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THE RIGHT TO PUBLIC EDUCATION AND THE SCHOOL TO PRISON PIPELINE

*Areto A. Imoukhuede**

INTRODUCTION

The school-to-prison pipeline is a controversial concept and a

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His article, *The Fifth Freedom: The Constitutional Duty to Provide Public Education*, 22 U. Fla. J.L. & Pub. Pol'y 45 (2011), in his article *Areto A. Imoukhuede, Education Rights and The New Due Process*, 47 Ind. L. Rev. 467 (2014), and in his book chapter, *Freedom from Ignorance: The International Duty to Provide Public Education*, Frenkel, D.A. (ed.), 2013, *Public Law and Social Human Rights* Athens Institute for Education and Research (ATINER), Athens, Greece, suggest that public education is a human right that the U.S. ought to recognize and protect.

Professor Imoukhuede has presented his academic research across the nation and overseas including in Athens, Greece and Rome, Italy. He has also served in the federal government as Investigative Counsel for the U.S. House of Representatives Committee on Homeland Security, as a Congressional Fellow in the U.S. House of Representatives, and with the U.S. Department of Justice's Antitrust Division. Professor Imoukhuede practiced law at a large Chicago-based law firm where, among other things, he wrote the law firm's international arbitration handbook and represented clients in a broad range of matters from complex commercial disputes to civil rights litigation.

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disappointing reality. It refers to the draconian disciplinary “trend of schools directly referring students to law enforcement or creating conditions under which students are more likely to become involved in the justice system—such as suspending or expelling them.”¹ Public schools are intended to primarily be institutions for public education. It is clear that serving as a pipeline to prison is not the central purpose of the public school.

The purpose of public education is to provide students an opportunity to develop their capabilities and grow as individuals.² Public education is intended to inculcate civic values that will prepare students to function socially and integrate seamlessly into society.³ However, prison is a place where we send those who demonstrate an inability or unwillingness to adhere to the norms of society, those who have not embraced society’s values, and those who have therefore, not successfully integrated into society.⁴ School should prepare students for happy, successful, and meaningful lives that are completely unrelated to prison. The school-to-prison pipeline distorts the public education mission by way of a “collection of education and public safety policies and

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¹ Jason P. Nance, *Over-Disciplining Students, Racial Bias, and the School-to-Prison Pipeline*, 50 U. RICH. L. REV. 1063, 1064 (2016); citing to *Hawker v. Sandy City Corp.*, 774 F.3d 1243, 1245–46 (10th Cir. 2014) (Lucero, J., concurring); Jason P. Nance, *School Surveillance and the Fourth Amendment*, 2014 WIS. L. REV. 79, 102-03; *School-to-Prison Pipeline Must Be Dismantled, Stakeholders Tell ABA*, ABA NEWS (Feb. 7, 2015, 9:59 AM), <https://www.americanbar.org/news/abanews/aba-news-archives/2015/02/school-to-prisonpip.html>; Press Release, Sen. Dick Durbin, Ill., *Durbin Holds Hearing on Ending the School-to-Prison Pipeline* (Dec. 12, 2012), <http://www.durbin.senate.gov/newsroom/press-releases/durbin-holds-hearing-on-ending-the-school-to-prison-pipeline>. See Jason P. Nance, *Dismantling the School-to-Prison Pipeline: Tools for Change*, 48 ARIZ. ST. L.J. 313, 325 (explaining the causes of the trend of over-disciplining students); Jason P. Nance, *Students, Police, and the School-to-Prison Pipeline*, 93 WASH. U. L. REV. 919, 929 (2016). (discussing the shift to the “criminalization of school discipline” and the reasons behind it).

² Areto A. Imoukhuede, *Education Rights and The New Due Process*, 47 IND. L. REV. 467, 467 (2014) [hereinafter Imoukhuede, *Education Rights*].

³ See Margaret Salazar-Porzio & George J. Sanchez, *The Logic of Civic Possibility: Undocumented Students and the Struggle for a Higher Education*, in CIVIC VALUES, CIVIC PRACTICES 65, 66 (Donald W. Harward ed., 2013), <https://www.aacu.org/sites/default/files/files/CLDE/CivicValuesCivicPractices.pdf>.

⁴ See George Freeman Solomon, *The Psychodynamics of Criminal Behavior and Their Implications for Prison and Jail Reform*, 2 J. PSYCHIATRY & L. 379, 399 (1974).

practices that push our nation's schoolchildren out of the classroom and into the streets, the juvenile justice system, [and ultimately] the [adult] criminal justice system."⁵ As the American Civil Liberties Union (ACLU) has noted: "[t]his pipeline reflects the prioritization of incarceration over education."⁶

Black children are "disproportionately targeted for referral and arrest by police in schools"⁷ and are inevitably more susceptible to becoming victims of the school-to-prison pipeline. One of the most disturbing consequences of being a victim of the pipeline is that it leads to negative educational and long-term outcomes and, thus, undermines a student's right to public education. Any student funneled into the pipeline is on a path to destruction.⁸

The core idea presented in this symposium-inspired piece is that the school-to-prison pipeline undermines the right to public education and must therefore be dismantled. This argument is advanced in three parts. Part I begins by first recognizing that there is a right to public education. That right is a duty—a positive right—that each state has an obligation to enforce pursuant to their state constitutions and the Equal Protection Clause of the U.S. Constitution. Part II defines the school-to-prison pipeline. This part discusses the emergence of zero tolerance policies and the impact of school exclusion and arrest on student education. Part III addresses the disproportionate impact of zero tolerance policies on Black victims and concludes that the school-to-prison pipeline is part of the modern American story of racial oppression.

⁵ Deborah N. Archer, *Introduction: Challenging the School-to-Prison Pipeline*, 54 N.Y. L. SCH. L. REV. 867, 868 (2009).

⁶ AMERICAN CIVIL LIBERTIES UNION, *LOCATING THE SCHOOL-TO-PRISON PIPELINE* (2008) https://www.aclu.org/files/images/asset_upload_file966_35553.pdf.

⁷ Janel George, *Populating the Pipeline: School Policing and the Persistence of the School-to-Prison Pipeline*, 40 NOVA L. REV. 493, 494 (2016) *citing to* ADVANCEMENT PROJECT ET. AL., *POLICE IN SCHOOLS ARE NOT THE ANSWER TO THE NEWTOWN SHOOTING*, 3–4, 6, 9 (2013), <http://www.naacpldf.org/publication/police-schools-are-not-answer-newtown-shooting> (follow pdf hyperlink) ("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 also home to schools and communities who have been historically underfunded, criminalized, politically underrepresented, and socially outcast.").

⁸ See generally AMERICAN CIVIL LIBERTIES UNION, *LOCATING THE SCHOOL-TO-PRISON PIPELINE* (2008).

I. *Fundamental Rights and the Pipeline*

The right to public education is fundamental. As was discussed previously in the *Fifth Freedom* and *The New Due Process*, history and traditions together demonstrate education as essential to ordered liberty within the United States; therefore, education should be recognized as a fundamental right.⁹ However, that right has been undermined by the infamous *San Antonio v. Rodriguez* case, which held that there is no fundamental right to public education under the U.S. Constitution.¹⁰ Despite the *Rodriguez* holding, today, each of the United States has acknowledged their duty to provide public education either by way of their state constitutions or by way of judicial decisions that acknowledge the duty.¹¹ A school-to-prison pipeline undermines the right to public education.¹²

This part begins by first arguing that education should be recognized as a fundamental right. Education is an access point to freedom, indeed historically it has been treated by enslavers and the enslaved as fundamental to any meaningful concept of liberty.¹³ The goals of education align with the concept of a fundamental right. Next, this part acknowledges that the *San Antonio v. Rodriguez* holding failed to recognize the fundamental right to public education but juxtaposes that holding with the recognition of the right exists in every state in the United States. This part concludes by describing the school-to-prison pipeline and how such a pipeline undermines a right to public education.

⁹ Areto A. Imoukhuede, *The Fifth Freedom: The Constitutional Duty to Provide Public Education*, 22 U. FLA. J.L. & PUB. POL'Y 45, 51 (2011) [hereinafter Imoukhuede, *The Fifth Freedom*] citing to Areto A. Imoukhuede, *Education Rights and The New Due Process*, 47 IND. L. REV. 467, 467 (2014) [hereinafter Imoukhuede, *Education Rights*].

¹⁰ *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 35 (1973).

¹¹ See Trish Brennan-Gac, *Educational Rights in the States*, HUM. RTS., July 2014, at 12, 14; citing to EMILY PARKER, EDUC. COMM'N OF THE STATES, 50 STATE REVIEW: CONSTITUTIONAL OBLIGATIONS FOR PUBLIC EDUCATION (2016), <https://www.ecs.org/wpcontent/uploads/2016-Constitutional-obligations-for-public-education-1.pdf>.

¹² See Alex M. Johnson, *Building Positive Relationships to Break the School-To-Prison Pipeline*, HUFFINGTON POST: THE BLOG (Oct. 8, 2015, 4:37 PM), https://www.huffingtonpost.com/alex-m-johnson/building-positive-relationships-school-to-prison_b_8265512.html.

¹³ Imoukhuede, *Education Rights*, *supra* note 2 at 494-496.

A. Why Education is a Fundamental Right

Access to public education is fundamental to ordered liberty.¹⁴ To understand this, we shall consider fundamental rights and their relationship to liberty, before discussing why education is itself essential to liberty. Finally, we shall consider the extent to which the goals of public education also align with the concept of a fundamental right.

1. *Fundamental Rights and Liberty*

Fundamental rights are so rooted in the nation's history and traditions that they are fundamental to ordered liberty.¹⁵ Fundamental rights are not all explicitly stated in the text of the Constitution.¹⁶ Those unenumerated fundamental rights are so important that they are nonetheless recognized as being of equal stature to enumerated rights.¹⁷ Today, fundamental rights are defined as those rights that are so rooted in the nation's history and traditions that the Supreme Court recognizes them as fundamental.¹⁸

2. *Education as Essential to Liberty*

When the Court recognizes a fundamental right, it considers the historical view of the right and its relationship to U.S. tradition and concepts of liberty.¹⁹ The Northwest Territory Ordinance of

¹⁴ See Imoukhuede, *The Fifth Freedom*, *supra* note 10, at 48.

¹⁵ Imoukhuede, *The Fifth Freedom*, *supra* note 10, at 53–54. See also Derek Black, *Unlocking the Power of State Constitutions With Equal Protection: The First Step Toward Education as a Federally Protected Right*, 51 WM. & MARY L. REV. 1343, 1409–10 (2006) (explaining that fundamental rights under state constitutions should be construed as fundamental by the Court); *citing to DeShaney v. Winnebago County Dep't of Soc. Servs.*, 489 U.S. 189, 195–97 (1989) (noting that the purpose of the due process clause was to protect the people from the State and not to ensure that the State protected them from each other). See also *Jackson v. City of Joliet*, 715 F.2d 1200, 1203 (7th Cir. 1983) (“[T]he Constitution is a charter of negative rather than positive liberties”).

¹⁶ Imoukhuede, *The Fifth Freedom*, *supra* note 10, at 53.

¹⁷ Imoukhuede, *The Fifth Freedom*, *supra* note 10, at 53.

