court acknowledged that absent their appeals, it would have followed the majority in *McKune*, holding that relatively minor sanctions for noncompliance will not violate the Fifth Amendment.[155]

Therefore, statements made by a convicted offender to a therapist under court-ordered conditions may be subject to the privilege against self-incrimination if the offender claims the privilege and is compelled to incriminate him or herself in the session.[156] Clearly, the most recent statutory efforts to require compelled therapeutic disclosure from convicted offenders have focused on sex offenses, a legislative policy which has failed to consider the reality of the current lack of evidence-based sex offender treatments.[157] If evidence-based mental health practices continue to justify mandatory treatment for additional offenses, the current judicial trend, eroding Fifth Amendment protections in favor of mandatory mental health treatment will already have a framework in therapeutic justice.[158] If the therapeutic setting is made to fit within the bounds of a custodial setting presumed to be coercive, then more therapists providing court-ordered treatment to offenders may be required to provide the added protection of *Miranda* warnings before mandating disclosures.[159]

153. *Rebulloza*, 184 Cal. Rptr. 3d at 550–51 (ordering the defendant subject to section 1203.067(b)(3) and (b)(4) of the California Penal Code respectively); *see also* CAL. PENAL CODE § 1203.067(b)(3) (West 2004 & Supp. 2014), *declared unconstitutional by* People v. Rebulloza, 184 Cal. Rptr. 3d 548, 551 (Ct. App. 2015); PENAL § 1203.067(b)(4).

154. *Reinhardt*, 66 F. Supp. 3d at 1356–57 (noting that the penalties of loss of an appeal were greater than those in *McKune* which only involved enhanced monitoring and restrictions); *see also* U.S. CONST. amend. V; *McKune*, 536 U.S. at 30.

155. *Reinhardt*, 66 F. Supp. 3d at 1356; *see also* U.S. CONST. amend. V; *McKune*, 536 U.S. at 41.

156. *McKune*, 536 U.S. at 35–36; *see also Reinhardt*, 66 F. Supp. 3d at 1357.

157. *See* James v. State, 75 P.3d 1065, 1066 (Alaska Ct. App. 2003); FINKELHOR ET AL., *supra* note 27, at 1; Przybylski, *supra* note 79.

158. *See* U.S. CONST. amend. V; *Substance Abuse Treatment Evidence-Based Practices (EBP)*, *supra* note 40.

159. *See* Miranda v. Arizona, 384 U.S. 436, 534–35 (1966) (White, J., dissenting).

B. Miranda *in Custodial Mental Health Settings*

A court-ordered therapeutic setting may require the added protections of *Miranda* warnings to ensure the defendant-patient's understanding of the privilege against self-incrimination if statements made are later admitted against the defendant at trial.[160] This requires an assessment of whether the setting fits within the scope of a custodial interrogation.[161] Recall that *Miranda* and its progeny require that a suspect in custody "must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed."[162] If a suspect does make a statement during custodial interrogation, the Government bears the burden of showing, prior to admitting the statement, that the suspect *voluntarily, knowingly, and intelligently* waived his or her *Miranda* rights.[163]

The test is objective when determining whether a suspect is in custody, sufficient to trigger the need for *Miranda* warnings prior to interrogation.[164] The court must determine whether there was "'a formal arrest or restraint on freedom of movement of the degree associated with formal arrest,'" by examining two inquiries: "'[F]irst, what were the circumstances surrounding the interrogation; and second, given those circumstances, would a reasonable person have felt he or she was at liberty to terminate the interrogation and leave.'"[165]

Custodial settings, whether questioning is conducted by civil or criminal investigators, may require *Miranda* warnings for statements made to be admissible.[166] For example, in 2014, in *Jackson v. Conway*,[167] the Second Circuit Court of Appeals held that a child protective services caseworker violated defendant's Fifth Amendment and *Miranda* rights when she interviewed the defendant while he was in police custody accused of child

160. *See id.* at 445; D'Emic, *supra* note 38, at 25.
161. *Miranda*, 384 U.S. at 439, 444.
162. *Id.* at 444.
163. *Id.* at 444, 475.
164. J.D.B. v. North Carolina, 131 S. Ct. 2394, 2402 (2011).
165. *Id.* (quoting Thompson v. Keohane, 516 U.S. 99, 112 (1995)).
166. Minnesota v. Murphy, 465 U.S. 420, 430 (1984); *Miranda*, 384 U.S. at 445, 455, 467; Jackson v. Conway, 763 F.3d 115, 136–37 (2d Cir. 2014), *cert. denied*, 135 S. Ct. 1560 (2015). *But see* United States v. Patane, 542 U.S. 630, 632 (2004) (holding that the privilege against self-incrimination is violated by admission in court of coerced statements made without *Miranda* warnings, but that failure to provide *Miranda* warnings alone does not violate the constitution nor does it justify exclusion of physical evidence as the fruit of the poisonous tree).
167. 763 F.3d 115 (2d Cir. 2014), *cert. denied*, 135 S. Ct. 1560 (2015).

sexual abuse.[168] Although he had invoked his right to remain silent during police interrogation, he was willing to speak to the caseworker with respect to her parallel civil investigation.[169] However, the statements defendant made to her were ultimately used against him, resulting in multiple charges in a grand jury indictment,[170] testimony by the caseworker at trial,[171] and extensive use of his disclosures during the State's closing argument.[172] On appeal, Jackson argued that the caseworker, in eliciting his incriminating statements, "acted either as a law enforcement officer or as the *functional equivalent* of a police officer when she interviewed him without first providing the required *Miranda* warnings, and that his statements to her were thus inadmissible."[173]

The State in *Jackson* conceded that the defendant was in custody for the purpose of Fifth Amendment analysis. However, the court of appeals disagreed with the State's limited definition of interrogation.[174] According to the Second Circuit, "the Supreme Court [of the United States] has not strictly limited its holdings in this regard to law enforcement personnel conducting criminal investigations."[175] The Second Circuit quoted *Estelle*, noting that when the psychiatrist:

> "went beyond simply reporting to the court on the issue of competence and testified for the prosecution at the penalty phase on the crucial issue of [the defendant's] future dangerousness, his role changed and became essentially like that of an agent of the State recounting unwarned statements made in a postarrest custodial setting."[176]

Note that *Estelle* had relied on *Miranda*, which clearly supported application of the privilege against self-incrimination beyond criminal proceedings "and [it] serves to protect persons in all settings in which their

168. *Id.* at 122, 140, 155; *see also* U.S. CONST. amend. V.
169. *Jackson*, 763 F.3d at 122.
170. *Id.* at 123.
171. *Id.* at 127.
172. *Id.* at 128.
173. *Id.* at 129–30.
174. *Jackson*, 763 F.3d at 137; *see also* U.S. CONST. amend. V.
175. *Jackson*, 763 F.3d at 137–38 (noting that Supreme Court of the United States precedent clearly had included non-law enforcement agents when determining that an interrogation had occurred, such as tax investigators and psychiatrists).
176. *Id.* at 138 (alteration in original) (quoting Estelle v. Smith, 451 U.S. 454, 467 (1981)).

freedom of action is curtailed in any significant way from being compelled to incriminate themselves."[177]

In contrast, the Third Circuit Court of Appeals held in 2010 that a child protective services worker who visited a murder defendant in jail in order to discuss his children's welfare, but who also happened to conversationally discuss the events of the murder, did not interrogate the defendant and therefore did not violate his *Miranda* rights by failing to issue a warning against self-incrimination.[178] Whereas the voluntariness of a confession may focus objectively on the defendant under a Fifth Amendment analysis,[179] according to the Third Circuit Court of Appeals, the motivation of the interrogator is relevant in determining whether an interrogation has taken place under *Miranda*.[180] This may be key when assessing whether court-ordered therapy in the juvenile justice system requires administration of *Miranda* warnings before proceeding with questioning during treatment.[181] As already discussed, many forms of therapeutic interventions deliberately rely on the juvenile offender providing truthful disclosures of details of potentially culpable events.[182]

With proper supervision and guidance, juvenile offenders may consent to treatment or interrogation by waiving their *Miranda* rights.[183] In cases where the offender has specifically requested the mental health assessment or examination, as opposed to one imposed by court order or by the state, a clear *Miranda* waiver is more likely to have occurred.[184] In essence, precedent since *Estelle* has attached Fifth Amendment protections in the mental health context only when the mental health provider is deemed an *agent of the state*.[185] Juvenile offenders would be particularly reliant on the

177. *Estelle*, 451 U.S. at 466 (quoting Miranda v. Arizona, 384 U.S. 436, 467 (1966)); *see also* U.S. CONST. amend. V.

178. *See* Saranchak v. Beard, 616 F.3d 292, 303–04 (3d Cir. 2010).

179. *See* U.S. CONST. amend. V; J.D.B. v. North Carolina, 131 S. Ct. 2394, 2402, 2408 (2011); Malloy v. Hogan, 378 U.S. 1, 6–7 (1964).

180. *Saranchak*, 616 F.3d at 303–04 ("When Saranchak 'freely admitted to killing [Edmund]' and 'also admitted to killing [Stella],' Garber's follow-up question was not an interrogation eliciting incriminating information.") (citation omitted); *see also Miranda*, 384 U.S. at 444.

181. *See* McKune v. Lile, 536 U.S. 24, 33–35 (2002); *Saranchak*, 616 F.3d at 303–04; Farkas & Miller, *supra* note 23, at 79.

182. *See McKune*, 536 U.S. at 33–34; Farkas & Miller, *supra* note 23, at 78–79.

183. *See* Smith v. Wainwright, 741 F.2d 1248, 1258–59 (11th Cir. 1984).

184. *See* Estelle v. Smith, 451 U.S. 454, 467–68 (1981); *Smith*, 741 F.2d at 1258–59 (noting that no *Miranda* warnings are required by a clinician who examines the defendant at the defendant's request).

185. *Smith*, 741 F.2d at 1258–59 (quoting *Estelle*, 451 U.S. at 467); *see also* U.S. CONST. amend. V.

counsel of their defense attorneys, as well as parents or guardians, when trying to identify who is an agent of the state or when agreeing to request a mental health assessment, which may ultimately be used against them in court without Fifth Amendment protections.[186] Frankly, such a determination would be daunting to anyone regardless of age.

However, minority age status does help determine the voluntariness of such waivers and is a key factor when addressing *Miranda* rights in the juvenile justice system.[187] In 2011, the Supreme Court of the United States reversed the Supreme Court of North Carolina's decision in *In re J.D.B.*,[188] highlighting the importance of age as a factor when evaluating a minor's right to remain silent.[189] Both state and federal courts considered the application of North Carolina's expanded *Miranda* protections under section 7B-2101(a) of the North Carolina General Statutes, which provides that:

> (a) Any juvenile in custody must be advised prior to questioning:
> (1) That the juvenile has a right to remain silent;
> (2) That any statement the juvenile does make can be and may be used against the juvenile;
> (3) That the juvenile has a right to have a parent, guardian, or custodian present during questioning; and
> (4) That the juvenile has a right to consult with an attorney and that one will be appointed for the juvenile if the juvenile is not represented and wants representation.[190]

When questioned by a school resource officer in a closed office without a parent or guardian present, J.D.B., a thirteen-year-old seventh grade student enrolled in special education at Smith Middle School in Chapel Hill, gave verbal consent to answer questions.[191] However, consent was not provided before the questioning began:

---

186. *See* U.S. CONST. amend. V; J.D.B v. North Carolina, 131 S. Ct. 2394, 2403; Buchanan v. Kentucky, 483 U.S. 402, 404, 424–25 (1987); State v. McClary, 577 S.E.2d 690, 692 (N.C. Ct. App. 2003); Kit Kinports, *Habeas Corpus, Qualified Immunity, and Crystal Balls: Predicting the Course of Constitutional Law*, 33 ARIZ. L. REV. 115, 138 n.102, 139 n.105 (1991).

187. *See J.D.B.*, 131 S. Ct. at 2402–03. Note that the ability to understand *Miranda* warnings based on IQ and cognitive ability has been relevant to the weight and credibility of a defendant's disclosures for some time. *See* State v. Sanchez, 400 S.E.2d 421, 423–24 (N.C. 1991).

188. 686 S.E.2d 135 (N.C. 2009), *rev'd*, J.D.B. v. North Carolina, 131 S. Ct. 2394 (2011).

189. *J.D.B.*, 131 S. Ct. at 2402–03.

190. N.C. GEN. STAT. § 7B-2101(a) (2007).

191. *J.D.B.*, 131 S. Ct. at 2399.

> With the two police officers and the two administrators present, J.D.B. was questioned for the next [thirty] to [forty-five] minutes. Prior to the commencement of questioning, J.D.B. was given neither *Miranda* warnings nor the opportunity to speak to his grandmother. Nor was he informed that he was free to leave the room.[192]

In deciding that J.D.B. was subject to a custodial interrogation warranting *Miranda* warnings, the Supreme Court of the United States set out factors that "so long as the child's age was known to the officer at the time of police questioning, or would have been objectively apparent to a reasonable officer, its inclusion in the custody analysis [was] consistent with the objective nature of that test."[193]

Note that as with J.D.B.'s experience in the school administrative setting, a juvenile offender participating in court-ordered psychotherapy, whether incarcerated or on probation, will likely meet with the clinician in a closed office without a parent or guardian present.[194] Both settings are arguably less punitive than incarceration in the criminal justice system, but the lines are hastily drawn.[195] Both the educational setting and mental health setting now increasingly overlap with criminal justice efforts,[196] as seen in the proliferation of law enforcement on school grounds and court-ordered mental health treatment.[197] In the juvenile justice system, all of these elements coexist to an extent, merging rehabilitative, educational, and punitive elements.[198]

Finally, if the court deems the disclosure setting noncustodial, then an offender must assert the privilege against self-incrimination; otherwise,

---

192. *Id.*

193. *Id.* at 2406.

194. *Compare* S.G. v. State, 956 N.E.2d 668, 678 (Ind. Ct. App. 2011) (holding that a juvenile was not subject to custodial interrogation, nor were his *Miranda* rights violated, when he was questioned about a theft by the school principal), *with* State v. Antonio T., 352 P.3d 1172, 1174, 1178 (N.M. 2015) (finding a violation of a high school student's privilege against self-incrimination for statements made to a vice principal in the presence of a deputy sheriff, requiring *Miranda* warnings before questioning).

195. *See* Parham v. J.R., 442 U.S. 584, 626–27 (1979) (Brennan, J., concurring in part, dissenting in part); Farkas & Miller, *supra* note 23, at 78.

196. *See* Grisso, *supra* note 12, at 144, 151; Paul Holland, *Schooling Miranda: Policing Interrogation in the Twenty-First Century Schoolhouse*, 52 LOY. L. REV. 39, 73 (2006) (advocating a reasonable student standard for understanding *Miranda* waivers in school-based interrogations). "Modern law enforcement-education collaborations must be examined through a different lens precisely because law enforcement officers and the coercive authority they represent and deploy often figure prominently in the interrogation process even when the officers do not ask student suspects any questions." Holland, *supra*, at 91.

197. *Id.* at 42; Peele, *supra* note 5, at 20; Zosky, *supra* note 77, at 360–61, 367.

198. Zosky, *supra* note 77, at 360–61.

the offender's silence in the face of interrogation may, in fact, be held against him.[199] One must question how easily a juvenile offender would be able to navigate and assert a right to remain silent in the face of incriminating questions in therapy. Courts apply a variable, albeit objective, standard to determine if a therapeutic setting is custodial or inherently coercive, a determination no juvenile could reasonably forecast.[200] Defense counsel will certainly bear some of the burden in their duty to advise unsuspecting juvenile defendants of the legal risks of accepting plea agreements or diversion involving psychotherapy.[201]

C. *Involuntary Commitment: Expanding the Due Process Divide Between Civil and Criminal Proceedings*

Even if the privilege against self-incrimination and *Miranda* rights attach to court-ordered psychotherapy in the juvenile justice system, the privilege may not attach to court-ordered mental health services deemed outside the scope of the justice system.[202] Despite the early 1970s broad application of a right to remain silent in settings involving a deprivation of

199. *See* Salinas v. Texas, 133 S. Ct. 2174, 2180, 2184 (2013) (holding that prosecutorial use of defendant's noncustodial silence did not violate the Fifth Amendment privilege against self-incrimination); Minnesota v. Murphy, 465 U.S. 420, 429, 440 (1984) (holding that a witness who does not claim the privilege against self-incrimination may lose the benefit of the privilege without making a knowing and intelligent waiver); Rogers v. State, 340 U.S. 367 (1951) (holding that the privilege against self-incrimination is deemed waived unless invoked); James v. State, 75 P.3d 1065, 1066–68 (Alaska Ct. App. 2003) (finding that an inmate verbally asserted his right to remain silent to correctional officers during sex offender treatment while his appeal was pending).

200. *See James*, 75 P.3d at 1067–68; Farkas & Miller, *supra* note 23, at 78–79; Holland, *supra* note 196, at 79.

201. *See* Buchanan v. Kentucky, 483 U.S. 402, 424–25 (1987) (denying defendant's Sixth Amendment claim of ineffective assistance of counsel for failure to warn defendant of the risk that his psychiatric examination results would be introduced into evidence against him at trial); State v. Huff, 381 S.E.2d 635, 661 (N.C. 1989), *vacated*, 497 U.S. 1021 (1990) (determining whether defendant's Sixth Amendment right to effective assistance of counsel was violated due to defense counsel's opening the door to rebuttal testimony by the State's psychiatric expert who evaluated defendant pre-trial subject to court order); State v. McClary, 577 S.E.2d 690, 692–93 (N.C. Ct. App. 2003) (addressing whether defense counsel properly objected to admission of defendant's pre-trial psychiatric evaluation and mental health treatment history); Kinports, *supra* note 186, at 139 n.105 (discussing Smith v. Murray, 477 U.S. 527, 530–31 (1986) (addressing defense counsel's unwillingness to object to the State's admission of defendant's statements to his own psychiatric expert in the sentencing phase of a capital trial)).

202. *See* U.S. CONST. amend. V; Saranchak v. Beard, 616 F.3d 292, 303–04 (3d Cir. 2010); Smith v. Wainwright, 741 F.2d 1248, 1259 (11th Cir. 1984); *supra* notes 179–83 and accompanying text.

liberty, whether criminal or civil,[203] today a sharper division is emerging between the two.[204]

By 1979, in *Parham*, if a juvenile offender made disclosures in court-ordered therapy that resulted in civil involuntary commitment, the constitutional due process rights that might attend the therapeutic setting in the criminal justice system would not be equally available in the involuntary commitment proceeding.[205] In 1986, with respect to proceedings of civil involuntary commitment of sexual predators, the Supreme Court of the United States in *Allen v. Illinois*[206] asserted that "involuntary commitment does not itself trigger the entire range of criminal procedural protections," including the privilege against self-incrimination.[207] Mandating psychiatric care and treatment, according to the majority in *Allen*, is not punitive, but justified civil state action under the *parens patriae* doctrine when the person subject to commitment is confined "to an institution expressly designed to provide psychiatric care and treatment."[208]

In a more limited interpretation, the Wisconsin Court of Appeals, in 2003, addressed a criminal defendant who made incriminating disclosures of past crimes to a psychologist in a court-ordered assessment interview for sexually violent civil commitment.[209] The court held that the State could not

---

203. *See In re* Gault, 387 U.S. 1, 47–48 (1967); Miranda v. Arizona, 384 U.S. 436, 478–79 (1966).

204. *See* J.D.B. v. North Carolina, 131 S. Ct. 2394, 2402 (2011); M.W. v. Davis, 756 So. 2d 90, 109 (Fla. 2000).

205. Parham v. J.R., 442 U.S. 584, 600–01, 620 (1979) (upholding the substantial liberty interests of juveniles under the Fourteenth Amendment to avoid being unnecessarily confined for the purpose of medical treatment); *M.W.*, 756 So. 2d at 99, 109 (upholding a court order to commit a minor without an evidentiary hearing subject to *Parham* and state statutory provisions); *see also* U.S. CONST. amend. XIV. Applying a classically nebulous *parens patriae* best interests standard in a dependency hearing, the court merely considered the minor's procedural rights, as well as "whether a child believes that he or she is being listened to and that his or her opinion is respected and counts." *M.W.*, 756 So. 2d at 108.

206. 478 U.S. 364 (1986).

207. *Id.* at 372, 375 (holding that proceedings under the Illinois Sexually Dangerous Persons Act were civil, not criminal proceedings within the scope of the Fifth Amendment right against compulsory self-incrimination); *In re* Heckl, 886 N.Y.S.2d 295, 297–98 (App. Div. 2009) (upholding the trial court's right to compel the testimony of an incompetent adult in a civil guardianship proceeding without violating her due process privilege against self-incrimination).

208. *Allen*, 478 U.S. at 373. *But see* Allison v. Snyder, 332 F.3d 1076, 1079 (7th Cir. 2003) ("If pretrial detainees may be subjected to the ordinary conditions of confinement, . . . then so may persons detained before trial as sexually dangerous persons.").

209. State v. Lombard (*In re* Commitment of Lombard), 669 N.W.2d 157, 163–64 (Wis. Ct. App. 2003) (noting that the psychologist testified against Lombard before the jury, using his disclosures against him).

suppress statements made by the defendant on the basis that *Miranda* warnings had not been given:

> The purpose of the examiner's interview was to evaluate Lombard for the purpose of a potential 'civil commitment proceeding, not a criminal proceeding,' and the examiner was not required to comply with *Miranda*'s dictates. Had the examiner, inadvertently or otherwise, elicited statements from Lombard, which could subject him to future criminal prosecution, those statements might well be suppressible in a future prosecution under *Estelle*.[210]

This evolving integration of civil commitment and criminal justice policies would be especially persuasive with regard to mental health treatment of young offenders because they may be subject to the State's protective interest under *parens patriae* based on both mental health and minority age status.[211] The specialized juvenile court system has long been defined by the doctrine of *parens patriae*:

> It is to save, not to punish; it is to rescue, not to imprison; it is to subject to wise care, treatment and control rather than to incarcerate in penitentiaries and jails; it is to strengthen the better instincts and to check the tendencies which are evil; it aims, in the absence of proper parental care, or guardianship, to throw around a child, just starting in an evil course, the strong arm of the *parens patriae*.[212]

A protective, rehabilitative approach to juvenile delinquency purportedly continues today, over a hundred years later, but with ready embrace of a more authoritative tone:

> Given the different goals of the juvenile delinquency and the adult criminal systems, and the former's emphasis on rehabilitation as the principal means by which to achieve the goal of preventing delinquent children from becoming adult offenders, we believe that it is constitutionally permissible for the trial court *to impose whatever treatment plan it concludes* is most likely to be effective for a particular child, as long as that plan does not pose a significant threat to the health or well-being of the child. In such a

210. *Id.* at 166 (citation omitted) (quoting State v. Zanelli (*In re* Commitment of Zanelli) 589 N.W.2d 687, 698 (Wis. Ct. App. 1998)); *see also* Estelle v. Smith, 451 U.S. 454, 468–69 (1981); Miranda v. Arizona, 384 U.S. 436, 467, 475 (1966).

211. *See* Commonwealth v. Fisher, 27 Pa. Super. 175, 181–83 (1905).

212. *Id.* (emphasis added).

case, the state is doing nothing more than exercising its traditional role as *parens patriae*.[213]

Because they have been deemed a hybrid of criminal and civil approaches, juvenile proceedings may offer a more complex interpretation of the privilege against self-incrimination and custodial interrogation.[214] As stated in *McKeiver v. Pennsylvania*,[215] "[t]he [Supreme Court of the United States] has refused to simplistically categorize juvenile proceedings as either *criminal* or *civil*, avoiding thereby a *wooden approach*."[216] If *Allen*'s application of the Fifth Amendment in the context of civil commitment requires a sufficient nexus to a criminal proceeding, then it follows that juvenile courts with greater discretion to invoke hybrid criminal and civil remedies may seek to chip away at the due process rights of juvenile offenders in a therapeutic justice system.[217] Nevertheless, the dissent in *Allen* strongly disagreed that civil involuntary commitment is treatment-based and non-punitive, noting specifically that the Illinois statute at issue provided for involuntary commitment of sexual predators only upon the filing of criminal charges.[218] Following this view, when mental health treatment is mandated by the criminal justice system, provided in confinement, or inherently attached to a criminal proceeding, then the privilege against self-incrimination should survive.[219]

IV. CONCLUSION

The sad truth is that for many young offenders in need of mental health and substance abuse services, the opportunity for rehabilitation is out of reach. In cases involving violent crime and a risk of recidivism, court-ordered mental health treatment may in fact invite coerced confessions

---

213. P.W.G. v. State, 682 So. 2d 1203, 1208 (Fla. 1st Dist. Ct. App. 1996) (emphasis added).

214. *See* McKeiver v. Pennsylvania, 403 U.S. 528, 541 (1971).

215. 403 U.S. 528 (1971).

216. State v. Boatman, 329 So. 2d 309, 312 (Fla. 1976) (citing *McKeiver*, 403 U.S. at 541); *see also P.W.G.*, 682 So. 2d at 1207.

217. *See* U.S. CONST. amend. V; Allen v. Illinois, 478 U.S. 364, 367, 372, 375 (1986); *McKeiver*, 403 U.S. at 541.

218. *Allen*, 478 U.S. at 377, 380 (Stevens, J., dissenting).

> A goal of treatment is not sufficient, in and of itself, to render inapplicable the Fifth Amendment, or to prevent a characterization of proceedings as *criminal*. With respect to a conventional criminal statute, if a [s]tate declared that its goal was *treatment* and *rehabilitation*, it is obvious that the Fifth Amendment would still apply.

Id. at 380; *see also* U.S. CONST. amend. V.

219. *See* U.S. CONST. amend. V; *Allen*, 478 U.S. at 377, 380 (Stevens, J., dissenting).

leading to additional charges or involuntary commitment.[220] As recently asserted by the California Court of Appeals in *People v. Rebulloza*[221]:

> Under this broad [Fifth Amendment] waiver, a probationer who poses little or even no risk to the community could be compelled to confess to a crime committed long ago having no relevance to his or her current status as a sex offender. Any such confession could be given to police or prosecutors, who could then use it against the probationer to initiate an independent prosecution. The past offense could itself be a crime having little or no impact on public safety, and given the passage of time, prosecution of it may no longer serve the public safety purposes it may have served in the past.[222]

Defense attorneys bound to protect their clients' legal interests cannot readily advocate waiving confidentiality in therapy when the treatment mandates disclosure of other crimes or risks a therapist's mandatory duty to disclose a danger to others.[223] The risk of waiver is even more unjustified considering the substantial lack of research supporting the efficacy of numerous therapeutic interventions commonly ordered in the juvenile justice system.[224] As stated by Justice Stevens in his dissenting opinion in *McKune*: "The State's interests in law enforcement and rehabilitation are present in every criminal case. If those interests were sufficient to justify impinging on prisoners' Fifth Amendment right, inmates would soon have no privilege left to invoke."[225]

No one benefits from the denial of mental health services to juvenile offenders who need them, but the therapeutic purpose is significantly undermined if the offender's disclosure of new offenses results in additional charges or sanctions.[226] Efforts to maintain the confidentiality of an offender's disclosures in therapy, such as creating exceptions to mandatory child abuse reporting, would undermine the important interests in protecting

---

220. *See* People v. Rebulloza, 184 Cal. Rptr. 3d 548, 560–61 (Ct. App.), *review granted*, 349 P.3d 1066 (Cal. 2015).

221. 184 Cal. Rptr. 3d 548 (Ct. App.), *review granted*, 349 P.3d 1066 (Cal. 2015).

222. *Id.* at 560–61.

223. *See* MODEL RULES OF PROF'L CONDUCT r. 2.1 (AM. BAR ASS'N 2015); Kapoor & Zonana, *supra* note 28, at 50–53; *supra* text accompanying notes 26–31.

224. *See* CTR. FOR SEX OFFENDER MGMT., *supra* note 22, at 10–11; *supra* Section II.B.

225. McKune v. Lile, 536 U.S. 24, 69 (2002) (Stevens, J., dissenting); *see also* U.S. CONST. amend. V.

226. *See Rebulloza*, 184 Cal. Rptr. 3d at 554; Kapoor & Zonana, *supra* note 28, at 52.

other minors and the public at large from victimization.[227] Realistically, for youth most in need of rehabilitation, those with serious behavioral concerns and recidivist tendencies, therapeutic justice may never be therapeutic or beneficial.[228] For those who pose less of a danger to society, it may not be legally possible to adequately protect the juvenile offender's interest in rehabilitation through court-ordered mental health treatment as long as therapy requires full and honest disclosure of other crimes.[229] Finally, for those most vulnerable offenders—young persons with histories of trauma, poverty, displacement, addiction, mental illness, and longstanding structural racism in the school-to-prison pipeline—due process violations in the guise of therapy constitute yet another societal betrayal.[230]

Even with better practices in providing *Miranda* warnings to youth in court-ordered custodial mental health services,[231] juvenile defenders may be bound to advise young clients to wait until their sentences are complete before proceeding with needed therapeutic interventions.[232] Therefore, while therapeutic justice may appear to reinvigorate the traditional focus on rehabilitation in the juvenile justice system, making use of advances in mental health and research on the juvenile brain, the truth is that the justice system was never meant to be a primary provider of mental health services for any age.[233] To avoid further entrenchment of criminal justice into mental

---

227. *See* Kapoor & Zonana, *supra* note 28, at 50–51 (providing a national overview of child abuse mandated reporting laws and policies); Andrew Longstreth, *Analysis: Mandatory Reporting Laws Could Harm Children*, REUTERS, Dec. 1, 2011, http://www.reuters.com/article/us-usa-crime-reportinglaws-idUSTRE7B01NZ20111201 (noting the lack of evidence that mandatory reporting laws protect children, with a concomitant risk of stigmatizing children).

228. *See* Kapoor & Zonana, *supra* note 28, at 52; Soler et al., *supra* note 13, at 513–14.

229. *See McKune*, 536 U.S. at 59–60 (Stevens, J., dissenting) (distinguishing capital cases which presented an option of voluntary disclosure of incriminating statements, as opposed to those in which defendant was "directly ordered by prison authorities to participate in a program that requires incriminating disclosures"); *supra* Section III.B.

230. *Compare* Soler et al., *supra* note 13, at 513–14, *with* Mandy Locke, *Army Combat Veteran's Call for Help Lands Him in Jail*, NEWS & OBSERVER (May 30, 2015, 5:30 PM), http://www.newsobserver.com/news/local/crime/article22658754.html (reporting on an Army veteran with PTSD who called a Veterans Affairs hotline and was criminally charged with communicating threats to the hotline worker who angered him). The veteran, who was jailed for over four months while awaiting trial, stated "[i]t is wrong to offer confidential help with one hand and throttle those who accept the offer with the other hand." Locke, *supra* note 230.

231. *See supra* Section III.B; Miranda v. Arizona, 384 U.S. 436, 478–79 (1966).

232. *See Miranda*, 384 U.S. at 445, 478–79; MODEL RULES OF PROF'L CONDUCT r. 2.1 (AM. BAR ASS'N 2015); *supra* note 201 and accompanying text.

233. *See* Grisso, *supra* note 12, at 154.

health, with its risk of compromising the Fifth Amendment rights of vulnerable defendants, the obvious course is to redirect funding to expand access to well supported evidence-based mental health services to youth in need of them before they enter the juvenile justice system and before they have a significant criminal history to disclose.

> Calls for a greater emphasis on mental health treatment services in juvenile justice, however, may not be the best answer. Increasing such services in juvenile justice could simply mean that youth would need to be arrested in order to get mental health services. Moreover, many of the most effective treatment methods work best when applied in the community, while youth are with their families rather than removed from them.

Id. at 143.

DISRUPTED LIVES; DIVERTED FUTURES: ZERO TOLERANCE POLICIES' IMPACT ON STUDENTS WITH DISABILITIES

CATHERINE E. JOHNSON*

I. INTRODUCTION: THE ILLUSIVE PROMISE OF EQUALITY

The United States of America was founded upon the highest of ideals—the promise of equality for all citizens.[1] This pledge is built upon the ideological belief that public education equalizes future opportunities for all students.[2] The societal expectation is for students to matriculate from high school with the core competencies, knowledge, and skills necessary to prepare them for a successful adult life. Students with disabilities experience

* Director, ADA Resource Center for Equity and Accessibility, University of Kansas, *formerly employed as Disability Rights Attorney, Disability Rights Center of Kansas, (2005–2016).*

University of Iowa, College of Law, J.D., 1991, University of Iowa, College of Education, M.A., 1998.

She is enriched by the passion, dedication, and perserverance students have shared with her over the past decade in their quest to enrich and protect educational opportunities. She is grateful for the insights, comments, and support from Amy M. Cohen, Bonnie L. Hemenover, Norm L. Johnson, and Katherine A. Weno. She is grateful to Professor Richard J. Whelan (1931–2015), Department of Special Education, University of Kansas for his life's work of ensuring students with disabilities equal access to public education. Special thanks to the editors and staff of *Nova Law Review*.

1. U.S. CONST. amend. XIV, § 1.
2. Thomas E. Perez, Assistant Attorney Gen., Civil Rights Div., Speech at the NSBA Council of School Attorneys (Apr. 20, 2012), http://www.justice.gov/opa/speech/assistant-attorney-general-civil-rights-division-thomas-e-perez-speaks-nsba-council.

many road blocks in their public education. These obstacles result in students with disabilities experiencing a lower graduation rate, higher dropout rate, and a higher rate of discipline than students without disabilities.[3] The inherent promise of success based on public education remains tantalizing but elusive for many students with disabilities.[4]

This Article focuses on an increasingly common obstacle for students with disabilities, Zero Tolerance ("ZT") policies. When applied to students with disabilities, ZT policies can prevent them from completing their public education and divert them into the juvenile justice system.[5] Proactive use of the federal safeguards contained in the Individuals with Disabilities Education Act ("IDEA") are a vital tool in combating ZT policies and retaining students with disabilities in school. In 1975, Congress enacted the Education for All Handicapped Children Act to counter educational practices that were removing students with disabilities from school.[6] In 1990, Congress reauthorized the Education for All Handicapped Children Act and changed the title to IDEA.[7] IDEA contains safeguards to prevent students with disabilities from being denied admission to school based on disability, being removed from school due to a manifestation of a disability, and being educated in a segregated setting.[8] ZT undermines these important protections, returning public schools to a pre-IDEA era.[9]

---

3. *See* CHESAPEAKE INST., NATIONAL AGENDA FOR ACHIEVING BETTER RESULTS FOR CHILDREN AND YOUTH WITH SERIOUS EMOTIONAL DISTURBANCE 2 (1994).

4. Kristy A. Mount, Comment, *Children's Mental Health Disabilities and Discipline: Protecting Children's Rights While Maintaining Safe Schools*, 3 BARRY L. REV. 103, 104 (2002); *see also* Perez, *supra* note 2.

5. PETER E. LEONE ET AL., NAT'L CTR. ON EDUC., DISABILITY, & JUVENILE JUSTICE, SCHOOL FAILURE, RACE, AND DISABILITY: PROMOTING POSITIVE OUTCOMES, DECREASING VULNERABILITY FOR THE INVOLVEMENT WITH THE JUVENILE DELINQUENCY SYSTEM (2003), http://www.edjj.org/Publications/list/leone_et_al-2003.pdf; *see also* Michael P. Krezmien et al., *Suspension, Race, and Disability: Analysis of Statewide Practices and Reporting*, 14 J. EMOTIONAL & BEHAV. DISORDERS 217, 217 (2006) [hereinafter *Suspension, Race, and Disability*]; *infra* Parts VII–VIII.

6. Education for All Handicapped Children Act of 1975, Pub. L. No. 94-142, 89 Stat. 773 (amended 1990).

7. 20 U.S.C. § 1415 (2012).

