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Learning in Lockdown: School Police, Race, and the Limits of Law

Aaron Sussman

ABSTRACT

Nationally, K–12 schools are increasingly relying on police officers and criminalized security measures like metal detectors and random searches in an attempt to make schools safer. In New York City, officers patrolling prison-like schools have acutely harmful effects, leading the New York Civil Liberties Union (NYCLU) to file a class action lawsuit in 2010 alleging the systemic violations of students' Fourth Amendment rights. The reality of the harm, though, is far deeper than the law is presently capable of recognizing. In New York City, the vast majority of students harmed by school police practices attend highly racially segregated schools, including the named plaintiffs in the NYCLU lawsuit, all of whom attend schools comprised of at least 98 percent students of color. In addition to the racial disparity in the numbers of children exposed to harmful school police practices, the nature of the harm is disproportionately severe and uniquely far-reaching for nonwhite students. In this Comment, I explore the many layers of this harm through the lenses of the school-to-prison pipeline, psychological effects, citizenship, and the economic system. I then examine the ways in which federal antidiscrimination law fails to recognize such harm as discrimination, foreclosing lawsuits like the NYCLU's from discussing race and confining them to tell obscured and incomplete stories. Ultimately, the law's blindness to the reality of the harm compels lawsuits that only scratch the surface while limiting the voices of their class members. Though such lawsuits are essential for immediate, if partial, relief, significant reform for students harmed by school police officers will only come when antidiscrimination law recognizes the full racial nature of the harm.

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INTRODUCTION

Though police officers frequently face unpredictable challenges, it may be surprising that one of those challenges has been handcuffing a child whose wrists are too small for the restraints.[1] This was the predicament faced by the police officers who arrested six-year-old Desre'e for having a tantrum in her kindergarten class. Police arrested Desre'e and took her to the county jail, where they photographed her for a mug shot and charged her with one felony and two misdemeanors.[2] Police officers may have faced similar handcuffing difficulties when arresting a five-year-old girl for misbehaving in kindergarten,[3] a ten-year-old girl for carrying scissors in her school backpack,[4] and twenty-five middle-school children for participating in a "food fight."[5] New York Police Department (NYPD) officers may also have been confronted with the same challenge when detaining a ten-year-old girl with disabilities for misbehaving on a school bus,[6] a five-year-old boy for being disruptive in his kindergarten class,[7] a twelve-year-old girl for writing on her school desk,[8] and a thirteen-year-old girl for doing the same.[9] In addition to the young ages of the arrestees and the minor nature of their misbehavior, these recent incidents have one thing in common: None of the children arrested were white.[10]

1. The solution, it turns out, is to lock the handcuffs around the child's biceps. *See* Bob Herbert, Op-Ed., *6-Year-Olds Under Arrest*, N.Y. TIMES, Apr. 9, 2007, at A17.
2. *Id.*
3. *The Early Show* (CBS television broadcast Apr. 25, 2005), *available at* http://www.cbsnews.com/video/watch/?id=690574n&tag=related;photovideo.
4. *Girl Arrested for Taking Scissors to School*, FOX NEWS, Dec. 11, 2004, http://www.foxnews.com/story/0,2933,141253,00.html.
5. Susan Saulny, *25 Chicago Students Arrested for a Middle-School Food Fight*, N.Y. TIMES, Nov. 11, 2010, at A18; *see also infra* Appendix, Table 3.
6. Kevin Fasick, *Cuffed Schoolkid Feared for Her Life*, N.Y. POST, Jan. 27, 2008 (Metro), at 2; *see also infra* Appendix, Table 3.
7. Carrie Melago, *5-Year-Old Boy Handcuffed in School, Taken to Hospital for Misbehaving*, DAILY NEWS (New York), Jan. 25, 2008, http://www.nydailynews.com/news/2008/01/25/2008-01-25_5yearold_boy_handcuffed_in_school_taken_.html.
8. Stephanie Chen, *Girl's Arrest for Doodling Raises Concerns About Zero Tolerance*, CNN, Feb. 18, 2010, http://articles.cnn.com/2010-02-18/justice/new.york.doodle.arrest_1_zero-tolerance-schools-police-precinct?_s=PM:CRIME.
9. Jen Chung, *13-Year-Old Arrested for Defacing School Desk*, GOTHAMIST, Apr. 6, 2007, http://gothamist.com/2007/04/06/13yearold_arres.php.
10. This conclusion was derived from the text of the cited source, interpreted from the images in the cited source, or inferred from school data cited *infra* Appendix.