¹⁸ Imoukhuede, *The Fifth Freedom*, *supra* note 10, at 53–54.

¹⁹ See *Brown v. Bd. of Educ.*, 347 U.S. 483, 492–93 (1954) (“We must consider public education in the light of its full development and its present place in American life throughout the Nation.”) *citing to Washington v. Glucksberg*, 521 U.S. 702, 721 (1997). Cf. *Trop v. Dulles*, 356 U.S. 86, 100–01 (1958) (“The Court recognized that the words of the Amendment . . . must draw their meaning from the evolving standards of decency that mark the progress of a maturing society.”).

1787 declared that “knowledge, being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged.”²⁰ Up until the Civil War, education in the South was largely seen as an enterprise for the privileged few. “The Reconstruction Era freedmen’s schools were a manifestation of the social, political, and legal recognition of the centrality of education to any meaningful concept of American liberty and citizenship.”²¹ Indeed, the newly freed slaves recognized education as essential to maintaining their freedom.²²

In the middle of the 20th century, the Court explicitly recognized the importance of education in cases such as *Brown v. Board of Education* and *Meyer v. Nebraska*.²³ *Brown v. Board* labeled education a strong American value before holding that “separate but equal” has no place in the field of public education. *Meyer v. Nebraska* also recognized that education has been an important American value as far back as the colonial era.²⁴ Both cases explicitly view education as important, suggest by their holdings that it is a fundamental American value, and implicitly support education as a right.²⁵

More recently, the federal government recognized the significance of education. President Bush in the America 2000 Plan²⁶ underlined that “education is a necessity for America’s continued vitality”²⁷ and that “the value of public education in the minds of the American people has developed beyond what it was at the adoption of the Constitution.”²⁸ Therefore, “education

²⁰ Northwest Territory Ordinance of 1787, art. III, 1 Stat. 51 (1787). A number of states incorporated the Ordinance’s education language directly into their constitutions.

²¹ Imoukhuede, *Education Rights*, *supra* note 2, at 495.

²² See Imoukhuede, *Education Rights*, *supra* note 2, at 495.

²³ *Meyer v. Nebraska*, 262 U.S. 390, 400 (1923); 347 U.S. 483, 493 (1954).

²⁴ *Meyer v. Nebraska*, 262 U.S. 390, 400 (1923).

²⁵ Areto A. Imoukhuede, *The Fifth Freedom: The Constitutional Duty to Provide Public Education*, 22 U. FLA. J.L. & PUB. POL’Y 45, 52 (2011) *citing to Meyer v. Nebraska*, 262 U.S. 390, 401 (1923).

²⁶ U.S. DEPT. OF EDUC., AMERICA 2000: AN EDUCATION STRATEGY (1991), <https://files.eric.ed.gov/fulltext/ED327009.pdf>.

²⁷ Areto A. Imoukhuede, *The Fifth Freedom: The Constitutional Duty to Provide Public Education*, 22 U. Fla. J.L. & Pub. Pol’y 45, 89 (2011) *citing to Michael Salerno, Note, Reading Is Fundamental: Why the No Child Left Behind Act Necessitates Recognition of a Fundamental Right to Education*, 5 CARDOZO PUB. L. POL’Y & ETHICS J. 509, 515 (2007).

²⁸ Thomas J. Walsh, *Education as a Fundamental Right Under the United States Constitution*, 29 WILLAMETTE L. REV. 279, 292 (1993).

should receive the same protection as a 'vital personal right,' or fundamental right that marriage and privacy receive."²⁹

Like the right to privacy, education is also essential to liberty.³⁰ The connection between education and liberty was recognized in the classical, enlightenment era, and modern philosophies of Aristotle, Rousseau, and John Dewey respectively; as well as today's capabilities approach as developed by Amartya Sen and Martha Nussbaum.³¹ The case for a human dignity-based constitutional protection for the right to public education is even stronger than the already recognized human dignity-based constitutional protection for the right to privacy.³² This is because, unlike the right to privacy, "education is essential to both the liberty [component] and to the democracy component of human dignity."³³ Despite a broad consensus regarding the importance of primary and secondary education, educational opportunity is systematically denied to the children of racial-ethnic minorities and to underprivileged children of every race.³⁴ No factor is more indicative of the sort of education a child will receive than the socioeconomic status of that child's parents.³⁵ "[S]ystemic failures are not incapable of correction; however, U.S. Constitutional law doctrine has gotten in the way."³⁶

3. *Goals of Public Education Align with Fundamental Rights*

Public education is appropriately conceived of as a "positive fundamental right because education is a basic human need and a constituent part of all democratic rights."³⁷ "[E]ducation is essential to any meaningful concept of personal liberty and to democracy."³⁸ "Without an educated citizenry, liberty and democracy are merely empty concepts, devoid of meaning for all

²⁹ Salerno, *supra* note 27, at 515 (footnote omitted).

³⁰ See generally Imoukhuede, *Education Rights*, *supra* note 2.

³¹ Imoukhuede, *Education Rights*, *supra* note 2, at 486.

³² Imoukhuede, *Education Rights*, *supra* note 2, at 468.

³³ Areto A. Imoukhuede, *Education Rights and The New Due Process*, 47 Ind. L. Rev. 467, 468(2014).

³⁴ Imoukhuede, *Education Rights*, *supra* note 2, at 473.

³⁵ Imoukhuede, *Education Rights*, *supra* note 2, at 473.

³⁶ Imoukhuede, *Education Rights*, *supra* note 2, at 467, 491 (footnotes omitted).

³⁷ Areto A. Imoukhuede, *Education Rights and The New Due Process*, 47 Ind. L. Rev. 467, 467(2014).

³⁸ *Id.*

but the economically privileged and socially advantaged.”³⁹ For instance, voter turnout is much lower among people with no college education as compared to people with college and graduate level education.⁴⁰ The voter turnout for adults who have not completed high school is even lower.⁴¹ “Education inspires and enables meaningful democratic engagement.”⁴²

In *Brown*, the Court underscored how education plays a most important role in sustaining state and local governments, improving a democratic society, inculcating civic values, and in helping to cultivate productive members of society.⁴³ As a consequence, if denied access to education, a child cannot be expected to succeed in life.⁴⁴

B. Current Doctrine Falls Short of Identifying a Fundamental Right, but Still Protects The Right

Current federal constitutional law doctrine falls short of identifying a clear, fundamental right to public education.⁴⁵ Nevertheless, the Court has continued to recognize and protect the

³⁹ *Id.*

⁴⁰ *Id.* at 468. See also Aina Gallego, *Understanding Unequal Turnout: Education and Voting in Comparative Perspective*, 29 ELECTORAL STUD. 239, 239, 246 (2010) (“Well-educated citizens vote more frequently than the poorly educated in some countries, including the USA.”); citing to Barry C. Burden, *The Dynamic Effects of Education on Voter Turnout*, 28 ELECTORAL STUD. 540, 540 (2009) (“Analyzing survey data from 1952 to 2004, I show that the effect of college education increased starting in [sic] 1980s, thereby magnifying the ability of educational attainment to predict turnout.”).

⁴¹ *Id.* citing to Rachel Milstein Sondheimer & Donald P. Green, *Using Experiments to Estimate the Effects of Education on Voter Turnout*, 54 AM. J. POL. SCI. 174, 174, 185 (2010) (arguing that there is a powerful relationship between education and voter turnout and pointing out that political participation is the function of one’s level of education; people with mere high school education or less are less likely to vote).

⁴² See Imoukhuede, *Education Rights*, *supra* note 2, at 467, 468; citing to Terry Smith, *Autonomy Versus Equality: Voting Rights Rediscovered*, 57 ALA. L. REV. 261, 262, 301–302 (2005) (arguing that autonomy as a constitutional value was always implied in many fundamental rights, but was neglected in voting especially when it was the political autonomy to vote of the minorities, and also arguing that minority voters must experience for themselves the value of autonomy).

⁴³ *Brown*, 347 U.S. at 493.

⁴⁴ *Id.*

⁴⁵ See *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 35 (1973) (“Education . . . is not among the rights afforded explicit protection under our Federal Constitution. Nor do we find any basis for saying it is implicitly so protected.”).

right to public education.⁴⁶ In considering the continuing existence and protection of the right to public education despite conflicting Supreme Court doctrine, this part begins by reviewing the *San Antonio v. Rodriguez* holding. Next, we will explore how each state recognizes the right to public education.⁴⁷ This discussion concludes by reviewing *Plyler v. Doe* as a federal judicial acknowledgement of a limited if not fundamental federal right to public education.⁴⁸

1. *Rejection of Federal Constitutional Right: San Antonio v. Rodriguez*

The right to public education was constrained by *San Antonio v. Rodriguez*, where the Court held that there is no right to public education under the U.S. Constitution.⁴⁹ In *Rodriguez*, the challenge by Mexican-American school children of a Texas statute that funded elementary and high schools with property taxes failed.⁵⁰ Among other things, the Court claimed that there was no fundamental right at stake that would elevate the case to a higher level of Constitutional scrutiny.⁵¹ The case was evaluated under the rational basis test – the lowest level of Constitutional scrutiny.⁵²

The *Rodriguez* holding, arguably, conflicts with *Brown v. Board of Education*.⁵³ Notwithstanding the *Rodriguez* holding regarding the fundamental right to public education, experts have long considered the latter case of *Plyler v. Doe* as having modified the rights holding. In *Plyler*, the Court treated education as an important right, which receives more than the minimal level of

⁴⁶ *Plyler v. Doe*, 457 U.S. 202, 220 (1982)“§ 21.031 is directed against children, and imposes its discriminatory burden on the basis of a legal characteristic over which children can have little control. It is thus difficult to conceive of a rational justification for penalizing these children for their presence within the United States.”

⁴⁷ See *San Antonio*, 411 U.S. at 30, 40, 45.

⁴⁸ See Dennis J. Hutchinson, *More Substantive Equal Protection? A Note on Plyler v. Doe*, 1982 SUP. CT. REV. 167, 175–76.

⁴⁹ *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 35 (1973).

⁵⁰ See Dennis J. Hutchinson, *More Substantive Equal Protection? A Note on Plyler v. Doe*, 1982 SUP. CT. REV. 167, 191.

⁵¹ *Id.*

⁵² Daniel B. Hatzenbuehler, *San Antonio Independent School District v. Rodriguez: Inequitable but Not Unequal Protection Under the Fourteenth Amendment*, 27 SW. L.J. 712, 719–21 (1973).

⁵³ See *Brown v. Bd. of Educ.*, 347 U.S. 483, 492–93 (1954).

constitutional scrutiny.⁵⁴ So that irrespective of the fundamentality of the right to public education, there exists a federally protected right to public education.⁵⁵ Furthermore, today, each state has acknowledged its duty to provide public education either by way of their state constitutions or by way of judicial decisions that acknowledge the duty.⁵⁶

2. *State Recognition*

Each state recognizes the right to public education, including the State of New York.⁵⁷ Article XI of the New York Constitution provides that all children are entitled to have a sound basic education consisting in “basic literacy, calculating and verbal skills necessary to enable children to eventually function productively as civic participants capable of voting and serving on a jury.”⁵⁸ The goal is to provide children the foundational tools necessary for productive citizenship.⁵⁹

The New York Constitution further states that “[t]he legislature shall provide for the maintenance and support of a system of free common schools, wherein all the children of this state may be educated.”⁶⁰ Specifically it requires all schools to provide “minimally adequate teaching of reasonably up-to-date basic curricula such as reading, writing, mathematics, science, and social studies, by sufficient personnel adequately trained to teach those subject areas.”⁶¹

Some states recognize that their state’s constitutions have an educational *quality* requirement embedded within their state’s right to public education. One example of a state court attempting

⁵⁴ See *Plyler v. Doe*, 457 U.S. 202, 222 (1982).