8. *Id.*; *see also* 34 C.F.R. §§ 300.534, .536 (2015); Joseph B. Tulman, *Disability and Delinquency: How Failures to Identify, Accommodate, and Serve Youth with Education-Related Disabilities Leads to Their Disproportionate Representation in the Delinquency System*, 3 WHITTIER J. CHILD & FAM. ADVOC. 3, 8 (2003); *infra* Parts VII–VIII.

9. *See* LEONE ET AL., *supra* note 5; Michael P. Krezmien et al., *Juvenile Court Referrals and the Public Schools: Nature and Extent of the Practice in Five States*, 26 J. CONTEMP. CRIM. JUST. 273, 274 (2010) [hereinafter *Juvenile Court Referrals and the Public Schools*]; Mount, *supra* note 4, at 108–09; *infra* Parts VI–VII.

II. THE IMPORTANCE OF SAFETY IN EDUCATION

Learning and moral development cannot occur in places ripe with chaos or violence. Schools must maintain order and be a safe space free from threats of violence and harm for education to successfully occur. School violence undermines educators' ability to teach, students' ability to learn, and the overall quality of a public education.[10]

In today's educational climate, protecting students and staff from harm has become increasingly more important, creating difficult and complex situations for students with disabilities. The past twenty years have brought repeated and highly publicized incidences of school shootings.[11] Such events have marred our educational environments.[12] Schools are now confronted with public fears of potential violent incidents, along with rare incidents of real violence, creating long-term negative consequences for students, teachers, administrators, school staff, and learning.[13] This results in a perspective that education cannot occur in the absence of safety and discipline that shifts public schools' priorities toward ensuring safety rather than providing equal education.[14] In 1969, Supreme Court Justice Black stated that: "School discipline, like parental discipline, is an integral and important part of training our children to be good citizens . . . ."[15] Student "violence includes all behaviors that create an environment in which students, teachers, and administrators feel fear or intimidation in addition to being victimized by physical assault, theft, or vandalism."[16] In such a volatile atmosphere, "[s]tudents cannot learn, teachers cannot teach, and administrators cannot manage effectively . . . ."[17]

III. ZERO TOLERANCE POLICIES

ZT is a disciplinary system where school administrators outline the expected or desired behaviors of all students, along with the designated

---

10. Joseph Lintott, *Teaching and Learning in the Face of School Violence*, 11 GEO. J. ON POVERTY L. & POL'Y 553, 560, 562–63 (2004).

11. Peter E. Leone et al., *School Violence and Disruption: Rhetoric, Reality, and Reasonable Balance*, FOCUS ON EXCEPTIONAL CHILD., Sept. 2000, at 1, 1.

12. *Id.*

13. *See id.*; Lintott, *supra* note 10, at 560, 563.

14. *See* Robert C. Cloud, *Federal, State, and Local Responses to Public School Violence*, 120 EDUC. L. REP. 877, 877 (1997).

15. Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 524 (1969) (Black, J., dissenting).

16. Cloud, *supra* note 14, at 877.

17. *Id.*

punishments for violating these rules.[18] As each infraction occurs, ZT provides a set of corresponding punishments.[19] Consideration is not given for the student's unique circumstances or the impetus for the behavior.[20] The discipline is predetermined with no deviation from the designated punishment.[21] ZT's primary purpose is to create safer learning environments in schools.[22] ZT was controversial in its origin and remains an extremely controversial approach to addressing school violence.[23]

The policies were enacted after the Safe Schools Act of 1994 which addressed firearms.[24] ZT today has significantly expanded to address a wide-range of violent and on-violent behaviors, including school disruption, truancy, and refusal to obey teachers and administrators.[25] These policies have exploded in the past fifteen years with over 90% of all schools in the United States implementing some form of ZT policy.[26] Clearly today's school administrators believe ZT is their best opportunity for effectively addressing the ever-increasing problem of violence in their schools.

IV. HISTORY OF DISCIPLINE IN EDUCATION

A review of discipline in public education in the United States provides an interesting perspective on how the United States has addressed the delicate balance between providing an interaction and diverse classroom and creating a safe learning environment. Numerous methods have been attempted, and ZT is the newest method used by school administrators in an attempt to end school violence, and ensure education.[27]

The type of disciplinary measures endorsed by educators changed radically from the 17th century to present. Whipping posts and paddling

---

18. Lintott, *supra* note 10, at 564.
19. *Id.*
20. Jill N. Richards, Comment, *Zero Room for Zero Tolerance: Rethinking Federal Funding for Zero Tolerance Policies*, 30 U. DAYTON L. REV. 91, 91 (2004).
21. *Id.*
22. Paul M. Bogos, *"Expelled. No Excuses. No Exceptions" — Michigan's Zero-Tolerance Policy in Response to School Violence: M.C.L.A. Section 380.1311*, 74 U. DET. MERCY L. REV. 357, 367 (1997)
23. *See* Lintott, *supra* note 10, at 564; Richards, *supra* note 20, at 93. In 2001, the American Bar Association recommended ending ZT in schools. *'No' to 'Zero Tolerance'*, WASH. POST, Feb. 20, 2001, at A14.
24. *See* Safe Schools Act of 1994, Pub. L. No. 103-227, § 701, 108 Stat. 125, 204 (1994) (codified at 20 U.S.C. §§ 5961–5968 (2012)); RONNIE CASELLA, AT ZERO TOLERANCE: PUNISHMENT, PREVENTION, AND SCHOOL VIOLENCE 18 (2001); *Juvenile Court Referrals and the Public Schools*, *supra* note 9, at 274.
25. *Juvenile Court Referrals and the Public Schools*, *supra* note 9, at 274.
26. *Id.*
27. *See* Bogos, *supra* note 22, at 367–68.

devices used on misbehaving students in front of his peers were used exclusively by teachers from the 17th through the 19th century in the United States.[28] These acts served to deter students from engaging in similar behavior.[29] Educators believed these disciplinary measures served as a tool for developing social norms, morality, and retained the student in school.[30]

The increase in school population during the 1960s caused by the baby-boom led schools to move away from corporal punishment and toward out-of-school suspensions and expulsions to rid the problematic, disruptive student from the classroom.[31] School administrators believed that out-of-school suspensions were beneficial to other students because the problem student was removed from class, and class time was not spent disciplining the student.[32]

During the 1970s and 1980s, many students challenged out-of-school suspensions on constitutional and humane grounds to the Supreme Court of the United States.[33] The Supreme Court recognized that a student's success in education is indicative of future success in higher education, employment, and stable family and community life, and negative experiences with education increase that student's likelihood for contact with the juvenile justice and criminal justice systems.[34] The Supreme Court was concerned about the consequences of increased suspensions, expulsions, and drop-outs from school.[35] In *Goss v. Lopez*,[36] the Supreme Court held that students subject to expulsion or suspension from school were entitled to due process protections prior to either suspension or expulsion.[37] Subsequent to *Goss*, school administrators amended their disciplinary measures and relied on in-school suspensions to combat and prevent school violence.[38] In-school suspensions were considered preferable as students remained in school and continued progressing educationally during their punishment period.[39]

---

28. Irwin A. Hyman & Eileen McDowell, *An Overview*, *in* CORPORAL PUNISHMENT IN AMERICAN EDUCATION: READINGS IN HISTORY, PRACTICE, AND ALTERNATIVES, 3, 5 (Irwin A. Hyman & James H. Wise eds., 1979).
29. *See id.* at 4.
30. *Id.* at 3–5.
31. A. Troy Adams, *The Status of School Discipline and Violence*, ANNALS AM. ACAD. POL. & SOC. SCI., Jan. 2000 at 140, 144.
32. *Id.* at 144–45.
33. *See* Goss v. Lopez, 419 U.S. 565, 568–69 (1975); Adams, *supra* note 31, at 145.
34. *Goss*, 419 U.S. at 575; *see also* Adams, *supra* note 31, at 145.
35. *See Goss*, 419 U.S. at 575 n.7.
36. 419 U.S. 565 (1975).
37. *Id.* at 581.
38. Adams, *supra* note 31, at 146.
39. *Id.*

ZT policies began to emerge in the late 1980s and early 1990s.[40] During this period of time, society increasingly viewed youth as violent and dangerous.[41] Americans perception was that juvenile crime was out of control and at an all-time high.[42] Approximately 71% of people thought that a school shooting occurring in their community was a realistic and possible threat to the safety of their children and community.[43]

Although the perceptions of dangerous youths were prevalent in the 1980s and 1990s, the statistics on reported violent crimes during this period illustrate the threat from juvenile violent crimes was low.[44] During this time frame, there were approximately 55 million students enrolled in school.[45] There were 133,700 violent crimes against teachers at private and public schools were reported; 217,400 thefts from teachers were reported;[46] 2.7 million students reported being a victim of a crime at school,[47] and 3523 students expelled for bringing a weapon to school.[48] In January 2001, the U.S. Surgeon General released a report on youth violence that indicated that arrest rates for violent youth crimes had decreased since 1983.[49]

Although not based in fact, the public perception of dangerous youth encouraged a movement away from rehabilitation and treatment for youth in the juvenile justice system and placed more emphasis on punishment and retribution of youth.[50] The trend trickled into school policies, including ZT policies.[51] The pendulum swung away from the prevailing practice of

---

40. *Id.* at 147.
41. *See id.*
42. *See* Ira M. Schwartz et al., *School Bells, Death Knells, and Body Counts: No Apocalypse Now*, 37 HOUS. L. REV. 1, 2–3, 5 (2000).
43. Robin F. Goodman, *Wellness News 4-8*, NEW CITIZENS PRESS (May 1, 2005), http://www.tncp.net/articles/tabid/1800/articletype/articleview/articleid/1710/wellness-news-48.aspx.
44. *Fast Facts*, NAT'L CTR. ED. STATISTICS, http://nces.ed.gov/fastfacts/display.asp?id=65 (last visited May 1, 2016).
45. *Id.*
46. U.S. DEP'T OF EDUC. & U.S. DEP'T OF JUSTICE, 2000 ANNUAL REPORT ON SCHOOL SAFETY 8 (2000), http://www.ncjrs.gov/pdffiles1/ojjdp/193163.pdf.
47. PHILLIP KAUFMAN ET AL., U.S. DEP'T OF EDUC. & U.S. DEP'T JUSTICE, INDICATORS OF SCHOOL CRIME AND SAFETY, 2000, at 4 (2000), https://nces.ed.gov/pubs2001/2001017.pdf.
48. KAREN GRAY & BETH SINCLAIR, U.S. DEPT. OF EDUC., REPORT ON STATE/TERRITORY IMPLEMENTATION OF THE GUN-FREE SCHOOLS ACT: SCHOOL YEAR 1999–2000, at 3 (2000), https://www2.ed.gov/about/reports/annual/gfsa/report992000.pdf.
49. U.S. OFFICE OF THE SURGEON GEN., YOUTH VIOLENCE: A REPORT OF THE SURGEON GENERAL 2 (2001).
50. *See* David M. Altschuler, *Trends and Issues in the Adultification of Juvenile Justice*, *in* RESEARCH TO RESULTS: EFFECTIVE COMMUNITY CORRECTIONS 233, 249–50 (Patricia Harris ed., 1999).
51. *See* Adams, *supra* note 31, at 147–48.

keeping students in school for discipline, as ZT mandates the immediately removal of perceived troublesome students from school.[52] During this same period, 3.1 million children were suspended and 87,000 were expelled.[53] This returned schools to policies of the 1960s where students were removed from school and left alone without any formal content or morality guidance from educators.[54]

V. EFFECTIVENESS OF ZERO TOLERANCE POLICIES

The U.S. Department of Education determined that there is little statistical evidence that ZT is effective at suppressing violence in schools.[55] Statistics demonstrate conclusively that juvenile crime was declining prior to the implementation of the Guns Free Schools Act and ZT policies.[56] The Federal Bureau of Investigation's Uniform Crime Report indicates a decline of 23% in juvenile homicide arrests between 1989 and 1998.[57] According to the U.S. Department of Education, children between the ages of twelve and eighteen are more likely to suffer a violent crime outside of school than inside school property.[58]

Despite these compelling statistics, school administrators continue touting ZT as an effective way to decrease school violence and protect students and teachers.[59] ZT is responsible for an increase in referrals of students with disabilities from school to the criminal and juvenile justice system.[60] Students today are far more likely to be arrested in school than a generation ago.[61] In 2000, 3.1 million students were arrested in school, compared to 1.7 million in 1974.[62] In 2006, data illustrates that one in every

---

52. *Id.*
53. ADVANCEMENT PROJECT & CIVIL RIGHTS PROJECT, OPPORTUNITIES SUSPENDED: THE DEVASTATING CONSEQUENCES OF ZERO TOLERANCE AND SCHOOL DISCIPLINE, at v (2000), http://www.civilrightsproject.ucla.edu/research/k-12-education/school-discipline/opportunities-suspended-the-devastating-consequences-of-zero-tolerance-and-school-discipline-policies/crp-opportunities-suspended-zero-tolerance-2000.pdf.
54. *See* Adams, *supra* note 31, at 144; Lintott, *supra* note 10, at 565.
55. *See* Adams, *supra* note 31, at 148.
56. *See* HOWARD N. SNYDER & MELISSA SICKMUND, NAT'L CTR. FOR JUVENILE JUSTICE, JUVENILE OFFENDERS & VICTIMS: 1999 NATIONAL REPORT 62 (1999).
57. U.S. DEP'T OF JUSTICE, FBI UNIFORM CRIME REPORTS: Table 32 (1998).
58. *See* Schwartz et al., *supra* note 42, at 6.
59. *See* Richards, *supra* note 20, at 114.
60. *See id.* at 108.
61. ACLU & ACLU OF CONNECTICUT, HARD LESSONS: SCHOOL RESOURCE OFFICE PROGRAMS AND SCHOOL-BASED ARRESTS IN THREE CONNECTICUT TOWNS 5 (2008), http://www.aclu.org/files/pdfs/racialjustice/hardlessons_november2008.pdf.
62. Johanna Wald & Daniel J. Losen, *Defining and Redirecting a School-to-Prison Pipeline*, 99 NEW DIRECTIONS FOR YOUTH DEV. 9, 10 (2003).

fourteen students was suspended at least once during the school year.[63] ZT policies have proven ineffective in increasing safety in our schools, and are penalizing our students.

VI. THE IMPACT OF ZERO TOLERANCE POLICIES ON STUDENTS WITH DISABILITIES

Despite the lack of evidence to support its efficacy, ZT continues to be used in direct response to the perceived increase and threat of violence at schools, and in particular, the highly sensationalized school shootings.[64] ZT policies failed to deliver the promised *safe school*.[65] In addition to the increased number of students being disciplined under ZT, the impact of ZT on students with mental illness and emotional or behavioral disabilities has been catastrophic.[66]

The fundamental failure of ZT policies for students with emotional disabilities is its failure to consider the underlying circumstances, behavior, and the child's disability in conjunction with the alleged misconduct.[67] Students with emotional disabilities frequently attend schools without the proper educational supports necessary for them to succeed.[68] It is rare that educators possess the awareness and knowledge of how mental health disabilities manifest in educational settings.[69] Educators commonly label students with emotional disabilities as *bad* and disruptive and subject them to discipline instead of addressing their needs for educational supports and services.[70]

ZT has exacerbated the issues around how public education addresses children with emotional disabilities. These conflicts will continue as the number of children experiencing mental health disorders and corresponding substantial limitations in their lives is significant and has remained constant for the past twenty years.[71] The recent U.S. Surgeon

---

63. MICHAEL PLANTY ET AL., U.S. DEP'T OF EDUC., THE CONDITION OF EDUCATION: 2009, at vii (Andrea Livingston & Thomas Nachazel eds., 2009), http://www.nces.ed.gov/pubs2009/2009081.pdf.
64. *See* CASELLA, *supra* note 27, at 24; Mount, *supra* note 4, at 108.
65. *See* Richards, *supra* note 20, at 93, 97.
66. *See* ACLU & ACLU OF CONNECTICUT, *supra* note 61, at 12; Mount, *supra* note 4, at 108–09.
67. Mount, *supra* note 4, at 109.
68. See *id.*
69. *See* U.S. DEP'T OF HEALTH & HUMAN SERVS., REPORT OF THE SURGEON GENERAL'S CONFERENCE ON CHILDREN'S MENTAL HEALTH: A NATIONAL ACTION AGENDA 19 (1999), http://www.ncbi.nlm.nih.gov/books/NBK44233/pdf/Bookshelf_NBK44233.pdf.
70. Richards, *supra* note 20, at 93; *see also* Mount, *supra* note 4, at 109.
71. U.S. DEP'T OF HEALTH & HUMAN SERVS., *supra* note 69, at 19–20.

General's report on children's mental health states that approximately 20% of all children and youth have a diagnosable mental disorder, 9% to 13% of these children experience a serious emotional disturbance with substantial functional impairment, and 5% to 9% of these children experience an extreme functional impairment.[72] Approximately 8.6% of public school students are identified as having a disability that qualifies them for special education services.[73]

Students with emotional and behavioral disorders come into frequent contact with school officials for disciplinary measures.[74] This is not surprising as mental illness manifests at school causing classroom disruption, disengagement from school, and lack of academic success for that student.[75] Students with disabilities have higher incident rates for receiving teacher-office referrals for *bothering others* and *unacceptable physical contact*.[76] ZT mandates the student be removed from the classroom, and time away from the classroom is disruptive to the educational process; students subject to disciplinary referrals often suffer negative associations with teaching, learning, and school.[77] ZT policies and the corresponding time away from education are linked to an increase in school dropouts and arrests for students with disabilities.[78]

Data consistently demonstrates that students with disabilities are disproportionately suspended from schools.[79] Leone et al. found that close to 20% of suspended students are students with disabilities.[80] This is troubling as only 6% to 11% of students are receiving special education services.[81] Most of the behaviors involved in these suspensions are for non-violent-

72. THE NAT'L ASS'N OF STATE DIRS. OF SPECIAL EDUC., MENTAL HEALTH, SCHOOLS AND FAMILIES WORKING TOGETHER FOR ALL CHILDREN AND YOUTH: TOWARD A SHARED AGENDA 2 (2002), http://www.ideapartnership.org/documents/Shared%20Agenda_final.pdf.

73. SUE BURRELL & LOREN WARBOYS, U.S. DEP'T OF JUSTICE, SPECIAL EDUCATION AND THE JUVENILE JUSTICE SYSTEM 1 (2000), https://www.ncjrs.gov/pdffiles1/ojjdp/179359.pdf.

74. *See* LEONE ET AL., *supra* note 5; Mount, *supra* note 4, at 108.

75. *See* BURRELL & WARBOYS, *supra* note 73, at 1, 3, 6, 9; LEONE ET AL., *supra* note 5; *Suspension, Race and Disability*, *supra* note 7, at 223.

76. *See Juvenile Court Referrals and the Public Schools*, *supra* note 9, at 274; Leone et al., *supra* note 11, at 10; National Education Association, *Truth in Labeling: Disproportionality in Special Education*, NEA.ORG (2007), http://www.nea.org/assets/docs/HE/EW-TruthInLabeling.pdf; *Suspension, Race, and Disability*, *supra* note 5, at 223.

77. *See Suspension, Race, and Disability*, *supra* note 5, at 218, 223, 225.

78. *See id.* at 218; LEONE ET AL., *supra* note 5.

79. LEONE ET AL., *supra* note 5.

80. Leone et al., *supra* note 11, at 10.

81. *See Suspension, Race, and Disability*, *supra* note 5, at 218; Leone et al., *supra* note 11, at 10; *Students with Disabilities*, NAT'L CTR. FOR EDUC. STAT., http://www.nces.ed.gov/fastfacts/display.asp?id=64 (last visited May 1, 2016).

related behaviors.[82] Students with disabilities suffer exponential harms during long-term suspension or expulsion from school through the disruption in their daily routine and loss of contact with their friends, peers, and teachers.[83] Students typically receive significantly less special education and related services during the long-term suspension or expulsion period than they received prior to being removed from school.[84] Categorical long-term suspension because of ZT creates risk for students frequently resulting in the first step toward the path to the criminal and juvenile justice systems.[85]

Students with emotional and behavioral disabilities are at a high risk for not completing high school.[86] The national high school—grades nine through twelve—dropout rate is 24%, but the rate is 48% of students with emotional and behavioral disabilities and 30% of students with other types of disabilities.[87] An additional 8% of students with emotional and behavioral disabilities drop out prior to grade nine.[88] According to the U.S. Department of Education's Twenty-third Annual Report to Congress in 2001, only 57.4% of the students identified as special education students matriculate.[89]

Removing a child from school frequently acts as an impetus for contact with the juvenile justice system.[90] The numbers of children with emotional and behavioral disabilities entering the juvenile justice system has exploded over the past fifteen years.[91] Texas reports a 27% increase in youth with mental disabilities entering the "juvenile justice system between 1995 and 2001."[92] Sixty-seven percent of these children were incarcerated for a

---

82. *See* Leone et al., *supra* note 11, at 10.
83. Lintott, *supra* note 10, at 567.
84. *Id.* at 565, 567.
85. *See* LEONE ET AL., *supra* note 5; *Suspension, Race, and Disability*, *supra* note 5, at 217.
86. *See* CHESAPEAKE INST., *supra* note 3, at 2; *Suspension, Race, and Disability*, *supra* note 5, at 218.
87. *See* CHESAPEAKE INST., *supra* note 3, at 2.
88. *Id.*
89. U.S. DEP'T OF EDUC., TWENTY-THIRD ANNUAL REPORT TO CONGRESS ON THE IMPLEMENTATION OF THE INDIVIDUALS WITH DISABILITIES EDUCATION ACT I-2 (2001), https://www2.ed.gov/about/reports/annual/osep/2001/index.html.
90. *Suspension, Race, and Disability*, *supra* note 5, at 225.
91. Steven C. Teske, *A Study of Zero Tolerance Policies in Schools: A Multi-Integrated Systems Approach to Improve Outcomes for Adolescents*, 24 J. CHILD & ADOLESCENT PSYCHIATRIC Nursing 88, 90 (2011).
92. *Id.*

non-violent offense.[93] A similar study in Louisiana determined that 73% of youth were incarcerated for non-violent offenses.[94]

Arrest statistics of school-based arrests of students with emotional disabilities are shocking. The dramatic increase in school-based arrests are credited as a contributing factor in the explosion of students with mental illness being placed in the juvenile justice system. "Twenty percent of students with [emotional disabilities] are arrested at least once before" leaving school, compared to the 6% of students without emotional disabilities.[95] Three to five years after matriculation from high school, 58% of students with emotional disabilities have been arrested, and 30% of students with learning disabilities have been arrested.[96] Seventy-three percent of students with emotional and behavioral disorders that drop out of high school are arrested within three to five years after leaving high school.[97]

Two million three hundred thousand children are arrested each year.[98] Over six hundred thousand of these youths are entered into the juvenile justice system, and over one hundred thousand youths are placed in secure juvenile correctional facilities.[99] A recent comprehensive study conducted by the National Center for Mental Health and Juvenile Justice indicates that "70.4% of youth in the juvenile justice system meet criteria for at least one mental health disorder."[100] These statistics demonstrate a rampant trend across all states of arresting students with emotional and behavioral disabilities instead of providing the required special education and related services.[101]

---

93. *Id.*

94. Xochitl Bervera, *Reclaiming Children from the Prison System: The Juvenile Justice Reform Act (Act 1225)*, RACEFORWARD.ORG (2003), https://www.raceforward.org/sites/default/files/pdf/281pdf.pdf.

95. CHESAPEAKE INST., *supra* note 3, at 2.

96. *See id.*

97. *See id.*

98. HOWARD N. SNYDER, U.S. DEP'T OF JUSTICE, JUVENILE ARRESTS 2001, at 1 (2003), https://www.ncjrs.gov/pdffiles1/ojjdp/201370.pdf.

99. NAT'L CTR. FOR MENTAL HEALTH AND JUVENILE JUSTICE, BETTER SOLUTIONS FOR YOUTH WITH MENTAL HEALTH NEEDS IN THE JUVENILE JUSTICE SYSTEM, http://cfc.ncmhjj.com/wp-content/uploads/2014/01/Whitepaper-Mental-Health-FINAL.pdf.

100. JENNIE L. SHUFELT & JOSEPH J. COCOZZA, NAT'L CTR. FOR MENTAL HEALTH & JUVENILE JUSTICE, YOUTH WITH MENTAL HEALTH DISORDERS IN THE JUVENILE JUSTICE SYSTEM: RESULTS FROM A MULTI-STATE PREVALENCE STUDY 2 (2006) http://www.unicef.org/tdad/usmentalhealthprevalence06(3).pdf.

101. *See id.*; CHESAPEAKE INST., *supra* note 3, at 2.

VII. IDEA PROCEDURAL PROTECTIONS

IDEA requires school districts to provide a free appropriate public education to children from three years old through twenty-one years of age.[102] "Free Appropriate Public Education [("FAPE")] means special education and related services that" meet state standards in an appropriate setting and in accordance with the student's individualized education program ("IEP").[103] Students with disabilities are entitled to receive special education services in the least restrictive environment "to the maximum extent appropriate" for them.[104] This requirement emphasizes the schools' obligation to provide students with an education in an integrated setting.[105]

IDEA places limits on a school district's ability to exclude students with disabilities from school through disciplinary action.[106] Students able to assert the procedural protections of IDEA in a disciplinary proceeding are students identified as eligible for special education and related services, students who are being evaluated for special education and related services, and any student where the school had knowledge of the student's disability before the behavior occured.[107]

If a school district seeks the removal of a student for longer than ten school days, this removal constitutes a change in the student's educational placement, which triggers the procedural protections of IDEA.[108] The procedural protections were added by Congress to ensure that school districts are not removing students with disabilities in a discriminatory manner[109] or for behavior that is a manifestation of their disabilities.[110] IDEA procedural protections require the district to conduct a manifestation determination review within ten days of the decision to change a student's educational placement.[111]

---

102. 20 U.S.C. § 1412(a)(1)(A) (2012); Tulman, *supra* note 8, at 8.
103. 20 U.S.C. § 1401(9)(B)–(D).
104. *Id.* § 1412(a)(5)(A).
105. *See id.*
106. *See id.* § 1415(k)(5).
107. *See id.*; 34 C.F.R. § 300.534(a)–(d).
108. 20 U.S.C. § 1415(k)(1)(C); 34 C.F.R. § 300.536(a)(1); *see also* Individuals with Disabilities Education Act Amendments of 1997, Pub. L. No. 105-17, § 615(k)(1)(A)(i), 111 Stat. 37, 93 (1997) (codified as amended at 20 U.S.C. §§ 1400–1482 (2012)).
109. 20 U.S.C. § 1415(k)(1)–(6); 34 C.F.R. § 300.530(b)(1).
110. *See* 20 U.S.C. § 1415(k)(1)(E)–(F); 34 C.F.R. § 300.530(e)–(f).
111. 20 U.S.C. § 1415(k)(1)(E)(i)–(ii).

VIII. IDEA AND ZERO TOLERANCE

Ninety-four percent of public schools in the United States have ZT policies regarding drugs, alcohol, weapons, violence, and tobacco in school.[112] These policies require the immediate removal of students from school for possessing drugs, alcohol, weapons, tobacco, or that commit violence in schools.[113]

ZT polices create inherent legal issues for school districts when implemented against a student with a disability.[114] The Supreme Court of the United States addressed the issue of disciplining a student with a disability in 1988.[115] In *Honig v. Doe*,[116] the Supreme Court held that school officials may not unilaterally remove even *dangerous* or *disruptive* children with disabilities from their educational placements.[117] The Supreme Court held that exclusion from school for more than ten days constitutes a *change of placement* for purposes of IDEA and is subject to all the procedural requirements governing such change.[118] In *Honig*, the Supreme Court determined that only a court may authorize a school to temporarily remove a child from school despite the protections contained within IDEA and only in the event the district can prove (1) that exhaustion of administrative remedies would be futile, and (2) that maintaining the child's placement is "substantially likely to result in injury either to himself, herself, or to others."[119]

Congress recognized that historically students with disabilities were excluded from school based on manifestations of their disabilities.[120] IDEA was amended to prevent students with disabilities from being pushed out of school based on behaviors that were manifestations of their disabilities.[121] IDEA now contains procedural due process rights for students prior to long-term suspensions and expulsion proceedings.[122] IDEA requires a *manifestation determination* review to determine whether the "conduct in question was caused by, or had a direct and substantial relationship, to the child's disability"[123] for removals from school longer than ten days.[124] On

112. *Juvenile Court Referrals and the Public Schools*, *supra* note 9, at 274.
113. Mount, *supra* note 4, at 108.
114. *See* Honig v. Doe, 484 U.S. 305, 308 (1988).
115. *Id.*
116. 484 U.S. 305 (1988).
117. *See id.* at 328–29.
118. *See id.*
119. *Id.* at 326–28.
120. *Honig*, 484 U.S. at 309, 324; *see also* 20 U.S.C. § 1415(k)(1)(B) (2012).
121. *Honig*, 484 U.S. at 325–26; *see also* 20 U.S.C. § 1415(k)(1)(B).
122. 20 U.S.C. § 1415.
123. *Id.* § 1415(k)(1)(E)(i)(I); *see also* 34 C.F.R. § 300.530(e)(1)(i) (2015).

the eleventh day of removal, schools are required to provide services to assist a student toward achieving their education goals as outlined in their IEP and to progress with the general curriculum.[125]

IDEA substantially impacts a school districts' ability to exclude students with disabilities from school.[126] If it is determined that the student's behavior is substantially related to his disability, then the school is prohibited from suspending or expelling the student through the school's disciplinary system.[127] The school is required to provide additional educational supports and related services to maintain that student in his current education placement.[128] The student is entitled to the development of a positive behavior plan that addresses the manifestations of his disability and provides support to the student in their classroom.[129]

ZT changed how educators address students' behaviors.[130] In implementing ZT, an educator focuses on the removal of a perceived troublesome student, not on meeting educational goals or moral development.[131] ZT affords educations several avenues to remove the student from school.[132] They may attempt to use the discipline code and suspend or expel the student from school for behaviors that violate ZT.[133] As stated previously, students with disabilities have procedural protections under the IDEA against exclusion from school based on behaviors that are a manifestation of their disabilities,[134] and some successfully employ these procedural protections and retain their right to remain in school.[135] Educators must comply with the procedural requirements of IDEA and the procedural due process requirements of state regulations concerning long-term suspensions and expulsion proceedings.[136] However many students

---

124. 20 U.S.C. § 1415(k)(1)(E)(i)(I).
125. *See id.* §§ 1401(14), 1412(a)(3), 1414(d); 34 C.F.R. § 300.536; *Honig*, 484 U.S. at 311.
126. *See* 20 U.S.C. § 1415(b)(3), (5); 34 C.F.R. § 300.536.
127. 20 U.S.C. § 1415(k)(1)(F); *Honig*, 484 U.S. at 315–16, 328.
128. 34 C.F.R. § 300.530(f).
129. *See id.*
130. *See* Bogos, *supra* note 22, at 358–60.
131. *See* Mount, *supra* note 4, at 109.
132. *See* Cloud, *supra* note 14, at 883–84.
133. Vito A. Gagliardi, Jr., *In Defense of Zero Tolerance: The Law Gives Educators the Flexibility to Respond to Cases on an Individual Basis*, N.J. L.J., May 21, 2001, at 3.
134. 20 U.S.C. § 1415(k)(1)(E) (2012); Mount, *supra* note 4, at 115.
135. *See* Honig v. Doe, 484 U.S. 305, 308, 328–29 (1988); Mount, *supra* note 4, at 118–20.
136. *See* U.S. CONST. amend. XIV; 20 U.S.C. § 1415(a)–(b), (k); 34 C.F.R. § 300.530 (2015); Bogos, *supra* note 22, at 369.

with disabilities are unable to successfully use IDEA procedural protections and are expelled for behaviors that are a manifestation of their disabilities.[137]

One way educators may attempt to subvert IDEA requirements is to assert that the student is *dangerous*.[138] ZT provisions of IDEA maintain that certain behaviors are so inherently dangerous and unsafe that regardless of whether the behavior is a manifestation of the student's disability, safety for all dictates that he or she be removed immediately from the classroom.[139] Students with disabilities still have due process rights in such situations.[140] Schools are required to file a notice of due process asserting the basis of the *dangerousness* and the reasons for the student's removal.[141] The student remains in his current educational placement during the pendency of the expedited due process hearing regarding *dangerousness*.[142]

Educators may attempt to immediately remove a student with a disability by asserting that student has brought a weapon or drugs to school.[143] Students accused of this type of behavior are immediately removed from the classroom but are entitled to education in a different setting.[144] IDEA limits a school's ability to remove a student for *dangerous behavior* or weapons to forty-five school days.[145]

ZT policies offer educators a final opportunity for removing a student from school.[146] Educators that are not successful in expelling a student with a disability, have turned to the police and the juvenile courts for assistance in removing the perceived troublesome student from their school.[147] Schools report students with in-school behavioral disorders to the police for juvenile filings and removal to juvenile detention centers.[148] This punitive approach to disciplining students with disabilities circumvents the

137. *See* 20 U.S.C. § 1415(b), (k); Mount, *supra* note 4, at 111.
138. 20 U.S.C. § 1415(k)(1)(G); 34 C.F.R. § 300.530(g); Mount, *supra* note 4, at 108–09.
139. 20 U.S.C. § 1415(k)(1)(G); *Honig*, 484 U.S. at 325–26.
140. 20 U.S.C. § 1415(k)(1)(H); 34 C.F.R. § 300.530(h); *see also* U.S. CONST. amend. XIV.
141. *See* 20 U.S.C. § 1415(k)(1)(H); 34 C.F.R. § 300.530(h); *Honig*, 484 U.S. at 316, 325–26.
142. 20 U.S.C. § 1415(k)(4); 34 C.F.R. § 300.533.
143. 20 U.S.C. § 1415(k)(1)(G); 34 C.F.R. § 300.530(g).
144. 20 U.S.C. § 1415(k)(1)(G); 34 C.F.R. § 300.530(g).
145. 20 U.S.C. § 1415(k)(1)(G).
146. EILEEN L. ORDOVER, CTR. FOR LAW & EDUC., CHALLENGING ABUSIVE FILING OF JUVENILE PETITIONS AGAINST CHILDREN WITH DISABILITIES BY SCHOOL OFFICIALS 2 (1996).
147. *Id.* at 2.
148. *Id.* at 2, 4–5.

procedural protections contained in IDEA and *Honig*.[149] The cited behavior is frequently a manifestation of the student's disability or related to the school's failure to follow the student's IEP and provide appropriated related services, such as mental health counseling and behavioral support.[150] Students subject to these tactics are removed from school in handcuffs, placed in a police car, and taken to a juvenile detention or processing center.[151] A student may remain in detention for hours, days, weeks, or months.[152] These students are charged with juvenile offenses, although frequently, these charges are dismissed months or years in the future.[153] This experience proves to be life altering, as many of these students do not return to their classroom that school year; and never return at all.[154] This process has proven highly efficient and effective in removing students with perceived difficult behaviors from their schools.[155]

Schools' reliance upon the police and the juvenile justice system to address behavioral issues related to a student's disability subverts their responsibility to comply with IDEA procedural protections.[156] School administrators implicitly understand their decision to call the police, report a student's behavior, and file a police report will cause that student to be immediately removed from the classroom or building.[157] This decision triggers a change in placement under IDEA,[158] and educators that call the police should be required to comply with the procedural protections contained in IDEA. To allow schools to ignore a student's protections under IDEA in this way is educational malpractice and should not be allowed to continue.