    Though very few media reports on these student arrests mention race, notable exceptions include Dave Lindorff, *Handcuffing 10-Year-Old Girls: Racism, Philly Style*, COUNTERPUNCH, Dec. 18, 2004, http://www.counterpunch.org/2004/12/17/racism-philly-style (criticizing the

These incidents are part of a national trend of criminalizing young students.[11] Security measures once primarily associated with the criminal justice system have infiltrated schools,[12] excluding or impeding children from receiving a traditional education and instead "funnel[ing] them onto a one-way path toward prison."[13] This process is widely understood as the school-to-prison pipeline: the various practices and conditions that increase students' likelihood of arrest or incarceration and that are most prevalent in schools with a predominantly poor, nonwhite student body.[14]

This Comment highlights one aspect of the pipeline: police officers in schools.[15] For a broad perspective, I first describe the increasing number of school–police partnerships nationally, along with prevailing notions of model

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coverage of the arrest cited *supra* note 4, and quoting a local principal as saying that "[r]ace may well have played a part in this, [and t]he fact that police were called in the first place, . . . that the principal allowed her to be handcuffed and placed into a paddy wagon, and . . . that her mother wasn't called right away, all suggest she was being treated like a criminal"), and Herbert, *supra* note 1, at A17 ("A highly disproportionate number of those youngsters . . . are black.").

It should be noted that the racial classifications used in this Comment correspond to those in most government data sources. However, the general term "nonwhite" is used in this Comment with the underlying assumption that racially marked groups occupy a subordinated social position in the United States and experience a form of systemic discrimination that whites do not. While racial and class distinctions among nonwhite groups and individuals are indeed salient, the harm described herein is applicable to all nonwhite students in criminalized schools, though to varying degrees. In the context of the New York City schools I discuss in this Comment, black students are the most heavily represented, followed by Latino students, as indicated by the school data sources cited in the Appendix, *infra*. For a discussion of intergroup issues that are beyond the scope of this Comment, see, for example, Barbara J. Fields, *Ideology and Race in American History*, *in* REGION, RACE, AND RECONSTRUCTION 143 (J. Morgan Kousser & James M. McPherson eds., 1982); ROBERT S. CHANG, DISORIENTED: ASIAN AMERICANS, LAW, AND THE NATION-STATE (1999).

11. "Criminalization" in this Comment refers to the process by which an element of the school system is effectively transformed into its criminal justice system counterpart. For example, criminalizing students is treating them like criminal suspects or inmates; criminalizing school security is adopting those measures found in prisons or heavily policed, high-crime areas.
12. "Schools" in this Comment refers to public K–12 schools unless otherwise noted.
13. NAACP LEGAL DEF. & EDUC. FUND, DISMANTLING THE SCHOOL-TO-PRISON PIPELINE (2005) [hereinafter NAACP], *available at* http://naacpldf.org/files/case_issue/Dismantling_the_School_to_Prison_Pipeline.pdf.
14. School-to-prison pipeline practices and conditions are varied but often include police presence, surveillance, exclusionary zero-tolerance discipline, racially disproportionate discipline, poor school resources, low expectations for student success and behavior, negative stereotyping, class and special education placement, lack of dropout prevention, and lack of cultural understanding. *See, e.g.*, RUSSELL J. SKIBA, IND. EDUC. POLICY CTR., ZERO TOLERANCE, ZERO EVIDENCE: AN ANALYSIS OF SCHOOL DISCIPLINARY PRACTICE 2 (2000), *available at* http://www.indiana.edu/~safeschl/ztze.pdf.
15. "Officer" in this Comment refers to any publicly employed individual with traditional state police authority (for example, to arrest, search, and question), including officers with designations such as school resource officer.

practices for such partnerships. These model practices provide a point of comparison for the NYPD's practices in schools, which led to a class action lawsuit filed in 2010 by the New York Civil Liberties Union (NYCLU).[16] Due to the confines of federal law aimed to prevent racial discrimination, the NYCLU lawsuit, though challenging harms with the severest effects on nonwhite children, never mentions race and is forced to tell an incomplete story about the actual nature and extent of the harm. I provide a starting point for filling out this story by illustrating the scope and depth of the uniquely racial harm. Using a multidisciplinary approach, I analyze the harm in the contexts of criminalized policies and practices that most directly push students onto the prison track,[17] psychological and developmental effects on students, notions of democratic citizenship, and participation in the economic system. Despite the varied and deep nature of these harms, federal antidiscrimination law perpetuates racial inequality by failing to recognize the ways in which school criminalization and school police practices deprive nonwhite students of an equal educational opportunity.[18] Ultimately, the law's blindness to the distinctly racial nature of the harm forces legal challenges to tell partial, obscured stories that, while capable of achieving some essential relief, leave intact serious and entrenched harm to nonwhite students.

