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## Populating The Pipeline: School Policing And The Persistence Of The School-To-Prison Pipeline

Janel George\*

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## **Abstract**

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.

**KEYWORDS:** prison, school, pipeline

# POPULATING THE PIPELINE: SCHOOL POLICING AND THE PERSISTENCE OF THE SCHOOL-TO-PRISON PIPELINE

JANEL GEORGE\*

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## 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.<sup>1</sup> 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

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\* 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.<sup>2</sup> 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<sup>3</sup>—but victims of this police brutality in our schools have found little, if any, successful legal redress.<sup>4</sup> 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.<sup>5</sup> 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.<sup>6</sup> 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](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,<sup>7</sup> effectively undermine equal educational opportunities for impacted students and exacerbate educational inequalities.<sup>8</sup>

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.<sup>9</sup> The recently-enacted *Every Student Succeeds Act* (“ESSA”)<sup>10</sup> 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.<sup>11</sup> 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.<sup>12</sup> Policymakers have largely ignored the collateral impact of police in schools on the most

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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.<sup>13</sup> Coalitions like the Dignity in Schools Campaign have demanded the removal of police from schools and implementation of discipline alternatives.<sup>14</sup> 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.<sup>15</sup>

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.<sup>16</sup> This Section also examines the emergence of zero tolerance policies and surveillance in schools.<sup>17</sup> 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.<sup>18</sup> The Section also examines how targeted federal funding has further embedded and influenced the placement of police in schools.<sup>19</sup> 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.<sup>20</sup> 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.<sup>21</sup>

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."<sup>22</sup> 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)*,<sup>23</sup> which invalidated racial apartheid in our nation's public schools and declared the *Plessy v. Ferguson*<sup>24</sup> doctrine of *separate but equal* unconstitutional<sup>25</sup> 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.<sup>26</sup> 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.<sup>27</sup> This is despite the *Brown v. Board of Education (Brown II)*<sup>28</sup> ruling in 1955, which ordered desegregation *with all deliberate speed*<sup>29</sup>—which many districts interpreted to mean no speed at all.<sup>30</sup> 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.<sup>31</sup> 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”),<sup>32</sup> that districts began complying with desegregation orders.<sup>33</sup> 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*,<sup>34</sup> *Green v. County School Board*,<sup>35</sup> and *Swann v. Charlotte-Mecklenburg Board of Education*,<sup>36</sup>—with the Supreme Court of the United States issuing mandates that ultimately required all vestiges of segregation to “be eliminated root and branch.”<sup>37</sup> 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.<sup>38</sup>

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.<sup>39</sup> 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.”<sup>40</sup> 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*.<sup>41</sup> 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.<sup>42</sup> 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.<sup>43</sup> 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.<sup>44</sup> 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."<sup>45</sup>

Despite this and other research exposing discriminatory discipline practices, exclusionary discipline practices have persisted, and disparities have worsened in our nation's public schools.<sup>46</sup> 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."<sup>47</sup>

While many scholars note the proliferation of *zero tolerance*<sup>48</sup> policies following high-profile shootings, like the tragedy at Columbine High School in Littleton, Colorado,<sup>49</sup> 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.<sup>50</sup> Zero tolerance policies gained increased national attention and adoption following the original enactment of the Gun-Free Schools Act (“GFSA”) in 1994,<sup>51</sup> which mandated automatic expulsion for offenses like bringing a gun or—in later iterations of the law—other weapon onto school property.<sup>52</sup> Such policies do not take into account the context in which an infraction might occur and provide minimal notice or due process.<sup>53</sup> High-profile school shootings, like the tragedy at Columbine High School,<sup>54</sup> 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.<sup>55</sup> The passage of the GFSA placed the federal imprimatur on zero tolerance and further justified the urgency of implementing serious exclusionary discipline practices.<sup>56</sup>

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.”<sup>57</sup> 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.<sup>58</sup> 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 Disfranchising 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.”<sup>59</sup> 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.<sup>60</sup>