IX. REMAINING IN SCHOOL THROUGH IDEA ADVOCACY

Combating ZT tactics requires that parents, students, and special education attorneys understand the protections IDEA provides and be

149. *Id.* at 2, 8; *see also* Honig v. Doe, 484 U.S. 305, 325–28 (1988); BURRELL & WARBOYS, *supra* note 73, at 7.
150. ORDOVER, *supra* note 146, at 4–5.
151. UDI OFER ET AL., N.Y. CIVIL LIBERTIES UNION, SAFETY WITH DIGNITY: ALTERNATIVES TO THE OVER-POLICING OF SCHOOLS 11 (Jennifer Carning et al. eds., 2009), http://www.nyclu.org/files/Safety_with_Dignity.pdf; Richards, *supra* note 20, at 108.
152. BURRELL & WARBOYS, *supra* note 73, at 8.
153. *Id.* at 7–8.
154. *Id.*
155. *Id.*
156. *Id.* at 7.
157. *See* OFER ET AL., *supra* note 151, at 9.
158. *See* Mount, *supra* note 4, at 117–18.

immediately proactive in asserting them.[159] Parents constitute an integral part of their child's IEP team and have the authority to request an IEP team meeting to discuss any issue that impacts their child's education.[160] If a student receives a short-term suspension—less than ten days—IDEA procedural protections are not triggered;[161] although, even short-term suspensions can impact a student's relationship with his school and educational progress.[162]

Parents may use their power under IDEA to immediately request an IEP team meeting to discuss the basis for the out-of-school suspension and request necessary amendments to the IEP services to prevent future out-of-school suspensions.[163] This meeting is an opportunity for parents to explain in depth their child's disabilities, manifestations of their disabilities, how the behavior precipitating the suspension was substantially related to their disability, and what additional services their child needs in the IEP to alleviate a future occurrence.[164] Future suspensions may be prevented by a discussion and agreement with school officials of the student's manifestations of his disability.[165] Agreed manifestations of behavior should be identified and a positive behavior intervention plan developed to appropriately support the student in their classroom.[166]

For long term suspension or expulsion, parents possess a powerful tool under IDEA to fight the school if the disciplinary action is related to the student's disability. IDEA prohibits schools from removing students from school for longer than ten days unless it has been determined that the precipitating behavior is not a manifestation of the student's disability.[167] Parents must not underestimate the importance of the outcome of the manifestation determination review. A properly conducted manifestation determination review considers two questions: (1) Was the conduct "caused by, or had a direct and substantial relationship to the child's disability; or (2) . . . [W]as [this conduct] the direct result of the [school's] failure to implement the [student's] IEP?"[168]

To prepare for this review, parents should request copies of the incident reports, witness statements, and other documents prior to the

159. *See* OFER ET AL., *supra* note 151, at 7–9; Mount, *supra* note 4, at 108–09, 117.
160. 34 C.F.R. § 300.321(a)(1)–(5) (2015); Mount, *supra* note 4, at 106, 116.
161. Mount, *supra* note 4, at 117.
162. *See* OFER ET AL., *supra* note 151, at 9; Richards, *supra* note 20, at 107–08.
163. *See* Mount, *supra* note 4, at 106, 116–17.
164. *See* 34 C.F.R. § 300.530(e)(1)–(2); Richards, *supra* note 20, at 113.
165. *See* 34 C.F.R. § 300.530(f)(1)(i); Richards, *supra* note 20, at 113.
166. 34 C.F.R. § 300.530(e)(1)(i), (f)(1)(i)–(ii).
167. *Id.* § 1415(k)(1)(B)–(C).
168. *Id.* §§ 1415(k)(1)(E)(i).

meeting and review them carefully with an eye toward the relationship between their child's disabilities and their cited behavior.[169] Parents may invite any person with knowledge of their child to the meeting.[170] Students receiving mental health services outside of the school may find the presence of their mental health professionals, mental health assessments, mental health plans, and services beneficial during this meeting.[171]

School officials commonly do not possess a significant enough understanding of mental illness and its impact on an individual to properly answer the first required question in a manifestation determination review: whether a student's "conduct . . . was caused by, or had a direct and substantial relationship to, [their] disability."[172] Mental health professionals are uniquely positioned to explain the student's mental health diagnoses, and their impact upon the student in the educational setting.[173] If the evidence presented from the mental health professionals, the student, and the parents convinces the school officials that the behavior "was caused by, or had a direct and substantial relationship to [his] disability," then the student's conduct is a manifestation of his disability, and the student must be returned to his prior educational placement.[174]

If the evidence presented fails to convince the school officials that the conduct was a manifestation of the student's disability, then the relationship between the conduct and the schools ability to implement the IEP will be considered.[175] The school is required to implement all sections of the IEP.[176] Any unimplemented sections of the IEP may result in a determination that the identified undesired behavior of the student is a manifestation of his disability.[177] Parents and advocates should carefully review all sections of the IEP to establish whether all identified services were provided, how the failure to provide a service impacted the student's behavior, and the relationship between any unimplemented service and the identified troublesome behavior.[178] Sections of the IEP that discuss a student's behavior must receive a heightened review[179]—in particular, the

169. *See id.*
170. *See id.* §§ 1414(d)(a)(B), 1415(k)(1)(E)(i).
171. *See* 20 U.S.C. §§ 1414(d)(a)(B), 1415(k)(1)(E)(i); Mount, *supra* note 4, at 111.
172. *See* 20 U.S.C. § 1415(k)(1)(E)(i)(I); Mount, *supra* note 4, at 109.
173. *See* 20 U.S.C. §§ 1414(b)(3)(A)(iv), (d)(1)(B)(v), 1415(k)(1)(E)(i)(I) (2); Mount, *supra* note 4, at 111.
174. 20 U.S.C. § 1415(k)(1)(E)(i)(I), (ii), (F)(iii).
175. *See id.* § 1415(k)(1)(E)(i)(II).
176. *See id.* § 1414(d)(2)(A).
177. *Id.* § 1415(k)(1)(E)(ii).
178. *See id.* § 1415(k)(1)(E), (F)(ii).
179. *See* 20 U.S.C. § 1415(k)(1)(F)(ii).

student's positive behavior intervention plan, listed related services, and listed goals.[180] If the team determines that the student's conduct was "the direct result of the [school's] failure to implement the IEP," then the conduct is a manifestation of the student's disability.[181] The student must be returned to his prior educational placement, and the school must immediately correct the IEP deficiencies.[182]

If the determination is made that the student's behavior is not a manifestation of his disabilities, then the school may proceed with the long-term suspension or expulsion proceedings.[183] Parents may appeal the decision of the manifestation determination review and the alternative education placement by filing an expedited request for due process.[184] *Stay-put* provisions of IDEA are not implicated in a disciplinary proceeding, and the student will remain in the disciplinary placement during the pendency of the due process hearing.[185]

All of these protections are not immediately available if the student is arrested and removed from school.[186] Schools do not schedule a manifestation determination meeting, long-term suspension, or expulsion proceeding.[187] The student is merely gone from the building without any apparent ability to assert his procedural due process rights contained in IDEA.[188] Parents cannot prevent the school from reporting their child to the police; although parents do retain the right to challenge the school's decision pursuant to IDEA.[189] IDEA contains specific legal remedies for parents to use in challenging school decision's regarding special education identification, evaluation, educational placement, and provision of a free appropriate public education.[190] A parent may file a state or federal education complaint or a request for due process alleging the school's actions of reporting the student to the police caused an educational change of placement for their child that implicates the procedural protections of IDEA.[191]

---

180. *See id.*; BURRELL & WARBOYS, *supra* note 73, at 6.
181. *See* 20 U.S.C. § 1415(k)(1)(E)(i)(II), (ii).
182. 34 C.F.R. § 300.530(e)(3), (f)(2) (2015).
183. 20 U.S.C. § 1415(k)(1)(C).
184. *Id.* § 1415 (f)(1)(A), (k)(3)(A).
185. *See id.* § 1415 (j), (k)(4)(A).
186. *See id.* § 1415(k)(1)(G).
187. *See id.*
188. *See* 20 U.S.C. § 1415(k)(1)(G).
189. *See id.* § 1415(b)(6)(A), (f)(1)(A), (k)(6).
190. *Id.* § 1415(b)(6).
191. *See id.* § 1415(b)(6), (f)(1)(A), (k)(3)(A).

Only a few cases have determined that a school's action of reporting a student to the police implicates the procedural protections of IDEA.[192] The Sixth Circuit upheld an administrative law judge's determination in *Morgan v. Chris L.*,[193] that the school district violated IDEA when it filed a juvenile court petition against a student with Attention Deficit Hyperactivity Disorder for in-school behavior.[194] The *Morgan* court determined the school's actions of filing a juvenile petition constituted a *change in placement*.[195] The school was required to follow the procedural protections in IDEA by evaluating the student in a timely manner, by conducting an IEP Team meeting to review the behavior, before filing a juvenile petition.[196] The court upheld the administrative law judge's ruling directing the school to withdraw the juvenile court petition that it had filed.[197]

The national trend of educators reporting students to police for in-school behaviors was identified as a concern by Congress as early as 1997.[198] The 1997 Amendments to IDEA clarified that IDEA does not prohibit schools from referring alleged criminal activity by a child with a disability to proper authorities, nor does the law keep police and courts from handling such matter.[199] However, Congress did not intend for schools to rely on the 1997 Amendment to subvert their responsibilities under IDEA.[200] The legislative history behind the 1997 Amendments to IDEA made clear that schools are not prohibited from reporting criminal activity of their students, but schools may not report students to even *appropriate* authorities when doing so would circumvent the school's obligations to the child under IDEA.[201] The U.S. Department of Education publically stated that the new IDEA provision on reporting crimes clarified the legal authority of schools to report crimes, but it "does not authorize school districts to circumvent any of their responsibilities under the Act."[202] Recently, the U.S. Department of

192. *See, e.g.*, Morgan v. Chris L., 927 F. Supp. 267, 269–71 (E.D. Tenn. 1994), *aff'd*, 106 F.3d 401 (6th Cir. 1997).

193. 927 F. Supp. 267 (E.D. Tenn. 1994), *aff'd*, 106 F. 3d 401 (6th Cir. 1997).

194. *Id.* at 270–71.

195. *Id.* at 269.

196. *Id.*

197. *Id.* at 271.

198. *See* Individuals with Disabilities Education Act Amendments of 1997, 105 CONG. REC. S4401–S4403 (daily ed. May 14, 1997) (statement of Sen. Harkin) [hereinafter IDEA Senate Debate].

199. 20 U.S.C. §1415(k)(6)(A) (2012).

200. *See* IDEA Senate Debate, *supra* note 198, at S4403.

201. *Id.* ("The bill also authorizes . . . proper referrals to police and appropriate authorities when disabled children commit crimes, so long as the referrals, do not circumvent the school's responsibilities under IDEA.").

202. Analysis of Comments and Changes, 64 Fed. Reg. 12537, 12631 (March 12, 1999).

Education weighed in more concretely on the national debate concerning the impact of ZT on students.[203] In 2014, the U.S. Department of Education issued a *Dear Colleague Letter* recommending that schools put an end to the failed ZT policies.[204]

X. CONCLUSION

Disciplinary measures have been an integral part of the public school system since its inception.[205] Educators have employed a variety of techniques from corporal punishment and suspensions to the immediate removal of a student from school.[206] While using a particular method, educators tout it as an effective tool for maintaining control and providing education,[207] but history illustrates that new disciplinary measures replace older ones once they are criticized by parents, the public, or the legal system.

Data and evidence demonstrate that ZT has failed to improve school safety. A school shooting in Oregon in September 2015 provides yet another example of ZT's inability to impact its state goal.[208] Study after study illustrates the negative and punitive impact of ZT on students with disabilities.[209] Ignoring the mounting evidence, school administrators continue to advocate the use of and expand the behaviors punished by ZT policies.

There exists a growing national public awareness of the cost associated with the current disciplinary practice of ZT and a national outcry for schools to stop penalizing students and return to teaching them.[210] U.S. Assistant Attorney General for Civil Rights, Thomas Perez, has acknowledged that: "[W]e have failed all our children—and our society—if . . . education becomes a pathway to prison. It is a moral imperative that education instead serves as a road to success."[211] History has shown that disciplinary policies reach a critical mass. It is the responsibility of all who

---

203. *See* CATHERINE E. LHAMON & JOCELYN SAMUELS, U.S. DEP'T OF JUST. & U.S. DEP'T OF EDUC., DEAR COLLEAGUE LETTER: NONDISCRIMINATORY ADMINISTRATION OF SCHOOL DISCIPLINE 7, 19 (2014), http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201401-title-vi.pdf.

204. *See id.* at 19.

205. *See* Hyman & McDowell, *supra* note 28, at 33, 59.

206. *Id.* at 59.

207. *Id.* at 14–16.

208. *See* Sara Sidner et. al, *Oregon Shooting: Gunman Was Student in Class Where He Killed 9*, CNN (Oct. 2, 2015), http://www.cnn.com/2015/10/02/us/oregon-umpqua-community-college-shooting.

209. *See supra* Part VI.

210. ACLU & ACLU OF CONNECTICUT, *supra* note 61, at 5; *see also* Bogos, *supra* note 22, at 380–81.

211. Perez, *supra* note 2.

work with students with disabilities—parents, educators, advocates, and attorneys—to be knowledgeable and timely in challenging new policies, to assert IDEA protections, and to proactively hasten the demise of discriminatory educational practices. For public education to remain the pathway to true equality for citizens with disabilities, it must remain free, equal, and accessible to all students. ZT practices divert students with disabilities out of school and halts their forward progress toward future prosperity and equal opportunities. Achieving the promise of equality for students with disabilities mandates the cessation of ZT policies.

THE RIGHT TO REMAIN SILENT IN NEW ORLEANS: THE ROLE OF NON-POLITICALLY ACCOUNTABLE CHARTER SCHOOL BOARDS IN THE SCHOOL-TO-PRISON PIPELINE

STEVEN L. NELSON, J.D., PH.D.*
JENNIFER E. GRACE, M.ED., N.C.C.**

* Assistant Professor of Leadership and Policy Studies, University of Memphis College of Education

** Ph.D. Candidate, University of New Orleans Educational Administration Program

I. INTRODUCTION

Residents and officials of many cities may fantasize about the possibilities of rebuilding their cities from scratch. It is rarely the case that these wonderers have the opportunity to conduct such rebuilding. This is not the case in New Orleans.[1] Through the pain, trauma, and catastrophic damage of Hurricane Katrina, the City of New Orleans had the opportunity to reconstruct a major American city.[2] The city had the opportunity to address many social ills, including inequitable access to quality education and the disproportionate incarceration of the city's young black citizens.[3] Federal, state, and local government actors dreamt of a charter school reform to revive and reform the faltering public schools of New Orleans.[4] In establishing a system of schools to replace their school system, the government officials effectively ridded the citizens of New Orleans of their power over educational governance, policy, and politics in exchange for the hope of *better* schools.[5] Last year, 2015, marked the tenth anniversary of Hurricane Katrina's landfall.[6] It is more than appropriate, and perhaps

1. *See* Paul T. O'Neill & Renita K. Thukral, *The Unique System of Charter Schools in New Orleans After Hurricane Katrina: Distinctive Structure, Familiar Challenges*, 11 LOY. J. PUB. INT. L. 319, 319–21 (2010); *infra* Part IV.
2. *See* O'Neill & Thukral, *supra* note 1, at 319–21; *infra* Part IV.
3. *See* Pamela N. Frazier-Anderson, *Public Schooling in Post-Hurricane Katrina New Orleans: Are Charter Schools the Solution or Part of the Problem?*, 93 J. AFR. AM. HIST. 410, 412 (2008); O'Neill & Thukral, *supra* note 1, at 319–20; Ellen Tuzzolo & Damon T. Hewitt, *Rebuilding Inequity: The Re-emergence of the School-to-Prison Pipeline in New Orleans*, HIGH SCH. J., Dec. 2006–Jan. 2007, at 59, 59–61; *infra* Part IV.
4. *See* Frazier-Anderson, *supra* note 3, at 410–11; O'Neill & Thukral, *supra* note 1, at 320–21; *infra* Part IV.
5. *See* Neerav Kingsland, *How Many Charter Schools Is Just Right? The New Orleans Case for All-Charter School Districts*, EDUC. NEXT, Summer 2015, at 57, 59, 61.
6. Jarvis DeBerry, *Asking Price for Vacant Lots Skyrockets in Neighborhood*, TIMES-PICAYUNE, Aug. 30, 2015, at E1.

imperative, to assess whether New Orleans' tradeoff is working.[7] Schools are purportedly better in New Orleans, but what impact do these better schools and different governance structures have on student achievement among school-age students in New Orleans as pertaining to the school-to-prison pipeline?[8] This Article will address this question with a focus on whether politically unaccountable charter schools are neutral towards, disrupt, or aggravate the school-to-prison pipeline in New Orleans.

II. THE SCHOOL-TO-PRISON PIPELINE: THE NEED TO EXAMINE CHARTER SCHOOLS BEYOND STANDARDIZED TEST SCORES IN NEW ORLEANS' SCHOOLS

A. *Defining the School-to-Prison Pipeline and Identifying Its Primary Targets*

The school-to-prison pipeline refers to the policies and praxis that shut out, push out, or snatch students out of schools in exchange for a greater likelihood of entry into the juvenile and criminal justice systems.[9] Inadequate access to quality schools, disparate and inconsistent enforcement of disciplinary policies, disproportionate placement into disciplinary alternative settings of some students, and the inappropriate involvement of actors from the criminal justice system are contributing forces in creating and maintaining the school-to-prison pipeline: These forces also act as barriers in the return to traditional public school settings of students who have been shut out, pushed out, or snatched out.[10] The perniciousness of the school-to-prison pipeline is troubling for all students, but the harmful effects do not, in

---

7. *See* Kingsland, *supra* note 5, at 59, 61–62.

8. *Compare* Kingsland, *supra* note 5, at 59, *with* Chauncee D. Smith, *Deconstructing the Pipeline: Evaluating School-to-Prison Pipeline Equal Protection Cases Through a Structural Racism Framework*, 36 FORDHAM URB. L.J. 1009, 1018–19 (2009) [hereinafter Smith, *Deconstructing the Pipeline*], *and* Lydia Smith, *Hurricane Katrina 10 Years on: New Orleans Charter Schools Improved Education From 'F to C'*, INT'L BUS. TIMES (Aug. 22, 2015, 6:00 BST), http://www.ibtimes.co.uk/hurricane-katrina-10-years-new-orleans-charter-schools-improved-education-f-c-1516347 [hereinafter Smith, *Hurricane Katrina 10 Years on*].

9. CATHERINE Y. KIM ET AL., THE SCHOOL-TO-PRISON PIPELINE: STRUCTURING LEGAL REFORM 9 (2010); Smith, *Deconstructing the Pipeline*, *supra* note 8, at 1018–19.

10. *See* MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS 185 (rev. ed. 2012); KIM ET AL., *supra* note 9, at 9; Deborah Fowler, *School Discipline Feeds the "Pipeline to Prison": As School Discipline Moves from the Principal's Office to the Courthouse, Children Are Poorly Served*, 93 PHI DELTA KAPPAN, Oct. 2011; Smith, *Deconstructing the Pipeline*, *supra* note 8, at 1018–19.

fact, affect all students equally.[11] Poor and minority students, particularly black males, are more likely to suffer the direct consequences of the school-to-prison pipeline.[12] The Schott Foundation's annual report identified that just over half of black male students are graduating from high school on a national level.[13] In Louisiana, the black male graduation rate is under 50%.[14] Many institutional factors contribute to black male students' struggles for educational equality.[15] These factors include the inequitable access to quality instruction and curriculum[16] and the harsh and uneven implementation of disciplinary policies.[17] Given the concentrated effect of the school-to-prison pipeline on black males, the Schott Foundation has recommended a specific and deliberate focus on black males.[18] Furthermore, some researchers have identified the school-to-prison pipeline as part and parcel to the black male crisis.[19]

The outcomes for black males finishing high school are stark.[20] The outcomes for black males who do not finish high school are, however, much more alarming.[21] Over half of all black males who do not complete high

---

11. *See* Smith, *Deconstructing the Pipeline*, *supra* note 8, at 1010–12.
12. *Id.* at 1012.
13. MICHAEL H. HOLZMAN, THE URGENCY OF NOW: THE SCHOTT 50 STATE REPORT ON PUBLIC EDUCATION AND BLACK MALES 2012 7 (John Jackson et al. eds., 2012), http://www.blackboysreport.org/bbreport2012.pdf.
14. *Id.* at 8 tbl.1.
15. Anne Gregory & Pharmicia M. Mosely, *The Discipline Gap: Teachers' Views on the Over-Representation of African American Students in the Discipline System*, 37 EQUITY & EXCELLENCE EDUC. 18, 18–19 (2004); *see also* Jerlando F.L. Jackson & James L. Moore III, *African American Males in Education: Endangered or Ignored?*, 108 TCHRS. C. REC. 201, 201 (2006).
16. *See* HOLZMAN, *supra* note 13, at 45; Deryl F. Bailey, *Preparing African-American Males for Postsecondary Options*, 12 J. MEN'S STUD. 15, 20–21 (2003); David J. Connor & Beth A. Ferri, *Integration and Inclusion — A Troubling Nexus: Race, Disability, and Special Education*, 90 J. AFR. AM. HIST. 107, 109 (2005).
17. Gregory & Mosely, *supra* note 15, at 21; Anne Gregory et al., *The Achievement Gap and the Discipline Gap: Two Sides of the Same Coin?*, 39 EDUC. RESEARCHER 59, 59, 62–63 (2010); *see also* IVORY A. TOLDSON, BREAKING BARRIERS 2: PLOTTING THE PATH AWAY FROM JUVENILE DETENTION AND TOWARD ACADEMIC SUCCESS FOR SCHOOL-AGE AFRICAN AMERICAN MALES, 10 (2011), http://www.cbcfinc.org/oUploadedFiles/BreakingBarriers2.pdf [hereinafter BREAKING BARRIERS 2].
18. HOLZMAN, *supra* note 13, at 2.
19. *See* Jackson & Moore III, *supra* note 15, at 201; Pedro Noguera, *Reconsidering the "Crisis" of the Black Male in America*, SOC. JUST., Summer 1997, at 147, 149–50; David Pluvoise, *Remedying the Black Male "Crisis"*, DIVERSE ISSUES HIGHER EDUC., May 1, 2008, at 5.
20. HOLZMAN, *supra* note 13, at 7; Noguera, *supra* note 19, at 149.
21. *See* Bailey, *supra* note 16, at 16; Noguera, *supra* note 19, at 149; George Gao, *Chart of the Week: The Black-White Gap in Incarceration Rates*, PEW RES. CTR. (July

school are incarcerated by the age of thirty.[22] Young black males' arrest and incarceration numbers are dubiously chart topping.[23] Two of every five black men in their twenties and thirties without a high school diploma are more likely to be incarcerated.[24] Overall, black men are six times more likely to be incarcerated than their white counterparts.[25] Almost three of every four state prison inmates, three of every five federal prison inmates, and seven of every ten jail inmates failed to graduate high school.[26] More than one third of male prison inmates reported that behavior and academic disengagement were the main reasons for not obtaining a high school diploma.[27] Michelle Alexander argues that "[t]he fate of millions of people—indeed the future of the black community itself—may depend on the willingness of those who care about racial justice to re-examine their basic assumptions about the role of the criminal justice system in our society."[28] It is, therefore, reasonable to argue that those who care about racial justice might also need to "re-examine their basic assumptions about the role[s]" that public schools play in our society.[29] In particular, advocates and allies for racial justice may need to identify, confront, and redirect the role of public schools in contributing to the school-to-prison pipeline.[30] Many adult criminals were tracked for prison from their early experiences in schools, labeled as criminals as they proceeded through their teenage years, and ultimately transitioned from their woefully under-resourced inner-city schools to prisons that are so overly-resourced as compared to their schools, that the comparison is almost pitiful.[31]

B. *Discovering the Origins of the School-to-Prison Pipeline*

As early as the 1980s and 1990s, and perhaps earlier, a national increase in juvenile crime led to educational polices that sought to police

---

18, 2014), http://www.pewresearch.org/fact-tank/2014/07/18/chart-of-the-week-the-black-white-gap-in-incarceration-rates.

22. *See* Courtney Connely, *Study: Black Male High-School Dropouts Have High Prison Risk*, BLACK ENTERPRISE (May 10, 2014), http://www.blackenterprise.com/education/black-men-who-drop-out-of-high-school-prison; Gao, *supra* note 21.

23. *See* Connely, *supra* note 22; Gao, *supra* note 21.

24. CAROLINE WOLF HARLOW, U.S. DEP'T OF JUSTICE, EDUCATION AND CORRECTIONAL POPULATIONS 6 (2003), http://www.bjs.gov/content/pub/pdf/ecp.pdf; *see also* Gao, *supra* note 21.

25. Gao, *supra* note 21.

26. HARLOW, *supra* note 24, at 3.

27. *Id.*

28. ALEXANDER, *supra* note 10, at 16.

29. *See id.*; Noguera, *supra* note 19, at 149.

30. *See* Noguera, *supra* note 19, at 149–150.

31. *See* Jackson & Moore III, *supra* note 15, at 201.

children and adolescents.[32] These policies created racial disparities in the meting out of discipline and increased the involvement of actors from the juvenile and criminal justice systems in public schools.[33] As the school-to-prison pipeline gathered steam, there was much conversation about delinquent juveniles and the need to address the rise of juveniles' errant behaviors.[34] There was less talk about delinquent adults, neglected communities, conspicuously absent educational, and social or occupational opportunities.[35] Some scholars have asserted that the school-to-prison pipeline is the result of a failed primary and secondary education system that does not meet the needs of many of its students.[36] It should be noted, however, that schools are simply microcosms of a larger society; thus, the issues that impact and contribute to the school-to-prison pipeline are, in large part, factors that besiege poor black and brown communities at large.[37]

Although the school-to-prison pipeline is beginning to gain deeper and more widespread attention nationally, inequitable practices within the educational system and the impact of those inequitable practices have been documented for years, if not generations.[38] More recently, scholars are working to identify how the many factors of the school-to-prison pipeline are interconnected and to compound the barriers to include educational settings that focus on providing students with the tools to be successful in society.[39] Scholars assert that schools and school districts across the country have opted to instead adopt and implement "policies and procedures that . . . force . . . students out of school[s]."[40] This is troubling because the removal of students—from school and into prison—does not often flow in both directions but instead, flows in one direction.[41] Students who are removed from school and enter the school-to-prison pipeline often find themselves enrolled in alternative schools or within the juvenile or criminal justice

32. Tuzzolo & Hewitt, *supra* note 3, at 61.
33. *Id.*
34. *See id.*
35. *See id.* at 61–62.
36. KIM ET AL., *supra* note 9, at 9.
37. *See id.* at 9, 112, 128; Noguera, *supra* note 19, at 149.
38. *See* Noguera, *supra* note 19, at 149; Russell J. Skiba et al., *Race Is Not Neutral: A National Investigation of African American and Latino Disproportionality in School Discipline*, 40 SCH. PSYCHOL. REV. 85, 86 (2011).
39. *See* Skiba et al., *supra* note 38, at 104–05; Tuzzolo & Hewitt, *supra* note 3, at 67.
40. Tuzzolo & Hewitt, *supra* note 3, at 62.
41. *See* ALEXANDER, *supra* note 10, at 185; KIM ET AL., *supra* note 9, at 128–29; Tuzzolo & Hewitt, *supra* note 3, at 61.

systems; once students enter this track, it is difficult to re-enter the traditional educational system.[42]

C. *Realizing the Final Destinations of the School-to-Prison Pipeline*

There are many socioeconomic factors that influence the educational experiences of black students.[43] The criminal justice system is one of those many factors.[44] Many black students have at least one incarcerated parent.[45] These parents, because of their incarceration, are unable to effectively be or become involved in their child or children's educational processes.[46] If parental involvement is a marker of greater student success in schools, it is reasonable to assume that a larger number of black parents in jail is directly correlated with less parental involvement.[47] Less parental involvement would, therefore, increase the number, and perhaps, depth and breadth of the barriers that black students must overcome to become successful in schools.[48] This set of circumstances could lead to a cycle of incarcerations that betrays attempts to stymie the school-to-prison pipeline.[49] At first glance, intervention in adult incarcerations may be a necessary component of any school-to-prison pipeline interventions.[50]

Another result of the school-to-prison pipeline is that black students are prescribed statuses as second-class citizens.[51] Alexander asserts that the current mass incarceration of blacks is akin to, and the next wave of slavery and Jim Crow laws, which limited the capability of blacks to become productive members of society—if they could become members at all.[52] The

---

42. *See* KIM ET AL., *supra* note 9, at 128–29; Pedro Antonio Noguera, *The Trouble with Black Boys: The Role and Influence of Environmental and Cultural Factors on the Academic Performance of African American Males*, IN MOTION MAG. (May 13, 2002), http://www.inmotionmagazine.com/er/pntroub1.html.

43. IVORY A. TOLDSON, BREAKING BARRIERS: PLOTTING THE PATH TO ACADEMIC SUCCESS FOR SCHOOL-AGE AFRICAN-AMERICAN MALES 9 (2008), http://www.indiana.edu/~atlantic/wp-content/uploads/2011/12/Toldson-Breaking-Barriers.pdf [hereinafter BREAKING BARRIERS 1].

44. *See id.* at 26, 29, 31–32.

45. *Id.* at 24, 29; ALEXANDER, *supra* note 10, at 180.

46. ALEXANDER, *supra* note 10, at 180; BREAKING BARRIERS 1, *supra* note 43, at 26, 29.

47. *See* ALEXANDER, *supra* note 10, at 180; BREAKING BARRIERS 1, *supra* note 43, at 24, 26, 29.

48. *See* BREAKING BARRIERS 1, *supra* note 43, at 24, 26, 29.

49. *See id.*; ALEXANDER, *supra* note 10, at 180–81, 199, 210.

50. *See* ALEXANDER, *supra* note 10, at 181, 185, 210.

51. *See id.* at 94, 181, 199, 210.

52. *Id.* at 20–21, 197.

school-to-prison pipeline assists in the mass incarceration of blacks.[53] For black and brown students, criminalization begins early and is often traceable to school settings.[54] Black and latino students are more likely to be arrested on campus than the white peers of those students; black and brown students comprise 45% of all juvenile arrests.[55] Just more than 10% of students who have been previously incarcerated obtain high school diplomas in the traditional setting, and half are re-arrested within two years of release from custody.[56] This same group of students is more likely to be referred to alternative educational settings or schools than white students, which often quickens the route to incarceration.[57]

Harsh disciplinary policies, as well as the disparate implementation of those policies, are not the end of the school-to-prison pipeline.[58] While these issues lead to excessive suspensions, expulsions, and arrests—both school-based and off-campus—it is important to note that modern-day schools mimic prisons and other incarcerative environments in several ways.[59] Black students are disproportionately likely to be assigned to school systems that mirror prisons, as opposed to environments conducive to learning with little hope for escape.[60] For instance, slightly more than 25% of black students report that they pass through metal detectors upon entering school while only about 5% of their white counterparts report a similar experience.[61] Likewise, once criminals are convicted of a felony—which also disproportionately happens to black and brown people—the government is lawfully permitted to deny these citizens protection from discrimination and the right to vote as well as the privilege of gaining public assistance.[62]

---

53. *See* Fowler, *supra* note 10.
54. *See* Skiba et al., *supra* note 38, at 86–87.
55. KIM ET AL., *supra* note 9, at 35.
56. *Id.* at 128–29.
57. *See id.* at 35, 128; Ivory A. Toldson, *Insecurity at Black Schools: When Metal Detectors Do More Harm Than Good*, 81 J. NEGRO EDUC. 303, 304 (2012).
58. *See* KIM ET AL., *supra* note 9, at 9, 128; MARSHA WEISSMAN, PRELUDE TO PRISON: STUDENT PERSPECTIVES ON SCHOOL SUSPENSION 41 (2015); Skiba et al., *supra* note 38, at 86, 88.
59. *See* SOFIA BAHENA ET AL., DISRUPTING THE SCHOOL-TO-PRISON PIPELINE 33, 35 (2012); KIM ET AL., *supra* note 9, at 9, 12; Skiba et al., *supra* note 38, at 86, 88.
60. BAHENA ET AL., *supra* note 59, at 33, 35 (one middle schooler described her school as uninviting, dreary, and equipped with security guards and metal bars; students were referred to as *assholes and animals*); KIM ET AL., *supra* note 9, at 112 (schools are places where students are controlled through drug sweeps, metal detectors, locker checks and full time police officers on campus—school resource officers); *see also* WEISSMAN, *supra* note 58, at 53; Toldson, *supra* note 57, at 304.
61. Toldson, *supra* note 57, at 304; *see also* BREAKING BARRIERS 1, *supra* note 43, at 5.
62. ALEXANDER, *supra* note 10, at 4.

For an educational comparison, students are in some sense—though certainly not in accord with law and equity—denied their educational rights when they are referred to alternative schools, police agencies, or court systems.[63] Although incarcerated youth and youth in alternative education programs are entitled to similar, if not the same, educational rights as traditional primary and secondary students under the Elementary and Secondary Education Act[64] and the Individual with Disabilities Education Act,[65] the students often do not have the opportunity to access equitable educational opportunities due to the misalignment of the curriculum to state standards,[66] low level instruction as compared to instruction focusing on higher order skills,[67] lack of accommodations for students who are entitled to services under appropriate special education and disability laws,[68] and poor planning for the transition back to traditional public schools after the completion of incarceration or removal.[69] The combination of these factors precipitates the recurrence of incarceration or removal for students who were previously removed from the traditional education setting.[70] If Gladwell is correct in arguing that children are shaped by their physical and external environments and that heavy emphasis on having control over students is very similar to the need to exhibit control over inmates, there is very little need to wonder why black students are becoming less prepared for college and careers and more ready for entrance into the criminal justice system.[71] Although some argue that removal from the traditional school environment is tantamount to an intervention that will prevent continued misbehaviors of disciplined students by removing misbehaving students from the traditional school environment,

63. *See* LESLIE BROCK & NATALIE KEEGAN, STUDENTS HIGHLY AT RISK OF DROPPING OUT: RETURNING TO SCHOOL AFTER INCARCERATION (2007) (on file with author); Heather M. Baltodano et al., *Transition of Incarcerated Youth with Disabilities Across Systems and Into Adulthood*, 13 EXCEPTIONALITY 103, 104 (2005); Joseph C. Gagnon et al., *Juvenile Correctional Schools: Characteristics and Approaches to Curriculum*, 32 EDUC. & TREATMENT CHILD. 673, 674–75 (2009); Peter E. Leone & Candace A. Cutting, *Appropriate Education, Juvenile Corrections, and No Child Left Behind*, 29 BEHAV. DISORDERS 260, 262–63 (2004); Peter E. Leone et al., *Special Education Programs for Youth with Disabilities in Juvenile Corrections*, 53 J. CORRECTIONAL EDUC. 46, 47 (2002); Daniel P. Mears & Jeremy Travis, *Youth Development and Reentry*, 2 YOUTH VIOLENCE & JUV. JUST. 3, 11 (2004).

64. 20 U.S.C. §§ 6301 *et seq.* (2012).

65. *Id.* § 1400.

66. *See* Gagnon et al., *supra* note 63, at 674–75.

67. *See* Leone & Cutting, *supra* note 63, at 262–63.

68. *See id.* at 262; Leone et al., *supra* note 63, at 47.

69. *See* BROCK & KEEGAN, *supra* note 63; Baltodano et al., *supra* note 63, at 104; Mears & Travis, *supra* note 63, at 11.