I. NATIONAL TRENDS IN SCHOOL SAFETY

The public perceives school crime and violence as a growing problem.[19] Yet, since the mid-1990s, school crime has decreased while school criminalization

16. Amended Complaint, B.H. v. City of New York, No. 10-0210 (E.D.N.Y. June 18, 2010).
17. I refer to this category in Part III.A as the "school-to-prison pipeline," which, though usually defined as encompassing the other categories, is discussed in a more narrow and direct context in this Part.
18. This Comment uses the term "equal educational opportunity" because it has been invoked as a standard for educational rights by several federal and state courts and legislatures. *See, e.g.*, Equal Educational Opportunity Act, 20 U.S.C. § 1703 (2006). However, as I discuss in Part IV, courts have interpreted the specific language of education laws to find a varying degree of substantive students' rights, ranging from the delineation of specific school obligations to the minimal guarantee of the right to some education. *See infra* Part IV.A. My argument, then, is not based on a single definition of equal educational opportunity, but rather on the notion that any right to something beyond a basic education should potentially give rise to a cognizable equal protection claim on the basis of race in highly criminalized schools.
19. *See* NAACP, *supra* note 13. This misperception may be the result of the media attention received by specific, high-profile school shootings that occurred within the span of two years in the late 1990s. For accounts from the time of the school shootings in West Paducah, Kentucky; Jonesboro, Arkansas; and Littleton, Colorado, see *Gunfire Inside a School Kills 3 and Wounds 5*, N.Y. TIMES, Dec. 2, 1997, at A18; Rick Bragg, *5 Are Killed at School*, N.Y. TIMES, Mar. 25,

has increased,[20] with scant evidence of a clear correlation between the two trends.[21] Far clearer are the devastating effects that criminalization and increased reliance on police officers have on nonwhite students at these schools already suffering from underfunding and low educational outcomes.

A. The Rise of Criminalized School Security Measures

Schools are increasingly allocating funds to become "well-policed fortresses,"[22] hiring police officers to conduct suspicionless searches of student belongings, instituting harsh disciplinary policies resulting in suspensions for relatively trivial offenses like dress code violations and profanity, and using extreme practices like mass strip searches and lock-down drills.[23] While enhanced security measures—including the presence of school police officers—may potentially curb school crime and improve school culture if adequately implemented,[24] these beneficial measures are not the ones that appear to be on the rise. Rather, it is the draconian measures used to target

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1998, at A1; James Brooke, *Terror in Littleton: The Overview*, N.Y. TIMES, Apr. 21, 1999, at A1, respectively.

20. *See* U.S. DEP'T OF EDUC., INDICATORS OF SCHOOL CRIME AND SAFETY: 2009, at 68–73 (2009), *available at* http://nces.ed.gov/pubs2010/2010012.pdf (finding that students reporting police officers and/or security guards in their schools climbed by 15 percent between 1999 and 2007).
21. *See* Randall R. Beger, *The "Worst of Both Worlds": School Security and the Disappearing Fourth Amendment Rights of Students*, 28 CRIM. JUST. REV. 336, 338–40 (2003); Kevin P. Brady et al., *School–Police Partnership Effectiveness in Urban Schools: An Analysis of New York City's Impact Schools Initiative*, 39 EDUC. & URBAN SOC'Y 455, 460 (2007).
22. *See* ADVANCEMENT PROJECT, TEST, PUNISH, AND PUSH OUT: HOW "ZERO TOLERANCE" AND HIGH-STAKES TESTING FUNNEL YOUTH INTO THE SCHOOL-TO-PRISON PIPELINE 4 (rev. ed. 2010), *available at* http://www.advancementproject.org/sites/default/files/publications/rev_fin.pdf.
23. *See* Beger, *supra* note 21, at 336–37, 339. Public reaction to these practices seems to mainly be triggered when the children involved are particularly young, *see supra* notes 1–9 and accompanying text, or when the visual images of the police excesses are publicized. For example, a 2009 "commando-style" high school police raid created an uproar when a video was released showing officers storming the school with dogs, waving their guns, and ordering children to lay face down while police tore through lockers. *See* David Hancock, *Drug Raid at S.C. High School*, CBS NEWS, Feb. 11, 2009, http://www.cbsnews.com/stories/2003/11/07/national/main582492.shtml. Given that criminalized security measures have become commonplace in schools in poor communities of color, as discussed below, it is likely that the public outcry was partly due to the fact that the images were mostly of white children being targeted in the raid. *See Raw Footage of the Stratford High School Raid 2003*, YOUTUBE (July 21, 2009), http://www.youtube.com/watch?v=GwDOlLFCZuk; *cf. About Our School*, STRATFORD HIGH, http://www.berkeley.k12.sc.us/Stratford.cfm?subpage=55702 (last visited Feb. 4, 2012) (stating that 64 percent of the students are white).
24. Part I.B, *infra*, elaborates on this potential benefit in the context of school police officers.

minor rule violations that are expanding,[25] making the education system and the criminal justice system increasingly difficult to distinguish in low-income, nonwhite communities.[26]

Criminalization in the education system is a process explicitly modeled on and interwoven with the criminal justice system, specifically policing and prisons. Zero-tolerance policies and juvenile justice trends are two aspects of the criminal justice system that most directly implicate and provide insight into the realities in the schools also facing the most serious economic and academic challenges.