As a result, rates of exclusionary discipline have skyrocketed, and racial disparities in the administration of school discipline have emerged in specific relief.<sup>61</sup> 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.”<sup>62</sup> 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.<sup>63</sup> 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.<sup>64</sup> 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](http://www.indiana.edu/~atlantic/wp-content/uploads/2014/03/African-American-Differential-Behavior_031214.pdf).

the facility—jails and schools.”<sup>65</sup> Increased surveillance in schools accompanied the spread of zero tolerance policies and has contributed to increasingly militarized school environments.<sup>66</sup> 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.<sup>67</sup> 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.”<sup>68</sup> Such oversight has fostered what Dr. Monique Morris describes as a culture of surveillance<sup>69</sup> 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.<sup>70</sup> This intrusion on student privacy is often viewed as a necessary safety measure to prevent school violence.<sup>71</sup>

However, others have noted the profoundly negative psychological and academic impacts of such environments.<sup>72</sup> In fact, Dr. David Stovall, a featured presenter at this symposium conference, uses the term *School-to-Prison Nexus*,<sup>73</sup> 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](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.<sup>74</sup> 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.”<sup>75</sup> 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.<sup>76</sup>

Students who are so closely surveilled also begin to internalize projections of themselves as criminals.<sup>77</sup> 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.”<sup>78</sup> Stigmatized students labeled as *troublemakers* then live out a self-fulfilling prophecy,<sup>79</sup> often resulting in their exclusion from the school environment and disengagement from learning.<sup>80</sup>

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.<sup>81</sup> In fact, in these schools, education appears to become secondary to security and surveillance.

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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.<sup>82</sup> 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,<sup>83</sup> the practice of school policing persists.<sup>84</sup> In fact, police presence in public schools has expanded over time since they first appeared in schools in the 1950s.<sup>85</sup> According to scholar Jason Nance, “[f]ewer than [one hundred] police officers were in schools when the practice began in the 1950s.”<sup>86</sup> 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.”<sup>87</sup> 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.”<sup>88</sup> 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.”<sup>89</sup> The National Association of School Resource Officers, or NASRO, estimates that SROs number between fourteen thousand and twenty thousand nationwide.<sup>90</sup> According to another survey, “43[%] of public schools employ security staff, including [SROs], while 28[%] have ‘sworn law enforcement officers routinely carrying a firearm.’”<sup>91</sup>

In fact, many schools now heavily rely on law enforcement to handle routine discipline matters.<sup>92</sup> School police have held varying roles in schools; they are sometimes perceived as mentors and as community liaisons,<sup>93</sup> and other times, they are assigned hybrid roles as educators and law enforcers.<sup>94</sup> 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.’”<sup>95</sup> 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.”<sup>96</sup>

School police were originally employed as security to keep intruders out of school buildings and ensure the safety of school occupants,<sup>97</sup> but the role of law enforcer most characterizes the current role of police in schools.<sup>98</sup> 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.<sup>99</sup> These increased interactions between youth and school

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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.<sup>100</sup>

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.<sup>101</sup> 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.<sup>102</sup> 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.<sup>103</sup> 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.”<sup>104</sup> 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.”<sup>105</sup> 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.”<sup>106</sup>

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.<sup>107</sup>

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.”<sup>108</sup> These schools become receptacles where students are funneled into the juvenile justice systems, instead of places where student achievement and learning is fostered.<sup>109</sup> 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.<sup>110</sup>

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.”<sup>111</sup>

Further, the “recruitment and training of these officers [is] largely overseen by conventional police departments.”<sup>112</sup> This training does not include instruction about youth development or interaction with youth.<sup>113</sup>

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](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.<sup>114</sup> Routine behavioral issues that in the past would have been swiftly resolved by classroom teachers are now escalating into violent confrontations.<sup>115</sup> Teachers who are untrained on classroom management and unable to handle discipline matters also contribute to high rates of student referral to law enforcement.<sup>116</sup> Combined with cultural bias, both implicit and explicit, the result is the disproportionate targeting of students of color for referral to law enforcement.<sup>117</sup>

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.<sup>118</sup> 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.<sup>119</sup> 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.”<sup>120</sup> In Baltimore, Maryland, similar targeting of students of color, specifically African