⁵⁵ *Id.*

⁵⁶ Kevin Woodson *Why Kindergarten Is Too Late: The Need for Early Childhood Remedies in School Finance Litigation*, 70 ARK. L. REV. 87, 105 (2017); EMILY PARKER, EDUC. COMM’N OF THE STATES, 50 STATE REVIEW: CONSTITUTIONAL OBLIGATIONS FOR PUBLIC EDUCATION 1–2 (2016), <https://www.ecs.org/wp-content/uploads/2016-Constitutional-obligations-for-public-education-1.pdf>.

⁵⁷ *Id.*

⁵⁸ *Paynter v. State*, 797 N.E.2d 1225, 1228 (2003) (quoting *Campaign for Fiscal Equity v. State*, 655 N.E.2d 661, 666 (1995)) (referring to N.Y. CONST. Art. XI, § 1).

⁵⁹ *Campaign for Fiscal Equity, Inc. v. State*, 801 N.E.2d 326, 330 (2003).

⁶⁰ N.Y. CONST. art. XI, § 1.

⁶¹ *Campaign for Fiscal Equity, Inc. v. State*, 801 N.E.2d 326, 330 (2003) (quoting *Campaign for Fiscal Equity v. State*, 655 N.E.2d 661, 666 (1995)) (referring to N.Y. CONST. Art. XI, § 1).

to breathe life into a state's constitution's quality requirement is *Rose v. Council for Better Educ.*⁶² Here the court held that every Kentucky child must be provided with equal opportunity and access to an "adequate education."⁶³ Another such example is *Claremont I*, where the court held that "the New Hampshire public schools have a duty to provide a 'constitutionally adequate education to every educable child.'"⁶⁴ In these two cases, the state courts treated their state constitutions as actually imposing some duties on the legislature that are not left for the legislature alone to interpret completely independent of judicial review.⁶⁵

Although Federal constitutional law doctrine does not directly recognize a fundamental right to public education, the right is currently protected by both the states and by the federal government.⁶⁶

3. Federal Law Recognizing the Right to Public Education

Since *Rodriguez*, federal statutes have been passed that protect a right to public education.⁶⁷ In addition, the Court has protected a right to public education as a matter of federal constitutional

⁶² *Rose v. Council for Better Educ.*, 790 S.W.2d 186, 189 (1989). See also Kelly Thompson Cochran, Comment, *Beyond School Financing: Defining the Constitutional Right to an Adequate Education*, 78 N.C. L. REV. 399, 401 n.12 (2000).

⁶³ *Rose v. Council for Better Educ.*, 790 S.W.2d 186, 211 (1989).

⁶⁴ *Claremont Sch. Dist. v. Governor (Claremont I)*, 635 A.2d 1375, 1376 (1993). See also Kelly Thompson Cochran, Comment, *Beyond School Financing: Defining the Constitutional Right to an Adequate Education*, 78 N.C. L. Rev. 399, 401, n.12 (2000).

⁶⁵ *Rose v. Council for Better Educ.*, 790 S.W.2d 186, 211–12 (1989); *Claremont Sch. Dist. v. Governor (Claremont I)*, 635 A.2d 1375, 1381 (1993).

⁶⁶ See *Plyler v. Doe*, 457 U.S. 202, 223–24 (1982).

⁶⁷ Areto A. Imoukhuede, *The Fifth Freedom: The Constitutional Duty to Provide Public Education*, 22 U. Fla. J.L. & Pub. Pol'y 45, 89 (2011) citing to Michael Salerno, Note, *Reading Is Fundamental: Why the No Child Left Behind Act Necessitates Recognition of a Fundamental Right to Education*, 5 CARDOZO PUB. L. POL'Y & ETHICS J. 509, 511–52 (2007). (For example, under the Equal Educational Opportunities Act of 1974 (EEOA), the Attorney General is authorized to institute suits against local and state education agencies that include public schools and school districts for "school desegregation." Under this federal law, the Attorney General can file a civil action on behalf of every individual who saw his or her rights denied such as equal educational opportunities and to act in front of language barriers, in light of § 1703(f). The EEOA prohibits the state denial of equal educational opportunities because of race, color, sex or national origins. U.S. DEPT OF JUSTICE, UNITED STATES ATTORNEYS' MANUAL § 8-2.222 (2018), <https://www.justice.gov/jm/jm-8-2000-enforcement-civil-rights-civil-statutes#8-2.222>).

law.⁶⁸

The Due Process Clause of the Fourteenth Amendment protects students from the abuses of the school-to-prison pipeline and thereby reinforces the right to public education.⁶⁹ In the specific context of zero tolerance, *Goss v. Lopez* held that students were entitled to due process protections prior to either suspension or expulsion.⁷⁰

In *Goss*, some students were suspended from a school in Ohio for disruptive behavior in a lunchroom.⁷¹ The students were suspended for more than ten days.⁷² The Court highlighted that the school authorities did not allow a hearing or provide evidence or testimony that justified the suspension of the students.⁷³ Justice White wrote that even if the right to education is not explicitly protected by the Constitution, students are protected from arbitrary suspensions from school by the Due Process Clause of the Fourteenth Amendment.⁷⁴ The opinion recognized that even short term suspensions can create problems for students, especially for their reputation with fellow students and teachers, future opportunities for higher education and employment.⁷⁵ State actions can stigmatize a person's reputation, so that even suspension from a public school for as little as ten days, without notice and a hearing, significantly undermines a student's public education due process rights.⁷⁶ Due process requires notice and a hearing.⁷⁷

In *Plyler*, the main issue was the constitutionality of the Texas Education code, section 21.031, establishing that undocumented children were required to pay tuition in order to attend public school or were even denied the access to school.⁷⁸ *Plyler* held that despite not being a fundamental right, education was such an important right that undocumented children cannot be denied it simply because they are undocumented.⁷⁹ Regardless of

⁶⁸ See Salerno, *supra* note 67, at 513.

⁶⁹ See Salerno, *supra* note 67, at 513.

⁷⁰ *Goss v. Lopez*, 419 U.S. 565, 567 (1975).

⁷¹ *Goss*, 419 U.S. at 570.

⁷² *Id.* at 568.

⁷³ *Id.* at 570.

⁷⁴ *Id.* at 574.

⁷⁵ *Id.* at 575–76.

⁷⁶ *Goss*, 419 U.S. at 575–76.

⁷⁷ *Goss*, 419 U.S. at 571.

⁷⁸ See *Plyler v. Doe*, 457 U.S. 202, 213–15 (1982).

⁷⁹ *Plyler v. Doe*, 457 U.S. 202, 203 (1982).

immigration status, educational rights must be extended to everyone, “*whether citizens or strangers*,” who is within the boundaries of a state.⁸⁰ Before a state can justify denying, even an undocumented alien, public education, it must demonstrate that such a denial would “further some substantial state interest.”⁸¹ This “substantial state interest” requirement, while not precisely matching the language of the strictest form of constitutional scrutiny, represents a form of heightened scrutiny for the right to public education and thus modifies the rational basis standard that was suggested in *Rodriguez*.⁸²

B. Pipeline to Prison

The trend of schools directly referring students to law enforcement for committing certain offenses at school undermines the above described right to public education.⁸³ Public education’s goal is not to make students more likely to become involved in the criminal justice system.⁸⁴ Such an outcome is a failure of education, not a success. Yet, today’s schools are not fulfilling their primary educational mission and are instead preparing them for, and in some cases putting them in, prison.

Nance suggests that “[o]ver the last three decades, our nation has witnessed a dramatic change regarding how schools discipline children for disruptive behavior.”⁸⁵ Incredibly, “during the 2011–12 school year alone, schools referred approximately 260,000 students to law enforcement and there were 92,000 school based arrests.”⁸⁶ These figures may not be an indication that serious disruptive behaviors in schools have escalated since “extreme disciplinary measures” for trivial disruptive behaviors are

⁸⁰ *Id.* at 214 (emphasis in the original) (quoting CONG. GLOBE, 39th Cong., 1st Sess., 1033, 1090 (1866) (statement of Rep. Bingham)).

⁸¹ *Id.* at 230

⁸² See *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 16–18 (1973).

⁸³ Jason P. Nance, *Students, Police, and the School-to-Prison Pipeline*, 93 WASH. U. L. REV. 919, 923 (2016).

⁸⁴ *Id.* at 920.

⁸⁵ Jason P. Nance, *Over-Disciplining Students, Racial Bias, and the School-to-Prison Pipeline*, 50 U. RICH. L. REV. 1063, 1063 (2016).

⁸⁶ *Id.* at 1064 citing to NAACP LEGAL DEF. & EDUC. FUND, INC., DISMANTLING THE SCHOOL-TO-PRISON PIPELINE 3 (2005), <http://www.naacpldf.org/publication/dismantling-school-prison-pipeline>; U.S. DEPT OF EDUC., CIVIL RIGHTS DATA COLLECTION, DATA SNAPSHOT: SCHOOL DISCIPLINE 6 (2014), <https://ocrdata.ed.gov/downloads/crdc-school-discipline-snapshot.pdf>.

routinely invoked in schools.⁸⁷ As such, these over disciplining measures may be wholly unwarranted in many instances.⁸⁸

This draconian school discipline trend of “directly referring students to law enforcement or otherwise creating conditions that leads to greater involvement with law enforcement, such as suspending or expelling them feeds the school-to-prison pipeline.”⁸⁹

⁸⁷ Nance, *supra* note 85, at 1064; *citing to* ACTION FOR CHILDREN, FROM PUSH OUT TO LOCK UP: NORTH CAROLINA’S ACCELERATED SCHOOL-TO-PRISON PIPELINE 8–9 (2013), http://www.ncchild.org/wpcontent/uploads/2014/05/2013_STPP-FINAL.pdf (citing AMERICAN CIVIL LIBERTIES UNION, LOCATING THE SCHOOL-TO-PRISON PIPELINE (2008) https://www.aclu.org/files/images/asset_upload_file966_35553.pdf) (“Students were most commonly referred to the juvenile justice system for low-level offenses.”); TONY FABELO ET AL., JUSTICE CTR. & PUB. POLICY RESEARCH INST., BREAKING SCHOOLS’ RULES: A STATEWIDE STUDY OF HOW SCHOOL DISCIPLINE RELATES TO STUDENTS’ SUCCESS AND JUVENILE JUSTICE INVOLVEMENT 38 (2011), https://csgjusticecenter.org/wpcontent/uploads/2012/08/Breaking_Schools_Rules_Report_Final.pdf (showing that more than 97% of suspensions and expulsions in Texas resulted from offenses that did not require suspension or expulsion under law); FED. ADVISORY COMM. ON JUVENILE JUSTICE, ANNUAL REPORT 2010 at 10 (2010), <http://www.facjj.org/annualreports.html> (follow link for 2010 report); NAT’L ASS’N FOR THE ADVANCEMENT OF COLORED PEOPLE, ARRESTING DEVELOPMENT: ADDRESSING THE SCHOOL DISCIPLINE CRISIS IN FLORIDA 6 (2006), https://b3cdn.net/advancement/e36d17097615e7c612_bbm6vub0w.pdf (reporting that during the 2004–05 school year in Florida, 76% of student referrals to the Florida Department of Juvenile Justice were for offenses such as disorderly conduct, trespassing, and fighting without a weapon); Daniel J. Losen, *Sound Discipline Policy for Successful Schools: How Redressing Racial Disparities Can Make a Positive Impact for All*, in DISRUPTING THE SCHOOL-TO-PRISON PIPELINE 45, 54 (Sofia Bahema et al. eds., 2012) [hereinafter Losen, *Sound Discipline*] (maintaining that the vast majority of suspensions and expulsions are for minor offenses).