Zero-tolerance[27] policing and sentencing proliferated in U.S. cities in the 1980s as part of the implementation of the broken windows theory, which states that correcting minor social disorder and enforcing laws against low-level, quality-of-life crimes reduce serious, violent crime.[28] While many dispute this theory's efficacy,[29] there is little doubt that such policies, combined with a host

25. *See* ADVANCEMENT PROJECT, *supra* note 22.

26. This blurred line between education and criminal justice and the resulting decline in student achievement (as elaborated on *infra* Parts II and III) have led some advocates to view criminal justice reform as an essential component of educational advocacy. *See* Katayoon Majd, *Students of the Mass Incarceration Nation*, 54 HOW. L.J. 343, 348 (2011) ("[I]n order to be successful, educational equity reform efforts must be accompanied by wide scale juvenile and criminal justice reform.").

27. For one general definition of this term, see James M. Peden, *Through a Glass Darkly: Educating With Zero Tolerance*, 10 KAN. J.L. & PUB. POL'Y 369, 371 (2000) ("Zero tolerance is a term that is used to characterize an institution's responses to breaches in the code of conduct which the institution recognizes as being fundamental to its operation. It carries with it a connotation of absolutism and inflexibility which implies that once parameters of conduct have been established for any particular institution, no activity which occurs outside those parameters will be allowed. A code of conduct premised on such a concept does not contemplate an individual's intent.").

28. *See* James Q. Wilson & George L. Kelling, *Broken Windows*, THE ATLANTIC, Mar. 1982, at 29, 31 (originating the theory). The broken windows zero-tolerance policing strategy was most influentially employed in New York City, as discussed in Part II, *infra*.

29. *See Reining in Overcriminalization: Assessing the Problem, Proposing Solutions: Hearing Before the Subcomm. on Crime, Terrorism & Homeland Sec. of the H. Comm. on the Judiciary*, 111th Cong. 2 (2010) [hereinafter *Hearing*] (statement of Rep. Robert C. Scott, Chairman, Subcomm. on Crime, Terrorism & Homeland Sec.), *available at* http://judiciary.house.gov/hearings/printers/111th/111-151_58476.pdf ("This massive increase in the number of Americans incarcerated has very little documented positive effect on public safety, while it contributes significantly to family disruption and other problems in many American communities. In fact, we incarcerate now at such a high rate that it is actually contributing to crime."); M. Chris Fabricant, *War Crimes and Misdemeanors: Understanding "Zero Tolerance" Policing as a Form of Collective Punishment and Human Rights Violation*, 3 DREXEL L. REV. 373, 377 (2011) ("This Article contributes to the growing body of literature that is critical of aggressive, zero-tolerance policing and challenges its claimed efficacy in reducing violent crime."); Bernard E. Harcourt & Jens Ludwig, *Broken Windows: New Evidence From New York City and a Five-City Social Experiment*, 73 U. CHI. L. REV. 271 (2006).

of other criminal justice trends,[30] contribute to the rising prison population, police harassment, and wrongful arrests, all aimed at poor, minority communities.[31] Zero-tolerance criminal policies have increasingly ensnared young people as the "'lock 'em up' mentality . . . [of] the adult criminal justice system has also been applied to the juvenile justice system."[32] Each year, roughly 400,000 youth spend time in juvenile detention centers, a number that is rising because, in addition to the effects of school criminalization, "juvenile courts are prosecuting many youth for misconduct that was previously handled informally."[33] And the length of time youth spend locked up in state facilities is increasing due to the imposition of mandatory minimum sentences in juvenile courts, the passage of laws to facilitate prosecution of juveniles in adult courts, and the amendment of juvenile delinquency codes to focus more on "punishment, retribution, and incapacitation."[34] These trends, as will also be demonstrated in this Comment with regard to school criminalization, have had the sharpest impact on young people of color in the criminal justice system.