70. Leone & Cutting, *supra* note 63, at 262; Leone et al., *supra* note 63, at 46.

71. *See* MALCOLM GLADWELL, OUTLIERS: THE STORY OF SUCCESS 19–20, 33 (2008); Deborah N. Archer, *Introduction: Challenging the School-to-Prison Pipeline*, 54 N.Y. L. SCH. L. REV. 867, 868–69 (2009–10).

this argument is easily rebutted by the voluminous data proving the contrary.[72] Some scholars have noted that the roots of the school-to-prison pipeline are much more nefarious.[73] Several scholars have associated the rise of the school-to-prison pipeline with the continued criminalization of black Americans, which began with the arrival of enslaved Africans to the United States.[74] Other scholars have not gone as far back as the arrival of enslaved Africans to track the development of the school-to-prison pipeline.[75] For instance, Lia Epperson asserts that the school-to-prison pipeline is yet another form of interposition to efforts at racial integration in public schools as well as the continuation of state-sanctioned violence against blacks in the United States.[76] Thus, it is arguable and has been argued that addressing the school-to-prison pipeline is an extension of efforts towards civil rights.[77]

D. *Teacher Expectations, Student Relationships, and the School-to-Prison Pipeline*

Teacher expectations and relationships with students are also factors that contribute to the school-to-prison pipeline.[78] The disposition of teachers towards black and brown students is a substantial factor in the path that these students will ultimately take.[79] When a student encounters a teacher with high expectations who exhibits a caring student-teacher relationship, the student is more likely to experience success.[80] Establishing and maintaining relationships is important to blacks in various settings, including schools.[81] In particular, black males who perceive their teachers to be nurturing people

72. *See* HOLZMAN, *supra* note 13, at 31–32.
73. *See infra* notes 74–76 and accompanying text.
74. Mark P. Fancher, *Born in Jail: America's Racial History and the Inevitable Emergence of the School-to-Prison Pipeline*, 13 J.L. SOC'Y 267, 268, 273–75 (2011); *see also* Tracie R. Porter, *The School-to-Prison Pipeline: The Business Side of Incarcerating, Not Educating, Students in Public Schools*, 68 ARK. L. REV. 55, 63–64 (2015).
75. *See* Lia Epperson, *Brown's Dream Deferred: Lessons on Democracy and Identity from* Cooper v. Aaron *to the "School-to-Prison Pipeline"*, 49 WAKE FOREST L. REV. 687, 688, 697–98 (2014).
76. *See id.* at 697–98.
77. Archer, *supra* note 71, at 869.
78. Bailey, *supra* note 16, at 20–22; *see also* Gilman W. Whiting, *From At Risk to At Promise: Developing Scholar Identities Among Black Males*, 17 J. SECONDARY GIFTED EDUC. 222, 226 (2006).
79. *See* Bailey, *supra* note 16, at 20; Whiting, *supra* note 78, at 226.
80. Jean A. Baker et al., *The Teacher-Student Relationship As a Developmental Context for Children with Internalizing or Externalizing Behavior Problems*, 23 SCH. PSYCHOL. Q. 3, 4 (2008); Whiting, *supra* note 78, at 226–27.
81. Baker et al., *supra* note 80, at 3–4; Brenda L. Townsend, *The Disproportionate Discipline of African American Learners: Reducing School Suspensions and Expulsions*, 66 EXCEPTIONAL CHILD. 381, 387–88 (2000).

are more academically successful than black males who do not perceive their teachers in a similar manner.[82] In the school setting, black students may find it difficult to fully engage in their educational processes without positive relationships with their teachers and other school personnel.[83] This assertion is reasonable, given the fact that building a positive rapport with students also helps school personnel become aware of and address the needs of individual students.[84]

Teacher expectations heavily impact teacher-student interactions.[85] Black male students have been found to have poor self-efficacy in regard to their academic abilities.[86] The transition into high school is particularly worrisome for black students, especially black males.[87] Black males entering high school are viewed more negatively than their female counterparts, and only 40% of black males graduated as opposed to 80% of their female counterparts in one study.[88] The same study found that black males were often counseled out of schools after "failure and withdrawal . . . were presented as punishment for their behavior."[89] Similarly, successful students, without regard to race, often feel that they are supported and become successful because their reputations precede them; while unsuccessful students, also without regard to race, feel that they are unsuccessful because their reputations precede them and sometimes prompt teachers to fail to support the unsuccessful students in necessary ways.[90] Likewise, successful students universally felt that at least one of their teachers cared for the

82. *See* BREAKING BARRIERS 1, *supra* note 43, at 40–42; Baker et al., *supra* note 80, at 4; Townsend, *supra* note 81, at 387–88.

83. *See* Baker et al., *supra* note 80, at 4; Townsend, *supra* note 81, at 387–88.

84. *See* Baker et al., *supra* note 80, at 4; Townsend, *supra* note 81, at 388.

85. BREAKING BARRIERS 1, *supra* note 43, at 40–42; Baker et al., *supra* note 80, at 4; Antoine M. Garibaldi, *Educating and Motivating African American Males to Succeed*, 61 J. NEGRO EDUC. 4, 8 (1992).

86. Don Martin et al., *Increasing Prosocial Behavior and Academic Achievement Among Adolescent African American Males*, 42 ADOLESCENCE 689, 691 (2007) (arguing that a lack of motivation to perform or achieve exists because of black males' beliefs regarding their teachers' expectations); *see also* Garibaldi, *supra* note 85, at 6–7 (citing that two of every five black males believed teachers had lower expectations for them as opposed to other groups, and also that three of every five black males believed that their teacher did not challenge them); Whiting, *supra* note 78, at 224.

87. Melissa Roderick, *What's Happening to the Boys?: Early High School Experiences and School Outcomes Among African American Male Adolescents in Chicago*, 38 URB. EDUC. 538, 540, 552 (2003).

88. *Id.* at 538.

89. *Id.* at 579.

90. Christopher M. Hampton, A Study of Perceptions of Achievement Factors for At-Risk Students in Comparison to Honor Students at a Northeast Tennessee High School 112–13 (Aug. 2007) (unpublished Ph.D dissertation, East Tennessee State University) (on file with East Tennessee State University).

successful student on a personal level, whereas only half of unsuccessful students felt that at least one of their teachers cared for the unsuccessful students on a personal level.[91] Struggling students often report that they are isolated and targeted in school environments by teachers and peers alike.[92] Teacher expectations and teacher-student relationships are important because they impact student access to challenging curriculum, quality instruction, and social self-efficacy.[93] Most importantly, teacher expectations and teacher-student relationships impact how discipline is meted out.[94] Both of these may contribute to or disrupt the school-to-prison pipeline.[95]

III. CIVIL RIGHTS OR CIVIL WRONGS: THE NATIONAL CHARTER SCHOOL MOVEMENT

The following summary can contextualize and summarize the longstanding crisis concerning black males, which is undoubtedly spreading to black females.[96] The devolving status of black males is of serious concern.[97] This concern is paramount and touches the "social, economic, and educational status of" all black males but particularly school-aged black males.[98] The grave reality for young black males is they own the dubious honor of leading the nation as both perpetrators and victims of homicide.[99] More poignantly, black males lead the nation in all but one cause of death: accidental deaths.[100] Black males are the only segment of the United States' population that is suffering a decline in life expectancy.[101] Black males are expected to live eight years less than the average American.[102] Black males

---

91. *Id.*
92. *Id.* at 114.
93. Baker et al., *supra* note 80, at 4; *see also* Martin et al., *supra* note 86, at 691; Whiting, *supra* note 78, at 224.
94. Townsend, *supra* note 81, at 382, 387–88; *see also* Baker et al., *supra* note 80, at 4.
95. Smith, *Deconstructing the Pipeline*, *supra* note 8, at 1027–28, 1037–38; *see also* Baker et al., *supra* note 80, at 4; Townsend, *supra* note 81, at 382, 387–88.
96. *See* Garibaldi, *supra* note 85, at 5.
97. *See id.* at 4–5.
98. *See id.* at 4.
99. Noguera, *supra* note 42.
100. Amadu J. Kaba, *Progress of African Americans in Higher Education Attainment: The Widening Gender Gap and Its Current and Future Implications*, EDUC. POL'Y ANALYSIS ARCHIVES, Apr. 6, 2005, at 1, 16.
101. Noguera, *supra* note 42.
102. *See* Patricia J. Kolb, *Developmental Theories of Aging*, *in* DEVELOPMENTAL THEORIES THROUGH THE LIFE CYCLE 285, 292 (Sonia G. Austrian ed., 2d ed. 2008).

have long led the nation in arrests, convictions, and incarcerations.[103] While college enrollment has grown until recently, black males still comprise less than 4% of all students enrolled in collegiate studies.[104] Finally, black males have the highest unemployment rates in the nation and are often the last selection options for employers.[105] In relation to white students, black students continue to lag behind in several important achievement markers: high school dropout rates and matriculation in postsecondary education.[106] Black students lead the nation in terms of removals from school.[107] Evidence of academic struggles is found not only among populations of black students with cognitive disabilities but also among black students with above average intelligence.[108] This should come as no surprise as young black men are often denied access to, or encouraged not to, pursue opportunities that could help them succeed academically.[109] Despite the graveness of this concern, it has been ignored in the minds of education reformers.[110] We must ask, then, is school reform a civil right—as it has been framed—or a civil wrong?[111]

Charter schools—the now standard-bearer of school reform in the United States—possess only a small market share of total student enrollment[112] and total number of schools operating[113] in the country;

---

103. Noguera, *supra* note 42.

104. Terrell Strayhorn, *Teacher Expectations and Urban Black Males' Success in School: Implications for Academic Leaders*, 6 ACAD. LEADERSHIP J., no. 2, 2008.

105. Kaba, *supra* note 100, at 14–15; Noguera, *supra* note 19, at 148–49.

106. *See* Donna Y. Ford & J. John Harris III, *Perceptions and Attitudes of Black Students Toward School, Achievement, and Other Educational Variables*, 67 CHILD DEV. 1141, 1141 (1996); Strayhorn, *supra* note 104.

107. *See* Garibaldi, *supra* note 85, at 5.

108. Ford & Harris III, *supra* note 106, at 1141.

109. *See* Strayhorn, *supra* note 104; Noguera, *supra* note 42. One of every six black male students has been told that they should consider postsecondary work as opposed to postsecondary education, as juxtaposed to white males where one in every twenty students is encouraged to work as opposed to seek postsecondary education. Strayhorn, *supra* note 104. The number for black females is one in every twelve students. *Id.*

110. *See* James Earl Davis & Will J. Jordan, *The Effects of School Context, Structure, and Experiences on African American Males in Middle and High School*, 63 J. NEGRO EDUC. 570, 571, 586 (1994).

111. *See* STEVEN L. NELSON, BALANCING SCHOOL CHOICE AND POLITICAL VOICE: AN ANALYSIS OF THE LEGALITY OF PUBLIC CHARTER SCHOOLS IN NEW ORLEANS, LOUISIANA UNDER SECTION 2 OF THE VOTING RIGHTS ACT 7–8 (2014).

112. Nat'l All. for Pub. Charter Schs., *Total Number of Students*, PUBLICCHARTERS.ORG, http://www.dashboard.publiccharters.org/dashboard/students/page/overview/year/2014 (last visited Mar. 10, 2016) [hereinafter *Total Number of Students*] (stating that there are just over 2.5 million students enrolled in public charter schools and that there are 46.6 million students enrolled in non-charter schools).

113. Nat'l All. for Pub. Charter Schs., *Total Number of Schools*, PUBLICCHARTERS.ORG, http://www.dashboard.publiccharters.org/dashboard/schools/page/

nevertheless, charter schools receive a disproportionate share of scholarly attention[114] and federal funding for education.[115] Charter schools are, however, experiencing exponential increases in student enrollment and total schools operating in the United States.[116] Charter schools did not exist in the United States only a quarter of a century ago;[117] now, charter school authorizing legislation can be found almost universally across the country.[118] The rise in charter school authorizing legislation has been in part fueled by increased national popularity, which has in turn been buoyed by extreme popularity among black and brown stakeholders.[119] Though many scholars worried that charter schools would become white-flight schools, recent research should assuage those concerns.[120] Charter schools are not, in fact, white-flight schools; at the national, regional, state, and most metropolitan area levels, charter schools are disproportionately minority as a whole.[121]

That black and brown stakeholders prefer charter schools is unsurprising.[122] Those advocating for the school choice movement have, in

---

overview/year/2014 (last visited Mar. 10, 2016) [hereinafter *Total Number of Schools*] (stating that there are 6440 public charter schools and that there are 89,775 non-charter schools).

114. *See* GENEVIEVE SIEGEL-HAWLEY & ERICA FRANKENBERG, THE CIVIL RIGHTS PROJECT, REVIVING MAGNET SCHOOLS: STRENGTHENING A SUCCESSFUL CHOICE OPTION 4 (2012), http://files.eric.ed.gov/fulltext/ED529163.pdf.

115. *See id.* at 5.

116. *See Total Number of Students*, *supra* note 112.

117. *See* INST. ON RACE & POVERTY, FAILED PROMISES: ASSESSING CHARTER SCHOOLS IN THE TWIN CITIES 1 (2008), http://www.amsd.org/pdfs/2_Charter_Report_Final.pdf (stating that Minnesota was the first state to authorize and create charter schools).

118. *See* Preston C. Green III et al., *Charter Schools, Students of Color and the State Action Doctrine: Are the Rights of Students of Color Sufficiently Protected?*, 18 WASH. & LEE J.C.R. SOC. JUST. 253, 254 (2012) (explaining that forty-two states, the District of Columbia, and Puerto Rico had charter school authorizing legislation as of 2010); *The Last Eight States Without Charter Laws*, CTR. FOR EDUC. REFORM (2013), http://www.edreform.com/wp-content/uploads/2013/01/CharterLaws2013-Last-8-States.pdf (discussing that Washington state approved charter school legislation in 2012).

119. *See* NELSON, *supra* note 111, at 28 (stating that black Americans support charters schools almost 4.5 times more than white Americans, and latino Americans support charter schools at a rate almost double that of white Americans); WILLIAM G. HOWELL ET AL., MEETING OF THE MINDS 23–24, 31 (2011), http://www.educationnext.org/files/ednext_2010_Survey_Article.pdf.

120. Preston C. Green, III, *Preventing School Desegregation Decrees from Becoming Barriers to Charter School Innovation*, 144 EDUC. L. REP. 15, 16 (2000).

121. *Id.*; *see also* ERICA FRANKENBERG ET AL., CHOICE WITHOUT EQUITY: CHARTER SCHOOL SEGREGATION AND THE NEED FOR CIVIL RIGHTS STANDARDS 7 (2010), http://www.civilrightsproject.ucla.edu/research/k-12-education/integration-and-diversity/choice-without-equity-2009-report/frankenberg-choices-without-equity-2010.pdf.

122. Janelle Scott, *School Choice as a Civil Right: The Political Construction of a Claim and Its Implications for School Desegregation*, *in* INTEGRATING SCHOOLS IN A CHANGING SOCIETY: NEW POLICIES AND LEGAL OPTIONS FOR A MULTIRACIAL GENERATION 32, 35 (Erica Frankenberg & Elizabeth Debray eds., 2011).

general, been able to effectively frame debates about the charter school movement in terms of school choice as a civil right.[123] The release of *A Nation at Risk* in 1983 helped create the space and public sentiment necessary to frame school choice as a necessary component of civil rights.[124] This is particularly the case since *A Nation at Risk* keyed in on the fact that our nation's schools were failing our most vulnerable student populations—poor and minority students.[125] Equal or perhaps equitable access to quality schools—as defined almost exclusively by test scores—became a mandate of the school choice movement.[126] At its core, the movement would grant poor and minority stakeholders an option for escaping ineffective inner-city schools that limited the educational, social, and occupational opportunities for poor and minority students.[127] School choice was, and is indeed, a civil right under this framing of the movement's purposes and objectives.[128]

The school choice movement created strange bedfellows of perpetual enemies: Conservatives could introduce free market concepts into public education, and liberals could provide equal and equitable education to all students through school choice.[129] Many scholars envisioned that charter schools would be a civil rights boon for poor and minority parents[130] who were largely trapped in failing and declining schools and school districts after the Supreme Court of the United States effectively banned the mandatory incorporation of suburban districts into urban desegregation plans in *Milliken v. Bradley*.[131] The combination of white flight to the suburbs and the Court's decision in *Milliken* thwarted the nation's attempts at integration, but advocates for educational equity hoped that school reform would provide reason for middle class and white families to return to inner city school districts[132] or—at a minimum—equal educational opportunity in lieu of integrated schools for poor and minority students.[133]

---

123. *Id.* at 33.
124. NAT'L COMM'N ON EXCELLENCE IN EDUC., A NATION AT RISK: THE IMPERATIVE FOR EDUCATIONAL REFORM 7, 33–35 (1983).
125. *See id.* at 7–8.
126. Scott, *supra* note 122, at 33.
127. *Id.* at 38.
128. *Id.* at 34–35.
129. *Id.* at 34, 36–37.
130. PRESTON C. GREEN, III & JULIE MEAD, CHARTER SCHOOLS AND THE LAW: ESTABLISHING NEW LEGAL RELATIONSHIPS 2 (2003); Robin D. Barnes, *Black America and School Choice: Charting a New Course*, 106 YALE L.J. 2375, 2380, 2388 (1997); *see also* Green III et al., *supra* note 118, at 254–55.
131. 418 U.S. 717, 744–45, 753 (1974).
132. *See id.* at 752–53; Scott, *supra* note 122, at 34, 44–45.
133. *See* Scott, *supra* note 122, at 45.

Some scholars have openly questioned the role of the school choice movement in advancing or retrenching civil rights, notwithstanding attempts by school choice advocates to frame the charter school movement as a modern extension of the Civil Rights Movement.[134] Of specific importance to this paper, charter schools have been cited as having a racially segregated effect.[135] Most charter schools are also managed—nearly exclusively—by self-selected or appointed boards that are disproportionately white, and many charter schools prevent poor black and brown stakeholders from obtaining, maintaining, or retaining political power over education policy and politics.[136] In some extreme cases, disproportionately white, self-selected charter school boards have been allowed to practically displace popularly-elected, predominately black, school boards.[137] Given that the quest for integrated schools and the electoral franchise were among the most sought after rights in the Civil Rights Movement, it is important to consider whether the school choice movement—and specifically charter schools—have been civil rights or civil wrongs.[138] Whether civil rights or civil wrongs, even when poor and minority students are able to access charter schools associated with high academic achievement for their disproportionately poor and minority student bodies, these students are often not completing their studies with their classmates.[139] One report cited that the *Knowledge Is Power Program* charter network, commonly known as "KIPP," loses roughly one of every six of its students.[140] That number is more than one of every three for the charter management organization's middle school cohorts.[141] Most shockingly, the same report suggests that two of every five of its black male student enrollees disappear before the students would enroll in or complete

---

134. *See* GARY ORFIELD & ERIKA FRANKENBERG, EDUCATIONAL DELUSIONS? WHY CHOICE CAN DEEPEN INEQUALITY AND HOW TO MAKE SCHOOLS FAIR 3 (2013); Scott, *supra* note 122, at 32; Green III et al., *supra* note 118, at 255; Steven L. Nelson, *Gaining "Choice" and Losing Voice: Is the New Orleans Charter School Takeover a Case of the Emperor's New Clothes?*, 63 EDUC. FUTURES 237, 239–40 (2015).

135. *See* FRANKENBERG ET AL., *supra* note 121, at 82; Green III et al., *supra* note 118, at 255; Nelson, *supra* note 134, at 240.

136. *See* NELSON, *supra* note 111, at 24–25, 95–96.

137. *See* Nelson, *supra* note 134, at 248–49.

138. *See* ORFIELD & FRANKENBERG, *supra* note 134, at 3; Scott, *supra* note 122, at 32; FRANKENBERG ET AL., *supra* note 121, at 7.

139. *See* FRANKENBERG ET AL., *supra* note 121, at 16–17; GARY MIRON ET AL., COLL. OF EDUC. & HUMAN DEV. W. MICH. UNIV., WHAT MAKES KIPP WORK? A STUDY OF STUDENT CHARACTERISTICS, ATTRITION, AND SCHOOL FINANCE 10–13 (2011), http://www.edweek.org/media/kippstudy.pdf (reporting that all subgroups of KIPP students exhibited dropout rates multiple times the national average at the national level).

140. MIRON ET AL., *supra* note 139, at 1, 3, 11 (reporting that KIPP's dropout rate is approximately five times the estimates for comparative local schools).

141. *See id.* at 12.

high school.[142] One might then surmise claims that the charter school movement's association as a civil right are exaggerated.[143] Charter schools often nullify minority efforts at electing school board members, which may be and are often disproportionately black[144] and segregate minority students.[145] Other charter schools are shutting out[146] students, pushing out[147]

142. *See id.*

143. *See* ORFIELD & FRANKENBERG, *supra* note 134, at 3; Scott, *supra* note 122, at 32; Green III et al., *supra* note 118, at 255; Nelson, *supra* note 134, at 239–40.

144. *See* Nelson, *supra* note 134, at 252.

145. FRANKENBERG ET AL., *supra* note 121, at 4.

146. *See* MIRON ET AL., *supra* note 139, at 13–14; *P.B., et al. v. Pastorek*, S. POVERTY L. CTR., http://www.splcenter.org/seeking-justice/case-docket/pb-et-al-v-pastorek (last visited Mar. 10, 2016). For purposes of this discussion, *shut out* is defined as a refusal to recruit or enroll students. *See* MIRON ET AL., *supra* note 139, at iii; *P.B., et al. v. Pastorek*, *supra*. In many ways, this definition extends from the argument that charter schools *cream* their student populations; or in other words, accept only the least challenging students. MIRON ET AL., *supra* note 139,at iii, 3. Reform advocates often argue that demographic statistics rebut claims of creaming since charter schools often enroll higher numbers of poor and minority numbers. *See id.* at 3. This argument misses the mark. *See id.* It is perfectly possible for poor and minority students to be academically astute. Thus, it is absolutely possible for a school to enroll large numbers of academically high performing poor and minority students while excluding more challenging poor and minority students. For instance, KIPP schools under-enroll students with disabilities and students who have limited English proficiency. *See id.*; *P.B., et al. v. Pastorek*, *supra*. Furthermore, the Southern Poverty Law Center accused charter schools in New Orleans of systematically excluding students with disabilities. *See P.B., et al. v. Pastorek*, *supra*. In open court, the State of Louisiana admitted that these exclusions were precipitated by the system of school reform chosen by the State of Louisiana. Interview with Jessica L. Carter, former Outreach Paralegal, S. Poverty Law Ctr., in New Orleans, La. (Apr. 14, 2015).

147. *See* HOLZMAN, *supra* note 13, at 29, 32; KIM ET AL., *supra* note 9, at 9; *P.B., et al. v. Pastorek*, *supra* note 146. As opposed to never letting some students into school, some schools simply ask students to leave or demand that students leave in lieu of some other—often more serious—consequence. *See* KIM ET AL., *supra* note 9, at 9. In these cases, no paperwork follows the request for removal, so the student's removal from the school community is not registered as a suspension or an expulsion. *See* Complaint at 16–17, P.B. v. Pastorek, No. 2:10-CV-04049 (E.D. La. Oct. 26, 2010); HOLZMAN, *supra* note 13, at 32, 37; KIM ET AL., *supra* note 9, at 9. The school's actions are, however, tantamount to a long-term removal from the school setting and in the case of a student with an Individual Education Plan, a change in placement. Complaint at 2, 29, *P.B.*, (No. 2:10-CV-04049); KIM ET AL., *supra* note 9, at 9. This practice is commonly referred to as *counseling out* in education circles. *See* KIM ET AL., *supra* note 9, at 9. There is no substantive difference between counseling a student out-of-school and pushing a student out of school. *See* HOLZMAN, *supra* note 13, at 29; KIM ET AL., *supra* note 9, at 9. This paper, therefore, defines *push out* as all actions—whether legitimate or illegitimate—that remove the student from the student's initial school placement without proper and due process. In the years immediately following the mass chartering of New Orleans' public schools, there was no method of tracking students who had been pushed out of school. *See* Complaint at 16–17, *P.B.*, (No. 2:10-CV-04049). Thus, some students such as P.B., the named plaintiff in the Southern Poverty Law Center's lawsuit, have been arrested for truancy after being pushed out of school. *Id.* at 36–38. There

students, or snatching out[148] students.[149] Or perhaps civil rights are not good for black stakeholders?[150]

IV. A PERFECT STORM: THE CHARTER SCHOOL MOVEMENT IN NEW ORLEANS

A. *Pre-Katrina Struggles in New Orleans' Public Schools*

No reasonable person in favor of student achievement and educational equity could stipulate that New Orleans' public schools worked well before Hurricane Katrina.[151] All stakeholders agreed that change was needed in the struggling school district.[152] The situation was bleak, and stakeholders were rightfully desperate for change.[153] Students entered the New Orleans' public schools with an even chance of exiting with or without a high school diploma.[154] For those students fortunate enough to reach high school graduation, educational, social, and occupational opportunities were almost certainly limited, if not completely foreclosed.[155] The low literacy

---

was no method, however, of tracking the status of these students for educational or truancy purposes. *Id.* at 16–17. Like many students with disabilities who were purported protected by the Individuals with Disabilities Education Act, P.B. was a poor and minority student who presented a challenge for the *reformed* New Orleans' public schools and needed to be removed from the school community to assure that his troubling behaviors and academic challenges did not show up in the school's test scores. *See id.* at 5, 36–38; MIRON ET AL., *supra* note 139, at 3, 26.

148. *See* Supplemental Complaint at 2, 5, Q.B. v. Jefferson Parish Pub. Sch. Sys., No. 06121151 (U.S. Dep't of Educ. May 7, 2015). Students are considered to be snatched out of school when the police remove the student from campus. *See id.*; KIM ET AL., *supra* note 9, at 9. The first time I heard this phrase was in a conversation with a classmate, Eric Ian Farmer. It seems appropriate to use the term in this context. Though not in the charter school context, the focus on school improvement in Louisiana, in combination with other factors, has led to unconscionable student arrest rates in the New Orleans suburbs. Supplemental Complaint at 5, 8 *Q.B.* (No. 06121151). In Jefferson Parish, the largest and perhaps most diverse school system in Louisiana, over seven hundred students were arrested on campus, and the district referred almost one thousand students to the criminal justice system for minor rule violations. *Id.* at 5, 8.

149. *Id.* at 2; HOLZMAN, *supra* note 13, at 29; KIM ET AL., *supra* note 9, at 9; MIRON ET AL., *supra* note 139, at iii, 12–14, 26; *P.B. et al. v. Pastorek*, *supra* note 146.

150. *See* Nelson, *supra* note 134, at 239–40.

151. *Id.* at 242; O'Neill & Thukral, *supra* note 1, at 319–20.

152. *See* O'Neill & Thukral, *supra* note 1, at 320–21.

153. *Id.*

154. *See id.* at 319–20.

155. *See* HOLZMAN, *supra* note 13, at 2, 7. This should not be construed to besmirch the reputation of a largely hardworking, predominately black teaching force in New Orleans' public schools prior to Hurricane Katrina. *See* Leigh Dingerson, *Dismantling a Community Timeline*, HIGH SCH. J., Dec. 2006–Jan. 2007, at 8, 8–9. Those teachers faced

rates of the City of New Orleans gave developing countries reason to pity the city once known as the *crown jewel* of the American South.[156] The low literacy rates could be directly tied to the nonfeasance, misfeasance, and malfeasance that plagued the finances and management of school districts.[157] Stakeholders wanted and demanded change.[158] This change came in the form of a state takeover followed by the proliferation of charter schools.[159] It is important to note that parents wanted educational change, but the only change that the Louisiana Board of Elementary and Secondary Education afforded stakeholders in New Orleans was the change that occurred after Hurricane Katrina's landfall.[160] Thus, the concept of *school choice* as implemented in New Orleans during the city's recovery after Hurricane Katrina was a forced choice, at best, and no choice at all, in the worst case; moreover, schools—until recently—had expansive power in choosing what students attended their schools as opposed to students and families choosing which schools they, themselves, would attend.[161] To this day, the most popular and sought after schools in New Orleans are managed by the Orleans Parish School Board, the popularly elected and predominately black governing body constitutionally tasked under Louisiana's state constitution with managing the city's schools.[162] Poor and black parents and students in New Orleans' public schools had little choice in choosing the school reform

---

many of the problems that some school reform advocates are willing to use as an excuse or mitigating factor in the poor performance of school reform in New Orleans when such poor performance is acknowledged. *See id.*

156. *See* John Moreno Gonzales, *Hurricane Recovery Confronts Low Literacy Rate*, S. ILLINOISAN, Aug. 27, 2008, at 1; Jonathan Chait, *How New Orleans Proved Urban-Education Reform Can Work*, N.Y. MAG. (Aug. 24, 2015, 9:45 AM) http://www.nymag.com/daily/intelligencer/2015/08/how-new-orleans-proved-education-reform-can-work.html (proclaiming progress in literacy when the City of New Orleans' illiteracy rate reached 40%, or about twice the national average).

157. NELSON, *supra* note 111, at 10.

158. *See id.*; Brian Beabout, *Stakeholder Organizations: Hurricane Katrina and the New Orleans Public Schools*, MULTICULTURAL EDUC., Winter 2007, at 43, 43–44 [hereinafter Beabout, *Stakeholder Organizations*]; Luis Mirón, *The Urban School Crisis in New Orleans: Pre- and Post-Katrina Perspectives*, 13 J. EDUC. FOR STUDENTS PLACED RISK 238, 240–41 (2008).

159. *See* Beabout, *Stakeholder Organizations*, *supra* note 158, at 43–46; Dingerson, *supra* note 155, at 8, 12–13; Nelson, *supra* note 134, at 245.

160. *See* Mirón, *supra* note 158, at 240–41; Nelson, *supra* note 134, at 244–46.

161. *See* Nelson, *supra* note 134, at 240, 244.

162. *See* ENROLL NOLA, RECOVERY SCHOOL DISTRICT AND ORLEANS PARISH SCHOOL BOARD: ONEAPP YEAR 4 MAIN ROUND: SUMMARY (2015), http://www.oneappnola.files.wordpress.com/2015/02/2015-0428-mr-summary1.pdf; *EnrollNOLA: Annual Report February 2015*, ENROLLNOLA 3–4 (Feb. 2015), http://www.oneappnola.files.wordpress.com/2015/02/2015-0210-annual-report-for-public-release.pdf; Nelson *supra* note 134, at 245; O'Neill & Thukral, *supra* note 1, at 322.

strategies that would most affect them.[163] To some extent, this limitation did not matter.[164] Not much, if anything, could be worse than the pre-Katrina schools in New Orleans, and even if the charter school reform became or becomes a catastrophe, the City of New Orleans' schools would not be in much worse of a position than they were immediately before Katrina's landfall.[165]

B. *The Mirage of a "Better" Day Emerges in New Orleans' Public Schools*

Filled with desperate hope and blind optimism, the charter school movement quickly overwhelmed New Orleans' educational market.[166] The City of New Orleans emerged as the epicenter of the school reform movement—where school turnaround miracles consistently occurred—and the charter school movement in general.[167] New Orleans has for many years maintained the highest proportion of its students enrolled in charter schools, at one point actually, doubling the charter school enrollment market share of the next closest city.[168] According to some reputable sources, the charter school movement in New Orleans has resulted in significant academic gains for students, especially poor and black students.[169] Student academic gains should be met with tempered enthusiasm, however, since most evaluations rely on school performance score formulas that are state-created and have changed multiple times since the beginning of the charter school movement in New Orleans.[170] Likewise, these formulas rely most heavily on student performance on state assessments, especially at the elementary and middle

---

163. *See* Nelson, *supra* note 134, at 243–45.
164. *See id.*
165. *See* Frazier-Anderson, *supra* note 3, at 412–13; Mirón, *supra* note 158, at 241.
166. *See* Frazier-Anderson, *supra* note 3, at 414.
167. NAT'L ALL. FOR PUB. CHARTER SCHS., A GROWING MOVEMENT: AMERICA'S LARGEST CHARTER SCHOOL COMMUNITIES 4 (8th ed. 2013), http://www.publiccharters.org/wp-content/uploads/2014/01/2013-Market-Share-Report-Report_20131210T133315.pdf; *see also* Frazier-Anderson, *supra* note 3, at 414.
168. NAT'L ALL. FOR PUB. CHARTER SCHS., *supra* note 167, at 3–4.
169. *See* CTR. FOR RESEARCH ON EDUC. OUTCOMES, CHARTER SCHOOL PERFORMANCE IN LOUISIANA 7 (2013), https://credo.stanford.edu/documents/la_report_2013_7_26_2013_final.pdf; Danielle Dreilinger, *Schools Excel Before Tests Get Tougher*, TIMES-PICAYUNE, Oct. 25, 2003, at A1 [hereinafter Dreilinger, *Schools Excel Before Tests Get Tougher*].
170. *See* Dreilinger, *Schools Excel Before Tests Get Tougher*, *supra* note 169.

school level.[171] John White, the state superintendent of education in Louisiana, proposed delaying accountability consequences on state test assessments to prevent too many schools from failing to meet academic expectations as a mechanism for gaming the accountability system.[172] The lower and almost nonexistent percentage of New Orleans' public school students attending *failing* schools[173] has been used to credit the charter school movement as being academically effective,[174] but a large number of schools do not receive letter grades and are, therefore, not included in this calculation.[175] In essence, the state only counts some schools—mostly academically acceptable schools—in the calculation of failing and non-failing schools.[176] Moreover, nationally scaled tests have brought into question the newfound achievements of New Orleans' public schools.[177] Reliance on academic comparisons of pre and post-Katrina schools using state test scores is misleading at the least.[178]

---

171. *See id.*; *School Performance Score*, LA. DEP'T EDUC., http://www.louisianabelieves.com/accountability/school-performance-scores (last visited Mar. 10, 2016).

172. Melinda Deslatte, *John White Keeps One Step Ahead of Anti-Common Core Movement*, INDSIDER MEDIA (Feb. 24, 2015, 9:45 AM), http://www.theind.com/article-20310-john-white-keeps-one-step-ahead-of-anti-common-core-movement.html. Of course, this intervention was not necessary as students across Louisiana defied odds and outperformed projections on the harder common core-based tests; in fact, students in Louisiana—on a more difficult version of the state test—had near record performance that resulted in relatively few students lacking proficiency. *See Academic Outcomes*, LA. DEP'T EDUC., http://www.louisianabelieves.com/docs/default-source/katrina/final-louisana-believes-v5-academic-outcomes.pdf?sfvrsn=2 (last visited Mar. 10, 2016); Jonathan Chait, *How New Orleans Proved Urban-Education Reform Can Work*, N.Y. MAG. (Aug. 24, 2015, 9:45 AM), http://www.nymag.com/daily/intelligencer/2015/08/how-new-orleans-proved-education-reform-can-work.html; Deslatte, *supra*.

173. *See* Dreilinger, *Schools Excel Before Tests Get Tougher*, *supra* note 169; Kingsland, *supra* note 5, at 59; *Academic Outcomes*, *supra* note 172.

174. *See* Dreilinger, *Schools Excel Before Tests Get Tougher*, *supra* note 169; Kingsland, *supra* note 5, at 59; *Academic Outcomes*, *supra* note 172.

175. *See* Mercedes Schneider, *2013 Louisiana School Letter Grades: Recovery School District Gains Nothing*, HUFFINGTON POST, (Oct. 31, 2013, 2:15 PM), http://www.huffingtonpost.com/mercedes-schneider/2013-louisiana-school-let_b_4179768.html (noting that twelve schools in New Orleans that would have received failing letter grades—or close to 15% of schools in New Orleans—were excluded from calculation of failing schools as well as increased letter grades did not correlate to increased performance).

176. *Academic Outcomes*, *supra* note 172; Schneider, *supra* note 175.

177. *See* Littice Bacon-Blood, *La. Students Score Near Bottom on National Test*, TIMES-PICAYUNE, Nov. 8, 2013, at A4. Despite soaring state test proficiency rates, Louisiana student proficiency rates lag national proficiency rates. *Id.*; *see also* Dreilinger, *Schools Excel Before Tests Get Tougher*, *supra* note 169.

178. *See* Dreilinger, *Schools Excel Before Tests Get Tougher*, *supra* note 169; Kingsland, *supra* note 5, at 59; Nelson, *supra* note 134, at 262 n.1.