⁸⁸ Janel George, *Populating the Pipeline: School Policing and the Persistence of the School-to-Prison Pipeline*, 40 NOVA L. REV. 493, 501 (2016); See also FED. ADVISORY COMM. ON JUVENILE JUSTICE, *supra* note 73 at 9–10, 12; See also 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).

⁸⁹ Jason P. Nance, *Over-Disciplining Students, Racial Bias, and the School-to-Prison Pipeline*, 50 U. RICH. L. REV. 1063, 1064 (2016); *citing to* Hawker v. Sandy City Corp., 774 F.3d 1243, 1245–46 (10th Cir. 2014) (Lucero, J., concurring); Jason P. Nance, *School Surveillance and the Fourth Amendment*, 2014 WIS. L. REV. 79, 102–03 (2014); *School-to-Prison Pipeline Must Be Dismantled, Stakeholders Tell ABA*, ABA NEWS (Feb. 7, 2015, 9:59 AM), <https://www.americanbar.org/news/abanews/aba-news-archives/2015/02/school-to-prisonpip.html>; Press Release, Sen. Dick Durbin, Ill., Durbin Holds Hearing on Ending the School-to-Prison Pipeline (Dec. 12, 2012), <http://www.durbin.senate.gov/newsroom/press-releases/durbin-holds-hearing-on-ending-the-school-to-prison-pipeline>. See also Jason P. Nance, *Dismantling the*

“Not all racial groups are affected equally by these negative trends.”⁹⁰ Children of color are disproportionately targeted for referral and arrest by police in schools⁹¹ and are therefore more susceptible to becoming victims of the school-to-prison pipeline.

One of the most disturbing consequences of being a victim of the pipeline is that it creates the potential for significant negative educational and long-term outcomes and undermines the victim’s right to public education. Schools sometimes refuse to readmit students after they have been arrested by the police.⁹² When a “student is readmitted . . . , that student often suffers from emotional trauma, stigma, and embarrassment and may be monitored more closely by school resource officers, school officials, and teachers.”⁹³ This creates an uncomfortable environment and

School-to-Prison Pipeline: Tools for Change, 48 ARIZ. ST. L.J. 313, 324 (2016) (explaining the causes of the trend of over-disciplining students); Jason P. Nance, *Students, Police, and the School-to-Prison Pipeline*, 93 WASH. U. L. REV. 919, 929 (2016) (discussing the shift to the “criminalization of school discipline” and the reasons behind it).

⁹⁰ Jason P. Nance, *Over-Disciplining Students, Racial Bias, and the School-to-Prison Pipeline*, 50 U. Rich. L. Rev. 1063, 1065 (2016) (citing JACOB KANG-BROWN ET AL., VERA INST. OF JUSTICE, A GENERATION LATER: WHAT WE’VE LEARNED ABOUT ZERO TOLERANCE IN SCHOOLS 3 (2013), https://storage.googleapis.com/vera-web-assets/downloads/Publications/a-generation-later-what-weve-learned-about-zero-tolerance-in-schools/legacy_downloads/zero-tolerance-in-schools-policy-brief.pdf); citing to Daniel J. Losen, *Sound Discipline For Successful Schools: How Redressing Racial Disparities Can Make Positive Impact For All*, in DISRUPTING THE SCHOOL-TO-PRISON PIPELINE 45, 50–51 (Sofia Bahena et al. eds., 2012). See also ADVANCEMENT PROJECT, POWER IN PARTNERSHIPS: BUILDING CONNECTIONS AT THE INTERSECTION OF RACIAL JUSTICE AND LGBTQ MOVEMENTS TO END THE SCHOOL-TO-PRISON PIPELINE 1–2 (2015), http://b.3cdn.net/advancement/85066c4a18d249e72b_r23m68j37.pdf.

⁹¹ Janel George, *Populating the Pipeline: School Policing and the Persistence of the School-to-Prison Pipeline*, 40 NOVA L. REV. 493, 494 (2016); citing to THE ADVANCEMENT PROJECT ET AL., POLICE IN SCHOOLS ARE NOT THE ANSWER TO THE NEWTOWN SHOOTING 6, 9 (2013), <http://www.naacpldf.org/publication/police-schools-are-not-answer-newtown-shooting> (“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 also home to schools and communities who have been historically underfunded, criminalized, politically underrepresented, and socially outcast.”).

⁹² Jason P. Nance, *Dismantling the School-to-Prison Pipeline: Tools for Change*, 48 ARIZ. ST. L.J. 313, 321 (2016); citing to THE ADVANCEMENT PROJECT, EDUCATION ON LOCKDOWN: THE SCHOOLHOUSE TO JAILHOUSE TRACK 12 (2005), http://b.3cdn.net/advancement/5351180e24cb166d02_mlbrqgxlh.pdf.

⁹³ Jason P. Nance, *Dismantling the School-to-Prison Pipeline: Tools for Change*, 48 ARIZ. ST. L.J. 313, 321 (2016); citing to Matthew T. Theriot, *School Resource Officers and the Criminalization of Student Behavior*, 37 J. CRIM. JUST.

hampers their ability to learn.

II. Zero Tolerance and the Prison Pipeline

The tension between the acknowledged right to public education by the states' highest laws and the failure to federally acknowledge a fundamental right under the U.S. Constitution has contributed to educational inadequacies and inequality.⁹⁴ Schools are often framed as safe spaces where students should be able learn without fear of trauma or physical harm. This safety argument is frequently used to justify so-called "zero tolerance" policies that hold students strictly liable for a wide range of offenses that are deemed to undermine school safety.⁹⁵ Zero tolerance policies require that students be removed, sometimes permanently, from their schools.⁹⁶ These policies have been found to have a cascading effect on the students whom these policies have been applied to—an effect whose end result is a pipeline to prison.⁹⁷

This part begins by first defining the zero tolerance policies and describing their history. Next to be discussed will be the impact of zero tolerance on students - including the impact of exclusion from school and arrest. Finally, it concludes by revealing that these policies do not reduce violence. What zero tolerance policies do accomplish is the transformation of schools into areas of police surveillance that are more reminiscent of prisons than educational centers.

A. Definitions and Policies

As we consider the meaning zero tolerance and the history of those policies, we begin by recognizing the relationship of zero tolerance policies to the school to prison pipeline. Next we will

280–81 (2009) (discussing arrests for minor offenses).

⁹⁴ See Derek W. Black, *The Constitutional Right to Education is Long Overdue*, THE CONVERSATION, (Dec. 4, 2017, 11:08 PM), <http://theconversation.com/the-constitutional-right-to-education-is-long-overdue-88445>.

⁹⁵ Jason P. Nance, *School Surveillance and the Fourth Amendment*, 2014 Wis. L. Rev. 79, 106 (2014); *citing to* ADVANCEMENT PROJECT, EDUCATION ON LOCKDOWN: THE SCHOOLHOUSE TO JAILHOUSE TRACK 13 (2005), http://b3cdn.net/advancement/5351180e24cb166d02_mlbrqgxlh.pdf.

⁹⁶ See NAT'L ASS'N OF SCH. PSYCHOLOGISTS, ZERO TOLERANCE AND ALTERNATIVE STRATEGIES: A FACT SHEET FOR EDUCATORS AND POLICYMAKERS (2001), http://www.naspcenter.org/factsheets/zt_fs.html.

⁹⁷ See Colleen Thomas, *Policing in Schools: Too Much Law Enforcement?* 17 PUB. INT. L. REP. 166, 167 (2012).

examine how zero tolerance policies emerged.

1. *Zero Tolerance and its Relationship to the Prison Pipeline*

Zero Tolerance is “a policy that originally was designed to address the most serious misconduct, which then morphed into a ‘take no prisoners’ approach to school discipline issues that created a track which led down into the juvenile and criminal justice systems.”⁹⁸ The term, zero tolerance, derived from “the war on drugs in which . . . law enforcement quickly and aggressively responded to offenders.”⁹⁹

While having police and other law enforcement officers in schools can serve to promote safety and prevent crime, the reality is that police presence in schools is also having serious and long-lasting effects on students. The primary impact of “zero tolerance policies has been the troublesome impact on student education.¹⁰⁰ Students continue to be expelled for minor fractions, which has discouraged students from attending school even as the schools themselves mimic prison-like conditions.¹⁰¹

2. *Emergence of Policies*

Schools have adopted policies that remove students from schools in order to create an illusion of a safer environment. Schools have two avenues in which they can pursue the pipeline.¹⁰² First, “excessive police involvement in imposing discipline and zero-tolerance policies that often end in arrest or referral to the juvenile justice system.”¹⁰³ Second, “police officers and metal detectors

⁹⁸ See ADVANCEMENT PROJECT, EDUCATION ON LOCKDOWN: THE SCHOOLHOUSE TO JAILHOUSE TRACK 13 (2005), http://b.3cdn.net/advancement/5351180e24cb166d02_mlbrqgxlh.pdf.

⁹⁹ *Id.* at 15.

¹⁰⁰ See THE ADVANCEMENT PROJECT, EDUCATION ON LOCKDOWN: THE SCHOOLHOUSE TO JAILHOUSE TRACK 17 (2005), http://b.3cdn.net/advancement/5351180e24cb166d02_mlbrqgxlh.pdf.

¹⁰¹ Jason P. Nance, *Dismantling the School-to-Prison Pipeline: Tools for Change*, 48 ARIZ. ST. L.J. 313, 316-17 (2016) “Local data provide additional sobering evidence of this growing problem, especially in light of the substantial evidence that many of these referrals to law enforcement were for minor offenses . . . This recent movement is troubling not only because of the lost instruction time, but empirical studies demonstrate that a suspended or expelled student is more likely to drop out of school, commit a crime, get arrested, and become incarcerated.”

¹⁰² Deborah N. Archer, *Introduction: Challenging the School-to-Prison Pipeline*, 54 N.Y. L. SCH. L. REV. 867, 868 (2009/2010).