This overall rise in punitive criminal justice measures spurred inner city schools to "embrace[] the prevailing culture of punishment" and adopt "social control measures that mirror those of the justice system . . . , with devastating consequences," particularly for poor, nonwhite students.[35] Their schools

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30. The additional factors that commentators claim contribute to the rise in incarceration are too numerous to exhaustively list here, but several of the more substantial ones were summarized by Virginia Congressman Bobby Scott in a 2010 congressional hearing. *See Hearing*, *supra* note 29, at 1–3 (listing mass incarceration factors including "mandatory minimum sentencing; three strikes and you're out; and after that didn't work, two strikes and you're out; life without parole; abolish[ment of] parole"; "an astounding rate of growth of the Federal criminal code"; "deterioration . . . in the standards of what constitutes a criminal offense"; "vagueness and the disappearance of the common law requirement of mens rea"; and "overzealous prosecutors").
31. *See* ADVANCEMENT PROJECT, *supra* note 22, at 9; Fabricant, *supra* note 29, at 377 ("A zero-tolerance policy modeled after the NYPD's and adopted in high-crime neighborhoods of Baltimore, Maryland, resulted in a broad pattern of abuse in which thousands of people were routinely arrested without probable cause." (internal quotation marks omitted)); *infra* note 245 and accompanying text (discussing zero tolerance leading to police harassment of young black and Latino men in New York City).
32. Majd, *supra* note 26, at 346.
33. DOUGLAS W. NELSON, ANNIE E. CASEY FOUND., A ROAD MAP FOR JUVENILE JUSTICE REFORM 3, 11 (2009), *available at* http://www.aecf.org/~/media/publicationfiles/aec180essay_booklet_mech.pdf.
34. *See* Majd, *supra* note 26, at 357. At least one state, Virginia, has designed sentencing guidelines that identify "youth" as an aggravating factor for several crimes, contrary to the vast majority of guidelines and the prevailing view that youth is a mitigating sentencing factor. *See* Michael Tonry, *Rethinking Unthinkable Punishment Policies in America*, 46 UCLA L. REV. 1751, 1759 (1999).
35. Majd, *supra* note 26, at 346, 348, 361. For a discussion of these effects specific to New York City, see Part II.A–II.B, *infra*.

have merged in many ways with prisons,[36] requiring a growing number of police officers in the schools to enforce harsh discipline and strict control.[37] As with the imposition of punitive criminal justice policies and policing practices in various cities, the introduction of police officers to schools has had a disproportionately harmful impact on nonwhite students, who are more likely to be arrested at school, but not more likely to commit offenses,[38] leading to what one commentator calls "a police-induced school crime wave."[39]

School criminalization is an educational crisis with far-reaching effects of racial subordination in many of the poorest schools, but it is also an integral component of the American "incarceration crisis."[40] School criminalization and overall mass incarceration are tightly linked and, if the goal of both is understood as increasing safety, the failure of the former is a predictable outcome given what is known about the effectiveness of the latter. The surge in mass incarceration beginning in the late 1980s[41] has continued despite today's "historically low crime rates,"[42] while having little role, if any, in achieving

36. *See infra* notes 185–189 (describing the ways in which some schools have come to resemble prisons, with the effect of normalizing imprisonment for youth in poor, minority communities).

37. *See* ADVANCEMENT PROJECT, *supra* note 22, at 4; U.S. DEP'T OF EDUC., *supra* note 20, at 72–73; Majd, *supra* note 26, at 366 ("The clearest manifestation of the application of crime control measures to the school setting is the increasing reliance by schools on law enforcement . . . to manage student behavior."). Teacher and student reports indicate that well over 50 percent of students, ages twelve to eighteen, experience a daily school police presence. CATHERINE Y. KIM & I. INDIA GERONIMO, ACLU, POLICING IN SCHOOLS 5 (2009) [hereinafter ACLU], *available at* http://www.aclu.org/files/pdfs/racialjustice/whitepaper_policinginschools.pdf; U.S. DEP'T OF EDUC., *supra* note 20, at 72–73; Peter Price, *When Is a Police Officer an Officer of the Law? The Status of Police Officers in Schools*, 99 J. CRIM. L. & CRIMINOLOGY 541, 548 (2009).

38. *See* Majd, *supra* note 26, at 368–69 (also stating that school police "are most likely to be found in schools in urban neighborhoods with high poverty").

39. Barry C. Feld, *T.L.O. and Redding's Unanswered (Misanswered) Fourth Amendment Questions: Few Rights and Fewer Remedies*, 80 MISS. L.J. 847, 885–86 (2011) ("The increased presence of police has led to a dramatic escalation in school referrals to juvenile courts—a police-induced school crime wave.").