Assuming arguendo that student academic performance—as defined by test scores alone—in New Orleans has increased in response to the expansion of charter schools in the city, there remain other important analyses of improvement for New Orleans' public school students.[179] Issues of student civil rights are ripe for discussion in New Orleans' charter schools.[180] The gravamen of these civil rights issues are student enrollment and matriculation,[181] student discipline,[182] and student racial segregation.[183] Scholars are also beginning to question the impact of the charter school movement on the ability of poor and black stakeholders to influence educational policy and politics in New Orleans.[184] Very little scholarship focuses on the role of the charter school movement on the school-to-prison pipeline in New Orleans.[185]

C. *You Can't Sit Here: Few Black Governance Positions in New Orleans' Charter Schools and the Retrenchment of the Voting Rights for Poor and Black Citizens in New Orleans*

As charter schools have expanded in New Orleans, self-selected charter school governing boards have expanded as well.[186] In traditional public schools, school board representation for black and brown students and parents has proven to be effective in promoting academic achievement for these students.[187] While this finding is still being examined in the context of

---

179. *See* Dreilinger, *Schools Excel Before Tests Get Tougher*, *supra* note 169; Hampton, *supra* note 90 (dissertation at 112–14).

180. *See* FRANKENBERG ET AL., *supra* note 121, at 7; Danielle Dreilinger, *Group Files Civil Rights Complaint Over Schools' Discipline Policies*, TIMES-PICAYUNE, Apr. 16, 2014, at B4 [hereinafter Dreilinger, *Group Files Civil Rights Complaint Over Schools' Discipline Policies*]; Danielle Dreilinger, *Strict Collegiate Academies Charters Are Working to Eliminate Suspensions*, TIMES-PICAYUNE (Nov. 20, 2014, 12:58 PM), http://www.nola.com/education/index.ssf/2014/10/strict_collegiate_academies_ch.html [hereinafter Dreilinger, *Strict Collegiate Academies Charters Are Working to Eliminate Suspensions*]; Jacob Landry, *Equity, Transparency Undercut by Holdouts Against OneApp School Admissions Process*, THE LENS (June 9, 2015, 6:15 AM), http://www.thelensnola.org/2015/06/09/equity-transparency-undercut-by-holdouts-against-oneapp-school-admissions-process.

181. *See* Landry, *supra* note 180.

182. *See* Dreilinger, *Group Files Civil Rights Complaint Over Schools' Discipline Policies*, *supra* note 180; Dreilinger, *Strict Collegiate Academies Charters Are Working to Eliminate Suspensions*, *supra* note 180 (recounting the extraordinary suspension rates—most over 60%—at Collegiate Academies in New Orleans).

183. *See* SIEGEL-HAWLEY & FRANKENBERG, *supra* note 114, at 7.

184. *See* Nelson, *supra* note 134, at 243, 259.

185. *Id.* at 243.

186. *Id.*

187. *See* MICHAEL B. BERKMAN & ERIC PLUTZER, TEN THOUSAND DEMOCRACIES: POLITICS AND PUBLIC OPINION IN AMERICA'S SCHOOL DISTRICTS 104–06

charter schools, it is worth investigating the racial composition of self-selected charter school boards of New Orleans.[188] The installation of predominately white charter school boards might negate or totally eradicate the political power of black and brown stakeholders to influence educational policy and politics even if there is little or no impact—or even positive impact—on student achievement as measured by testing.[189] Considering whether black and brown parents have equitable representation on the governance boards of New Orleans' charter schools is critically important because self-selected charter school boards are accountable to very few entities, predominately themselves; they are not at all accountable to the predominately black and brown voters of New Orleans.[190] Of course, dissatisfied parents of students in New Orleans' charter schools may *vote with their feet*, but those parents are generally required to attend another charter school since the few schools operated under the popularly elected Orleans Parish School Board are amongst the most sought after in the area and are often filled to capacity.[191]

Poor and black parents did not initiate the charter school movement in New Orleans.[192] To the contrary, the State of Louisiana and the federal government offered poor and black parents one option: charter schools.[193] With no pun intended, the convergence of Hurricane Katrina, federal and state policy, and funding incentives created the perfect storm for a charter school takeover in New Orleans.[194] The people most affected by the *en masse* changes to the systems to educate public school students in New Orleans—almost exclusively poor and black citizens—were not invited to the table for input or to be otherwise briefed about the proposed changes or

---

(2005); Kenneth J. Meier & Robert E. England, *Black Representation and Educational Policy: Are They Related?*, 78 AM. POL. SCI. REV. 392, 397 (1984); Kenneth J. Meier et al., *Structural Choices and Representational Biases: The Post-Election Color of Representation*, 49 AM. J. POL. SCI. 758, 764 (2005); Ted P. Robinson et al., *Black Resources and Black School Board Representation: Does Political Structure Matter?*, 66 SOC. SCI. Q. 976, 979 (1985); Joseph Stewart, Jr. et al., *Black Representation in Urban School Districts: From School Board to Office to Classroom*, 42 W. POL. Q. 287, 301 (1989).

188. Nelson, *supra* note 134, at 243–44, 260–61.

189. *See id.* at 259–61, 262 n.1.

190. *Id.* at 243, 247.

191. *See* ENROLL NOLA, *supra* note 162; *Enroll NOLA: Annual Report February 2015*, *supra* note 163, at 4–5; *How to Read School Demand Data*, ENROLL NOLA, http://www.oneappnola.files.wordpress.com/2015/02/2015-0126-ar-appendix-3.pdf (last visited Mar. 10, 2016).

192. NELSON, *supra* note 111, at 13; *see also* Nelson, *supra* note 134, at 244.

193. Nelson, *supra* note 134, at 244; *see also* NELSON, *supra* note 111, at 11, 13.

194. *See* NELSON, *supra* note 111, at 11, 13; Frazier-Anderson, *supra* note 3, at 410–11.

the impact of those changes.[195] The poor and black citizens in New Orleans were disproportionately affected by the flooding associated with Hurricane Katrina and were least able to afford a rapid return to the city, which was aided in efforts to shut out poor and black parents from conversations concerning the reestablishment of the city, including the rebuilding of the city's faltering school district.[196] The State of Louisiana, though slow to act in assisting in the evacuation of endangered citizens during Hurricane Katrina, worked quickly to snatch political power from poor and black citizens in New Orleans after the storm.[197] While most of the city's poor and black citizens were still evacuated from the city, the state legislature, which had recently bailed New Orleans' public schools out of financial and operational distress, devised a plan for the state to summarily takeover nearly all of New Orleans' public schools, including some schools that the state had recently commended for their academic performance.[198]

D. *The Louisiana Legislature's Great Caper: Act 35*

In November 2006, the state legislature through Act 35 wrested control of the majority of New Orleans' public schools in spite of opposition from the entire black portion of New Orleans' delegation to the state legislature.[199] Act 35 placed control of almost every public school in New Orleans in the Recovery School District, a state-run school district with appointed leadership.[200] By legislative fiat, the Louisiana State Legislature destroyed the ability of poor and black citizens of New Orleans to hold government officials in charge of education politically accountable, and the

---

195. NELSON, *supra* note 111, at 9–11; Joshua M. Akers, *Separate and Unequal: The Consumption of Public Education in Post-Katrina New Orleans*, 36 INT'L J. URB. & REGIONAL RES. 29, 29, 44 (2012); Dingerson, *supra* note 155, at 10; Nelson, *supra* note 134, at 244.

196. *See* Akers, *supra* note 195, at 38; Dingerson, *supra* note 155, at 9–10; Nelson, *supra* note 134, at 244.

197. *See* NELSON, *supra* note 111, at 9, 11; Nelson, *supra* note 134, at 245.

198. *See* Brian Beabout et al., *The Perceptions of New Orleans Educators on the Process of Rebuilding the New Orleans School System After Katrina*, 13 J. EDUC. FOR STUDENTS PLACED RISK 212, 214 (2008).

199. *See* 2005 La. Acts 2538–39 (codified as amended at LA. STAT. ANN. § 17:10.7 (2015)); NELSON, *supra* note 111, at 11; Mirón, *supra* note 158, at 239, 247 (explaining that acquisition of public schools was too quick and was conducted while residents were away. The paper also surmises that residents were likely preoccupied with survival). Other papers juxtapose the State's swift takeover of the New Orleans public schools and political power with the state government's glacial pace to restore the neighborhoods of poor and black citizens. *See* Akers, *supra* note 195, at 33, 36; Dingerson, *supra* note 155, at 9–10.

200. *See* 2005 La. Acts 2540; Dingerson, *supra* note 155, at 11.

state legislature simultaneously opened the door to disproportionate political power for middle-class and white citizens of New Orleans in the realm of education.[201] Although Act 35 had statewide applicability, the law in effect, affected only New Orleans.[202] One way to trigger Act 35's district takeover power is for a school district to have thirty failing schools.[203] Very few school districts in Louisiana have thirty schools; thus, those school districts could never trigger this statutory provision, even if all of those district's schools were deemed failing.[204] Of the school districts with more than thirty schools, many triggered Act 35's district takeover provision, but the state opted with little explanation only to act upon New Orleans' public schools.[205] The district takeover provisions of Act 35 also empowered the state to alter the definition of *failing* in takeover districts: The State of Louisiana could deem any school in New Orleans that also fell below the state average failing and commandeer the school.[206] Many stakeholders in New Orleans were left confused as to how a school that would be sufficient for educating students in one district might be failing in a neighboring district.[207] Likewise, stakeholders were chagrined and bewildered to learn that schools commended for academic achievement immediately before Hurricane Katrina's landfall, could be deemed failing only weeks later when no new students were instructed and no new data was made available.[208]

In quick order, the Recovery School District proceeded to manage the majority of New Orleans' public schools; however, the hastiness of the state takeover was beset by a number of management and operational

---

201. *See* 2005 La. Acts 2538–40; Brian R. Beabout, *Leadership for Change in the Educational Wild West of Post-Katrina New Orleans*, 11 J. EDUC. CHANGE 403, 414, 418 (2010) [hereinafter Beabout, *Leadership for Change*]; Dirk Tillotson, *What's Next for New Orleans?*, HIGH SCH. J., Dec. 2006 - Jan. 2007, at 69, 69–70, 72.

202. *See* 2005 La. Acts 2538–39, 2543; UNITED TEACHERS OF NEW ORLEANS ET AL., 'NATIONAL MODEL' OR FLAWED APPROACH? THE POST-KATRINA NEW ORLEANS PUBLIC SCHOOLS 4 (2006), http://www.naomiklein.org/files/resources/pdfs/aft-nov-2006.pdf; Nelson, *supra* note 134, at 245.

203. LA. STAT. ANN. §§ 17:10.6(B)(1)–(2)(a), 10.7(A)(1) (2015); *see also* 2005 La. Acts 2538–39; UNITED TEACHERS OF NEW ORLEANS ET AL., *supra* note 202, at 13–14.

204. UNITED TEACHERS OF NEW ORLEANS ET AL., *supra* note 202, at 14; *see also* LA. STAT. ANN. §§ 17:10.6(B)(1)–(2)(a), 10.7(A)(1).

205. UNITED TEACHERS OF NEW ORLEANS ET AL., *supra* note 202, at 14; *see also* LA. STAT. ANN. §§ 17:10.6(B)(1)–(2)(a), 10.7(A)(1); 2005 La. Acts 2539.

206. 2005 La. Acts 2539; *see also* UNITED TEACHERS OF NEW ORLEANS ET AL., *supra* note 202, at 11, 13.

207. UNITED TEACHERS OF NEW ORLEANS ET AL., *supra* note 202, at 6, 11, 13–14; *see also* LA. STAT. ANN. §§ 17:10.6(B)(1)–(2)(a), 10.7(A)(1).

208. UNITED TEACHERS OF NEW ORLEANS ET AL., *supra* note 202, at 6, 10–11; *see also* LA. STAT. ANN. §§ 17:10.6(B)(1)–(2)(a), 10.7(A)(1); Nelson, *supra* note 134, at 242, 245–46.

problems.[209] These problems led to the chartering of all of the schools for which the Recovery School District had previously assumed control.[210] The initial takeover of New Orleans' public schools was advertised as temporary; the schools would return to the control of the Orleans Parish School Board after five years.[211] This return never occurred.[212] The state, instead, decided to allow self-selected charter school boards to determine whether the charter schools managed by individual boards would ever return to voter accountability.[213] To this day, exactly two charter schools have returned to the control of the popularly elected and predominately black Orleans Parish School Board.[214]

Research on the racial composition of New Orleans' self-selected charter school boards supports the argument that charter school boards are *disproportionately white*.[215] Without question, the State of Louisiana created an additional school board that is separate from the Orleans Parish School Board and politically unaccountable to the predominately black voters of New Orleans.[216] While the State of Louisiana may have intended to venture into education reform with Act 35, it is abundantly clear that Act 35 was the quintessential violation of section 5 of the Voting Rights Act of 1965, which was still valid at Act 35's passage in 2005.[217] Act 35 effectively muted the political power of black citizens in New Orleans by way of creating an appointed school board that replaced the predominately black and elected school board with a predominately white board.[218] Black parents in New Orleans no longer had a right to vote for representation on the school board with the greatest influence on education policy and involvement with the politics of education in New Orleans; black parents had the right to remain

---

209. Frazier-Anderson, *supra* note 3, at 414–17.
210. *Id.* at 414; Nelson, *supra* note 134, at 237–38, 242.
211. 2005 La. Acts 2541; Nelson, *supra* note 134, at 242–43, 246.
212. Nelson, *supra* note 134, at 246.
213. *See id.*
214. Danielle Dreilinger, *Charter School to Leave RSD*, TIMES-PICAYUNE, Jan. 3, 2015, at A9 [hereinafter Dreilinger, *Charter School to Leave RSD*]. Nearly ten years after Hurricane Katrina enabled the charter school takeover of New Orleans' public schools, only two of thirty-six *recovered* schools have elected to return to the system that is electorally accountable to the parents of New Orleans' predominately black public school students. *See* Nelson, *supra* note 134, at 246; Dreilinger, *Charter School to Leave RSD*, *supra*.
215. Nelson, *supra* note 134, at 260; Steven Nelson, *The Charter School Paradox in New Orleans: Too Big to Fail*, BLOGSPOT: EDUC. POL'Y BLOG (Dec. 11, 2014), http://www.educationpolicyblog.blogspot.com/2014/12/the-charter-school-paradox-in-new.html.
216. *See* 2005 La. Acts 2542, 2546–47; Nelson, *supra* note 134 at 245–46.
217. 2005 La. Acts 2542, 2546–47; *see also* Voting Rights Act of 1965, Pub. L. No. 89-110, § 5, 79 Stat. 437, 439 (1965); Nelson, *supra* note 134, at 246–47.
218. Nelson, *supra* note 134, at 245–46; *see also* 2005 La. Acts 2542, 2546–47.

silent in education politics.[219] Given that research suggests descriptive representation, or the ability to have a black presence on school boards, impacts substantive representation, the passage and implementation of policies—which in turn impacts student achievement—is important to investigate the impact of board representation types in New Orleans, appointed as opposed to elected, which in the context of New Orleans also indicates racial composition of the board on the measures of student achievement.[220]

E. *Charter Schools in New Orleans: Dead Right or Dead Wrong?*

The situation is—before Hurricane Katrina and remains after the charter school movement—bleak in New Orleans.[221] The city has led the nation in murder rate rankings in twelve of the last twenty-five years; these numbers include the year of Hurricane Katrina when New Orleans was not ranked.[222] The situation is much more perilous for young black men in New Orleans.[223] The majority of murder victims in the city are young black men.[224] Fifty-five percent of murder victims in New Orleans are black men under the age of thirty, and an astounding near 20% of murder victims are school-aged.[225] Assuming that New Orleans' state standardized test scores are increasing at miracle-like intervals, as stated by the State of Louisiana and advocates of the charter school movement in New Orleans—which is hard to believe given the State of Louisiana's poor results on national assessments—it is necessary to investigate the role of school governance and governance accountability structures on measures other than test scores.[226] Students in New Orleans do not need improved tests scores if improved test scores do not directly correlated better educational, social, and occupational opportunities.[227] More specifically, dead students are unable to be tested, so test scores must be secondary to quality of life indicators—or simply life.[228] It is beyond reasonable and supported in the literature to correlate more time in school and the attainment of credentials to better educational, social, and

219. *See* 2005 La. Acts 2546–47; Nelson, *supra* note 134, at 245–46.
220. *See* Nelson, *supra* note 134, at 259–60.
221. Nelson, *supra* note 215.
222. *See* Ken Daley, *New Orleans Murders Down in First Half of 2014, but Summer's Death Toll Climbing*, TIMES-PICAYUNE (Aug. 21, 2014, 8:30 AM), http://www.nola.com/crime/index.ssf/2014/08/murders_down_in_first_half_of.html.
223. *See* Garibaldi, *supra* note 85, at 4; Nelson, *supra* note 215.
224. Nelson, *supra* note 215.
225. *Id.*
226. *See id.*
227. *See id.*
228. *See id.*

occupational opportunities.[229] Comparing the discipline rates, the graduation rates, and college matriculation rates may give some guidance on effective accountability models for charter school agendas.[230] Part V of this Article will assess how schools—charter or traditional public—accountable to the popularly elected school board in New Orleans compare to schools that are politically unaccountable to voters in New Orleans in these regards.[231]

V. COMPARING NEW ORLEANS' REFORMED SCHOOLS UNDER ELECTED AND SELF-SELECTED LEADERSHIP: WHICH GROUP OF SCHOOLS IS MORE SUCCESSFUL?

A. *The Re-Establishment of Potentially Apartheid Schools Systems in New Orleans*

The popularly elected Orleans Parish School Board manages a whiter and wealthier student population.[232] The Recovery School District is appointed and governs a blacker and poorer student population.[233] On its face, this fact alludes to notions that white parents are perfectly capable of participating in, if not controlling, educational policy whereas black parents do not have similar capabilities.[234] On racial and economic numbers alone, it appears that the City of New Orleans might be running apartheid schools.[235] There are higher achieving schools for wealthier, whiter students and lower performing schools for poorer, blacker students.[236] In this case, school reform mirrors the authors' experiences in Orleans Parish School prior to Hurricane Katrina's landfall with one caveat.[237] There were always predominately black and predominately white public schools in New Orleans.[238] Prior to Hurricane Katrina, there were a number of predominately poor and predominately black high performing schools in the city that were amongst the highest performing public schools in the State of Louisiana.[239] The high achieving, predominately black public school option

229. *See* Garibaldi, *supra* note 85, at 4, 7–8, 10.
230. *See* Nelson, *supra* note 215.
231. *See infra* Part V.
232. *See* Landry, *supra* note 180; Nelson, *supra* note 215.
233. *See* Landry, *supra* note 180; Nelson, *supra* note 134, at 237–38.
234. *See* Nelson, *supra* note 215; Garibaldi, *supra* note 85, at 8.
235. *See* Landry, *supra* note 180.
236. *See* Beabout et al., *supra* note 198, at 225; Landry, *supra* note 180.
237. *See* Nelson, *supra* note 134, at 244–45; Landry, *supra* note 180.
238. Nelson, *supra* note 134, at 244–45.
239. *Id.* at 237–38, 244–45; *see also* Landry, *supra* note 180. For instance, Edna Karr Magnet School and Eleanor McMain Magnet Secondary School were among the best schools in the city of New Orleans—ranked second and third—and both were amongst

seems to have been a casualty of Hurricane Katrina.[240] The high achieving, disproportionately white public school option managed to survive Hurricane Katrina.[241]

Any fair comparison of the schools managed by the Orleans Parish School Board and the Recovery School District must note that the Recovery School District was tasked with governing the more challenging schools in the city of New Orleans.[242] Even if the definition of a failing school changed to include some previously academically adequate schools, the Recovery School District gained control of only those schools at or below the state average while the Orleans Parish School Board maintained control of the most selective and high achieving schools in the City of New Orleans.[243] It is sometimes difficult, however, to gauge the success of the Recovery School District because measures typically rely too heavily on test scores, which do not carry as much weight in predicting the trajectories of most students, specifically black, brown, and poor students.[244] Moreover, most reports on education reform aggregate the achievements of the Orleans Parish School Board and the Recovery School District: This distorts, through enhancement, the achievements of the Recovery School District.[245] Alone the Orleans Parish School Board's school district ranks as the second highest performing district in the state in terms of student achievement.[246] That ranking slips to the lower end of the middle of all school districts when combined with the Recovery School District—below the state average.[247] It

---

the best public schools in the State of Louisiana. Danielle Dreilinger, *Top New Orleans Public School Choices in OneApp Are Edna Karr, Baby Ben*, TIMES-PICAYUNE (Apr. 23, 2014, 7:46 PM), http://www.nola.com/education/index.ssf/2014/04/top_new_orleans_public_school.html [hereinafter Dreilinger, *Top New Orleans Public School Choices in OneApp Are Edna Karr, Baby Ben*]. Both schools were also predominately black. Danielle Dreilinger, *Has Gentrification Begun in New Orleans Public Schools?*, TIMES-PICAYUNE (Sept. 3, 2015, 10:43 AM), http://www.nola.com/futureofneworleans/2015/09/bricolage_morris_jeff_interest.html [hereinafter Dreilinger, *Has Gentrification Begun*]; *see also* Nelson, *supra* note 134, at 244–45.

240. *See* Nelson, *supra* note 134, at 245.

241. *See id.* at 244–45.

242. *See id.*; Landry, *supra* note 180.

243. *See* Nelson, *supra* note 134, at 245–46; Dreilinger, *Schools Excel Before Tests Get Tougher*, *supra* note 169; Landry, *supra* note 180.

244. *See* Dreilinger, *Schools Excel Before Tests Get Tougher*, *supra* note 169; Landry, *supra* note 180.

245. *See* Dreilinger, *Schools Excel Before Tests Get Tougher*, *supra* note 169.

246. *See 2014 District Performance Scores/Letter Grades*, LA. DEP'T EDUC., http://www.louisianabelieves.com/docs/default-source/data-management/2014-district-performance-scores.xlsx?sfvrsn=11 (last visited Mar. 10, 2016) (showing that the 2014 district performance score for Orleans Parish trails only the district performance score for the schools comprising the City of Zachary).

247. *Id.*

appears that the schools run by the popularly elected Orleans Parish School Board carry the day in terms of student achievement and school reform in the City of New Orleans.[248] This is ironic because the unreformed schools appear to be bolstering the reputation of the reformed schools.[249] Test scores aside, there appears to be disparate treatment and overall achievement of students in the Orleans Parish School Board managed schools and the Recovery School District managed schools.[250] The following subsections disclose and elaborate on those differences.[251] The following subsections, in effect, discuss whether school board selection procedures—self-selection versus popular election—are related to student outcomes.[252] Remember that self-selected charter school boards are disproportionately white while the popularly elected Orleans Parish School Board is almost exactly proportional to the city's black voting age population.[253]

B. *Extreme Discipline Rates Statistically Less Likely in Politically Accountable Schools*

Any measure of the effect of the proliferation of charter schools should compare the discipline rates of students enrolled in Recovery School District charter schools—with boards not politically accountable—to the discipline rates of students in schools that are managed by the politically accountable school board. Research suggests that disparate and excessive discipline contributes to the school-to-prison pipeline.[254] A statistical analysis using the Fisher Exact Test of Independence[255] to determine whether discipline rates are independent of governance classification—elected as opposed to appointed—reveals the following conclusion:[256] There is insufficient evidence to warrant the claim that school governance

248. *See id.*; Landry, *supra* note 180; Nelson, *supra* note 215.
249. *See* Beabout, *Leadership for Change*, *supra* note 201, at 405; Dreilinger, *Schools Excel Before Tests Get Tougher*, *supra* note 169; *2014 District Performance Scores/Letter Grades*, *supra* note 246.
250. *See 2014 District Performance Scores Letter/Grades*, *supra* note 246; Landry, *supra* note 180.
251. *See infra* Sections V.B–D.
252. *See infra* Sections V.B–D.
253. Nelson, *supra* note 134, at 243, 260–61.
254. Fowler, *supra* note 10.
255. NELSON, *supra* note 111, at 59. The use of the Fisher Exact Test of Independence was necessary because the sample sizes were small, particularly in the case for schools under the popularly elected Orleans Parish School Board, n-value is below thirty: Thus, other more powerful inferential statistics were not appropriate. *Id.* at 59, 80–82 tbl.5-2. Unlike other statistical tests, when the sample size is small, the Fisher Exact Test will produce the exact p-value for a given contingency table. *Id.* at 59.
256. *See id.*; *infra* Table 1.

classification is associated with a school's act of suspending a measurable portion of the student body at least once in an academic year.[257] Just over 25% of schools governed by the Orleans Parish School Board reported suspending a negligible number of students—less than ten students in one academic year—as compared to just under 15% of schools governed by the Recovery School District.[258] Though the schools governed by the Recovery School District reported a negligible suspension rate at almost half the rate of schools governed by the Orleans Parish School Board, the statistical analysis does not support the claim that these proportions are statistically different.[259]

To the contrary, the same statistical test proves that schools governed by the Orleans Parish School Board are less likely to report higher and measurable suspension rates.[260] Nearly 58% of schools governed by the Orleans Parish School Board report suspension rates under 5%, which is the benchmark for disclosing the actual suspension rate in Louisiana.[261] Only about 30% of schools under the guidance of the Recovery School District report a suspension rate under 5%.[262] This comparison is statistically significant at the .05 alpha level.[263] Along the same lines, nearly 85% of schools operating under the Orleans Parish School Board, which can be held politically accountable, reported suspension rates under the state average of 14%.[264] Only 57% of schools answering to the politically unaccountable Recovery School District suspend less than 14% of their students in a given school year.[265] This comparison is also statistically significant at the .05 alpha level.[266] Thus, there is a statistical association with school board governance classification—elected versus self-selected—and the issuance of out-of-school suspensions at measureable rates.[267] Self-selected boards suspend more students.[268] Although statistical tests are not useful in measuring the number of schools significantly above the state average of 14% suspensions for each governance structure,[269] over 10% of schools in

257. *See* NELSON, *supra* note 111, at 59–61; *infra* Table 1.
258. *See infra* Table 1.
259. *See infra* Table 1.
260. *See infra* Table 1.
261. *See infra* Table 1.
262. *See infra* Table 1.
263. *See* NELSON, *supra* note 111, at 59; *infra* Table 1.
264. *See infra* Table 1.
265. *See infra* Table 1.
266. *See* NELSON, *supra* note 111, at 59; *infra* Table 1.
267. *See* NELSON, *supra* note 111, at 59, 99; *infra* Table 1.
268. *See infra* Table 1.
269. *See* NELSON, *supra* note 111, at 59–60. Because the Fisher Exact Test of Independence has less power than other statistical tests, it does not make sense to conduct statistical comparisons of proportions with n-values well under ten for both categories. *See id.* It is unlikely that the statistical test will find a statistical association based merely on the small

the Recovery School District suspended at least 28% of their students at least once, and almost 6% of schools in the Recovery School District suspend over 42% of their students at least once in a school year.[270] For a comparison to the popularly elected Orleans Parish School Board, only one school has a suspension rate exceeding 28%, and no schools suspend over 35% of their students at least once a year.[271] This is what school reform, and in particular, protecting charter schools from political accountability to the families they serve, has given the city of New Orleans: suspension rates that appear erroneously calculated at first glance.[272] Table 1 provides the statistical data used to compare and contrast the suspension rates of schools in New Orleans.[273]

sample sizes presented. *See id.* In this case, it should be noted that the absence of statistical evidence supporting associated is not the disproval of an association. *See id.*

270. *See infra* Table 1.

271. *See infra* Table 1; *2013–2014 Discipline Rates and Letter Grade* (Author's Independent Data).

272. *See* Dreilinger, *Group Files Civil Rights Complaint Over Schools' Discipline Polices*, *supra* note 180; Dreilinger, *Strict Collegiate Academies Charters Are Working to Eliminate Suspensions*, *supra* note 180.

273. *See infra* Table 1.

Table 1: Fisher Exact Test of Independence for School Discipline in New Orleans Public Schools (Disaggregated by Political Accountability Status)[274]

	Not Reporting Suspension Rate[275]	Reporting Suspension Rate
Politically Accountable (OPSB)	5	14
Not Politically Accountable (RSD)	10	59
p-value	**.2997**	
	Suspension Rate Under 5%[276]	Suspension Rate Over 5%
Politically Accountable (OPSB)	11	8
Not Politically Accountable (RSD)	21	48
p-value	**.0342**	
	Suspension Rate Under 14%[277]	Suspension Rate Above 14%
Politically Accountable (OPSB)	16	3
Not Politically Accountable (RSD)	39	30
p-value	**.0331**	

274. Independent Statistical Analysis Conducted by Authors from Louisiana Department of Education Data. See the following reports. 2013–14 STATEWIDE DISCIPLINE RATES; 2013–14 STATEWIDE DISCIPLINE RATES BY SITE; 2013–14 STATEWIDE DISCIPLINE RATES BY LEA (data on file with the Louisiana Department of Education); *see also* NELSON, *supra* note 111, at 59–60. "OPSB" is New Orleans Parish Public Schools. PATRICK SIMS & VINCENT ROSSMEIER, THE COWEN INST. FOR PUB. EDUC. INITIATIVES AT TULANE UNIV., THE STATE OF PUBLIC EDUCATION IN NEW ORLEANS: 10 YEARS AFTER HURRICANE KATRINA 2 (2015), http://www.speno2015.com/images/SPENO.2015.small.single.pdf. "RSD" is Recovery School District. *Id.*

275. The State of Louisiana does not calculate suspension rates for schools issuing less than ten first-time suspensions. The state's calculation of suspension rates is flawed in that manner. Some schools, particularly those with few students may suspend nine students and have relatively high suspension rates. For instance, a school with one hundred fifty students and nine first-time suspensions would have a 6% suspension rate.

276. The State of Louisiana does not disclose the actual suspension rate for schools with suspension rates below 5%.

277. Fourteen percent is the average suspension rate for all Louisiana public schools.

Given the link between suspension rates and the school-to-prison-pipeline, it is unsurprising that large swaths of youth in New Orleans end up incarcerated or worse—dead.[278] The suspension rates in schools governed by the Recovery School District are disturbingly high, with one entire charter system with no schools under 42% first-time suspensions.[279] Although one school is under the guidance of the Orleans Parish School Board, Eleanor McMain has a first time suspension rate at 35%; that suspension rate almost seems pedestrian given that some schools in the Recovery School District are almost double that rate.[280] The data used to conduct these statistical tests were self-reported; it is possible that more students were temporarily removed from class and not included in these numbers. For instance, some students may have been asked to leave campus for the remainder of the school day without being counted as having been suspended, an all too routine practice in some schools. These statistical tests rely on comparisons between all schools in each system, although all schools in the Recovery School District are open admission,[281] and the majority of schools under the management of the Orleans Parish School Board are selective admission.[282]

---

278. Dreilinger, *Strict Collegiate Academies Charters Are Working to Eliminate Suspensions*, *supra* note 180; Nelson, *supra* note 216. It is not far-fetched to reason that a large portion of New Orleans' murder victims are school-aged once an observer realizes that large numbers of school-aged students are not permitted to attend school and are not accounted for throughout parts of the school day. *See* Nelson, *supra* note 134.

279. *See* Author's Independent Data. Collegiate academies, often promoted by the State of Louisiana for its great academic achievements, has no single charter school in its network that is not at least three times the Louisiana state average for suspensions. *See* Author's Independent Data. These suspensions are often for minor offenses, and this situation has prompted a civil rights complaint to the U.S. Office of Civil Rights. *See* Dreilinger, *Group Files Civil Rights Complaint Over Schools' Discipline Policies*, *supra* note 180. Though the charter network asserts that deep reflection has led to efforts at reducing suspension rates, it is more likely that federal probing—due to the civil rights complaint—is the motive for addressing the network's propensity for student suspension. *See id.*; Landry, *supra* note 180.

280. *See* Author's Independent Data.

281. *See* Landry, *supra* note 180. While all charter schools under the supervision of the Recovery School District are open admission, this Article has already discussed the prevalence of schools avoiding the enrollment of the most challenging students or finding ways to remove those same students after they have been enrolled. *See id. EnrollNOLA: Annual Report February 2015*, *supra* note 163, at 3; Landry, *supra* note 180; *supra* Section V.A. In some ways, the title of *open admission* is a misnomer in most of New Orleans' charter schools. *See* Landry, *supra* note 180.

282. *Id.* This Article considers schools under the supervision of the Orleans Parish School Board to be selective admission if the schools have opted to not participate in the unified enrollment process called OneApp. *See id.*; *supra* Sections V.A–B. OneApp was designed to rid the disjointed and decentralized system of schools in New Orleans of bias, and the illegality in public school admissions processes. *See EnrollNOLA: Annual Report February 2015*, *supra* note 163, at 3; Landry, *supra* note 180. Failure to participate in

Such a comparison does not appear fair at first blush, but the comparison is appropriate given the fact that schools have great autonomy in temporary removals of students from the student's primary placement.[283] Although some behaviors require various measures and durations of removal, there are allegations and evidence that the majority of student removals are for very minor offenses.[284] At its core, the excessive removal of students, albeit temporary, may be intensifying the school-to-prison pipeline in New Orleans and is sufficiently within the domain of school-level officials to control.[285]

C. *Students in Politically Accountable Schools Statistically More Likely to Matriculate in College, but Not When Comparing Only Open Admissions Schools*

Excessive, unevenly applied discipline does not alone account for the school-to-prison pipeline, although it certainly contributes to the black male and soon-to-be, if not already so, black female crisis in education.[286] Education has been historically viewed as the great equalizer in the United States because collegiate credentials have been—whether justly or unjustly—linked to higher social and occupational mobility.[287] In fact, Debra Dickerson argued that educational attainment was a marker of middle-class status for black Americans.[288] It is, therefore, paramount to assess the impact of charter school board political accountability, as such accountability may enhance or regress the ability of poor and black students to enter collegiate studies.[289] On its face, data suggests that political accountability in New Orleans' public schools is statistically correlated to higher numbers of schools with collegiate matriculation rates above the state average for college

---

OneApp is not, in and of itself, a prima facie violation of the law, but raises questions concerning the admissions processes of opt-out schools. *See EnrollNOLA: Annual Report February 2015*, *supra* note 162, at 3, 14; Landry, *supra* note 180. About one of every three schools under the supervision of the Orleans Parish School Board in 2013–2014 were selective admission. *See EnrollNOLA: Annual Report February 2015*, *supra* note 162, at 4.

283. *See* FRANKENBERG ET AL., *supra* note 121, at 3; Dreilinger, *Group Files Civil Rights Complaint Over Schools' Discipline Policies*, *supra* note 180; Landry, *supra* note 181.

284. *See* Dreilinger, *Group Files Civil Rights Complaint Over Schools' Discipline Policies*, *supra* note 180.

285. *See* Dreilinger, *Strict Collegiate Academies Charters Are Working to Eliminate Suspensions*, *supra* note 180.

286. *See* Fancher, *supra* note 74, at 275–76; Garibaldi, *supra* note 85, at 5.

287. *See* Akers, *supra* note 195, at 32–33.

288. *See* DEBRA DICKERSON, THE END OF BLACKNESS: RETURNING THE SOULS OF BLACK FOLK TO THEIR RIGHTFUL OWNERS 22 (2004).