¹⁰³ *Id.*

often transform schools from nurturing learning environments into virtual detention centers.”¹⁰⁴ Detaining students as if they were criminals has become a normal method of discipline. Indeed, policies such as policing in schools and zero tolerance have been shown to be ineffective as corrective measures and instead serve to demoralize our children.”¹⁰⁵

School safety is key to a safe learning environment. However, an expanded police presence itself undermines the sanctity of the learning environment without providing additional safety. Zero tolerance policies pave a path or lay a pipeline to “incarceration through suspensions, expulsions, high-stakes testing, push-outs, and the removal of students from mainstream educational environments and into disciplinary alternative schools.”¹⁰⁶ The new culture of discipline has brought instability to an already fragile learning environment in many schools.¹⁰⁷

In 1993, homicides committed at schools reached a high of fifty-four deaths.¹⁰⁸ In response to the distress regarding school violence, society abandoned rehabilitative measures and replaced them with “get-tough” policies.¹⁰⁹ Congress enacted the Gun-Free School Act

¹⁰⁴ *Id.*

¹⁰⁵ *Id.* at 869.

¹⁰⁶ *Id.* at 869 (citing Johanna Wald & Daniel J. Losen, *Defining and Redirecting a School-to-Prison Pipeline*, NEW DIRECTIONS FOR YOUTH DEV., Autumn 2003, at 9, 12, <http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.482.7613&rep=rep1&type=pdf>); *citing to* THE ADVANCEMENT PROJECT, EDUCATION ON LOCKDOWN: THE SCHOOLHOUSE TO JAILHOUSE TRACK 11 (2005), http://b.3cdn.net/advancement/5351180e24cb166d02_mlbrqgxlh.pdf.

¹⁰⁷ See Elbert H. Aull IV, *Zero Tolerance, Frivolous Juvenile Court Referrals, and the School-to-Prison Pipeline: Using Arbitration as a Screening-Out Method to Help Plug the Pipeline*, 27 OHIO ST. J. ON DISP. RESOL. 179, 186 (citing Am. Psychological Ass’n Zero Tolerance Task Force, *Are Zero Tolerance Policies Effective in the Schools? An Evidentiary Review and Recommendations*, 63 AM. PSYCHOLOGIST 852, 854, 856 (2008) (discussing that studies show schools with higher rates of suspension and expulsion “have less satisfactory ratings of school climate[,] . . . less satisfactory school governance structures” and that high rates of discipline are “associated with more negative achievement outcomes”), <https://www.apa.org/pubs/info/reports/zero-tolerance.pdf>; and then citing ADVANCEMENT PROJECT & THE CIVIL RIGHTS PROJECT HARVARD UNIV., OPPORTUNITIES SUSPENDED: THE DEVASTATING CONSEQUENCES OF ZERO TOLERANCE AND SCHOOL DISCIPLINE POLICIES 10 (2000), <https://eric.ed.gov/?id=ED454314> (follow “Download full text” hyperlink)).

¹⁰⁸ Rocío Rodríguez Ruiz, Comment, *School-to-Prison Pipeline: An Evaluation of Zero Tolerance Policies and Their Alternatives*, 54 HOUS. L. REV. 803, 808 (2017) (citing RICHARD LAWRENCE, *SCHOOL CRIME AND JUVENILE JUSTICE* 148 (2d ed. 2006)).

¹⁰⁹ *Id.* (citing David M. Pedersen, *Zero-Tolerance Policies*, in SCHOOL

of 1994, which required states to expel students in possession of a firearm on school grounds for at least one year to ensure federal funding for their public schools was not jeopardized.¹¹⁰

The ultimate goal of zero tolerance policy was to send a message to potential troublemakers that their actions will not be tolerated.¹¹¹ In the 1990s, advocates of zero tolerance argued that there was an increase in violence in school and as a result there had to be a tougher approach to school safety.¹¹² However, data from the U.S. Department of Education which issues its Annual Reports on School Safety concluded that “[t]he vast majority of America’s schools are safe places.”¹¹³ This official observation has not stopped schools and lawmakers from acting on a continuing fear of violent crimes among juveniles.¹¹⁴ While safety is important, it should not be ignored that when schools create an environment with an excessive police officer presence, metal detectors, and other prison-like conditions, students will begin to see their schools as prisons.¹¹⁵

Far from being a silver bullet that has made schools safer and more conducive to learning, the overbearing police presence and overly punitive disciplinary policies appear to have transformed schools into places where administrators are far more concerned with controlling student behavior than encouraging scholarship and the free flow of ideas.¹¹⁶

Too many schools have become overly concerned with enforcing the zero tolerance policies at the expense of their primary mission – serving as a learning haven for students. Traditionally, the use of police in schools was done through a practice that arose out of “a

VIOLENCE: FROM DISCIPLINE TO DUE PROCESS 48 (James C. Hanks ed., 2004).

¹¹⁰ *Id.* at 808, 808 n.17 (“The Act also mandated that state law permit school administrators to modify the expulsion punishment on an individual basis as needed.”).

¹¹¹ Russell Skiba, *Zero Tolerance: The Assumptions and the Facts*. EDUC. POL’Y BRIEFS (Ctr. for Evaluation & Educ. Policy, Bloomington, Ind.), Summer 2004, at 1, <https://files.eric.ed.gov/fulltext/ED488918.pdf>.

¹¹² See generally U.S. DEPT OF EDUC., ANNUAL REPORT ON SCHOOL SAFETY (1998).

¹¹³ U.S. DEPT OF EDUC., ANNUAL REPORT ON SCHOOL SAFETY 1998 (1998), <https://www2.ed.gov/PDFDocs/schoolsafety.pdf>.

¹¹⁴ Jason P. Nance, *Students, Police, and the School-to-Prison Pipeline*, 93 WASH. U. L. REV. 919, 927 (2016).

¹¹⁵ Jason P. Nance, *Students, Security, and Race*, 63 EMORY L.J. 1, 5 (2013).

¹¹⁶ Aull, *supra* note 107, at 186.

community-oriented policing philosophy which emphasize[d] a proactive and prevention-oriented approach to policing.”¹¹⁷ Today, some schools, misguidedly, rely on law enforcement to handle routine disciplinary matters.¹¹⁸ An excessive police presence in schools has distorted the way teachers now interact with their students by criminalizing even innocuous childhood misbehavior such as texting or even passing gas in class.¹¹⁹ These policies that feed the prison pipeline have triggered a more damaging interaction between students, their teachers, and law enforcement.

B. Impact on Students

Zero Tolerance policies resulting students being excluded from school and arrested. We shall begin by discussing the impact of exclusion from school on the students. Then, we shall consider the

¹¹⁷ Bethany J. Peak, *Militarization of School Police: One Route on the School-to-Prison Pipeline*, 68 ARK. L. REV. 195, 208 (2015) (quoting JOANNE MCDANIEL, SCHOOL RESOURCE OFFICERS: WHAT WE KNOW, WHAT WE THINK WE KNOW, WHAT WE NEED TO KNOW 4 (2001), <http://www.ncpublicschools.org/docs/cfss/law-enforcement/whatweknow.pdf>).

¹¹⁸ Janel George, *Populating the Pipeline: School Policing and the Persistence of the School-to-Prison Pipeline*, 40 Nova L. Rev. 493, 506 (2016); see e.g., 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) (Officer yanks “down a 16 year old female student, then flinging her across the floor before her arrest. The student allegedly refused to leave her desk.”).

¹¹⁹ See Nance, *supra* note 115, at 955; citing to SHAKTI BELWAY, S. POVERTY LAW CTR., ACCESS DENIED: NEW ORLEANS STUDENTS AND PARENTS IDENTIFY BARRIERS TO PUBLIC EDUCATION 2 (2010) (describing various incidents where police mishandled student disciplinary issues); Nancy A. Heitzeg, *Criminalizing Education: Zero Tolerance Policies, Police in the Hallways, and the School to Prison Pipeline, in FROM EDUCATION TO INCARCERATION: DISMANTLING THE SCHOOL-TO-PRISON PIPELINE* 11, 21–22 (Anthony J. Nocella II et al. eds., 2014) (describing various incidents where students were punished, and even arrested, for minor offenses); ELORA MUKHERJEE, N.Y. CIVIL LIBERTIES UNION, CRIMINALIZING THE CLASSROOM: THE OVER-POLICING OF NEW YORK CITY SCHOOLS 6, 14 (2007), https://www.nyclu.org/sites/default/files/publications/nyclu_pub_criminalizing_the_classroom.pdf (describing the arrests of students resulting from bringing cell phones to school and being late to class); Matthew T. Theriot, *School Resource Officers and the Criminalization of Student Behavior*, 37 J. CRIM. JUST. 280, 281 (2009) (describing arrests for trivial offenses); Sharif Durhams, *Tosa East Student Arrested, Fined for Repeated Texting*, MILWAUKEE J. SENTINEL (Feb. 17, 2009), <http://www.jsonline.com/news/milwaukee/39711222.html>; *Student Arrested for ‘Passing Gas’ at Fla. School*, NBCNEWS.COM (Nov. 24, 2008, 9:47 PM), http://www.nbcnews.com/id/27898395/ns/us_news-weird_news/t/student-arrested-passing-gas-fla-school/.

impact of arrest on the students who have received the ultimate punishment under zero tolerance policies.

1. *Impact of Exclusion from School*

Law and policies perpetrating Zero Tolerance in schools have an objectively negative effect on students.¹²⁰ “The number of students in secondary schools suspended or expelled increased from one in thirteen in 1972-73 to one in nine in 2009-10.”¹²¹ Many suspensions were the result of trivial infractions of rules that did not endanger the physical well-being of other students.¹²² The majority of them are school-based referrals to law enforcement. Many negative consequences are associated with incarcerating the youth for minor infractions. Empirical evidence demonstrates that once a student is incarcerated it effects his or her future educational, housing, employment and military opportunities.¹²³ Furthermore, it affects the mental health of the student who develops a violent attitude, and it increases the possibility of future involvement in the justice system.¹²⁴ The Tenth Circuit recognized the traumatizing impact of zero tolerance policies. In *Hawker v. Sandy City Corp.*, they said that “[t]he criminal punishment of young schoolchildren leaves permanent scars and unresolved anger, and its far-reaching impact on the abilities of these children to lead future prosperous and productive lives should be a matter of grave concern for us all.”¹²⁵

Even if the student is not convicted or incarcerated there are negative consequences such as the refusal to be readmitted in the school, the emotional trauma, stigma in their schools and among classmates and teachers.¹²⁶ They are more monitored than other students and as a consequence they will have lower test scores, higher likelihood to drop out of schools and increased interaction

¹²⁰ Jason P. Nance, *Students, Police, and the School-to-Prison Pipeline*, 93 WASH. U. L. REV. 919, 952–57 (2016).

¹²¹ *Id.* at 952; *citing to* U.S. DEP’T OF EDUC., CIVIL RIGHTS DATA COLLECTION, DATA SNAPSHOT: SCHOOL DISCIPLINE 2 (2014), <https://ocrdata.ed.gov/Downloads/CRDC-School-Discipline-Snapshot.pdf>.

¹²² Nance, *supra* note 105, at 952–53.

¹²³ Nance, *supra* note 105, at 954.

¹²⁴ Nance, *supra* note 105, at 954.

¹²⁵ Nance, *supra* note 105, at 984; *citing to* *Hawker v. Sandy City Corp.*, 774 F.3d 1243, 1244 (10th Cir. 2014) (Lucero, J., concurring).