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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.<sup>121</sup> 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.<sup>122</sup> A public defender interviewed about the incident called the video “a vivid example of the criminalization of children and of treating misbehavior like crime.”<sup>123</sup> 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.<sup>124</sup> Other local advocates also called for more transparency about school policing practices.<sup>125</sup> 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;<sup>126</sup> 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;<sup>127</sup> 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.<sup>128</sup> 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/2015/11/08/937ddf0d-816c-11e5-9afb-0c971f713d0e\\_story.html](https://www.washingtonpost.com/local/education/police-in-schools-keeping-kids-safe-or-arresting-them-for-no-good-reason/2015/11/08/937ddf0d-816c-11e5-9afb-0c971f713d0e_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,<sup>129</sup> the criminal repercussion for students are significant.<sup>130</sup>

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.<sup>131</sup> 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<sup>132</sup>—who was later fired for his conduct.<sup>133</sup> 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.<sup>134</sup>

These interactions between students of color and school police result in early youth involvement with the justice system.<sup>135</sup> 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.<sup>136</sup> The

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<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](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.<sup>137</sup> Data shows that the majority of these arrests are for non-violent and minor offenses.<sup>138</sup> These referrals and arrests compromise students' academic and life outcomes—a first-time arrest doubles a student's likelihood of dropping out of school.<sup>139</sup>

The research about any attendant increases in school safety as the result of police presence in schools is inconclusive.<sup>140</sup> 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.”<sup>141</sup> Further, “the research does not address whether SRO programs deter school shootings, one of the key reasons for renewed congressional interest in these programs.”<sup>142</sup> 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.”<sup>143</sup>

Contributing to the increasingly hostile hallways in public schools is the presence of military weapons.<sup>144</sup> 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.<sup>145</sup> 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](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](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.<sup>146</sup> Birthed during the *War on Drugs*, such military equipment has become commonplace, particularly in heavily policed low-income communities or communities of color.<sup>147</sup> 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.<sup>148</sup> 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.<sup>149</sup>

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.<sup>150</sup> 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.<sup>151</sup>

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.<sup>152</sup>

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.<sup>153</sup> However,

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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-in-san-diego-military-vehicle-20140918-story.html>. "The district joins a list of agencies

despite requests,<sup>154</sup> 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.<sup>155</sup> In a step in the right direction, the President's Law Enforcement Equipment Working Group, pursuant to an Executive Order,<sup>156</sup> did recommend ending the transfer of weapons through the 1033 Program to stand-alone school police departments,<sup>157</sup> 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.<sup>158</sup> 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.<sup>159</sup>

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.”<sup>160</sup> Following the tragic shooting at Sandy Hook Elementary in Newtown, Connecticut,<sup>161</sup> the DOJ announced nearly \$45 million in funding for school resource officer

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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](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.<sup>162</sup> 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.<sup>163</sup> In fact, many of the police departments receiving CHP funds requested funding for school-based policing.<sup>164</sup> “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 . . . .”<sup>165</sup> Specifically, the President’s Budget includes a requested increase of \$42 million over the Fiscal Year 2016 level for the CHP,<sup>166</sup> a primary funding source for the hiring of SROs.<sup>167</sup>

#### 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](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.”<sup>168</sup> Pushed out students who end up in juvenile facilities are exposed to notoriously sub-par 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.<sup>169</sup> 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.<sup>170</sup>

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?<sup>171</sup> 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.<sup>172</sup> 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.<sup>173</sup>

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.<sup>174</sup> In fact, it is not coincidental that states that spend less per-pupil on education also spend more on incarceration.<sup>175</sup> 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.<sup>176</sup> That same year, Louisiana arrested 16,582 of its children.<sup>177</sup> 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.<sup>178</sup> Another report found that Wisconsin spent 12% higher than the national average on its prisons, \$1.5 billion.<sup>179</sup> 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

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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](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.<sup>180</sup> In many states, like Louisiana and Wisconsin, prisons are major employers and local economic engines.<sup>181</sup>