289. *See* Danielle Dreilinger, *More Students in N.O. College Bound*, TIMES-PICAYUNE, Apr. 8, 2015, at A1 [hereinafter Dreilinger, *More Students in N.O. College Bound*].

matriculation in New Orleans.[290] In comparing all New Orleans' public schools in terms of high school graduating classes, schools operated by the Orleans Parish School Board, which is politically accountable, achieved post-secondary education matriculation rates above Louisiana's state average of 59% in all but one case, or 86% of the time.[291] Comparatively, schools operated by non-politically accountable charter school boards authorized to operate by the State of Louisiana—either the Board of Elementary and Secondary Education or the Recovery School District—accomplished this achievement in just under 17% of cases, or three out of eighteen times.[292] This comparison is statistically significant at the .01 alpha level.[293] It appears at least arguable that political accountability is associated with higher post-secondary education enrollment rates in New Orleans.[294] The data, in aggregate, would support this argument.[295]

It is unfair, to some extent, to measure the post-secondary enrollment rates of the schools in the Recovery School District to those of the primarily selective admissions schools under the watch of the Orleans Parish School Board.[296] Selective admissions schools do not face the bevy of academic challenges of working with students who are sometimes several grade levels behind in core educational competencies.[297] Instead, selective admissions schools receive a large number, if not a majority, of their students at or above grade level in core competencies.[298] Selectively admitted students may be less difficult to instruct, and they may also possess better self-efficacy and motivation to enroll in post-secondary studies.[299] When comparing only schools that do not admit students selectively, there is no statistically significant relationship between board governance structures (p-value=.1278).[300] Politically accountable schools achieve post-secondary

290. *See id.*; *infra* Table 2.
291. *See infra* Table 2.
292. *See infra* Table 2.
293. *See infra* Table 2.
294. *See* Dreilinger, *More Students in N.O. College Bound*, *supra* note 289; *infra* Table 2.
295. *See infra* Table 2.
296. *See* FRANKENBERG ET AL., *supra* note 121, at 16; Akers, *supra* note 195, at 29; Dreilinger, *More Students in N.O. College Bound*, *supra* note 290; Stephanie Simon, *Special Report: Class Struggle — How Charter Schools Get Students They Want*, REUTERS (Feb. 15, 2013, 8:41 PM), http://www.reuters.com/article/2013/02/16/us-usa-charters-admission-idUSBRE91e0hf20130216.
297. *See* FRANKENBERG ET AL., *supra* note 121, at 16; Akers, *supra* note 195, at 29; Simon, *supra* note 296.
298. *See* FRANKENBERG ET AL., *supra* note 121, at 16; Akers, *supra* note 195, at 29; Simon, *supra* note 296.
299. *See* Simon, *supra* note 296; *infra* Table 2.
300. *See infra* Table 2.

enrollment rates over 59% in two of three occasions—or 66%—as opposed to 17% achievement of the same feat for schools run by appointed or self-selected boards operating under the authorization of the Recovery School District or the Louisiana Board of Elementary and Secondary Education.[301] Table 2 discloses the appropriate statistical comparison of post-secondary matriculation rates for schools under the Orleans Parish School Board and the Recovery School District.[302]

Proponents of the charter school takeover in New Orleans have asserted that the majority of students in New Orleans are attending better schools than they would have attended prior to Hurricane Katrina.[303] The proponents may be—but are probably not—correct in this assertion as far as the assertion is directed towards the increased likelihood of post-secondary enrollment upon graduation for the majority of students in New Orleans' public schools.[304] As compared to non-selective schools in New Orleans run by the politically accountable Orleans Parish School Board, schools in the non-politically accountable Recovery School District have gained in terms of post-secondary education matriculation rates.[305] As compared to selective admissions schools, the appropriate standard of comparison of New Orleans' public schools prior to Hurricane Katrina,[306] the schools in the Recovery

301. *See infra* Table 2.

302. *See infra* Table 2.

303. *See* Kingsland, *supra* note 5, at 59; Smith, *Hurricane Katrina 10 Years On*, *supra* note 8.

304. *See* SIMS & ROSSMEIER, *supra* note 274, at 22; *More Recovery School District Students Than Ever Graduating High School on Time*, LA. RECOVERY SCH. DISTRICT (Apr. 6, 2015), http://www.rsdla.net/apps/news/show_news.jsp?REC_ID=350614&id=0.

305. *See* SIMS & ROSSMEIER, *supra* 274, at 22; *More Recovery School District Students Than Ever Graduating High School on Time*, *supra* note 305; *infra* Table 2.

306. *See* Andre Perry, *How One NOLA School Got More Kids into College by Opening Its Doors*, SECOND LINE EDUC. BLOG (May 26, 2015), http://www.secondlineblog.org/2015/05/how-one-nola-school-got-more-kids-into-college-by-opening-its-doors; Andrew J. Rotherham, Opinion, *The Real Heroes: New Orleans Educators Do Not Get the Credit They Deserve for Rebuilding the Schools After Hurricane Katrina*, U.S. NEWS & WORLD REP. (Aug. 28, 2015), http://www.usnews.com/news/the-report/articles/2015/08/28/new-orleans-educators-deserve-credit-10-years-after-hurricane-katrina. Prior to Hurricane Katrina, the students at New Orleans' selective admissions schools were almost guaranteed to enter post-secondary studies. *See* Perry, *supra*. Thus, the argument for educational equity in New Orleans should not be based on the performance of open admissions schools after Hurricane Katrina, which are in no way as successful as the previously operated selective admissions schools in New Orleans. *See id.* The comparison for determining academic gains in New Orleans should be against the selective admissions schools. *See id.* It is highly doubtful that parents in New Orleans—disappointed by the gap in future educational, social, and occupational mobility—would argue for comparison to similarly situated schools as opposed to comparison to schools with better educational, social, and occupational opportunities for their students. *See* Nelson, *supra* note 216; Perry, *supra*; Smith, *Hurricane Katrina 10 Years On*, *supra* note 8; *infra* Table 2.

School District are still statistically behind.[307] Thus, students in the schools under the watch of the Recovery School District have made ground on mediocre or underperforming schools, but those students have not made ground on post-secondary studies enrollment as measured against schools with students who frequently enroll in post-secondary studies.[308] This data, at the least, casts doubt upon broad statements of better schools in New Orleans.[309] Statistical evidence supports the claim that schools under the politically accountable Orleans Parish School Board, or the high performing schools prior to Hurricane Katrina, outpace the schools under the non-politically accountable Recovery School District when evaluating post-secondary studies enrollment.[310] Moreover, the inability of the Recovery School District to place its poorer and black students into academically competitive schools in the city of New Orleans may be inflaming the school-to-prison pipeline.[311]

307. *See* SIMS & ROSSMEIER, *supra* note 274, at 22; *infra* Table 2.
308. *See* SIMS & ROSSMEIER, *supra* note 274, at 22; *infra* Table 2.
309. *See* Perry, *supra* note 306; *infra* Table 2.
310. *See* SIMS & ROSSMEIER, *supra* note 274, at 22; *infra* Table 2.
311. *See* Townsend, *supra* note 81, at 382; Dreilinger, *Has Gentrification Begun*, *supra* note 239.

Table 2: Fisher Exact Test of Independence for Post-Secondary Studies Matriculation in New Orleans Public Schools—Disaggregated by Political Accountability Status—2013–14 School Year Data[312]

	Above 59%[313]	Below 59%
Politically Accountable (OPSB)	6	1
Not Politically Accountable (RSD)	3	15
p-value	**.0029**	
Politically Accountable (OPSB; Non-Selective)	2	1
Not Politically Accountable (RSD)	3	15
p-value	**.1278**	

D. *Students in Non-Politically Accountable Schools More Likely to Drop Out Regardless of Admissions Processes*

Students who fail to complete high school are more likely to later be incarcerated.[314] The impact of political accountability, or lack thereof, on the likelihood of non-completion of the high school curriculum is worthy of investigation.[315] The state average for student dropout rates per individual schools in Louisiana is 3.42%.[316] No schools operating under the regulation of the Orleans Parish School Board exceeded the state average for dropout rates.[317] Just less than half of schools operating under the monitor of the

312. Independent Statistical Analysis Conducted by Authors from Louisiana Department of Education Data. See the following reports. COLLEGE ENROLLMENT DATA FOR 2013–2014 HIGH SCHOOL GRADUATES; FALL 2014 COLLEGE ENROLLMENT BY HIGH SCHOOL BY COLLEGE FOR 2013–2014 (data on file with the Louisiana Department of Education); *see also* NELSON, *supra* note 111, at 59–60. OPSB is New Orleans Parish Public Schools. SIMS & ROSSMEIER, *supra* note 301, at 2. RSD is Recovery School District. *Id.*

313. Fifty-nine percent is the Louisiana state average of post-secondary studies matriculation.

314. HARLOW, *supra* note 24, at 1, 3.

315. *See id.*; *infra* Table 3.

316. *See Annual Student Dropout Rates by State, District and Site 2013–2014*, LA. DEP'T EDUC., http://www.louisianabelieves.com/docs/default-source/data-management/2013-student-dropout-counts-and-rates-site-(district-state---public).xlsx?sfvrsn=4 (last visited Feb. 21, 2016).

317. *See infra* Table 3.

Recovery School District exceed the state average for dropout rates with the majority of the twenty-four schools classified as exceeding the state average and doing so at rates multiple times over the state average for dropout rates.[318] The Fisher Exact Test of Independence for political accountability structure and dropout rate in Table 3 suggests that schools under the politically accountable Orleans Parish School Board are less likely than schools in the non-politically accountable Recovery School District to exceed the state average for dropouts, notwithstanding admissions processes—selective or non-selective.[319] The comparison between all schools under the Orleans Parish School Board (p-value = .0011) as well as the non-selective schools under the Orleans Parish School Board (p-value = .0366) and the schools under the Recovery School District are statistically significant.[320] It is, therefore, reasonable to conclude that schools in the Recovery School District may be exacerbating the school-to-prison pipeline by way of not preventing student dropouts.[321]

318. *See generally Annual Student Dropout Rates by State, District and Site 2013–2014*, *supra* note 318; *infra* Table 3. There are twenty schools with appointed or self-selected boards with dropout rates over twice the Louisiana state average.

319. *See infra* Table 3.

320. *See infra* Table 3.

321. *See infra* Table 3.

Table 3: Fisher Exact Test of Independence for High School Dropouts in New Orleans Public Schools—Disaggregated by Political Accountability Status—2013–14 School Year Data[322]

	Below 3.42%[323]	Above 3.42%
Politically Accountable (OPSB)	14	0
Not Politically Accountable (RSD)	28	24
p-value	**.0011**	
Politically Accountable (OPSB; Non-Selective)	6	0
Not Politically Accountable (RSD)	28	24
p-value	**.0366**	

VI. CONCLUSIONS AND RECOMMENDATIONS FOR THE NEXT WAVE OF SCHOOL REFORM IN NEW ORLEANS

The state takeover of New Orleans' public schools has been heralded as a model of urban school reform,[324] but these accounts are based on analyses of test scores, which are not always indicative of academic aptitude for poor and black students.[325] The analyses of the charter school movement and school reform in New Orleans often neglect necessary and impactful statistical analyses of variables more predictive of student trajectories.[326] In a city plagued by a slew of social problems, it is not appropriate to evaluate schools on test scores alone, especially if the tests in question are written by, administered by, and evaluated by the entities most invested in creating and

322. Independent Statistical Analysis Conducted by Authors from Louisiana Department of Education Data. See the following reports. ANNUAL STUDENT DROPOUT RATES BY STATE, DISTRICT AND SITE 2013–2014 (data on file with the Louisiana Department of Education); *see also* NELSON, *supra* note 111, at 59–60. "OPSB" is New Orleans Parish Public Schools. SIMS & ROSSMEIER, *supra* note 274, at 2. "RSD" is Recovery School District. *Id.*

323. Three point four two percent is the state average for student dropouts for all schools in Louisiana that have grades seven or above.

324. *See* Kingsland, *supra* note 5, at 59.

325. *See id.* at 61 fig. 2; *The Test Score Gap*, PBS, http://www.pbs.org/wgbh/pages/frontline/shows/sats/etc/gap.html (last visited Feb. 22, 2016).

326. *See* Andrea Gabor, *The Myth of the New Orleans School Makeover*, N.Y. TIMES, Aug. 22, 2015, at SR3.

maintaining the narrative that school reform has worked in the city of New Orleans.[327] It may, nevertheless, be a mistake to summarily dismiss the noticeable gains of the charter school movement in New Orleans.[328] The city's literacy rate, while still poor, is improving.[329] This is surely, however, not solely the effect of the charter school movement.[330]

Evaluations of gains based on test scores have prompted one scholar to note that the State of Louisiana happens to be the player, the coach, the referee, and the scorekeeper in the game known as New Orleans' education reforms; of course, the state is going to win under this accountability structure.[331] The district is also educating a more diverse student body, although district level data supporting narratives of diversity belie the fact that individual schools are hardly more diverse than they were before Hurricane Katrina.[332] The majority of white students who are returning to the city's public schools are enrolling in a small number of disproportionately white and relatively high performing public charter schools with selective admissions criteria; white students are not returning to New Orleans' public schools in an even distribution.[333] It might be appropriate to revive the conversation about whether charter schools are white flight schools.[334] In New Orleans, charter schools are

---

327. *See* Frazier-Anderson, *supra* note 3, at 411–12; Gabor, *supra* note 327.

328. *See* Kingsland, *supra* note 5, at 61 fig.2.

329. *See* Gonzales, *supra* note 156; Chait, *supra* note 156.

330. *See* Gabor, *supra* note 326; Chait, *supra* note 156.

331. Raynard Sanders, Address at the Education Law Association 60th Annual Conference, The New Orleans Education Reforms: Valuable New Old Lessons for the Nation (Nov. 14, 2014).

332. *See* Dreilinger, *Has Gentrification Begun*, *supra* note 239; *Student Enrollment & Demographics*, LA. DEP'T EDUC., https://www.louisianabelieves.com/docs/default-source/katrina/final-louisana-believes-v5-enrollment-demographics22f9e85b8c9b66d6b292ff0000215f92.pdf?sfvrsn=2 (last visited Mar. 10, 2016).

333. *See* Dreilinger, *Has Gentrification Begun*, *supra* note 239. Charter schools in New Orleans have increased racial diversity at the district level, but the majority of white students in New Orleans are isolated in selective admissions and high performing schools, such as Ben Franklin High, Lusher Charter, or Audubon Charter. *See id.* Other charter schools are also disproportionately white as compared to the New Orleans' public schools enrollment demographics, such as Morris Jeff Community School and Bricolage Academy. *Id.* As school reform advocates advance assertions that New Orleans' public schools are more diverse, little has changed in the segregation of students in New Orleans' public schools. *See id.*; *Student Enrollment & Demographics*, *supra* note 332. White students are isolated to a few schools and black students are isolated in most others. *See* Dreilinger, *Has Gentrification Begun*, *supra* note 239. Perhaps school reform advocates are not concerned with school-level diversity, but even district-level data, given the total student-age population in New Orleans, is not indicative of a major movement towards diverse public schools in New Orleans. *See id.*; *Student Enrollment & Demographics*, *supra* note 332.

334. *See* FRANKENBERG ET AL., *supra* note 121, at 10.

disproportionately black in aggregate, but a careful analysis of individual charter schools might indicate the development of white flight or white enclave schools.[335] For instance, white students make up less than 10% of students in New Orleans' public schools, but several schools have majority white student populations or significantly white student populations—over 33%.[336] Some may frame this fact as gaining diversity.[337] Others may find this to indicate white flight—or white isolation—within the city.[338] Finally, the return of white students to public schools may have been an effect of the economic downturn.[339] The New Orleans metropolitan area has historically led the nation in private school—mostly Catholic—enrollment, per capita.[340] It is entirely possible that parents of white school-aged students can no longer afford private school tuition and predominately white, selective admissions charter schools may be relatively *safe* havens for these white and middle-class families.[341]

Given the uncertainty around academic gains in New Orleans' charter schools and the potential of those schools to disproportionately contribute to the school-to-prison pipeline, as compared to the schools that are politically accountable, one might wonder about the costs of the charter school movement in New Orleans.[342] The charter school takeover of New Orleans' public schools aided in the destruction of the black middle class in New Orleans; the predominately black teaching force in place before Hurricane Katrina was effectively displaced and replaced by a whiter teaching force.[343] The displaced and replaced teachers have filed suit alleging wrongful termination in violation of contract law, which might prove costly for the city's schools in both liquid assets as well as political

335. *See id.*

336. *See id.*; Dreilinger, *Has Gentrification Begun*, *supra* note 239; *Student Enrollment & Demographics*, *supra* note 332.

337. *See* FRANKENBERG ET AL., *supra* note 121, at 10; Dreilinger, *Has Gentrification Begun*, *supra* note 239; *Student Enrollment & Demographics*, *supra* note 332.

338. FRANKENBERG ET AL., *supra* note 121, at 10; *see also Student Enrollment & Demographics*, *supra* note 332.

339. *See* FRANKENBERG ET AL., *supra* note 121, at 11–12.

340. *Id.* at 26, 34; Valerie E. Lee & Anthony S. Bryk, *Curriculum Tracking as Mediating the Social Distribution of High School Achievement*, 61 SOC. EDUC. 78, 79 (1988).

341. FRANKENBERG ET AL., *supra* note 121, at 26; Landry, *supra* note 180.

342. *See* Schneider, *supra* note 175.

343. *See* Corey Mitchell, *'Death of My Career': What Happened to New Orleans' Veteran Black Teachers?*, EDUC. WK. (Aug. 19, 2015), http://neworleans.edweek.org/veteran-black-female-teachers-fired; Stephen Sawchuk, *New Orleans' Teaching Force Today: Whiter, Less Experienced, Higher Turnover*, EDUC. WK.: TCHR. BEAT (Aug. 25, 2015, 9:30 AM), http://blogs.edweek.org/edweek/teacherbeat/2015/08/new_orleans_teaching_force_whi.html.

capital.[344] Moreover, black stakeholders have seen a reduction in political power since they have little or no power to hold charter school boards politically accountable through the voting process.[345] Because New Orleans was a Voting Rights Act section 5 city prior to the Supreme Court's disempowerment of section 5 by way of invalidating section 4 of the same statute, questions remain as to how the State of Louisiana created a parallel, and perhaps more powerful, predominately white school board in New Orleans with the effect of displacing and replacing the popularly elected and predominately black Orleans Parish School Board.[346] Assuming for the sake of argument that test scores are rising in New Orleans' public schools, the extraordinary dropout rates in New Orleans' charter schools would force any reasonable observer to question whether test scores are higher because students are performing better on standardized tests, or whether test scores are higher because students who might not perform well are not being tested because they are no longer enrolled in the public schools, if they are enrolled in any schools at all.[347] It is much easier to believe that the smaller black middle class—and more jobless blacks—in New Orleans combined with less political power for blacks in New Orleans and higher dropout numbers for non-politically accountable charter schools worsen the school-to-prison pipeline. Furthermore, it is reasonable to believe that these facts enhance the school-to-prison pipeline.[348] What, then, were the costs of the uncertain gains in New Orleans' public schools?[349]

That charter schools governed by boards that are politically unaccountable to its stakeholders might increase access points to the school-to-prison pipeline is troubling, but to a large extent, there is very little room to undo the effects of the New Orleans charter school movement.[350] It is not, however, too late to create interventions[351] aimed at lessening the impact of

344. *See* Mitchell, *supra* note 343.
345. Nelson, *supra* note 134, at 258–59.
346. *See id.* at 258, 260, 263 n.11.
347. *See* NELSON, *supra* note 111, at 11–12.
348. *See* Nelson, *supra* note 134, at 245, 258–59; Smith, *Deconstructing the Pipeline*, *supra* note 8, at 1018–19; *supra* Table 3.
349. Sanders, *supra* note 331.
350. *See* Nelson, *supra* note 134, at 260–61; *supra* Table 3.
351. FRANKENBERG ET AL., *supra* note 121, at 82–84. The easiest and most efficient intervention may not be an intervention at all. *See id.* Charter schools that are not politically accountable to stakeholders could stop developing and implementing practices that contribute to the school-to-prison pipeline. Nelson, *supra* note 134, at 259. Of course, this is unlikely to happen given those schools' focus on *no excuses* policies for minor behaviors. Surely, charter schools could and can develop policies that address simple student violations of school norms with methods other than suspension. *See* WEISSMAN, *supra* note 58, at 41.

the effects of the charter school movement in New Orleans.[352] This study suggests that school reform may be more effective if governing bodies are to some extent politically accountable to stakeholders.[353] The extent of that accountability is debatable.[354] The most obvious solution to a lack of political accountability is to begin transitioning *recovered* schools, or schools no longer labeled as failing, to the supervision of the popularly elected Orleans Parish School Board while continuing to afford the governing boards of charter schools great autonomy in governing the schools those individual schools manage.[355] Another viable solution would be to infuse charter school governing boards with some, if not all, elected seats.[356] There is precedent for this structure of governance.[357] Some states allow for election of charter school board members[358] and Minnesota, the originator of charter school authorizing legislation, requires charter school board elections with stakeholders, teachers, and parents, among others, as required electors.[359] If poor and black stakeholders, those most affected by the proliferation of charter schools in New Orleans, have input into the redevelopment of New Orleans' public schools, they may experience a sense of urban school renewal or a revival of hope that education can and will advance the social and occupational trajectories of poor and black stakeholders.[360] While current school reform strategies, including charter schools, seek primarily to improve the trajectories of poor and black stakeholders via improved test scores, urban school renewal aims to infuse hope into poor and black communities through the inclusion of those groups in dialogues concerning educational policy and politics.[361] If the State of Louisiana is not amenable to charter school board elections or a return of schools to the popularly elected Orleans Parish School Board, the state may construct an accountability formula that accounts for factors associated with the school-to-prison pipeline. For instance, suspension, expulsion rates, dropout rates,

352. *See* FRANKENBERG ET AL., *supra* note 121, at 82–84; WEISSMAN, *supra* note 58, at 41; Nelson, *supra* note 134, at 242, 259–61.

353. Beabout, *Stakeholder Organizations*, *supra* note 158, at 43–44; *see also supra* Sections V.B–D.

354. *See* Beabout, *Stakeholder Organizations*, *supra* note 158, at 43–44, 48.

355. *See id.* at 44–47.

356. *See Charter School Boards*, MINN. SCH. BOARDS ASS'N, http://www.mnmsba.org/CharterSchoolBoards (last visited Mar. 10, 2016).

357. *Id.*; *see also* MINN. STAT. § 124E.07 (2015).

358. *Charter School Boards*, *supra* note 356.

359. *See* MINN. STAT. § 124E.07(3).

360. *See* Tuzzolo & Hewitt, *supra* note 3, at 67.

361. *See* UNITED TEACHERS OF NEW ORLEANS ET AL., *supra* note 202, at 6, 8; Nelson, *supra* note 134, at 242, 259.

and other factors might be used to evaluate the effectiveness of schools, both traditional and charter public, in college and career readiness.

More research is needed to determine the impact of non-politically accountable charter school boards on poor and black stakeholders in New Orleans. Charter school and state officials, because of the potential usefulness of charter schools in addressing social ills, including the school-to-prison pipeline, should openly share pertinent data with all researchers. This has not historically been the case in Louisiana. As such, charter schools have not reached their full potential of addressing and perhaps remedying social ills. Charter schools might be *unwittingly intensifying social ills* for our nation's most vulnerable students.

One argument justifying the segregated nature of charter schools is that charter schools aimed to provide educational equity to poor and minority students, who are often marginalized in the public schooling system. Charter schools, therefore, originate from noble intentions. It is hard, however, to congratulate the charter school movement on any measure of achievement when charter school achievement is muddied by the exclusion of the very population of students that charter schools profess to give expanded opportunities. Correlation does not prove causation, but the very fact that the largest supervisor of charter schools in New Orleans is associated with indicators that promote the school-to-prison pipeline is troubling.

POPULATING THE PIPELINE: SCHOOL POLICING AND THE PERSISTENCE OF THE SCHOOL-TO-PRISON PIPELINE

JANEL GEORGE*

I. INTRODUCTION

This Article examines the establishment, expansion, and current role of police in schools and how police presence perpetuates the racial profiling, discriminatory disciplining, and incarcerating of children of color. Despite research showing that police presence in schools increases the likelihood of early involvement of youth of color in the juvenile justice system, and in resulting compromised life outcomes, police continue to be a fixture in many low-income districts and districts predominantly populated by students of color.[1] In addition, policing of youth of color in our nation's public schools often mirrors the discriminatory racial profiling and excessive force employed by police against people of color in our nation's major cities—most saliently exemplified in police response to protests in Baltimore and

* Janel George is the Senior Education Policy Counsel, NAACP Legal Defense and Educational Fund, Inc. She would like to thank the staff, students, parents, and advocates of the Dignity in Schools Campaign who taught her that the struggle for educational equity and justice must not end until all children have access to quality education. She has been inspired by their tireless advocacy.

1. *See infra* Part III.

Ferguson.[2] These discriminatory school policing encounters have garnered increased media attention and public outrage—including incidents of escalated interactions between students of color and school police in South Carolina and Texas[3]—but victims of this police brutality in our schools have found little, if any, successful legal redress.[4] For example, the federal government continues to funnel federal funds to further embed the practice of police in public schools with less funding directed towards alternatives, like restorative practices, despite the government's own acknowledgment of the pervasiveness of racially discriminatory discipline practices in our nation's public schools.[5] This has incentivized more states and school districts to continue to place police in public schools with devastating consequences for children of color and low-income children who are disproportionately targeted for referral and arrest by police in schools.[6] The

---

2. *See* Ben Kesling & Dan Frosch, *Justice Department Faults Police Response to Ferguson Unrest*, WALL STREET J. (Sept. 3, 2015), http://www.wsj.com/articles/justice-department-faults-police-response-to-ferguson-unrest-1441300481; Kevin Rector, *'Major' Problems in Riot Response: New Review Details City Police Shortcomings*, BALTIMORE SUN, Nov. 16, 2015, at A1. "The Justice Department said that some [of the] tactics. . . [of] law enforcement during the initial protests—such as widespread use of tear gas, canine units deployed inappropriately, and the use of military weapons and snipers—were often unsafe, ineffective, and served to inflame tensions rather than ease them." Kesling & Frosch, *supra*.

3. Dana Ford et al., *Spring Valley High School Officer Suspended After Violent Classroom Arrest*, CNN, http://www.cnn.com/2015/10/27/us/south-carolina-school-arrest-video (last updated Oct. 27 2015, 10:12 PM); *see also* Tierney Sneed, *School Resource Officers: Safety Priority or Part of the Problem?*, U.S. NEWS & WORLD REPORT (Jan. 30, 2015, 12:01 AM), http://www.usnews.com/news/articles/2015/01/30/are-school-resource-officers-part-of-the-school-to-prison-pipeline-problem. "The videos show the officer standing over a student seated at her desk. He puts his arm near her neck, then yanks her backward. The desk tips over, and the student crashes onto the floor." Ford et al., *supra*.

4. *See id.*

5. CATHERINE E. LHAMON & JOCELYN SAMUELS, U.S. DEP'T OF JUSTICE & U.S. DEP'T OF EDUC., DEAR COLLEAGUE LETTER: NONDISCRIMINATORY ADMINISTRATION OF SCHOOL DISCIPLINE 1–2, 4, 23 (2014), http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201401-title-vi.pdf; *see also* Every Student Succeeds Act, S. 1177, 114th Cong., § 1005 (2015) (signed into law by President Barack Obama on Dec. 10, 2015); MONICA GARCIA, 2013 SCHOOL DISCIPLINE AND SCHOOL CLIMATE BILL OF RIGHTS RESOLUTION, NAT'L STRATEGY INFO. CTR., http://www.thestrategycenter.org/node/6060 (click PDF link at bottom); Sneed, *supra* note 3.

6. POLICE IN SCHOOLS ARE NOT THE ANSWER TO THE NEWTOWN SHOOTING 3–6, 9 (2013), http://b.3cdn.net/advancement/df16da132af1903e5b_zlm6bkclv.pdf.

> Despite the fact that the Columbine shooting took place in a suburban and majority white school, the post-Columbine security measures—and the resulting unintended consequences—were most keenly felt in urban areas with a high percentage of students of color, many of whom live in concentrated poverty. These areas were

resulting negative outcomes, including early involvement with the juvenile justice system and higher dropout rates,[7] effectively undermine equal educational opportunities for impacted students and exacerbate educational inequalities.[8]

Action must be taken to dismantle and disrupt the entrenched systems and incentives that keep police in public schools. Alternatives to police presence and exclusionary and punitive discipline practices—like suspensions and expulsions—hold the promise of promoting school safety and better outcomes for all students. But, implementation of alternative discipline practices and eliminating police presence in public schools is predicated on the political will of educational decision-makers at all levels—federal, state, and local—and reversing financial incentives that keep police in public schools.[9] The recently-enacted *Every Student Succeeds Act* ("ESSA")[10] provides federal funds for discipline alternatives, like restorative practices and schoolwide positive behavioral interventions and supports ("SWPBIS"), but states and school districts must choose to target funding for these alternatives.[11] The task of encouraging states and districts to fund alternative discipline programs has fallen to community advocates, and garnering support for alternatives has been an uphill battle.[12] Policymakers have largely ignored the collateral impact of police in schools on the most

---

also home to schools and communities who have been historically underfunded, criminalized, politically underrepresented, and socially outcast.

Id. at 6.

7. *Id.* at 10; *see also* Shiri Klima, *The Children We Leave Behind: Effects of High-Stakes Testing on Dropout Rates*, 17 S. CAL. REV. L. & SOC. JUST. 3, 11 (2007). The American Psychological Association, CSG, and the Center for Disease Control and Prevention have all found that extreme discipline, including arrests, predict grade retention, school dropout, and future involvement in the juvenile and criminal justice systems. As a result, students face lasting consequences, not only in the justice system, but also when applying for college, the military, or a job.

POLICE IN SCHOOLS ARE NOT THE ANSWER TO THE NEWTOWN SHOOTING, *supra* note at 6, at 10.

8. *See* JUDITH KAFKA, THE HISTORY OF "ZERO TOLERANCE" IN AMERICAN PUBLIC SCHOOLING 2–3 (2011). "The ramifications of zero tolerance are severe—both for the individuals they penalize and for American society in general. Ultimately, we all . . . ." *Id.* at 9.

9. *See* S. 1177, § 1111; TAMARINE CORNELIUS, WIS. BUDGET PROJECT, PRISON PRICE TAG: THE HIGH COST OF WISCONSIN'S CORRECTIONS POLICIES 3 (2015), http://www.wisconsinbudgetproject.org/wp-content/uploads/2015/11/Prison-Price-Tag.pdf; GARCIA, *supra* note 5.

10. S. 1177, § 5. This law replaces the No Child Left Behind Act, which expired in 2007. *Every Student Succeeds Act (ESSA)*, U.S. DEP'T EDUC., http://www.ed.gov/essa (last visited Mar. 31, 2016).

11. *See* S. 1177, § 1111.

12. *See Mission*, DIGNITY SCHOOLS, http://www.dignityinschools.org/about-us/mission (last visited Mar. 31, 2016).

marginalized students who are viewed as dispensable and responsible for the negative outcomes that they experience due to police presence in schools.[13] Coalitions like the Dignity in Schools Campaign have demanded the removal of police from schools and implementation of discipline alternatives.[14] In fact, grassroots advocacy to limit the role of police in schools has shown the most promise—including the establishment of a School Climate Bill of Rights and Memoranda of Understanding in the Los Angeles Unified School District, a victory secured through the advocacy of the Labor Community Strategy Center and other community-based organizations—in garnering similar victories around the country that have resulted in limiting police involvement in routine discipline matters.[15]

Part II of this Article examines the roots of discriminatory discipline practices in our nation's history of racial segregation in education and the biases that justify the relegation of African American students and other marginalized students to inferior educational opportunities.[16] This Section also examines the emergence of zero tolerance policies and surveillance in schools.[17] Part III examines how police presence in schools further facilitates the criminalization of students of color and their resulting involvement in the juvenile justice system, as well as the collateral consequences they experience due to the criminalization of minor misbehavior.[18] The Section also examines how targeted federal funding has further embedded and influenced the placement of police in schools.[19] Additionally, this Section examines excessive use of force by police in schools, contextualizing such violence within broader violence against people of color by law enforcement and how militarization of school police

---

13. *See* Tierney Sneed, *School Resources Officers: Safety Priority or Part of the Problem?*, U.S. NEWS & WORLD REPORT (Jan. 30, 2015, 12:01 AM), http://www.usnews.com/news/articles/2015/01/30/are-school-resource-officers-part-of-the-school-to-prison-pipeline-problem.

14. *Mission*, *supra* note 12. The Dignity in Schools Campaign is a coalition of 104 organizations from 26 states committed to ending overly punitive discipline practices that disproportionately impact students of color, students with disabilities, and LGBTQ students. *See Members*, DIGNITY SCHOOLS, http://www.dignityinschools.org/about-us/members (last visited Mar. 31, 2016); *Mission*, *supra* note 12.

15. GARCIA, *supra* note 5 (noting that "[s]tudents have the right to safe school environments that minimize the involvement of law enforcement, probation, and the juvenile and criminal justice system to the greatest extent possible"); *Success Stories*, ADVANCEMENT PROJECT, http://safequalityschools.org/pages/success-stories (last visited Mar. 31, 2016).

16. *See infra* Part II.

17. *See infra* Part II.

18. *See infra* Part III.

19. *See infra* Part III.

worsen school climates.[20] Finally, this Article exposes the incentive behind the school-to-prison pipeline as a profit driver of the prison-industrial complex and examines alternatives to incarcerating children of color.[21]

Most importantly, this Article insists that we must end the practice of policing in public schools and instead, support and foster evidence-based alternative discipline practices to promote better outcomes for all students, as well as foster positive and inclusive school climates. We must examine the motives behind the placement of police in schools, including profit incentives for law enforcement and prison facilities that stand to benefit so long as the school-to-prison pipeline continues to be populated. We must recognize the moral imperative that demands we end harmful and profit-motivated practices that are predicated on the backs and futures of our nation's most promising children and instead, ensure that schools perform the function of providing equal and quality educational opportunities for all of our nation's children.

II. HOW DID WE GET HERE?

A. *Discrimination, Segregation, and Discipline Disparities*

It is imperative that we trace modern-day racial disproportionality in school discipline to our nation's history of racial apartheid in public schools because many of our modern-day discriminatory discipline practices are vestiges not only of the practice of physical segregation, but also of the institutionalized and systemic racism that deemed African American students and other students of color intellectually inferior and unworthy of quality educational opportunities. Schools mirror the society in which we live, and for African American students, schools also mirror the pervasive racism and inequality in American society. As one scholar notes: "Education systems in all societies are designed to serve as the primary institutions that reproduce dominant social and economic orders, customs, and beliefs systems. In U.S. public education, this makes schooling a function of capitalism, white supremacy, and their intrinsic restraints on democracy and social equality."[22] Therefore, discipline must be contextualized within a racially discriminatory history that has scarred our nation's educational

20. *See infra* Part III.
21. *See infra* Part IV.
22. Deborah M. Keisch & Tim Scott, *U.S. Education Reform and the Maintenance of White Supremacy Through Structural Violence*, 3 LANDSCAPES VIOLENCE 2, no.3, 2015, http://scholarworks.umass.edu/cgi/viewcontent.cgi?article=1055&context=lov.

system and functioned to promote inequalities along racial, socioeconomic, and other socially defined castes and categories.