40. Lisa E. Cowart, *Legislative Prerogative vs. Judicial Discretion: California's Three Strikes Law Takes a Hit*, 47 DEPAUL L. REV. 615, 616 (1998) ("The United States is besieged by an incarceration crisis which far surpasses that of any other nation."). School criminalization is an integral component of the incarceration crisis largely because of the toxic effect it has on all areas of school life, as I describe *infra* Part III. Other commentators compellingly emphasize schools' academic shortcomings, rather than school criminalization, as the direct link to the mass incarceration of people of color. *See, e.g.*, Lizbet Simmons, *Buying Into Prisons, and Selling Kids Short*, 6 MOD. AM. 51, 51 (2010) ("There is an increasing need to account for the role of the nation's failing public school system in structuring incarceration risk among minority populations and to link theories of the minority achievement gap with those of disproportionate minority confinement.").

41. The U.S. prison population nearly tripled between 1987 and 2007. ADVANCEMENT PROJECT, *supra* note 22, at 9. The result is that the United States, while containing 5 percent of the global population, contains 25 percent of the world's prisoners. Majd, *supra* note 26, at 345.

42. Majd, *supra* note 26, at 345.

these rates.[43] Following suit, school criminalization is only intensifying as schools steadily become safer, with various sources indicating either no correlation or an inverse one.[44] Moreover, mass incarceration trends, while spurring schools to devote more of their resources to criminalized security measures, have made the overall pool of school resources substantially smaller. In other words, poor schools are now spending a larger portion of their money to look like prisons and have less money to spend because state funds are being used to maintain prisons.[45]

Despite the trend of school criminalization, the most harmful practices and policies are rare on the whole. For example, regarding school metal detectors (a prime indicator of educational disruption and harsh police practices),[46] only 1 percent of schools nationally require daily metal detector checks and only 5 percent have random metal detector checks.[47] While most schools now employ some criminalized measures, it is likely a very small percentage that do so to the extent of inflicting the degree of systemic harm seen in the New York City

43. *See* Sharon Dolovich, *Foreword: Incarceration American-Style*, 3 HARV. L. & POL'Y REV. 237, 239–40 (2009) ("[M]ass incarceration does considerably less than might be thought to reduce crime and foster public safety."); *see also Hearing*, *supra* note 29, at 2 (stating that "we incarcerate now at such a high rate that it is actually contributing to crime" and that "all of the studies have shown that [if you prosecute juveniles as adults] you will actually increase the crime rate").

44. On zero-tolerance school policies, see A. Troy Adams, *The Status of School Discipline and Violence*, 567 ANNALS AM. ACAD. POL. & SOC. SCI. 140, 148 (2000) ("Strikingly, those schools where zero tolerance was deployed were less safe than those without harsh policies. This suggests that certainty of punishment provides no assurance that safer schools will be created."); Am. Psychological Ass'n Zero Tolerance Task Force, *Are Zero Tolerance Policies Effective in the Schools? An Evidentiary Review and Recommendations*, 63 AM. PSYCHOL. 852, 853–54 (2008) (finding that the "data tended to contradict the presumptions" regarding the correlation between zero tolerance and "maintaining school discipline and order"). On school police, see *infra* note 101 and accompanying text (stating that the crime rate stayed roughly the same in a subset of New York City schools despite the addition of many more school police officers); *infra* note 111 (citing a survey finding that most New York City teachers believe that school officers do not make the students feel safe). On searches of students, see Dennis D. Parker, *Discipline in Schools After* Safford Unified School District #1 v. Redding, 54 N.Y.L. SCH. L. REV. 1023, 1030 (2009/10) ("What is most distressing is that research has suggested that intrusive searches are actually counterproductive to the goal of assuring safe schools and may lead to speeding children along the pipeline from the schools to the criminal justice system.").

45. *See* Steven Hawkins, *Education vs. Incarceration*, AM. PROSPECT, Dec. 6, 2010, http://prospect.org/article/education-vs-incarceration ("[C]onfinement costs have claimed an increasing share of state and local government spending[,] . . . starv[ing] essential social programs—most notably education. . . . With tens of billions of dollars in prison spending annually, states are finding that there is simply less discretionary money available to invest in education . . . ."). For a discussion of school funding litigation, see Part IV.A, *infra*.

46. *See* N.Y. CIVIL LIBERTIES UNION, CRIMINALIZING THE CLASSROOM: THE OVER-POLICING OF NEW YORK CITY SCHOOLS 7, 9 (2007) [hereinafter NYCLU, CRIMINALIZING THE CLASSROOM], *available at* http://www.nyclu.org/pdfs/criminalizing_the_classroom_ report.pdf.