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.<sup>182</sup> The two largest for-profit prison corporations, GEO and Corrections Corporation of America, reportedly collect a combined \$3.3 billion in annual revenue.<sup>183</sup> Many for-profit prisons operate on contracts that require them to maintain occupancy rates—some up to 90%<sup>184</sup>—necessitating a steady stream of individuals to be funneled into the system.<sup>185</sup> 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.<sup>186</sup> For-profit youth correctional facilities, like those operated by Youth Services International, featured in an investigation, also profit from the school-to-prison pipeline.<sup>187</sup> Youth in such facilities reportedly experience high rates of abuse, including high rates of sexual abuse.<sup>188</sup> In fact, "[t]he prison-industrial complex is not only a set of interest groups and institutions. It is also a state of mind."<sup>189</sup> 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.<sup>190</sup> 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.<sup>191</sup> As a result, “the nation is, in effect, commoditizing human bodies for an industry in militant pursuit of profit.”<sup>192</sup>

#### 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.<sup>193</sup> 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.<sup>194</sup> Section 602 allows the federal government to enforce this provision through regulations.<sup>195</sup> 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.<sup>196</sup> 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.<sup>197</sup> However, the right to bring a private Title VI disparate impact claim was foreclosed by the case of *Alexander v. Sandoval*,<sup>198</sup> 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/vimannual.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.<sup>199</sup> Therefore, an individual plaintiff cannot file a disparate impact claim under Title VI.<sup>200</sup> 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.<sup>201</sup> However, OCR is under-staffed, under-funded, and facing record numbers of Title VI complaints.<sup>202</sup> 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 . . . ."<sup>203</sup> The amount of complaints received by OCR increased from 7841 complaints in 2011, to 9950 in 2015<sup>204</sup>—with complaints pending for longer than 180 days, doubling over 5 years from 315 to 630 in 2015.<sup>205</sup> 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.<sup>206</sup> 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.<sup>207</sup>

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

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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.<sup>208</sup> Among these possible legislative remedies may be the recently enacted ESSA,<sup>209</sup> the current iteration of the ESEA.<sup>210</sup> 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.<sup>211</sup> 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.<sup>212</sup> 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.<sup>213</sup> 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.<sup>214</sup> 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.<sup>215</sup> 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,<sup>216</sup> 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.<sup>217</sup> This funding would allow school districts to implement evidence-based discipline alternative programs and provide school staff with ongoing professional development opportunities.<sup>218</sup> In addition, the law funds SWPBIS and evidence-based programs to reduce reliance on exclusionary discipline practices.<sup>219</sup>

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.”<sup>220</sup> 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.”<sup>221</sup> 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.<sup>222</sup>

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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.<sup>223</sup>

There are also some federal legislative proposals pending in the 114th Congress that could help address school climate and discipline.<sup>224</sup> Among the proposals is the Supportive School Climate Act, sponsored by Senator Chris Murphy in the Senate and Representative Danny Davis in the House<sup>225</sup> that would allow states to use portions of Title I ESEA funds to implement SWPBIS.<sup>226</sup> Components of this proposal were incorporated into ESSA.<sup>227</sup> The Safe Schools Improvement Act,<sup>228</sup> 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.<sup>229</sup> 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.<sup>230</sup> Representative Alcee Hastings also introduced a bill to impose a federal ban on corporal punishment, a practice still permitted in nineteen states.<sup>231</sup> 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](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”).<sup>232</sup> 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.<sup>233</sup> 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.<sup>234</sup> Recently, advocates pushed the LAUSD to return the last of the weapons it received under the 1033 Program,<sup>235</sup> including sixty-one automatic rifles and a MRAP vehicle, and to withdraw from the program.<sup>236</sup>

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.<sup>237</sup> 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.”<sup>238</sup> 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](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.<sup>239</sup>

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 hamstrung 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”),<sup>240</sup> 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.<sup>241</sup> 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.<sup>242</sup> 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.”<sup>243</sup> 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.’<sup>244</sup> 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.<sup>245</sup> 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.<sup>246</sup> 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](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.