¹²⁶ See ADVANCEMENT PROJECT, EDUCATION ON LOCKDOWN: THE SCHOOLHOUSE TO JAILHOUSE TRACK 12 (2005), http://b.3cdn.net/advancement/5351180e24cb166d02_mlbrqgxlh.pdf.

with the justice system.¹²⁷ From a study conducted by the criminologist Gary Sweeten, a “first-time arrest during high school nearly doubles the odds of a high school dropout, while a court appearance nearly quadruples the odds of dropout.”¹²⁸ The “sociologist Paul Hirschfield found that those who were arrested in ninth or tenth grade were six to eight times more likely than students who were not arrested to drop out of high school.”¹²⁹ When a student is expelled, he is deprived of an educational experience, giving him “more time and opportunities to engage in harmful or illegal activities.”¹³⁰

Another problematic aspect of these policies is that although the data does not demonstrate more frequent or more serious misbehavior by Black students, Black students are disproportionately punished under zero tolerance policies.¹³¹ The Office of Civil rights found that there are many cases where “African-American students were disciplined more harshly and more frequently because of their race than similarly situated white students.”¹³² In short, racial discrimination in school discipline, specifically the targeting of Black students, is a real problem.

Even if a student is not convicted and detained, the consequences are severe because schools may refuse to readmit students who have been suspended and frequently do not readmit

¹²⁷ Nance, *supra* note 105, at 923; citing to CATHERINE Y. KIM ET AL., THE SCHOOL-TO-PRISON PIPELINE: STRUCTURING LEGAL REFORM 1 (2010).

¹²⁸ Jason P. Nance, *Students, Police, and the School-to-Prison Pipeline*, 93 WASH. U. L. REV. 919, 955-56 (2016) citing to Gary Sweeten, *Who Will Graduate? Disruption of High School Education by Arrest and Court Involvement*, 23 JUST. Q. 462, 473 (2006).

¹²⁹ *Id.* at 955-56; citing to Paul Hirschfield, *Another Way Out: The Impact of Juvenile Arrests on High School Dropout*, 82 SOC. OF EDUC. 368, 368 (2009).

¹³⁰ See Jason P. Nance, *Students, Police and the School-to-Prison Pipeline*, 93 WASH. U. L. REV. 919, 956 (2016); citing to *Ending the School-to-Prison Pipeline: Hearing Before the Subcomm. on the Constitution, Civil Rights and Human Rights of the S. Comm. on the Judiciary*, 112th Cong. 2–3 (2012) (statement of Laurel G. Bellows, President, American Bar Association), archived at <http://perma.cc/N49C-Y7WN> (explaining how exclusion is an indirect route to involvement in the justice system).

¹³¹ *Id.* at 957; citing to DANIEL J. LOSEN, NAT’L EDUC. POLICY CTR., DISCIPLINE POLICIES, SUCCESSFUL SCHOOLS, AND RACIAL JUSTICE 6–7 (2011), <https://nepc.colorado.edu/sites/default/files/NEPC-SchoolDiscipline.pdf>.

¹³² Press Release, U.S. Dep’t of Educ, Education Department Announces Resolution of Civil Rights Investigation of Christina School District in Wilmington, Del., (December 18, 2012), <https://www.ed.gov/news/press-releases/education-department-announces-resolution-civil-rights-investigation-christina-school-district-wilmington-del>.

students who have been expelled. These students suffer emotional trauma, stigma, and embarrassment.¹³³ When excluded students are readmitted to school, the stigma continues as they are more closely monitored by school officials, teachers, and school resource officers.

2. *Impact of Arrest*

When students are arrested, it starts a cycle that has a long-term effect on students who, many times, do not have proper guidance and are acting out to seek attention. Arrested students have lower test scores as a result of the trauma of arrest and missed school days, which often leaves them unfocused when they are able to attend school.¹³⁴ Arrested students are both less likely to graduate and more likely to become involved in the criminal justice system later in life.¹³⁵

As Nance notes, when students are arrested for trivial offenses such as “texting, passing gas in class, violating the school dress code, stealing two dollars from a classmate, bringing a cell phone to class, [or] arriving late to school,”¹³⁶ this causes students to act out and conditions them to be distrustful of authority in the future.¹³⁷

¹³³ See Nance, *supra* note 115, at 955.

¹³⁴ See Nance, *supra* note 115, at 955.

¹³⁵ See Nance, *supra* note 115, at 955.

¹³⁶ Nance, *supra* note 115 at 922 (2016); citing to SHAKTI BELWAY, S. POVERTY LAW CTR., ACCESS DENIED: NEW ORLEANS STUDENTS AND PARENTS IDENTIFY BARRIERS TO PUBLIC EDUCATION 2 (2010) (describing various incidents where police mishandled student disciplinary issues); Nancy A. Heitzeg, *Criminalizing Education: Zero Tolerance Policies, Police in the Hallways, and the School to Prison Pipeline*, in FROM EDUCATION TO INCARCERATION: DISMANTLING THE SCHOOL-TO-PRISON PIPELINE 11, 21–22 (Anthony J. Nocella II et al. eds., 2014) (describing various incidents where students were punished, and even arrested, for minor offenses); ELORA MUKHERJEE, N.Y. CIVIL LIBERTIES UNION, CRIMINALIZING THE CLASSROOM: THE OVER-POLICING OF NEW YORK CITY SCHOOLS 6, 14 (2007), https://www.nyclu.org/sites/default/files/publications/nyclu_pub_criminalizing_the_classroom.pdf (describing the arrests of students resulting from bringing cell phones to school and being late to class); Matthew T. Theriot, *School Resource Officers and the Criminalization of Student Behavior*, 37 J. CRIM. JUST. 280, 281 (2009) (describing arrests for trivial offenses); Sharif Durhams, *Tosa East Student Arrested, Fined for Repeated Texting*, MILWAUKEE J. SENTINEL (Feb. 17, 2009), <http://www.jsonline.com/news/milwaukee/39711222.html>; *Student Arrested for ‘Passing Gas’ at Fla. School*, NBCNEWS.COM (Nov. 24, 2008, 9:47 PM), http://www.nbcnews.com/id/27898395/ns/us_news-weird_news/t/student-arrested-passing-gas-fla-school/.

¹³⁷ See Nance, *supra* note 115, at 975.

[Studies show] that arresting a student substantially reduces the odds that the student will graduate from high school, especially if that student appears in court. It also decreases the odds that a student will succeed academically and have future stable employment opportunities. Worse, it increases the likelihood of that student's future involvement in the criminal justice system. The consequences associated with incarceration are even more severe. Empirical research shows that incarcerating youth reinforces violent attitudes and behaviors; limits future educational, housing, employment, and military opportunities; deteriorates their mental health; and increases the likelihood of their future involvement in the justice system.¹³⁸

It is dehumanizing for a student to be handcuffed and walked out as if he has committed a serious crime for a trivial offense. Students who suffer under such treatment frequently lose interest in succeeding academically and may also have their chances for future employment greatly diminished.¹³⁹ When students are treated as criminals, they will begin to believe that they are criminals, and are more likely to become criminals.

B. Results for Schools

The United States Department of Education has found no evidence that zero tolerance policies curb violence in schools.¹⁴⁰ Furthermore, statistics indicate that juvenile crime was decreasing prior to the Gun-Free Schools Act of 1994.¹⁴¹ The US Department of Education's Office of Civil Rights Data Collection demonstrates that although African-American students represented only 16% of the total number of students during the 2011–12 school year, they represented 32% of students receiving

¹³⁸ Jason P. Nance, *Students, Police and the School-to-Prison Pipeline*, 93 WASH. U. L. REV. 919, 923-24 (2016) ("Notably, there are calls to reform the juvenile justice system to respond better to the needs of youth and help them to avoid future involvement in the justice system").

¹³⁹ Jason P. Nance, *Students, Police and the School-to-Prison Pipeline*, 93 WASH. U. L. REV. 919, 924 (2016).

¹⁴⁰ *Id.* at 934 citing to Jill Richards, *Zero Room for Zero Tolerance: Rethinking Federal Funding for Zero Tolerance Policies*, 30 U. DAYTON L. REV. 91, 108–09 (2004).

¹⁴¹ *Id.* at 952-53 citing to Alicia C. Insley, *Suspending and Expelling Children From Educational Opportunity: Time to Reevaluate Zero Tolerance Policies*, 50 AM. U. L. REV. 1039, 1063 (2001).

an in-school suspension; 33% of students receiving one out-of-school suspension; 42% of students receiving more than one out-of-school suspension; and 34% of students who were expelled.¹⁴² Also during this period, African-American students accounted for 27% of the students who were referred to law enforcement, and 31% of students who received a school-based arrest.¹⁴³ Just as appalling, or perhaps more so, while African-Americans accounted for 18% of the preschool student population, they represented 48% of the preschool children who received more than one out-of-school suspension.¹⁴⁴ These disparities are not explained by more frequent or more serious misbehavior by minority students.¹⁴⁵

Michael Krezmien, Peter Leone, Mark Zablocki, and Craig Wells conducted an empirical study to compare referrals across multiple states and found that in four of the five states studied (Arizona, Hawaii, Missouri, and West Virginia)¹⁴⁶ referrals from schools comprised a larger proportion of total referrals to the juvenile justice system in 2004 than in 1995.¹⁴⁷ That study also demonstrated that schools in Missouri, Hawaii, and Arizona referred greater proportions of their students in 2004 than in 1995.¹⁴⁸ The number of school-based arrests also increased in the Philadelphia Public School District (from 1,632 in 1999–2000 to 2,194 in 2002–2003);¹⁴⁹ Houston Independent School District (from 1,063 in 2001 to 4,002 in 2002); Clayton County, Georgia (from 89 in the 1990s to 1,400 in 2004);¹⁵⁰ Miami-Dade County, Florida (a

¹⁴² *Id.* at 957 *citing to* OFFICE FOR CIVIL RIGHTS, U.S. DEP'T OF EDUC., CIVIL RIGHTS DATA COLLECTION, DATA SNAPSHOT: SCHOOL DISCIPLINE 2 fig. (2014), <https://ocrdata.ed.gov/downloads/crdc-school-discipline-snapshot.pdf>.

¹⁴³ *Id.*

¹⁴⁴ Nance, *supra* note 139 at 6 fig., 7 fig..

¹⁴⁵ Nance, *supra* note 139 at 957 *citing to* "Dear Colleague" Letter from Catherine E. Lhamon, Assistant Sec'y for Civil Rights, U.S. Dep't. Of Educ. & Jocelyn Samuels, Acting Assistant Attn'y Gen. U.S. Dep't of Justice, Nondiscriminatory Administration of School Discipline 4 (Jan. 8, 2014), <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201401-title-vi.pdf> (last visited Dec. 23, 2018).

¹⁴⁶ Nance, *supra* note 139 at 953 *citing to* 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, 277 (2010).

¹⁴⁷ *Id.* at 273.

¹⁴⁸ *Id.* at 280.

¹⁴⁹ Nance, *supra* note 139 at 953 *citing to* ADVANCEMENT PROJECT, EDUCATION ON LOCKDOWN: THE SCHOOLHOUSE TO JAILHOUSE TRACK 15 (2005) https://b.3cdn.net/advancement/5351180e24cb166d02_mlbrqxlh.pdf (last visited Dec. 23, 2018).