The seminal Supreme Court of the United States victory of *Brown v. Board of Education (Brown I)*,[23] which invalidated racial apartheid in our nation's public schools and declared the *Plessy v. Ferguson*[24] doctrine of *separate but equal* unconstitutional[25] was not a silver bullet. In fact, many states and school districts refused to comply with federal orders to desegregate public schools in the wake of the ruling—triggering an era known by the moniker of Massive Resistance.[26] For example, the Prince Edward County School District in Virginia opted to close its public schools for five years rather than comply with orders to desegregate its schools.[27] This is despite the *Brown v. Board of Education (Brown II)*[28] ruling in 1955, which ordered desegregation *with all deliberate speed*[29]—which many districts interpreted to mean no speed at all.[30] In 1957, President Eisenhower federalized the Arkansas National Guard and deployed segments of the 101st Airborne Division to ensure the safety of nine African American students integrating Central High School in Little Rock, Arkansas.[31] However, it was not until subsequent statutory federal protections were enacted, including the Civil Rights Act of 1964 and the Elementary and Secondary Education Act of 1965 ("ESEA"),[32] that districts began complying with desegregation orders.[33] It also took additional litigation to help dismantle segregated school systems and garner access to educational opportunities for African American

23. 347 U.S. 483 (1954).
24. 163 U.S. 537 (1896).
25. *Brown I*, 347 U.S. 483 at 495.
26. *See Massive Resistance*, VA. HIST. SOC'Y, http://www.vahistorical.org/collections-and-resources/virginia-history-explorer/civil-rights-movement-virginia/massive (last visited Mar. 30, 2016).
27. *The Closing of Prince Edward County's Schools*, VA. HIST. SOC'Y, http://www.vahistorical.org/collections-and-resources/virginia-history-explorer/civil-rights-movement-virginia/closing-prince (last visited Mar. 30, 2016).
28. 349 U.S. 294 (1955).
29. *Id.* at 301.
30. *See The Closing of Prince Edward County's Schools*, *supra* note 27.
31. *School Desegregation and Equal Educational Opportunity*, LEADERSHIP CONF., http//www.civilrights.org/resources/civilrights101/desegregation.html (last visited Mar. 30, 2016).
32. 20 U.S.C. § 6301 (2012); The Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (1964). Enacted as part of President Lyndon Johnson's War on Poverty, Johnson envisioned education as a lever out of poverty and "[f]rom its inception, ESEA was a civil rights law." *Every Student Succeeds Act (ESSA)*, *supra* note 10.
33. *See* 20 U.S.C. §6301; Civil Rights Act § 401; *School Desegregation and Equal Educational Opportunity*, *supra* note 30.

students—including *Cooper v. Aaron*,[34] *Green v. County School Board*,[35] and *Swann v. Charlotte-Mecklenburg Board of Education*,[36]—with the Supreme Court of the United States issuing mandates that ultimately required all vestiges of segregation to "be eliminated root and branch."[37] These efforts helped to finally break the back of the Jim Crow education system and prompted the progression of integrated schools; while only about 1% of African American children in the south attended integrated schools with white children in 1963, that number jumped to 90% by the early 1970s.[38]

While physical racial integration in schools became a reality, what proved to be—and still is—much harder to eradicate are entrenched ideas of racial stratification and caste, which place African American children at the lowest rung of achievement and opportunity. Therefore, racial discipline disparities are not isolated phenomena but are part of larger systemic educational inequities that marginalize students along racial and socioeconomic stratifications.[39] In fact, "both ethnic and class disparities are perpetuated through pervasive inequity across a variety of educational processes . . . . in areas as diverse as tracking, representation in curriculum, quality of instruction, physical resources, and school funding."[40] Therefore, discipline disparities are part and parcel of the vestiges of racial segregation and discrimination in our nation's public schools. Entrenched racial biases, both implicit and explicit, have contributed to the discriminatory application of discipline measures, particularly in discipline categories that call for broad discretion, such as *insubordination* or *willful defiance*.[41] These disparities have been apparent since the earliest days of integrated school environments.

In fact, as integration became a reality in public schools, so did the emergence of discriminatory discipline practices, particularly exclusionary practices like suspensions and expulsions that removed African American students from the general classroom.[42] In 1974, the Children's Defense Fund

---

34. 358 U.S. 1 (1958).
35. 391 U.S. 430 (1968).
36. 402 U.S. 1 (1971).
37. *Green*, 391 U.S. at 438.
38. Nikole Hannah-Jones, *Lack of Order: The Erosion of a Once-Great Force for Integration*, PROPUBLICA (May 1, 2014, 12:11 PM), https://www.propublica.org/article/lack-of-order-the-erosion-of-a-once-great-force-for-integration.
39. RUSSELL J. SKIBA ET AL., IND. EDUC. POL'Y CTR., THE COLOR OF DISCIPLINE: SOURCES OF RACIAL AND GENDER DISPROPORTIONALITY IN SCHOOL PUNISHMENT 4–6 (2000), http://www.indiana.edu/~equity/docs/ColorOfDiscipline.pdf.
40. *Id.* at 18 (citations omitted).
41. *See* Janel A. George, *Stereotype and School Pushout: Race, Gender, and Discipline Disparities*, 68 ARK. L. REV. 101, 105, 110–12 (2015).
42. *See id.* at 105, 109; *Mission*, *supra* note 12.

("CDF") released a report, *Children Out of School in America*, which included survey findings showing that many children had been excluded from school due to disciplinary actions.[43] The following year, the CDF followed that report with the 1975 report, *School Suspensions: Are They Helping Children?*, which documented compelling stories of children that had been excluded from school through suspensions, expulsions, and other measures based upon the discriminatory application of disciplinary sanctions and exposed national data showing the impact of these practices on African Americans and other students.[44] The report's authors "found that many suspensions were unnecessary, made no educational sense, and disserved the interests of the children involved. In many cases, short-term disciplinary exclusions added up to a significant loss of schooling and caused youngsters to drop out of school permanently."[45]

Despite this and other research exposing discriminatory discipline practices, exclusionary discipline practices have persisted, and disparities have worsened in our nation's public schools.[46] In fact, this phenomenon—known as the school-to-prison pipeline—refers broadly to "the school-based policies, practices, conditions, and prevailing consciousness that facilitate criminalization within educational environments and the processes by which this criminalization results in the incarceration of youth and young adults."[47]

While many scholars note the proliferation of *zero tolerance*[48] policies following high-profile shootings, like the tragedy at Columbine High School in Littleton, Colorado,[49] scholar Judith Kafka traces the origins of

---

43. CHILDREN'S DEF. FUND, CHILDREN OUT OF SCHOOL IN AMERICA 5–6 (1974), http://www.childrensdefense.org/library/archives/digital-library/children-out-of-school-in-america.html [hereinafter CHILDREN OUT OF SCHOOL IN AMERICA].

44. *See* CHILDREN'S DEF. FUND, SCHOOL SUSPENSIONS: ARE THEY HELPING CHILDREN? 1–7, 9–10, 12, 15 (1975), http://www.childrensdefense.org/library/archives/digital-library/school-suspensions-are-they-helping-children.html [hereinafter SCHOOL SUSPENSIONS: ARE THEY HELPING CHILDREN?].

45. *Id.* at v.

46. *See id.* at 9–10, 12, 15; KAFKA, *supra* note 8, at 2–3; Avarita L. Hanson, *Have Zero Tolerance School Discipline Policies Turned into a Nightmare? The American Dream's Promise of Equal Educational Opportunity Grounded in* Brown v. Board of Education, 9 U.C. DAVIS J. JUV. L. & POL'Y 289, 302, 308–09, 312–13 (2005).

47. Monique W. Morris, *Searching for Black Girls in the School-to-Prison Pipeline*, NAT'L COUNCIL ON CRIME & DELINQ. (Mar. 18, 2013), http://www.nccdglobal.org/blog/searching-for-black-girls-in-the-school-to-prison-pipeline.

48. KAFKA, *supra* note 8, at 2. "The term *zero tolerance*, grew out of a U.S. Customs Service antidrug program implemented in the 1980s, and states and school districts began using the phrase to refer to school discipline soon after." *Id.*

49. *See* Bill Hutchinson & Helen Kennedy, *High School Bloodbath Gun-Toting Teens Kill As Many As 25*, N.Y. DAILY NEWS, Apr. 21, 1999.

zero tolerance policies to decades earlier and notes the original purpose of zero tolerance policies was to limit the discretion—and the possibility of abuse of discretion—of educators.[50] Zero tolerance policies gained increased national attention and adoption following the original enactment of the Gun-Free Schools Act ("GFSA") in 1994,[51] which mandated automatic expulsion for offenses like bringing a gun or—in later iterations of the law—other weapon onto school property.[52] Such policies do not take into account the context in which an infraction might occur and provide minimal notice or due process.[53] High-profile school shootings, like the tragedy at Columbine High School,[54] were used to justify the spread of zero tolerance policies as preventive measures to keep weapons off school grounds and deter such incidents of violence.[55] The passage of the GFSA placed the federal imprimatur on zero tolerance and further justified the urgency of implementing serious exclusionary discipline practices.[56]

However, over time, zero tolerance policies began to be broadly applied to minor offenses, like dress code violations or the catch-all *willful defiance*, and many schools and districts began the practice of applying typically punitive "consequences or punishments—such as suspension and expulsion—for a wide variety of and broadly defined school rule violations."[57] Like other punitive practices, data shows that zero tolerance policies have disproportionately impacted students of color, exacerbated achievement gaps, and worsened academic outcomes for targeted students.[58] In fact, studies have found no attendant benefits from zero tolerance policies; to the contrary, "[t]hey find that zero tolerance policies have enormous costs

---

50. KAFKA, *supra* note 8, at 6–7. "The policies are supposed to prohibit educators from *tolerating* certain kinds of misconduct, and they grant increasing disciplinary control to district supervisors, centralized boards of education, and state legislatures." *Id.*

51. *See* 20 U.S.C. § 8921 (1994); Hanson, *supra* note 46, at 300–01, 303. The GFSA was enacted on October 20, 1994, as part of the Improving America's Schools Act of 1994—the reauthorization of the ESEA. 20 U.S.C. § 8921; *see also* Hanson, *supra* note 46, at 303. The 2002 reauthorization of the ESEA, No Child Left Behind, amended the GFSA, including expanding zero tolerance policies by broadening the definition of school settings and applying not only to children who bring guns to school, but also to those found to be in possession of guns on school property. *See* 20 U.S.C. § 7151 (2012); Hanson, *supra* note 46, at 305–06.

52. 20 U.S.C. § 7151.

53. S. David Mitchell, *Zero Tolerance Policies: Criminalizing Childhood and Disenfranchising the Next Generation of Citizens*, 92 WASH. U. L. REV. 271, 272, 302 (2014).

54. *See* Hanson, *supra* note 46, at 347.

55. *See id.* at 303, 305–06.

56. *See* 20 U.S.C. § 7151; Hanson, *supra* note 46, at 303.

57. *See* Hanson, *supra* note 46, at 301, 309.

58. KAFKA, *supra* note 8, at 2–3; *see also* Hanson, *supra* note 46, at 332.

for the individuals they punish while carrying no discernible benefits to the larger community."[59] Ironically, these policies spread rapidly in school districts in which high percentages of students of color and low-income students are represented, despite the fact that many high-profile school shootings occurred in middle-class and predominantly white schools.[60]

As a result, rates of exclusionary discipline have skyrocketed, and racial disparities in the administration of school discipline have emerged in specific relief.[61] In fact, "zero tolerance has led to a severe widening of the racial *discipline gap* in American schooling, as the rate of school suspensions and expulsions for black and latino youth has risen disproportionately since the policies' implementation."[62] According to data compiled biannually in the Civil Rights Data Collection ("CRDC") by the Department of Education's Office for Civil Rights ("OCR") for the 2011–2012 school year—the most recent year that data is available at the time of this Article—African American students are suspended and expelled at three times the rate of their white peers.[63] Research also shows that these higher rates along racial lines cannot be explained by more frequent or severe misbehavior of African American or other impacted students.[64] Therefore, we must examine how discriminatory practices are embedded within educational systems to perpetuate the criminalization and exclusion of African American students.

B. *Surveillance*

"There are two primary institutions in society where those entering the premises give up most of their individual rights to those who administer

---

59. KAFKA, *supra* note 8, at 2.

60. *See* Hanson, *supra* note 46, at 333–34; *Arresting Developments*, THE ECONOMIST, Jan. 9, 2016, at 25. "There was a police officer at Columbine during its massacre. Moreover, such shootings tend to happen in schools dominated by middle-class whites, and according to researchers at the American Civil Liberties Union . . . cops are far more likely to be placed in schools dominated by poor non-whites." *Arresting Developments*, *supra*, at 25.

61. KAFKA, *supra* note 8, at 3.

62. *Id.* at 2–3.

63. OFFICE FOR CIVIL RIGHTS, U.S. DEP'T OF EDUC., DATA SNAPSHOT: SCHOOL DISCIPLINE 1 (2014), http://ocrdata.ed.gov/Downloads/CRDC-School-Discipline-Snapshot.pdf.

64. RUSSELL J. SKIBA & NATASHA T. WILLIAMS, ARE BLACK KIDS WORSE? MYTHS AND FACTS ABOUT RACIAL DIFFERENCES IN BEHAVIOR 4 (2014), http://www.indiana.edu/~atlantic/wp-content/uploads/2014/03/African-American-Differential-Behavior_031214.pdf.

the facility—jails and schools."[65] Increased surveillance in schools accompanied the spread of zero tolerance policies and has contributed to increasingly militarized school environments.[66] While available data is limited, research indicates the pervasiveness of these surveillance instruments, including cameras, metal detectors, and screening devices, in school districts with high proportions of low-income students or students of color.[67] Rather than the appearance of safe and nurturing learning environments, these schools "physically resemble prisons, with fortress-like layouts, metal detectors, video surveillance cameras, security check points, and drug-sniffing dogs."[68] Such oversight has fostered what Dr. Monique Morris describes as a culture of surveillance[69] in many schools in which students enter schools that are surveilled by cameras, pass through metal detectors, undergo body searches, are patrolled by school police in hallways, and are constantly subjected to oversight and scrutiny by authority.[70] This intrusion on student privacy is often viewed as a necessary safety measure to prevent school violence.[71]

However, others have noted the profoundly negative psychological and academic impacts of such environments.[72] In fact, Dr. David Stovall, a featured presenter at this symposium conference, uses the term *School-to-Prison Nexus*,[73] noting that schools so closely resemble prisons that schools are no longer a *pipeline* to prison, but a replication of prison-like conditions and environments in which many students—including disproportionate numbers of low-income students and students of color—are expected to

---

65. Prakash Nair, *School Safety — Problem or Goal?*, DESIGN SHARE (Nov. 2001), http://www.designshare.com/Research/Nair/School_Safety.htm.

66. Aaron Kupchik & Geoff K. Ward, Reproducing Social Inequality Through School Security: Effects of Race and Class on School Security Measures 3 (unpublished manuscript).

67. Katayoon Majd, *Students of the Mass Incarceration Nation*, 54 HOW. L.J. 343, 368–69 (2011); Kupchik & Ward, *supra* note 66, at 3. "SROs are most likely to be found in schools in urban neighborhoods with high poverty . . . ." Majd, *supra* at 368.

68. Majd, *supra* note 67, at 368–69.

69. *See* Monique W. Morris, *Black Girls and 20 Years of 'Zero Tolerance' Policies*, EBONY (Oct. 21, 2014), http://www.ebony.com/news-views/black-girls-and-20-years-of-zero-tolerance-policies-943#axzz42RtNSTK4.

70. *Id.*

71. *See id.*

72. *Id.*

73. Dr. David Omotoso Stovall, Associate Professor of Education Policy Studies & African American Studies, University of Illinois at Chicago, Unearthing the War at Home: Into the School and Prison Nexus and Towards a Future for Black Life at the Nova Law Review Symposium: Shutting Down the School to Prison Pipeline (Sep. 18, 2015).

learn.[74] This "contributes to a cultural understanding of both in and out-of-school discipline that accepts as common sense that children of color are future criminals who must be surveilled."[75] In fact, Dr. Morris recounts African American girls' experiences with such heightened surveillance at schools, noting

> [m]any [b]lack girls have described their processes of having to walk through metal detectors, to having their bags searched, and to learning under the surveillance of law enforcement in their schools as *stressful* and embarrassing conditions that make them not even want to go to school some days—especially if they are menstruating.[76]

Students who are so closely surveilled also begin to internalize projections of themselves as criminals.[77] In fact, "at a relatively young age students may have so many negative experiences in school that they soon begin to recognize that education is not working for them . . . . [T]hey are more likely to internalize . . . labels and act out in ways that match the expectations that have been set for them."[78] Stigmatized students labeled as *troublemakers* then live out a self-fulfilling prophecy,[79] often resulting in their exclusion from the school environment and disengagement from learning.[80]

Increased surveillance of students also fosters tense school climates wrought with distrust between students of color who are often also subjected to similar policing and racial profiling at home in their communities.[81] In fact, in these schools, education appears to become secondary to security and surveillance.

---

74. *Id.*
75. Keisch & Scott, *supra* note 22, at 22.
76. Morris, *supra* note 69.
77. *See* Pedro A. Noguera, *Schools, Prisons, and Social Implications of Punishment: Rethinking Disciplinary Practices*, 42 THEORY INTO PRAC. 341, 343, 345 (2003).
78. *Id.* at 343 (citation omitted).
79. *Id.*
80. *Id.*
81. *See* Keisch & Scott, *supra* note 22, at 6, 22.

III. POLICING DISCIPLINE: THE EMERGENCE AND EXPANSION OF POLICE IN SCHOOLS

A. *School Safety and School Discipline: Blurring the Role of Police in Schools*

In addition to heightened surveillance in public schools, students of color and low-income students are impacted by increased police presence in their schools.[82] However, despite the best evidence demonstrating the harm of police presence in schools and the lack of conclusive evidence showing that police presence actually improves school safety,[83] the practice of school policing persists.[84] In fact, police presence in public schools has expanded over time since they first appeared in schools in the 1950s.[85] According to scholar Jason Nance, "[f]ewer than [one hundred] police officers were in schools when the practice began in the 1950s."[86] However, "they increased significantly throughout the 1980s and 1990s as tough-on-crime federal and state policies attempted to bring down juvenile crime rates around the country."[87] Today, the exact number of school resource officers ("SROs") in schools nationwide is difficult to determine with the Bureau of Justice Statistics' Law Enforcement Management and Administrative Statistics survey showing that the numbers of "SROs increased between 1997 . . . and 2003 before decreasing slightly in 2007."[88] Other reports estimate that "[s]ome 43% of all U.S. public schools—including 63% of middle and 64% of high schools—had such officers on their grounds during the 2013–2014 school year . . . . This includes more than [forty-six thousand] full-time and

82. *See Arresting Developments*, THE ECONOMIST, Jan. 9, 2016, at 25.

83. *See* POLICE IN SCHOOLS ARE NOT THE ANSWER TO THE NEWTOWN SHOOTING, *supra* note 6, at 3–7 (noting that "further research shows that excessive and inappropriate reliance on school-based law enforcement officers can actually promote disorder and distrust in schools").

84. *See* NATHAN JAMES & GAIL MCCALLION, CONG. RES. SERV., SCHOOL RESOURCE OFFICERS: LAW ENFORCEMENT OFFICERS IN SCHOOLS 4–5 (2013), https://www.fas.org/sgp/crs/misc/R43126.pdf; POLICE IN SCHOOLS ARE NOT THE ANSWER TO THE NEWTOWN SHOOTING, *supra* note 6, at 5.

85. *See* JAMES & MCCALLION, *supra* note 84, at 5; Josh Sanburn, *Do Cops in Schools Do More Harm Than Good?*, TIME (Oct. 29, 2015), http://www.time.com/4093517/south-carolina-school-police-ben-fields/.

86. Sanburn, *supra* note 85.

87. *Id.*

88. JAMES & MCCALLION, *supra* note 84, at 4–5.

[thirty-six thousand] part-time officers."[89] The National Association of School Resource Officers, or NASRO, estimates that SROs number between fourteen thousand and twenty thousand nationwide.[90] According to another survey, "43[%] of public schools employ security staff, including [SROs], while 28[%] have 'sworn law enforcement officers routinely carrying a firearm.'"[91]

In fact, many schools now heavily rely on law enforcement to handle routine discipline matters.[92] School police have held varying roles in schools; they are sometimes perceived as mentors and as community liaisons,[93] and other times, they are assigned hybrid roles as educators and law enforcers.[94] In fact, law enforcement officers were originally placed in schools to "'give young people the opportunity to interact with [police] officers in a positive way.'"[95] Their duties generally fall into the categories of: "(1) safety expert and law enforcer, (2) problem solver and liaison to community resources, and (3) educator."[96]

School police were originally employed as security to keep intruders out of school buildings and ensure the safety of school occupants,[97] but the role of law enforcer most characterizes the current role of police in schools.[98] In fact, over time, police in schools—often referred to as SROs—became involved in the handling of routine discipline matters previously reserved to the discretion and management of the classroom teachers and school administrators.[99] These increased interactions between youth and school

89. Greg Botelho & Ralph Ellis, *Police in Schools: Why Are They There?*, CNN, http://www.cnn.com/2015/10/27/us/south-carolina-school-resource-officers (last updated Oct. 30, 2015).

90. Sanburn, *supra* note 85.

91. Melinda D. Anderson, *When Schooling Meets Policing*, THE ATLANTIC (Sept. 21, 2015), http://www.theatlantic.com/education/archive/2015/09/when-schooling-meets-policing/406348.

92. *See, e.g., id.*; Botelho & Ellis, *supra* note 89.

93. JAMES & MCCALLION, *supra* note 84, at 2 (noting "[i]t has been argued that SROs are a new type of public servant; a hybrid educational, correctional, and law enforcement officer").

94. *Id.*

95. Anderson, *supra* note 91 (alteration in original).

96. JAMES & MCCALLION, *supra* note 84, at 2; *see also* Bethany J. Peak, *Militarization of School Police: One Route on the School-to-Prison Pipeline*, 68 ARK. L. REV. 195, 208 (2015) ("Police first entered the nation's public schools in Flint, Michigan during the 1950s.").

97. *See* JAMES & MCCALLION, *supra* note 84, at 2, 23.

98. *See id.* at 4; Anderson, *supra* note 91.

99. *See* Anderson, *supra* note 91.

police have resulted in escalated responses to relatively minor discipline infractions and more tense school climates.[100]

At some point in the evolution of the role of police in schools, there was also a paradigm shift in thinking about discipline—discipline transitioned from being contextualized within education as a teaching tool, *i.e. teachable moments*—and became a mechanism to push students outside of the general classroom.[101] There is little doubt, the *test and punish* culture of No Child Left Behind, the reauthorization of the Elementary and Secondary Education Act ("ESEA") that was enacted in 2002, contributed to this *high-stakes* atmosphere where teachers and administrators feared that their jobs, salary, and even the viability of their school's existence was predicated on student achievement and performance.[102] Therefore, *trouble* students were no longer educators' or school administrators' *problems* but *problems* to be handled by law enforcement or within the juvenile justice system.[103] The idea of pushing *problem* students out of the general classroom to foster learning for the remaining students has little credence and discounts the importance of student engagement and classroom management. In addition, and most concerning, this process of *sorting* out *bad apples* supports the idea that some students "must be deemed expendable so that others can be saved."[104] Ironically, in an evaluation of such a *sorting* process, one scholar found that "while [teachers] appreciated the absence of the troublemakers, new students had emerged to take their place."[105] In fact, the best way to avoid behavioral problems and disruptions, as observed in the study, was to keep "students focused on learning and intellectually engaged."[106]

Unfortunately, the insertion of law enforcement in schools has shifted the focus away from fostering intellectually stimulating and engaging learning environments or providing needed support staff—like school social workers or counselors, to help students who exhibit disruptive behaviors—to

---

100. *See id.*

101. *See* Kupchik & Ward, *supra* note 66, at 3, 10–11; JAMES & MCCALLION, *supra* note 84, at 21.

102. No Child Left Behind Act of 2001, Pub. L. No. 107-110, § 101, 115 Stat. 1425, 1439–40 (2002); Klima, *supra* note 7, at 20–21. This reauthorization of ESEA emphasized student achievement on standardized assessments and the consequences for low-performing schools included sanctions such as possible school closing or the firing of school staff, as well as the option of linking teacher evaluations to student performance. *See* No Child Left Behind Act § 101; Klima, *supra* note 7, at 5–7.

103. *See* Sneed, *supra* note 3.

104. Noguera, *supra* note 77, at 346.

105. *Id.*

106. *Id.* at 347.

instead criminalizing minor misbehavior and setting students on a path to early involvement with the criminal justice system and compromised life and educational outcomes.[107]

In fact, schools with strong police presence have not been found to foster feelings of safety among students but quite the opposite; "research [has] show[n] that excessive and inappropriate reliance on school-based law enforcement officers can actually promote disorder and distrust . . . [and] this trend has led to increased student anxiety, and . . . to increasing numbers of students ending up in prison instead of on a college or career path."[108] These schools become receptacles where students are funneled into the juvenile justice systems, instead of places where student achievement and learning is fostered.[109] In fact,

> [i]ncreasing police presence in schools is simply not the answer. When school officials implement policies that create prison-like atmospheres in schools, they provide false hope and miss crucial opportunities to promote a safe and healthy environment. . . . [D]espite investing in heavy police presence in our schools in the last decade, there is no clear positive correlation between police in schools and student safety.[110]

And sadly, "[i]n any educational setting where children are regarded as academically deficient, and where the adults view large numbers of them as potentially bad or even dangerous, the fixation on control tends to override all other educational objectives and concerns."[111]

Further, the "recruitment and training of these officers [is] largely overseen by conventional police departments."[112] This training does not include instruction about youth development or interaction with youth.[113]

---

107. *See* JAMES & MCCALLION, *supra* note 84, at 21–22, 26 (noting that schools with SROs may also be "more likely to report non-serious violent crimes . . . to the police than schools [lacking] SROs"); POLICE IN SCHOOLS ARE NOT THE ANSWER TO THE NEWTOWN SHOOTING, *supra* note 6, at 7.

108. POLICE IN SCHOOLS ARE NOT THE ANSWER TO THE NEWTOWN SHOOTING, *supra* note 6, at 7.

109. *See id.* at 7–8.

110. *Id.* at 6–7.

111. Noguera, *supra* note 77, at 345.

112. Anderson, *supra* note 91.

113. *See* POLICE IN SCHOOLS ARE NOT THE ANSWER TO THE NEWTOWN SHOOTING, *supra* note 6, at 12. "Because police are not trained in fields such as education and developmental psychology, decisions such as whether to arrest a student rely on criteria which do not include the full range of options that would be provided if school officials responded." THE SENTENCING PROJECT, THE FACTS ABOUT DANGERS OF ADDED POLICE IN SCHOOLS, http://sentencingproject.org/doc/publications/jj_Police%20in%20Schools%20Fact%20Sheet.p

This lack of training is evidenced in incidents of excessive use of force and the escalation and intensification of routine discipline matters between school police and students of color in schools.[114] Routine behavioral issues that in the past would have been swiftly resolved by classroom teachers are now escalating into violent confrontations.[115] Teachers who are untrained on classroom management and unable to handle discipline matters also contribute to high rates of student referral to law enforcement.[116] Combined with cultural bias, both implicit and explicit, the result is the disproportionate targeting of students of color for referral to law enforcement.[117]

A. *Excessive Use of Force in Schools: When Discriminatory Discipline and Policing Collide*

Violent interactions between students of color and school police occur so frequently—and are often caught on cell phone video in real time—it is inaccurate to categorize these interactions as *rare* occurrences or *one-offs*. In San Bernardino, California, Josue "Josh" Muniz alleges that he was grabbed by the throat, pepper sprayed, and beaten by a school police officer for hugging his girlfriend after the officer asked Muniz and his girlfriend to separate.[118] According to a report, the San Bernardino City Unified School District, which has its own police department with twenty-eight sworn officers, made more than thirty thousand arrests of minors between 2005 and 2014.[119] Further, "[t]he bulk of the minors arrested or referred to school police represent some of the most academically vulnerable demographics in the state: low-income [l]atino and black kids, as well as kids with disabilities, in disproportionate numbers."[120] In Baltimore, Maryland, similar targeting of students of color, specifically African

---

df (last visited Mar. 31, 2016) (citing research finding "'no evidence suggest[s] that [SROs] or other sworn law-enforcement officers contribute to school safety'").

114. THE SENTENCING PROJECT, *supra* note 113; *see also Arresting Developments*, *supra* note 60, at 25.

115. *See Arresting Developments*, *supra* note 60, at 25.

116. *See id.* "The eagerness of weak, or ill-equipped, teachers to outsource classroom discipline to the cops is another part of the problem." *Id.*

117. *See* THE SENTENCING PROJECT, *supra* note 113.

118. Susan Ferriss, *Criminalizing Kids: An Epidemic of Questionable Arrests by School Police*, CTR. FOR PUB. INTEGRITY (Dec. 10, 2015, 5:01 AM), http://www.publicintegrity.org/2015/12/10/18944/epidemic-questionable-arrests-school-police [hereinafter *An Epidemic of Questionable Arrests*].

119. *Id.*

120. *Id.*

American students, by school police is prevalent.[121] A criminal investigation has been launched following the release of cell phone video showing a school police officer kicking and slapping a student at REACH Partnership School in Clifton Park.[122] A public defender interviewed about the incident called the video "a vivid example of the criminalization of children and of treating misbehavior like crime."[123] The NAACP Legal Defense and Educational Fund, Inc. requested an investigation by the Department of Justice ("DOJ") into policing practices by the Baltimore Police Department to include examination of the city school police department.[124] Other local advocates also called for more transparency about school policing practices.[125] The litany of similar incidents of abuse by school police is lengthy, including: a police officer arrested and charged with child abuse after allegedly slamming to the ground and twisting the arm of a thirteen-year-old student in Florida;[126] a finding of unconstitutional use of force by school police in Birmingham, Alabama, for pepper-spraying children for minor offenses, including pepper-spraying a pregnant student for crying in the hallway;[127] and in Wake County, North Carolina, a complaint filed by several civil rights organizations detailing excessive targeting of African American students by school police, including arresting students for a water balloon fight.[128] The impact of such punitive police action is especially

---

121. Liz Bowie & Kevin Rector, *Criminal Investigation Launched After Video Shows School Police Officer Slapping Young Man*, BALT. SUN (Mar. 3, 2016, 7:32 AM), http://www.baltimoresun.com/news/maryland/education/blog/bs-md-ci-school-slapping-video-20160301-story.html.

122. *Id.*

123. *Id.*

124. *Id.*

125. *Id.*

126. Emma Brown, *Police in Schools: Keeping Kids Safe, or Arresting Them for No Good Reason?*, WASH. POST (Nov. 9, 2015), https://www.washingtonpost.com/local/education/police-in-schools-keeping-kids-safe-or-arresting-them-for-no-good-reason/2015/11/08/937ddfd0-816c-11e5-9afb-0c971f713d0c_story.html.

127. *Id.*

128. Susan Ferriss, *Criminalizing Kids: North Carolina Complaint Alleges Excessive Force by Police in Schools*, CTR. FOR PUB. INTEGRITY (Jan. 24, 2014, 6:00 AM), http://www.publicintegrity.org/2014/01/24/14158/north-carolina-complaint-alleges-excessive-force-police-schools [hereinafter *North Carolina Complaint Alleges Excessive Force*].

> [A] federal civil rights complaint filed in North Carolina this week alleges that school police have *violently tackled* students, pepper-sprayed teens and handcuffed, interrogated and arrested students on baseless accusations without informing them of their rights or calling parents. The complaint . . . recounts multiple incidents of alleged abusive police behavior, most of them involving African American students.

Id.; *see also* Mike Meno, *Criminalization of Students in the Wake County Public School System Detailed in Complaint to Justice Department*, ACLU N.C. (Jan. 23, 2014),

detrimental in places like North Carolina—which treats all sixteen and seventeen-year-olds as adults; in such jurisdictions,[129] the criminal repercussion for students are significant.[130]

These recent incidents also demonstrate excessive use of force by school police not only against young male students of color but also against African American girls.[131] For instance, an incident caught on cell phone video at Spring Valley High School in South Carolina documented the violent assault and arrest of a young female student by a school police officer—nicknamed "Officer Slam" by the students for his violent tactics[132]—who was later fired for his conduct.[133] It is in this climate that according to a recent report linked to the National Juvenile Justice Network in 2013, African American girls, who are the fastest growing population in the juvenile justice system, were 20% more likely to be detained than white girls.[134]

These interactions between students of color and school police result in early youth involvement with the justice system.[135] Students who are under increased surveillance and scrutiny by school police are more likely to be referred to or become involved with the juvenile justice system.[136] The

---

http://www.acluofnorthcarolina.org/blog/criminalization-of-students-in-the-wake-county-public-school-system-detailed-in-complaint-to-justice-department.html.

129. N.C. JUST. CTR., BAD NEWS: THE STATE OF SCHOOL POLICING IN THE WAKE COUNTY PUBLIC SCHOOL SYSTEM (WCPSS) (2014), http://www.ncjustice.org/sites/default/files/Fact%20Sheet%20on%20Wake%20School%20Policing.pdf. In North Carolina, "students age [sixteen] and older who are arrested at school or have a complaint filed against them for something that happened at school, even for minor misbehavior, are sent directly into the adult criminal system." *Id.*

130. *See id.*; Meno, *supra* note 128.

131. Brown, *supra* note 126; Hannah Levintova, *Girls Are the Fastest-Growing Group in the Juvenile Justice System*, MOTHER JONES (Oct. 1, 2015, 6:00 AM), http://www.motherjones.com/politics/2015/09/girls-make-ever-growing-proportion-kids-juvenile-justice-system; *North Carolina Complaint Alleges Excessive Force*, *supra* note 128.

132. Holly Yan & Mariano Castillo, *Attorney Defends Actions of Fired School Officer As 'Justified and Lawful'*, CNN, http://www.cnn.com/2015/10/28/us/south-carolina-school-arrest-videos (last updated Oct. 29, 2015).

133. *Id.*

134. FRANCINE T. SHERMAN & ANNIE BALCK, GENDER INJUSTICE: SYSTEM-LEVEL JUVENILE JUSTICE REFORMS FOR GIRLS 8 (2015), http://www.nwlc.org/sites/default/files/pdfs/ed_rp_gender_injustice.pdf; Levintova, *supra* note 131.

135. *See* POLICE IN SCHOOLS ARE NOT THE ANSWER TO THE NEWTOWN SHOOTING, *supra* note 6, at 7–8, 9.

136. Amanda Merkwae, *Schooling the Police: Race, Disability, and the Conduct of School Resource Officers*, 21 MICH. J. RACE & L. 147, 160, 168 (2015) (citing a study by Chongmin Na and Denise Gottfredson finding that "the presence of an SRO correlated with higher referral rates to law enforcement for weapon and drug offenses, along with more serious consequences for student offenders"). Also citing, a study by Matthew

disparities persist along racial lines; while African American students represented 16% of student enrollment in the 2011–2012 school year, they comprised 27% of students referred to law enforcement and 31% of students subjected to a school-based arrest.[137] Data shows that the majority of these arrests are for non-violent and minor offenses.[138] These referrals and arrests compromise students' academic and life outcomes—a first-time arrest doubles a student's likelihood of dropping out of school.[139]

The research about any attendant increases in school safety as the result of police presence in schools is inconclusive.[140] In fact, "the body of research on the effectiveness of SRO programs is noticeably limited, and the research that is available draws conflicting conclusions about whether SRO programs are effective at reducing school violence."[141] Further, "the research does not address whether SRO programs deter school shootings, one of the key reasons for renewed congressional interest in these programs."[142] Further, research shows that "[f]ar from making students feel safe, this trend has led to increased student anxiety and led to increasing numbers of students ending up in prison instead of on a college or career path."[143]

Contributing to the increasingly hostile hallways in public schools is the presence of military weapons.[144] The phenomena of military-grade weapons in public schools was exposed nationally following news footage of local police using military equipment, including tanks and tear gas on protestors in cities like Ferguson and Baltimore.[145] Investigation of data

---

Theriot finding that "the presence of an SRO at a school increased the rate of arrests per [one hundred] students for incidents of disorderly conduct by more than 100%, even when controlling for school poverty." *Id.* at 168.

137. OFFICE FOR CIVIL RIGHTS, U.S. DEP'T OF EDUC., DATA SNAPSHOT: SCHOOL DISCIPLINE 1 (2014), http://ocrdata.ed.gov/Downloads/CRDC-School-Discipline-Snapshot.pdf.

138. M. Alex Evans, *Schoolyard Cops and Robbers: Law Enforcement's Role in the School-to-Prison Pipeline*, 37 N.C. CENT. L. REV. 183, 185 (2015).

139. *See* Majd, *supra* note 67, at 378.

140. *See* JAMES & MCCALLION, *supra* note 84, at 9–11.

141. *Id.* at 26 (citing research finding no evidence suggesting that SROs or other sworn law-enforcement officers contribute to school safety).