47. U.S. DEP'T OF EDUC., *supra* note 20, at 68–69.

schools profiled in Part II.[48] These few schools, though, containing the most extreme school-to-prison pipeline practices, are not where white children go to learn.[49] Nonwhite students are most acutely harmed by such practices, both in the disproportionate numbers in which they are affected by the practices, and in the severity of the harm they suffer as compared to the relatively few white students in schools with the same practices.[50]

B. Potential for Positive School–Police Partnerships

The practices among schools with full-time police officers vary widely. Some elements of such school–police partnerships may increase safety and foster student achievement, or at least minimize the risk of harm caused by school police.[51] Many educational and youth policy experts recommend the following best practices for school police officers.[52]

48. As noted in Part III, *infra*, however, even the less egregious forms of criminalization can have a significant detrimental effect on students of color, particularly when accompanied by other hallmarks of failing schools, like overcrowding and inadequate teaching materials.

49. *See* N.Y. CIVIL LIBERTIES UNION, EDUCATION INTERRUPTED 14 (2011), *available at* http://www.nyclu.org/files/publications/Suspension_Report_FINAL_noSpreads.pdf ("The problem of aggressive police behavior appears to heavily afflict schools that are disproportionately attended by children of color."); U.S. DEP'T OF EDUC., *supra* note 20, at 136 (finding that random metal detector searches occur at only 1.1 percent of schools that are at least 95 percent white yet occur at over 12 percent of schools that are less than 50 percent white).

50. One clear illustration of this is in the area of disparate school discipline. Regarding the same type of disciplinary infraction, a nonwhite student is far more likely to be punished than a white student, and, when a white student is also punished, a nonwhite student is more likely to receive a harsher punishment. *See infra* Part III.A.1–III.A.2.

51. Most writings on school police appear to be in response to harmful school-to-prison pipeline practices and so focus their recommendations on minimizing and controlling the role of school police. *See, e.g.*, N.Y. CIVIL LIBERTIES UNION, SAFETY WITH DIGNITY (2009) [hereinafter NYCLU, SAFETY WITH DIGNITY], *available at* http://www.nyclu.org/files/Safety_with_Dignity.pdf. Reports looking more broadly at school police practices tend to offer general recommendations, recognizing the wide variation in school needs and school–police partnerships. *See, e.g.*, PETER FINN ET AL., COMPARISON OF PROGRAM ACTIVITIES AND LESSONS LEARNED AMONG 19 SCHOOL RESOURCE OFFICER (SRO) PROGRAMS 1–2 (2005), *available at* http://www.ncdjjdp.org/cpsv/pdf_files/SRO_Natl_Survey.pdf (emphasizing that school–police partnerships can range from officers "engaging in mostly law enforcement activities" to officers "engaging in mostly teaching and mentoring"). A relatively small number of writers explicitly call for categorically removing officers from schools. *See, e.g.*, Majd, *supra* note 26, at 391 ("At the state level, advocates should promote laws and policies that prohibit or seriously limit the use of punitive exclusionary responses to minor student misbehaviors. This includes working to . . . remove SROs from school campuses altogether . . . .").

52. For examples of New York City schools that have been successful in implementing some of these best practices, see NYCLU, SAFETY WITH DIGNITY, *supra* note 51, at 22–42.

(1) **Oversight and Accountability**: Because school officers operate in a setting and with a population that has very different needs than the outside adult population, school officers must be accountable to school officials, not just to the police chief.[53] According to a government-commissioned report, schools should help develop the roles and responsibilities of the officers, which should be written in a publicly available document that provides a mechanism for resolving disagreements between school administrators and officers.[54] The raw data regarding police incidents at school should also be made publicly available and used to determine the effectiveness of school police practices and policies.[55] Given the discretion the courts afford to school officers, schools should "diligently monitor police intervention" and clearly identify the circumstances warranting police involvement.[56]

(2) **Training**: Just as educators must "satisfy rigorous training and certification requirements," school police should obtain the skills needed to work positively with students.[57] Because most officers lack experience counseling youth and lack knowledge about the legal issues unique to schools, they should receive basic training in youth counseling and in students' procedural and privacy rights.[58] Officers should also receive training in "child psychology and behavior" and "unlearn" policing techniques "that are not appropriate in dealing with students," such as the overuse of handcuffs or treating students like criminals when their behavior may just be acts of "youthful indiscretion."[59]

(3) **Clearly Defined Responsibilities**: Most importantly, officers should not arrest students for minor, noncriminal behavior,[60] nor should schools rely on officers to enforce school rules.[61] A United

53. *See id.* at 45.
54. FINN ET AL., *supra* note 51, at 4–5, 32–34.
55. *See* NYCLU, SAFETY WITH DIGNITY, *supra* note 51, at 45 (listing the categories of data that should be collected and how that data should be broken down for a useful analysis).
56. *See* Mario S. Torres Jr. & Jacqueline A. Stefkovich, *Demographics and Police Involvement: Implications for Student Civil Liberties and Just Leadership*, 45 EDUC. ADMIN. Q. 450, 469 (2009); *infra* Part III.C.2. One example of successful oversight is Chicago's Safe School program, a community-based school–police partnership in which oversight is shared by the Chicago Board of Education and the Chicago Police Department. *See* Brady et al., *supra* note 21, at 458.
57. ACLU, *supra* note 37, at 25.
58. FINN ET AL., *supra* note 51, at 48.
59. *Id.*
60. *See* ACLU, *supra* note 37, at 7–13 (suggesting model policy language for distinguishing between disciplinary infractions and criminal acts).
61. *See* NYCLU, SAFETY WITH DIGNITY, *supra* note 51, at 44 (recommending that schools adopt a "governance structure that restores discipline responsibilities to educators").