¹⁵⁰ Nance, *supra* note 139 at 953 *citing to* ADVANCEMENT PROJECT, ENDING THE SCHOOLHOUSE TO JAILHOUSE TRACK 1

threefold increase from 1999 to 2001, and from 1,816 in 2001 to 2,566 in 2004);¹⁵¹ and Lucas County, Ohio (from 1,237 in 2000 to 1,727 in 2002).¹⁵² Similar to the increase of suspensions and expulsions, there is substantial evidence that the vast majority of these school-based referrals were for relatively minor offenses.¹⁵³

Furthermore, the economic costs of incarcerating students are staggering. The national average expense for detaining one juvenile per year is \$148,767 (reaching as high as \$352,663 in the state of New York).¹⁵⁴ Beyond the millions of dollars that government entities spend to incarcerate youth, some estimate that the long-term costs to our society of detaining youth (which include lost future earnings, recidivism, lost future tax revenue, and additional Medicare and Medicaid spending) range from \$7.9 billion to \$21.47 billion per year.¹⁵⁵

The U.S. Department of Education determined that there is little statistical evidence that Zero Tolerance is effective at suppressing violence in school.¹⁵⁶ Statistics demonstrate conclusively that juvenile crime was declining prior to the implementation of the Gun-Free Schools Act of 1994 and other zero tolerance policies.¹⁵⁷ Also, “the Federal Bureau of Investigation’s Uniform Crime Report indicates a decline of 23% in juvenile

<https://web.archive.org/web/20160712073218/http://safequalityschools.org:80/pages/clayton-county-ga> (last visited Dec. 23, 2018).

¹⁵¹ Nance, *supra* note 139 at 954 *citing to* Sara Rimer, *Unruly Students Facing Arrest, Not Detention*, N.Y. TIMES (Jan. 4, 2004), <https://www.nytimes.com/2004/01/04/us/unruly-students-facing-arrest-not-detention.html>; Jason P. Nance, *Students, Police and the School-to-Prison Pipeline*, 93 WASH. U. L. REV. 919, 953–954 (2016).

¹⁵² Nance, *supra* note 139 at 954 *citing to* Rimer, *supra* note 142.

¹⁵³ Nance, *supra* note 139 at 954 *citing to* FLA. STATE CONFERENCE NAACP ET AL., *ARRESTING DEVELOPMENT: ADDRESSING THE SCHOOL DISCIPLINE CRISIS IN FLORIDA* 16 (2006) http://b.3cdn.net/advancement/e36d17097615e7c612_bbm6vub0w.pdf.

¹⁵⁴ Nance, *supra* note 139 at 954 *citing to* JUSTICE POLICY INST., *STICKER SHOCK: CALCULATING THE FULL PRICE TAG FOR YOUTH INCARCERATION* 11 tbl. (2014), www.justicepolicy.org/uploads/justicepolicy/documents/sticker_shock_final_v2.pdf.

¹⁵⁵ Nance, *supra* note 139 at 955 *citing to id.* at 37.

¹⁵⁶ Nance, *supra* note 139 at 931 *citing to* Barry C. Feld & Donna M. Bishop, *Transfer of Juveniles to Criminal Court*, in *THE OXFORD HANDBOOK OF JUVENILE CRIME AND JUVENILE JUSTICE* 801, 826 (Barry C. Feld & Donna M. Bishop eds., 2012).

¹⁵⁷ Nance, *supra* note 139 at 952–53 *citing to* See Alicia C. Insley, *Suspending and Expelling Children from Educational Opportunity: Time to Reevaluate Zero Tolerance Policies*, 50 AM. U. L. REV. 1039, 1063 (2001).

homicide arrests between 1989 and 1998.¹⁵⁸ 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.”¹⁵⁹ Despite these compelling statistics, school administrators continue embracing zero tolerance as an effective way to decrease school violence and protect students and teachers.¹⁶⁰ Zero Tolerance policies have proven to be ineffective in increasing safety in the schools, and are unjustifiably penalizing the students.¹⁶¹

III. Victims of the Pipeline

The impact of zero tolerance policies has been the reinforcement of a school to prison pipeline. To be clear, all students at schools that apply zero tolerance policies are ultimately the victims of such policies. The mass surveillance and prison-like conditions that frequently accompany these measures inculcate a mentality of control and punishment that is at odds with the educational values of free and critical thought.

There is even greater damage done to those students who are ensnared by the zero tolerance policies. Those students are all too frequently Black students. This part begins by first providing support for the fact that Black students are not more prone to be mischievous. This part next discusses how, notwithstanding the fact that Black students are not more mischievous, schools discipline and arrest Black students at higher rates than similarly situated white students. The part concludes that racism in school discipline violates the right to public education as well as the right to due process and the Equal Protection clause of the Fourteenth Amendment to the U.S. Constitution.

A. Black Students unjustly receive higher rates of school discipline and arrest

Black Students are not more prone to misbehavior, yet there are

¹⁵⁸ *Id.* at 1062.

¹⁵⁹ *Id.* at 1063.

¹⁶⁰ See generally Farnel Maxine, *Zero Tolerance Policies and the School to Prison Pipeline*, SHAREDJUSTICE.ORG (Jan 18, 2018), <http://www.sharedjustice.org/domestic-justice/2017/12/21/zero-tolerance-policies-and-the-school-to-prison-pipeline>.

¹⁶¹ Deborah Gordon Klehr, *Addressing the Unintended Consequences of No Child Left Behind and Zero Tolerance: Better Strategies for Safe Schools and Successful Students*, 16 GEO. J. ON POVERTY L. & POL'Y, 585, 591 n.26 (2009).

higher rates of discipline and arrest for Black Students.¹⁶² The Office of Civil Rights confirmed that it has found “cases where African-American students were disciplined more harshly and more frequently because of their race than similarly situated white students.¹⁶³ In short, racial discrimination in school discipline is a real problem.”¹⁶⁴

Empirical studies show that disparities are not explained by more frequent or more serious misbehavior by minority students.¹⁶⁵

Empirical analys[e]s [have] revealed that both student race and student poverty were strong predictors for whether a school chose to employ high surveillance security methods.¹⁶⁶ These findings support what many scholars have observed anecdotally—that large, urban schools serving primarily low-income or minority students are more likely to create intense surveillance environments than other schools;¹⁶⁷

In effect, minority and low-income students are subjected to “heavy-handed, punitive-based measures to maintain order and control crime.”¹⁶⁸ “The findings further suggest that schools serving primarily affluent or white students find alternative ways to create safer environments.”¹⁶⁹

In his study titled “Race Is Not Neutral: A National

¹⁶² Jason P. Nance, *Students, Police and the School-to-Prison Pipeline*, 93 WASH. U. L. REV. 919, 958 (2016); citing to 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, 102 (2011) (describing differential disciplinary treatment for an equal infractions among races).

¹⁶³ 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).

¹⁶⁴ Jason P. Nance, *Student Surveillance, Racial Inequalities, and Implicit Racial Bias*, 66 EMORY L.J. 765, 814 (2017) (quoting “Dear Colleague” Letter from Catherine E. Lhamon, Assistant Sec’y for Civil Rights, U.S. Dep’t. of Educ. & Jocelyn Samuels, Acting Assistant Attn’y Gen., U.S. Dep’t of Justice, *Nondiscriminatory Administration of School Discipline* 4 (Jan. 8, 2014), <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201401-title-vi.pdf>).

¹⁶⁵ “Dear Colleague”, *supra* note 158, at 4.

¹⁶⁶ Jason P. Nance, *School Surveillance and the Fourth Amendment*, 2014 WIS. L. REV. 79, 90 (2014).

¹⁶⁷ *Id.*

¹⁶⁸ *Id.*

¹⁶⁹ *Id.*

Investigation of African American and Latino Disproportionality in School Discipline,” Skiba summarized that:

The fact of racial/ethnic disproportionality in school discipline has been widely and, we would argue, conclusively demonstrated. Across urban and suburban schools, quantitative and qualitative studies, national and local data, African Americans and to some extent Latino students have been found to be subject to a higher rate of disciplinary removal from school. These differences do not appear to be explainable solely by the economic status of those students, nor through a higher rate of disruption for students of color.¹⁷⁰

Using data from more than 22,000 students from forty-five elementary schools in a large suburban/urban, rural consolidated school district in a mid-Atlantic state,¹⁷¹ Rocque investigated whether teachers are more likely to discipline black students.¹⁷² After taking into account their conduct, their school performance, and their attitude and demeanor, it was found that as early as elementary school black students feel the sting of discipline at a much higher rate than whites.¹⁷³ The study’s results suggested that disproportionality in discipline is not explained by differential behavior and is thus not justified.¹⁷⁴

In its Joint “Dear Colleague” letter dated January 8, 2014, issuing guidance on the non-discriminatory administration of school discipline, the U.S Department of Education (DOE) and the U.S. Attorney General noted that both departments recognized that disparities in student discipline in school districts may be caused by a number of factors.¹⁷⁵ “However, research suggests that the substantial racial disparities of the kind reflected in the CRDC [Civil Rights Data Collection] data are not explained by more frequent or more serious misbehavior by students of color.”¹⁷⁶

¹⁷⁰ Skiba, *supra* note 157, at 104.

¹⁷¹ Michael Rocque & Raymond Paternoster, *Understanding the Antecedent of the “School-to-Jail” Link: The Relationship Between Race and School Discipline*, 101 J. CRIM. L. & CRIMINOLOGY 633, 645 (2011).

¹⁷² *Id.* at 633.

¹⁷³ Rocque, *supra* note 171 at 638.

¹⁷⁴ Rocque, *supra* note 171 at 662.

¹⁷⁵ Jason P. Nance, *Over-Disciplining Students, Racial Bias, and the School-to-Prison Pipeline*, 50 U. RICH. L. REV. 1063, 1073 (2016); citing to U.S. Dep’t. of Educ., Office for Civil Rights & U.S. Dep’t. of Justice, Civil Rights Div., “Dear Colleague” Letter 4 (Jan. 8, 2014), <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201401-title-vi.pdf>.

¹⁷⁶ *Id.* at 1067.

Research and data from the DOE's Civil Rights Data Collection ("CRD Collection") provide telling evidence regarding racial disparities. Disparities exist with regard to school discipline, including student suspensions, referrals to law enforcement, and school-based arrests at "every school level in every setting."¹⁷⁷ As such, Black children are faced with a serious obstacle when seeking access to public education because they receive more frequent and harsher discipline. This can lead to serious negative consequences for them. Consequences that are disproportionate, not because they misbehave more than other children, but "because of their race."¹⁷⁸

Black students represented 16% of the total student population during the 2011–12 school year, but represented 32% of students who received an in-school suspension, 33% of students who received an out-of-school suspension, 42% of students who received more than one out-of-school suspension, and 34% of students who were expelled.¹⁷⁹ In another snapshot, during the 2009–10 school year, one out of every six black students enrolled in K–12 public school was suspended at least once, but only one out of every twenty white students was suspended.¹⁸⁰ Even worse, during the 2009–10 school year, one out of every four African American students with a disability was suspended during that same time period.¹⁸¹ And perhaps even worse than that, during the 2011–12 school year, while African American children represented 18% of preschool enrollment, they represented 48% of preschool children who received more than one out-of-school suspension.¹⁸² Significant racial disparities also exist with respect to law enforcement referrals and school-based arrests. According to the 2011–12 CRD Collection, although African American students represented 16% of the total student population, they represented 27% of students that schools referred to law enforcement and 31% of students subject to a school-based arrest.¹⁸³

The right to public education is undermined by the continuing

¹⁷⁷ Jason P. Nance, *Over-Disciplining Students, Racial Bias, and the School-to-Prison Pipeline*, 50 U. RICH. L. REV. 1063, 1065–67 (2016).