142. *Id.* at 11.

143. POLICE IN SCHOOLS ARE NOT THE ANSWER TO THE NEWTOWN SHOOTING, *supra* note 6, at 7.

144. Letter from ACLU Tex. to Mark D. Harnitchek, Dir., Def. Logistics Agency (Sept. 15, 2004), http://www.naacpldf.org/files/case_issue/LDF-Texas%20Appleseed-1033%20Letter.pdf.

145. Jamelle Bouie, *The Militarization of the Police: It's Dangerous and Wrong to Treat Ferguson, Missouri, as a War Zone*, SLATE (Aug. 13, 2014, 1:15 PM), http://www.slate.com/articles/news_and_politics/politics/2014/08/police_in_ferguson_militar

revealed that police departments working within K-12 public schools were also receiving such military equipment, including weapons, for use in these schools.[146] Birthed during the *War on Drugs*, such military equipment has become commonplace, particularly in heavily policed low-income communities or communities of color.[147] These weapons are largely received through the Department of Defense's Surplus Military Equipment Program administered by the Defense Logistics Agency, known as the *1033 Program* for its reauthorizing statute.[148] Through the 1033 Program, police departments may request and receive surplus military equipment, including innocuous supplies like blankets and computers, but also *tactical* equipment, including military weapons like M16s.[149]

The NAACP Legal Defense and Educational Fund, Inc. and Texas Appleseed, along with over twenty other civil rights organizations, wrote a letter exposing the prevalence of these weapons in K-12 public schools and demanded that the federal government address the presence of these weapons in schools.[150] The letter outlined the harms of inserting military-grade weapons into school climates already rife with racial tension, distrust, and excessive use of force by police.[151]

The letter details the high-powered weaponry, including M16s and Mine-Resistant Ambush Protected ("MRAP") vehicles, received by police for use in K-12 schools.[152]

In response to the media outcry following release of the letter, some school districts returned some military equipment, including the return of an MRAP vehicle by the San Diego Unified School District.[153] However,

---

y_weapons_threaten_protesters.html. "Image after image shows officers clad in Kevlar vests, helmets, and camouflage, armed with pistols, shotguns, automatic rifles, and tear gas." *Id.*

146. *See LDF Supports Petition Requesting the President and Congress End Lending of Military Weapons to K-12 Public Schools*, NAACP LDF (Dec. 19, 2014), http://www.naacpldf.org/print/press-release/ldf-supports-petition-requesting-president-and-congress-end-lending-military-weapons-k.

147. *See* Bouie, *supra* note 145; Anderson, *supra* note 91.

148. *See* 10 U.S.C. § 2576a (2012); Letter from ACLU Tex., *supra* note 144 ("Pursuant to 10 U.S.C. § 2576a, [Excess personal property: Sale or donation for law enforcement activities], the Secretary of Defense is granted permanent authority to transfer defense material to federal and state agencies for use in law enforcement, particularly those associated with counter-drug and counter-terrorism activities.").

149. *See* Letter from ACLU Tex., *supra* note 144.

150. *Id.*

151. *Id.*

152. *Id.*

153. Tony Perry, *San Diego School District to Return Armored Military Vehicle* LA TIMES (Sept. 18, 2014, 9:07 PM), http://www.latimes.com/local/lanow/la-me-ln-san-diego-military-vehicle-20140918-story.html. "The district joins a list of agencies

despite requests,[154] the federal government has not provided a mechanism for eliminating the transfer of *all* weapons for use in K-12 schools and for the return of such equipment used by law enforcement in school districts.[155] In a step in the right direction, the President's Law Enforcement Equipment Working Group, pursuant to an Executive Order,[156] did recommend ending the transfer of weapons through the 1033 Program to stand-alone school police departments,[157] which comprise the small minority of law enforcement in schools—as the majority of police departments contract with school districts to place police in schools.[158] Advocates continue to call for executive or legislative action to completely ban the transfer of military weapons for use by school police in K-12 public schools.[159]

What is concerning, is that targeted federal funding has reinforced law enforcement in schools—thereby incentivizing law enforcement presence in schools. In fact, federal funding under the DOJ's Community-Oriented Policing Services ("COPS") program "awarded in excess of $750 million in grants to more than [three thousand] law enforcement agencies, resulting in more than [sixty-five hundred] newly hired SROs."[160] Following the tragic shooting at Sandy Hook Elementary in Newtown, Connecticut,[161] the DOJ announced nearly $45 million in funding for school resource officer

---

returning excess military equipment amid a national controversy over local law enforcement agencies using such equipment." *Id.*

154. *LDF Supports Petition Requesting the President and Congress End Lending of Military Weapons to K-12 Public Schools*, *supra* note 146; *Sign Our Petition to End 1033 Program's Lending of Weapons to Law Enforcement in K-12 Public Schools!*, DIGNITY IN SCHOOLS (Dec. 22, 2011), http://www.dignityinschools.org/blog/sign-our-online-petition-end-1033-programs-lending-weapons-law-enforcement-k-12-public-schools.

155. *See LDF Supports Petition Requesting the President and Congress End Lending of Military Weapons to K-12 Public Schools*, *supra* note 146; *Sign Our Petition to End 1033 Program's Lending of Weapons to Law Enforcement in K-12 Public Schools!*, *supra* note 154.

156. LAW ENF'T EQUIP. WORKING GRP., RECOMMENDATIONS PURSUANT TO EXECUTIVE ORDER 13688: FEDERAL SUPPORT FOR LOCAL LAW ENFORCEMENT EQUIPMENT ACQUISITION 7 (2015), https://www.whitehouse.gov/sites/default/files/docs/le_equipment_wg_final_report_final.pdf.

157. Molly Knefel, *What Obama's New Military-Equipment Rules Mean for K-12 School Police*, ROLLING STONE (May 29, 2015), http://www.rollingstone.com/politics/news/what-obamas-new-military-equipment-rules-mean-for-k-12-school-police-20150529.

158. *See id.*

159. *See* POLICE IN SCHOOLS ARE NOT THE ANSWER TO THE NEWTOWN SHOOTING, *supra* note 6, at 15.

160. Anderson, *supra* note 91.

161. *Sandy Hook Shooting: What Happened?*, CNN http://www.cnn.com/interactive/2012/12/us/sandy-hook-timeline (last visited Mar. 31, 2016).

positions nationwide.[162] For applicants seeking federal funding under the Fiscal Year 2015 COPS Hiring Program ("CHP"), additional consideration was given to applicants that indicated that the funding was being requested for officers to serve as SROs.[163] In fact, many of the police departments receiving CHP funds requested funding for school-based policing.[164] "The [President's Fiscal Year] 2017 Budget [Request for the COPS program] include[d] [an] increase of $62.5 million above the [Fiscal Year] 2016 enacted level for a total of [$97] million . . . ."[165] Specifically, the President's Budget includes a requested increase of $42 million over the Fiscal Year 2016 level for the CHP,[166] a primary funding source for the hiring of SROs.[167]

IV. DISMANTLING THE PIPELINE

A. *Understanding the Incentive: Profiting from the Pipeline*

Advocacy to not only end the 1033 Program but also to end the practice of policing in public schools continues as part of the efforts to avert the devastating impacts of such practices on the life outcomes of targeted students of color. For instance, "[t]he Centers for Disease Control [and] Prevention found that out-of-school youth—[pushed out due to suspensions, expulsions, or arrests]—are more likely to be retained a grade, drop out of

---

162. Sneed, *supra* note 3. "Friday afternoon the Justice Department announced about $45 million in funding intended to create 356 new school resource officer positions under the federal COPS grants." Evan Perez & Bryan Koenig, *Obama Admin Funding Cops in Schools*, CNN (Sept. 27, 2013, 4:31 PM), http://politicalticker.blogs.cnn.com/2013/09/27/obama-admin-borrows-a-page-from-the-nra-funding-cops-in-schools.

163. *COPS Hiring Program*, U.S. DEP'T OF JUST., http://www.cops.usdoj.gov/default.asp?Item=2367 (last visited March 31, 2016). "[A]dditional consideration was also given to applicants who indicated that the officer position[s] requested will be deployed as a [SRO]." *Id.*

164. *2015 COPS Hiring Program (CHP) Award List by Problem Area*, U.S. DEP'T JUST., http://www.cops.usdoj.gov/pdf/2015AwardDocs/chp/CHP_Award_List_by_Problem_Areas.pdf (last visited Mar. 24, 2016).

165. U.S. DEP'T OF JUSTICE, BUILDING COMMUNITY TRUST 1 (2016), http://www.justice.gov/jmd/file/820796/download.

166. *Id.* at 1, 4.

167. JAMES & MCCALLION, *supra* note 84, at 1, 7. "Traditionally, COPS grants have provided 'seed' money for local law enforcement agencies to hire new officers, but it is the responsibility of the recipient agency to retain the officer(s) after the grant expires. Since smaller law enforcement agencies tend to have smaller operating budgets and smaller sworn forces, retaining even one or two additional officers after a grant expire[d] might pose a significant financial burden." *Id.* at 21.

school, become teen parents, and engage in delinquent behavior."[168] Pushed out students who end up in juvenile facilities are exposed to notoriously subpar instruction in juvenile facilities—when they do receive instruction—and find it impossible to re-enroll in school and to stay on track to graduate.[169] Therefore, students who are arrested or referred to law enforcement are most likely to suffer the residual consequences and stigma of incarceration, including reduced employment opportunities, compromised educational outcomes, likelihood of recidivism, and alienation from society among other consequences.[170]

Therefore, we must question *why*—with all of the data, research, and anecdotal evidence available about the harms of overly punitive discipline measures and increased police presence and militarization schools—do stakeholders, like the federal government, school boards and school leaders, special interest groups, and others, continue to insist upon placing police officers in so many public schools?[171] The answer lies in the incentives—inherent in both profit-making and the perpetuation of social norms and stratifications—from school policing. The practice of school policing readily allows individuals who are deemed *unteachable* or unworthy of education to be removed from the education environment.[172] School policing and the criminalization of youth rely upon a theory of punishment that justifies mass incarceration of those considered socially irredeemable, including low-income individuals, African Americans and latinos, and individuals with

---

168. Matt Cregor & Damon Hewitt, *Dismantling the School-to-Prison Pipeline: A Survey from the Field*, POVERTY & RACE, Jan.–Feb. 2011, at 5, 5; Mitchell, *supra* note 53, at 285.

169. *See* Majd, *supra* note 67, at 378–79; Mitchell, *supra* note 53, at 284. "The quality of education that youth receive while incarcerated is typically abysmal, and approximately 66% of youth who leave juvenile justice facilities end up dropping out of school." Majd, *supra* note 67, at 379.

170. *See id.* at 378; Mitchell, *supra* note 53, at 284–85, 288–89. "The stigma and ostracism that the students encounter is no different than their adult counterparts who face numerous obstacles under the framework of collateral consequences that attach upon a felony conviction." Mitchell, *supra* note 53, at 285.

171. *See* KAFKA, *supra* note 8, at 3; Noguera, *supra* note 77, at 348; Sanburn, *supra* note 85. For instance,

> [s]chools with higher suspension rates continue to spend more time addressing disciplinary problems than other schools, and tend to have lower student achievement, even after taking students' demographic factors such as race and socioeconomic status into account. . . . [T]he enforcement of strict and punitive disciplinary measures do not appear to have any positive effects on the general learning conditions of a school.

KAFKA, *supra* note 8, at 3.

172. *See* Noguera, *supra* note 77, at 342, 344–46.

disabilities—they populate the school-to-prison pipeline and ensure the continued operation and profitability of the prison-industrial complex.[173]

Yes, many administrators know that police presence increases the likelihood of youth involvement with the criminal justice system and that—not school safety—is the likely goal. While the United States possesses less than 5% of the world's population, it incarcerates about a quarter of the world's prisoners.[174] In fact, it is not coincidental that states that spend less per-pupil on education also spend more on incarceration.[175] For example, Louisiana, which imprisons more of its residents per capita than any other state, spent $23,455 per prisoner, versus $10,701 per pupil in 2012–2013.[176] That same year, Louisiana arrested 16,582 of its children.[177] According to reports, Wisconsin spends about $10,000 per student a year, a third of what it spends annually to house an inmate—about $30,000.[178] Another report found that Wisconsin spent 12% higher than the national average on its prisons, $1.5 billion.[179] Wisconsin also incarcerates African American men at a higher rate than any other state—one out of every eight African American men in Wisconsin is incarcerated—perpetuating

---

173. *See id.*; Eric Schlosser, *The Prison-Industrial Complex*, ATLANTIC MONTHLY, Dec. 1998, at 51, 54. "[T]he United States has developed a prison-industrial complex—a set of bureaucratic, political, and economic interests that encourage increased spending on imprisonment, regardless of the actual need. . . . It is a confluence of special interests that has given prison construction in the United States . . . unstoppable momentum." Schlosser, *supra*, at 54.

174. Bernie Sanders, *We Must End For-Profit Prisons*, HUFFPOST POL. (Sept. 22, 2015, 7:21 PM), http://www.huffingtonpost.com/bernie-sanders/we-must-end-for-profit-pr_b_8180124.html.

175. *See* Pauleen Le, *Wisconsin Prison System Costs Three Times More Than Education*, NEWS8000.COM (May 18, 2013, 6:05 PM), http://www.news8000.com/news/wisconsin-prison-system-costs-three-times-more-than-education/20205282.

176. THE FRIEDMAN FOUND. FOR EDUC. CHOICE, THE ABCS OF SCHOOL CHOICE: THE COMPREHENSIVE GUIDE TO EVERY PRIVATE SCHOOL CHOICE PROGRAM IN AMERICA 39 (2013), http://www.edchoice.org/wp-content/uploads/2015/09/The-ABCs-of-School-Choice-2013.pdf; Terry Gross, *How Louisiana Became the World's 'Prison Capital'*, NPR (June 5, 2012).

177. CHILDREN'S WELFARE LEAGUE OF AM., LOUISIANA'S CHILDREN 3 (2011), http://www.cwla.org/wp-content/uploads/2014/06/Louisiana.pdf.

178. Le, *supra* note 175.

179. Gilman Halsted, *Report Finds Wisconsin Spends More on Prisons than Neighboring States*, WIS. PUB. RADIO (Nov. 20, 2015, 7:35 PM), http://www.wpr.org/report-finds-wisconsin-spends-more-prisons-neighboring-states.

disparities along racial lines.[180] In many states, like Louisiana and Wisconsin, prisons are major employers and local economic engines.[181]

The prison-industrial complex also works with federal and state lawmakers to maintain their profitable enterprise and ensure a steady stream of individuals to occupy prisons.[182] The two largest for-profit prison corporations, GEO and Corrections Corporation of America, reportedly collect a combined $3.3 billion in annual revenue.[183] Many for-profit prisons operate on contracts that require them to maintain occupancy rates—some up to 90%[184]—necessitating a steady stream of individuals to be funneled into the system.[185] The influx of youth from our nation's public schools provide a dependable supply of individuals to incarcerate, and who once incarcerated, will likely return and remain involved within the system, thereby fueling the school-to-prison pipeline and ensuring the profitability of prisons.[186] For-profit youth correctional facilities, like those operated by Youth Services International, featured in an investigation, also profit from the school-to-prison pipeline.[187] Youth in such facilities reportedly experience high rates of abuse, including high rates of sexual abuse.[188] In fact, "[t]he prison-industrial complex is not only a set of interest groups and institutions. It is also a state of mind."[189] It is a state of mind that justifies discriminatory discipline practices that are the primary means by which youth of color are incarcerated at high rates.[190] Any legislative proposals that would threaten

---

180. WIS. BUDGET PROJECT, PRISON PRICE TAG: THE HIGH COST OF WISCONSIN'S CORRECTIONS POLICIES 1, 3 (2015), http://www.wisconsinbudgetproject.org/wp-content/uploads/2015/11/Prison-Price-Tag.pdf.

181. *See* CHILDREN'S WELFARE LEAGUE OF AM., *supra* note 177, at 3; Halsted, *supra* note 179.

182. *See* Michael Cohen, *How For-Profit Prisons Have Become the Biggest Lobby No One Is Talking About*, WASH. POST (Apr. 28, 2015), http://www.washingtonpost.com/posteverything/wp/2015/04/28/how-for-profit-prisons-have-become-the-biggest-lobby-no-one-is-talking-about/.

183. *Id.*

184. *Id.*

185. *See id.*

186. Lucy Madison, *Who's Profiting off the School-to-Prison Pipeline*, THE WEEK (Oct. 25, 2013), http://theweek.com/articles/458118/whos-profiting-schooltoprison-pipeline; *see also* CHILDREN'S WELFARE LEAGUE OF AM., *supra* note 177, at 3; Cohen, *supra* note 182.

187. Madison, *supra* note 186.

188. *Id.*

189. Schlosser, *supra* note 173, at 54–55.

190. *See id.*; Cindy Long, *Stemming the Flow of the School-to-Prison Pipeline*, NEATODAY (May 15, 2013, 8:18 AM), http://www.neatoday.org/2013/05/15/stemming-the-flow-of-the-school-to-prison-pipeline-2 ("There is no incentive for the carceral state to find solutions to incarceration and the challenges the poor and oppressed face.").

this status quo are also opposed by the powerful private prison industry lobby, which opposes legislation that jeopardizes its supply of prisoners, including legislative proposals that would amend mandatory minimum policies or end punitive sanctions for non-violent offenses.[191] As a result, "the nation is, in effect, commoditizing human bodies for an industry in militant pursuit of profit."[192]

B. *Alternatives to Incarceration: Promising Practices*

Legal remedies to address discriminatory discipline policies are few. In fact, students impacted by discriminatory discipline practices in schools have found little legal redress.[193] The right to be free from discrimination on the basis of race, color, or national origin is protected by the Equal Protection Clause of the Fourteenth Amendment and explicitly guaranteed by Title VI of the Civil Rights Act of 1964—section 601 of Title VI prohibits discrimination based on race, color, or national origin in covered programs and activities.[194] Section 602 allows the federal government to enforce this provision through regulations.[195] A student challenging discriminatory discipline based on race could do so by showing that she was subjected to different treatment solely based on her race, requiring a showing of intentional discrimination, which is essentially impossible to prove.[196] A student could also challenge a discriminatory discipline practice under the disparate impact theory by showing that a disciplinary policy that appears neutral on its face and that is administered in an even-handed manner, is disproportionately impacting students of a protected class, such as African American students.[197] However, the right to bring a private Title VI disparate impact claim was foreclosed by the case of *Alexander v. Sandoval*,[198] which held that only the administering federal regulatory

191. *See* Cohen, *supra* note 182.
192. *Id.*
193. *See* Cohen, *supra* note 182; Long, *supra* note 190.
194. U.S. CONST. art. XIV, § 1; Civil Rights Act of 1964, Pub. L. No. 88-352, § 601, 78 Stat. 241, 252 (1964).
195. Civil Rights Act § 602.
196. *See* Elston v. Talladega Cty. Bd. of Educ., 997 F.2d 1394, 1406 (11th Cir. 1993). A plaintiff would have to show that a "challenged action was motivated by an intent to discriminate," and plaintiffs may present evidence of intent that is direct or circumstantial. *Id.*
197. U.S. DEP'T OF JUSTICE, TITLE VI LEGAL MANUAL 48 (2001), https://www.justice.gov/sites/default/files/crt/legacy/2011/06/23/vimanual.pdf. "The second primary theory for proving a Title VI violation is based on Title VI regulations and is known as the discriminatory 'effects' or disparate impact theory." *Id.* at 47.
198. 532 U.S. 275 (2001). Martha Sandoval challenged Alabama's English-only driver's license exam as discriminatory use of federal funds by recipient Alabama, and

agency could bring a disparate impact claim under Title VI of the Civil Rights Act of 1964.[199] Therefore, an individual plaintiff cannot file a disparate impact claim under Title VI.[200] To bring a discriminatory school discipline complaint, an individual must file a Title VI complaint with the Department of Education's OCR, the regulating agency.[201] However, OCR is under-staffed, under-funded, and facing record numbers of Title VI complaints.[202] In fact, a 2015 report noted that, "[a]ttorneys and investigators in the civil rights office have seen their workloads double since 2007, and the number of unresolved cases mushroom . . . ."[203] The amount of complaints received by OCR increased from 7841 complaints in 2011, to 9950 in 2015[204]—with complaints pending for longer than 180 days, doubling over 5 years from 315 to 630 in 2015.[205] While complaints have increased, funding to OCR has not kept pace with the increasing caseload, despite requests to Congress to increase funding to the agency to increase staffing capacity to help resolve pending complaints.[206] In addition, despite historic guidance issued in 2014 by the Departments of Education and Justice on the Non-Discriminatory Administration of School Discipline—putting school districts on notice of their responsibility to administer school discipline non-discriminatorily under federal civil rights law—discriminatory discipline in schools is still a significant problem with limited redress being found through the OCR complaint process.[207]

With limited legal redress available, impacted students must explore extra-legal remedies to address discriminatory discipline practices. For instance, some federal legislative proposals hold the hope of encouraging

---

the United States. *Id.* at 279. The Supreme Court held that there is no private right of action to enforce disparate impact regulations promulgated under Title VI. *Id.* at 293.

199. *Id.*

200. *Id.* at 291–93.

201. *See* LHAMON & SAMUELS, *supra* note 5, at 2, 7, 8.

202. Michael Gagne, *Civil Rights Key Cog in U.S. Education Department*, SOUTH COAST TODAY (Feb. 6, 2015, 2:01 AM), http://www.southcoasttoday.com/article/20150206/news/150209655.

203. Lyndsey Layton, *Civil Rights Complaints to U.S. Department of Education Reach a Record High*, WASH. POST (Mar. 18, 2015), https://www.washingtonpost.com/news/local/wp/2015/03/18/civil-rights-complaints-to-u-s-department-of-education-reach-a-record-high/.

204. Gagne, *supra* note 202.

205. Layton, *supra* note 203.

206. *See id.*; Gagne, *supra* note 202.

207. *See* CATHERINE E. LHAMON & JOCELYN SAMUELS, U.S. DEP'T OF JUSTICE & U.S. DEP'T OF EDUC., DEAR COLLEAGUE LETTER: NONDISCRIMINATORY ADMINISTRATION OF SCHOOL DISCIPLINE 3 (2014), http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201401-title-vi.pdf.

states and districts to implement alternatives to overly punitive and discriminatory discipline practices.[208] Among these possible legislative remedies may be the recently enacted ESSA,[209] the current iteration of the ESEA.[210] Not often contextualized as a civil rights law, ESEA, enacted one year after the Civil Rights Act of 1964 and eleven years after *Brown*, is very much part of the civil rights era statutes that answered Massive Resistance by creating a federal mechanism to ensure state compliance with federal civil rights law—the threat of loss of federal education funds.[211] Although the majority of education funding is local, many districts rely upon federal funds, particularly Title I funds, to help serve the highest-need school districts.[212] Therefore, statutes like ESSA do have influence over state action.

Several provisions in ESSA promote positive and inclusive school climates. The most significant is that the law allows for states to choose among indicators for measuring overall school climate and student success, including an optional indicator for middle and high schools of school climate and safety.[213] The inclusion of school climate and safety as a measure of overall school climate and student success recognizes that, in order for students to succeed, school climates must be safe and inclusive.[214] However, ESSA does not specify how to define or measure school climate and safety—and how it is defined in implementing regulations expected from the Department of Education will be critical in ensuring that the indicator is not interpreted in ways that undermine student outcomes—i.e., through

---

208. Ending Corporal Punishment in Schools Act of 2015, H.R. 2268, 114th Cong. § 1 (2015); Supportive School Climate Act of 2015, H.R. 1435, 114th Cong. § 2 (2015); Safe Schools Improvement Act of 2015, S. 311, 114th Cong. § 2 (2015).

209. *See generally* Every Student Succeeds Act, S. 1177, 114th Cong., (2015) (signed into law by President Barack Obama on Dec. 10, 2015).

210. *Id.* § 3; *see also* 20 U.S.C. § 6301 (2012).

211. *See* 20 U.S.C. § 6301 (2012); Brown v. Bd. of Educ. (*Brown I*), 347 U.S. 483, 483 (1954); *Massive Resistance*, VA. HIST. SOC'Y, http://www.vahistorical.org/collections-and-resources/virginia-history-explorer/civil-rights-movement-virginia/massive (last visited Mar. 31, 2016).

212. S. 1177, § 9211(I).

213. *Id.* § 1111(c). Other indicators include: 1. Performance on annual assessments; for high school: 2. Four-year graduation rate; 3. Progress of English proficiency; and for elementary and middle schools; 4. Optional indicator of school quality or student success that may include: "[a.] student engagement, [b.] educator engagement, [c.] student access to and completion of advanced coursework, [d.] post-secondary readiness, [e.] school climate and safety, and [f.] [another] indicator that the State chooses. . . ." *Id.* § 1111(c)(4)(B)(II).

214. *See id.* § 1111(c)(4)(B).

expansion of police in schools or increased school surveillance.[215] If framed through the effective implementation of alternatives, such as restorative practices or training for educators on classroom management or implicit bias, then the indicator could help schools gauge their success in fostering positive school climates. Schools could also evaluate the effectiveness of their programs by conducting student, staff, and parent surveys that honor privacy but reveal opinions about school climate and whether students and educators feel safe and respected.

ESSA also allows states to target federal funds under Safe and Healthy Students Activities for alternative discipline practices,[216] including funds for school-based mental health programs, school-based services that include evidence-based trauma-informed practices, anti-bullying and harassment programs, professional development training, and programming in crisis management and conflict resolution, among other options.[217] This funding would allow school districts to implement evidence-based discipline alternative programs and provide school staff with ongoing professional development opportunities.[218] In addition, the law funds SWPBIS and evidence-based programs to reduce reliance on exclusionary discipline practices.[219]

The law also includes reporting provisions that will help improve transparency about school discipline in states and districts. For example, in developing comprehensive needs assessments to design interventions for low-performing schools, the law requires that local educational agencies ("LEAs"), before receiving funding from the state, must examine areas for improvement, including "school conditions for student learning in order to create a healthy and safe school environment."[220] State plans must also report how the state will work with LEAs to reduce incidents of bullying and harassment, reliance on exclusionary discipline practices, and "the use of aversive behavioral interventions that compromise student health and safety."[221] State plans must also report school discipline data—the same data reported for the OCR CRDC—disaggregated by student sub-group on annual state report cards.[222]

---

215. *See id.* §§ 1005, 1111; *Every Student Succeeds Act (ESSA)*, *supra* note 10; Sanburn, *supra* note 85.
216. *See* S. 1177, §§ 4101, 4103, 4104.
217. *Id.* § 4101.
218. *See id.* §§ 4101, 4108(1)–(5).
219. *Id.* § 4108(5)(G).
220. *Id.* § 4106(d)(1)(B).
221. S. 1177, § 1005(g)(1)(C).
222. *See id.* § 1005(b)(3)(H)(v)(II); OFFICE FOR CIVIL RIGHTS, *supra* note 63, at 20.

The law also includes provisions to promote parent and family engagement and requires states to establish procedures to re-enroll students who become involved in the criminal justice system back into the school system—all efforts that could positively impact school climate and student outcomes.[223]

There are also some federal legislative proposals pending in the 114th Congress that could help address school climate and discipline.[224] Among the proposals is the Supportive School Climate Act, sponsored by Senator Chris Murphy in the Senate and Representative Danny Davis in the House[225] that would allow states to use portions of Title I ESEA funds to implement SWPBIS.[226] Components of this proposal were incorporated into ESSA.[227] The Safe Schools Improvement Act,[228] sponsored by Senator Robert Casey and Representative Linda Sanchez, would have required states to direct LEAs to establish policies to prevent and prohibit bullying and harassment and to notify parents, students, and educators of prohibited conduct.[229] This proposal was also considered during the ESEA reauthorization process in the Senate, but disagreement about how to define bullying and harassment and concerns about imposing directives on states prevented incorporation of this proposal into the final ESSA.[230] Representative Alcee Hastings also introduced a bill to impose a federal ban on corporal punishment, a practice still permitted in nineteen states.[231] While some aspects of these and other federal proposals were incorporated into ESSA, advocates continue to push federal lawmakers to introduce and pass strong federal legislation to improve school climates and address discipline disparities.

---

223. S. 1177, § 1401(3)(A)(ii)(VI)(i).

224. *See generally* Safe Schools Improvement Act of 2015, H.R. 2902, 114th Cong. (2015); Supportive School Climate Act of 2015, S. 811, 114th Cong. (2015); Supportive School Climate Act of 2015, H.R. 1435, 114th Cong. (2015); Safe Schools Improvement Act of 2015, S. 311, 114th Cong. (2015).

225. S. 811; H.R. 1435.

226. S. 811, § 2(a)(1); H.R. 1435, § 2(a)(1).

227. *See generally* S. 1177, §§ 1002, 1005, 4101.

228. H.R. 2902; S. 311.

229. H.R. 2902, § 3(a); S. 311, § 3(a).

230. *See* Lauren Camera, *Senate Ed. Committee Spars Over Bullying Prevention in ESEA Rewrite; Nears Finish*, EDUC. WEEK (Apr. 15, 2015, 8:12 PM), http://blogs.edweek.org/edweek/campaign-k-12/2015/04/senate_ed_committee_spars_over.html. "Essentially, Alexander's amendment would *let* states protect students from bullying while Casey's [amendment] would *require* states to protect students from bullying. The two amendments elicited the most lengthy and heated debate thus far in the markup." *Id.*

231. Ending Corporal Punishment in Schools Act of 2015, H.R. 2268, 114th Cong. §§ 2(6), 3(1).

Perhaps the greatest hope of ending the practice of policing in schools lies with grassroots advocacy organizations, parents, and students who have been tirelessly advocating to implement alternative discipline practices and dismantle the school-to-prison pipeline. This is exemplified by parent and student advocacy resulting in significant victories to improve school climate and school policing practices in the Los Angeles Unified School District ("LAUSD").[232] Youth-led advocacy supported by the Labor/Community Strategy Center and the Brothers, Sons, Selves Coalition resulted in the passage of the School Climate Bill of Rights in the Los Angeles School District, which included a ban on suspensions for the catch-all discipline category of *willful defiance* in most circumstances.[233] The School Climate Bill of Rights also limits the role of police in schools, preventing their involvement in routine discipline matters and implemented restorative justice programs in schools.[234] Recently, advocates pushed the LAUSD to return the last of the weapons it received under the 1033 Program,[235] including sixty-one automatic rifles and a MRAP vehicle, and to withdraw from the program.[236]

In 2008, in Denver, Colorado, following a six-year collaborative campaign to end zero tolerance policies, parent and student-led Padres y Jovenes Unidos effectively eliminated zero tolerance policies in Denver Public Schools ("DPS") and secured revised and inclusive discipline policies.[237] In 2012, Denver passed a law that "advises schools to adopt policies that limit law enforcement involvement in cases of minor misbehavior and beefs up training requirements for school officers."[238] In 2013, the advocacy group was influential in securing an Intergovernmental Agreement between DPS and the Denver Police Department to ensure the

232. *See Success Stories*, *supra* note 15.

233. *Id.* "LAUSD is shifting away from suspensions, arrests, and citations—and toward a more progressive system known as restorative justice." Raul A. Reyes, *L.A. School Discipline Reforms Praised by Latino Educators, Experts*, NBCNEWS (Aug. 19, 2014, 2:24 PM), http://www.nbcnews.com/news/latino/l-school-discipline-reforms-praised-latino-educators-experts-n184191.

234. *Success Stories*, *supra* note 15.

235. Evie Blad, *Los Angeles School Police Return Last of Weapons Issued by Defense Department*, EDUC. WK. (Mar. 1, 2016, 4:47 PM), http://blogs.edweek.org/edweek/rulesforengagement/2016/03/los_angeles_school_police_return_last_of_defense_department-issued_weapons.html.

236. *Id.*

237. *History & Accomplishments*, PADRES & JÓVENES UNIDOS, http://www.padresunidos.org/history-accomplishments (last visited Mar. 31, 2016).

238. Sneed, *supra* note 3.

end of unnecessary student referrals to law enforcement and further limit the role of police in schools.[239]

These victories demonstrate the tremendous power of community advocacy by those most impacted by punitive discipline policies and practices can have on reforming school climates and discipline practices. However, this advocacy is not easy, and these wins are years in the making. They require continued relationship-building and pushing of educators and policy-makers to understand the consequences of punitive policies—most often by putting faces to the discipline disparity statistics. Resistance from educators who feel hamstringed by limited options when faced with behavioral issues is a component of the challenge to reforming discipline practices. Educators also often feel blamed for discipline disparities when they are working in challenging school conditions with few resources or support systems.

Parents, students, and educators must work together to devise individualized and inclusive discipline policies and practices. Coalitions like the Dignity in Schools Campaign ("DSC"),[240] which includes teacher, student, and parent advocates, must continue to highlight evidence-based best practices, like peer mediation and restorative practices, and continue the work of implementing them in schools.[241] The advocacy of DSC organizations has helped to change the landscape of school discipline across the country and continued multi-stakeholder partnerships like DSC will be instrumental in holding states and districts accountable for reforming school discipline practices.[242] It is also critical that stakeholders agree upon what a positive and an inclusive school climate means for all students. For instance, the Centers for Disease Control and Prevention defines a positive school climate as one that is "characterized by caring and supportive interpersonal relationships; opportunities to participate in school activities and decision-making; and shared positive norms, goals, and values."[243] Further, research shows that "one of the most important elements in a positive school climate is for students to have a feeling of school connectedness. School

239. *Id.*

240. *See Mission*, *supra* note 12. The Dignity in Schools Campaign is comprised of 104 organizations from twenty-five states committed to reforming overly punitive discipline practices and protecting the human rights and dignity of all students. *See Members*, DIGNITY SCHOOLS, http://www.dignityinschools.org/about-us/members (last visited Mar. 30, 2016).

241. *Mission*, *supra* note 12.

242. *Id.*

243. NATHAN JAMES & GAIL MCCALLION, CONG. RES. SERV., SCHOOL RESOURCE OFFICERS: LAW ENFORCEMENT OFFICERS IN SCHOOLS 24 (2013), https://www.ras.ORG/sgp/crs/misc/R43126.pdf.

connectedness is defined as 'the belief by students that adults and peers in the school care about their learning as well as about them as individuals."[244] In fact, feelings of trust and strong relationships between students and school personnel—not police in schools—have been found to have the most significant impact on deterring school violence.[245] Starting from a common understanding that all students have value and should be afforded an opportunity to learn in environments where they feel safe and secure, stakeholders can work together to draft policies that promote school safety and positive outcomes for students, without reliance on school police.

V. CONCLUSION

The only way that we can end the trajectory of the school-to-prison pipeline that is undermining the academic and life outcomes of our nation's most promising youth is by eradicating the deeply-entrenched biases and beliefs that reinforce ideas of racial inferiority and support the criminalization of youth of color. When we recognize that all children deserve to learn in schools free from surveillance, the assumption of guilt, and without fear of being screened, searched, and possibly arrested, then we can begin the work of dismantling the systems and practices that have justified this punitive system of punishment and looked the other way as children of color and low-income children are streamed into the criminal justice system. When we admit that objective data tells the story that police in schools disproportionately target and criminalize students of color; then we must accept responsibility for ending the practices that feed the profit motives of the prison-industrial complex.[246] The argument that it is not politically feasible to remove all police from schools cannot stand in the face of the moral imperative to honor the human dignity of all children in our schools and end the use of policies and practices that we know destroy young lives and undermine our nation's potential.

---

244. *Id.*

245. POLICE IN SCHOOLS ARE NOT THE ANSWER TO THE NEWTOWN SHOOTING 7, 14 (2013), http://b.3cdn.net/advancement/df16da132af1903e5b_zlm6bkclv.pdf. Noting that "further research shows that excessive and inappropriate reliance on school-based law enforcement officers can actually promote disorder and distrust in schools." *Id.* at 7.

246. *See supra* Part III.