¹⁷⁸ *Id.* at 1065–67.

¹⁷⁹ *Id.* at 1065–66.

¹⁸⁰ *Id.* at 1066.

¹⁸¹ Jason P. Nance, *Over-Disciplining Students, Racial Bias, and the School-to-Prison Pipeline*, 50 U. RICH. L. REV. 1063, 1066 (2016).

¹⁸² *Id.*

¹⁸³ *Id.*

existence of the school to prison pipeline and the victims of this pipeline are disproportionately Black students.

B. Inequality and Oppression

For Black students, schools mirror the pervasive racism and inequality in American society.¹⁸⁴ Entrenched racial biases have led to selective enforcement and discriminatory application of school discipline measures.

Entrenched racism in school discipline negatively influences decision making by educators and school officials and causes them to engage in the disproportionate application of strict security measures on students of color. These biases can create a tense and uncomfortable environments for Black children and contribute to funneling these children through the school-to-prison pipeline.

“Several empirical studies conclude that arresting a student leads to lower standardized test scores, a higher probability that the student will not graduate from high school, and a higher likelihood of future involvement in the justice system.”¹⁸⁵ When victims of the pipeline “begin to sense that the educational process will not help them—that it is unlikely that they will meet the grade level expectations, graduate, attend college or obtain a well-paying job—they have fewer reasons to behave, take school seriously, master classroom material or stay in school.”¹⁸⁶ Instead, they

¹⁸⁴ See Rocque & Paternoster, *supra* note 171, at 635.

¹⁸⁵ Jason P. Nance, *Dismantling the School-to-Prison Pipeline: Tools for Change*, 48 ARIZ. ST. L.J. 313, 321 (2016); citing to CATHERINE Y. KIM ET. AL., THE SCHOOL-TO-PRISON PIPELINE: STRUCTURING LEGAL REFORM 113, 128 (2010); Pedro A. Noguera, *Schools, Prisons, and Social Implications of Punishment: Rethinking Disciplinary Practices*, 42 THEORY INTO PRAC. 341, 344 (2003) (arguing that a broken social contract between the education system and students motivates them to violate school rules as a “way of obtaining retribution for a failed education.”).

¹⁸⁶ Jason P. Nance, *Dismantling the School-to-Prison Pipeline: Tools for Change*, 48 ARIZ. ST. L.J. 313, 324–25 (2016); citing to MATTHEW P. STEINBERG ET AL., STUDENT AND TEACHER SAFETY IN CHICAGO PUBLIC SCHOOLS: THE ROLES OF COMMUNITY CONTEXT AND SCHOOL SOCIAL ORGANIZATION 27–31 (2011) (documenting that students’ academic skills are highly correlated with overall safety at the school); PAUL E. WILLIS, LEARNING TO LABOR: HOW WORKING CLASS KIDS GET WORKING CLASS JOBS 72 (1977) (observing that “teachers’ authority becomes increasingly the random one of the prison guard, not the necessary one of the pedagogue” when students believe that the knowledge, skills, and credentials acquired in school will not benefit them); See also Pedro A. Noguera, *Schools, Prisons, and Social Implications of Punishment: Rethinking Disciplinary Practices*, 42 THEORY INTO PRAC. 341, 343 (2003). See also Jason P. Nance, *School Surveillance and the Fourth Amendment*, 2014 WIS. L. REV. 79, 100.

retaliate by “disrupt[ing] classroom activities, push[ing] back against mandatory attendance policies, look[ing] for (often illegitimate) ways to establish their self-worth, identity, and status among peers, or drop[ping] out of school altogether,”¹⁸⁷ missing out on their right to be educated.

“There is evidence suggesting that some school administrators and teachers believe that some students, particularly African-American male students, simply cannot be taught, are ‘unsalvageable’ and are prison bound.”¹⁸⁸ Consequently, there are many educators “who believe that they lack the resources to help all of the troubled students and have adopted an exclusionary ethos to preserve their limited resources to help students who they believe have a better chance of succeeding,”¹⁸⁹ effectively denying

¹⁸⁷ Jason P. Nance, *Dismantling the School-to-Prison Pipeline: Tools for Change*, 48 ARIZ. ST. L.J. 313, 325 (2016); citing to Jason P. Nance, *Students, Security, and Race*, 63 EMORY L.J. 1, 45–46 (2013). See also Jason P. Nance, *School Surveillance and the Fourth Amendment*, 2014 WIS. L. REV. 79, 100–01 (2014); MATTHEW P. STEINBERG ET AL., UNIV. CHI. URBAN EDUC. INST., STUDENT AND TEACHER SAFETY IN CHICAGO PUBLIC SCHOOLS: THE ROLES OF COMMUNITY CONTEXT AND SCHOOL SOCIAL ORGANIZATION 46 (2011) (observing that low-performing students are less engaged, more likely to become frustrated and act out, and less likely to respond to punishment).

¹⁸⁸ Jason P. Nance, *Dismantling the School-to-Prison Pipeline: Tools for Change*, 48 ARIZ. ST. L.J. 313, 327 (2016). citing to Michelle Fine et al., *Civics Lessons: The Color and Class of Betrayal*, 106 TEACHERS C. REC. 2193, 2201–05 (2004) (reporting that some minority students believed that their teachers considered them to be “animals,” “inmates,” or “killers”); Paul J. Hirschfield, *Preparing for Prison?: The Criminalization of School Discipline in the USA*, 12 THEORETICAL CRIMINOLOGY 79, 92 (2008) (“Owing to a dominant image of black males as criminals and prisoners, many school authorities view chronically disobedient black boys as ‘bound for jail’ and ‘unsalvageable.’”); Pedro A. Noguera, *The Trouble with Black Boys: The Role and Influence of Environmental and Cultural Factors on the Academic Performance of African American Males*, 38 URB. EDUC. 431, 448 (2003) (maintaining that black students are less likely than white students to believe that their teachers were concerned about and supported them); David M. Ramey, *The Social Structure of Criminalized and Medicalized School Discipline*, 88 SOC. EDUC. 181, 185 (2015) (“[S]chool officials have lower expectations of minority children and often view their misbehavior as stable and unchanging, openly opining that these children are destined for criminal activity.”).

¹⁸⁹ Jason P. Nance, *Dismantling the School-to-Prison Pipeline: Tools for Change*, 48 ARIZ. ST. L.J. 313, 327 (2016). citing to FLA. STATE CONFERENCE NAACP, ADVANCEMENT PROJECT & NAACP LEGAL DEFENSE FUND, INC., ARRESTING DEVELOPMENT: ADDRESSING THE SCHOOL DISCIPLINE CRISIS IN FLORIDA 7 (2006) (“[L]ong-standing resource inadequacies . . . lead to negative educational and behavioral outcomes, and [there are] perverse incentives created by the testing and accountability movement to remove children from school who may drag down a school’s test scores.”); Paul J. Hirschfield, *Preparing for Prison?: The*

victims and potential victims of the pipeline of their right to public education.¹⁹⁰

Sussman suggests that “[f]looding schools with police officers has the direct effect of pushing children toward the track to prison. For many nonwhite students, school criminalization reflects the racial profiling, police harassment, and disproportionate incarceration that they see in their communities.”¹⁹¹ The result has been a disaster when nonwhite students feel entrapped as if they are already in prison when they go to school. Furthermore, data has demonstrated that “[n]onwhite students are far more likely than white students to be arrested, suspended, expelled, or exposed to corporal punishment for the same type of conduct.”¹⁹²

Given that one in nine black men aged twenty through thirty four are incarcerated,¹⁹³ and one in three “young [B]lack males live under some form of criminal justice control,”¹⁹⁴ routine police contact in schools that resemble prisons cannot be healthy.¹⁹⁵ The constant police presence in criminalized schools represents to students that the school’s priority is controlling, not educating, them and normalizes police surveillance and prison.¹⁹⁶ This

Criminalization of School Discipline in the USA, 12 THEORETICAL CRIMINOLOGY 79, 92 (2008) (maintaining that some educators rely on extreme punitive measures because they believe that they “lack the resources to reverse the downward trajectories of the most troublesome students without compromising the quality of teaching and services aimed at more deserving or promising students”); Pedro A. Noguera, *Schools, Prisons, and Social Implications of Punishment: Rethinking Disciplinary Practices*, 42 THEORY INTO PRAC. 341, 346 (2003) (describing the “triage approach” to schooling).

¹⁹⁰ See Linda Darling-Hammond, *Inequality in Teaching and Schooling: How Opportunity Is Rationed to Students of Color in America*, in THE RIGHT THING TO DO THE SMART THING TO DO 208, 208–09 (2001).

¹⁹¹ Aaron Sussman, *Learning in Lockdown: School Police, Race, and the Limits of Law*, 59 UCLA L. REV. 788, 811 (2012).

¹⁹² *Id.* at 813.

¹⁹³ Adam Liptak, *U.S. Imprisons One in 100 Adults, Report Finds*, N.Y. TIMES (Feb. 29, 2008), <https://www.nytimes.com/2008/02/29/us/29prison.html>.

¹⁹⁴ See Katayoon Majd, *Students of the Mass Incarceration Nation*, 54 HOW. L.J. 343, 353 (2011) (including those who are “in prison, on probation or parole, or awaiting trial.”).

¹⁹⁵ See *id.* at 368–69 (Many schools now literally resemble prisons, fully equipped with surveillance technologies, full-time law enforcement officers, “metal detectors, video surveillance cameras, security check points, and drug-sniffing dogs.”).

¹⁹⁶ See Loïc Wacquant, *Deadly Symbiosis: When Ghetto and Prison Meet and Mesh*, 3 PUNISHMENT & SOC’Y 95, 108 (2001) (stating that inner city schools have “deteriorated to the point where they operate in the manner of *institutions of confinement* whose primary mission is not to educate but to ensure ‘custody and control’—to borrow the motto of many departments of corrections”).

message is reinforced by the merger of the criminalized culture students see inside their schools and the mass incarceration they see in their communities.¹⁹⁷

CONCLUSION

The school-to-prison pipeline undermines the right to public education and must therefore be dismantled. Notwithstanding the fundamental rights holding of *San Antonio v. Rodriguez*, there is a right to public education that each state within the United States has recognized and that the constitution and federal laws protect. Both the Equal Protection Clause and the Due Process Clause of the Fourteenth Amendment demand that students be treated equally and not be subject to arbitrary application of zero tolerance policies. Despite these protections, zero tolerance policies emerged and have negatively impacted the lives of children through school exclusion and arrest. The disproportionate impact on Black victims of the school-to-prison pipeline is part of the modern American story of racial oppression.

¹⁹⁷ See Katayoon Majd, *Students of the Mass Incarceration Nation*, 54 HOW. L.J. at 382 (“[T]he lowest-performing schools tend to be located in communities with the highest incarceration rates.”).