Nations General Assembly resolution advises that policies "should avoid criminalizing and penalizing a child for behaviour that does not cause serious damage to the development of the child or harm to others"[62] and that "legislation should be enacted to ensure that any conduct not . . . penalized if committed by an adult is not . . . penalized if committed by a young person."[63] Without specific guidelines, officers can create "an adversarial environment that pushes students . . . out of school," instead of engaging them and making them feel safe.[64]

(4) **Student Involvement**: Student involvement in the formation of school safety policies helps make schools safer,[65] avoids the harmful treatment of students as "mere objects of . . . control,"[66] and promotes citizenship, academic achievement, and student empowerment.[67] Specifically, schools should "ensure that students are given meaningful opportunities to provide input on school rules."[68]

These best practices ultimately help achieve "interpersonal trust," which one expert calls "the most important ingredient" for a safe and positive learning environment.[69] Schools can likely reduce violence through partnerships with law enforcement, provided that the partnership fosters trust and meets certain standards promulgated by those with an understanding of both educational and public safety needs. However, in the most criminalized schools, such trust, understanding, and standards are largely absent.

62. Guidelines for the Prevention of Juvenile Delinquency, G.A. Res. 45/112 (I), ¶ 5, U.N. Doc. A/RES/45/112 (Dec. 14, 1990), *available at* http://www2.ohchr.org/english/law/juvenile.htm.
63. *Id.* at (VI), ¶ 56.
64. ACLU, *supra* note 37, at 6.
65. In one school that adopted a model in which students were asked to help identify and propose solutions to safety problems, the number of students reporting that they feared being harmed dropped by 40 percent by the end of the school year. Jennie Rabinowitz, *Leaving Homeroom in Handcuffs: Why an Over-Reliance on Law Enforcement to Ensure School Safety Is Detrimental to Children*, 4 CARDOZO PUB. L. POL'Y & ETHICS J. 153, 184–87 (2006).
66. G.A. Res. 45/112, *supra* note 62, at (I), ¶ 3.
67. Patrick J. McQuillan, *Possibilities and Pitfalls: A Comparative Analysis of Student Empowerment*, 42 AM. EDUC. RES. J. 639, 664 (2005).
68. NYCLU, SAFETY WITH DIGNITY, *supra* note 51, at 45 (reasoning that "[s]uch exercises in participatory democracy enhance the legitimacy of school rules, increase the students' incentive to obey them and strengthen students' sense of belonging to the community").
69. Beger, *supra* note 21, at 341; *see also* NYCLU, SAFETY WITH DIGNITY, *supra* note 51, at 21 (emphasizing the importance of fostering a "culture of trust and respect"); *infra* notes 217, 230 and accompanying text (regarding the importance of trust).

II. THE CRIMINALIZATION OF NEW YORK CITY SCHOOLS AND STUDENTS

New York City's school–police program provides a cautionary example, exemplifying many of the worst harms caused by school police in criminalized schools. The New York program reflects few of the best practices described in Part I.B, resulting in stark racial disparities in student discipline and educational outcomes. It is currently being challenged by a lawsuit that, while having significant potential to combat elements of the school-to-prison pipeline, is forced to ignore unique racial harms that affect the vast majority of the plaintiffs.[70] The school–police program is also massive: The NYPD currently has over 5000 School Safety Agents (SSAs)[71] in addition to nearly 200 armed police officers patrolling the halls,[72] eclipsing the number of total police officers in all but four U.S. cities.[73]

A. The NYPD Takeover

New York City's soaring crime rate in the 1980s, and its steep decline starting in the mid-1990s, has stirred much debate, particularly over the effectiveness of the broken windows policing strategy that began in the early 1990s and its role, if any, in the decline.[74] Roughly four years after this policing strategy became the norm on the streets, the City implemented it in the schools.

Along with the crime swell in the late 1980s, the City faced an educational crisis. In 1993, the Campaign for Fiscal Equity sued New York State for allocating educational funds in a way that denied an adequate education to "thousands" of City students.[75] The state's highest court vindicated this claim in

70. This lawsuit is discussed more fully in Part II.D, *infra*.
71. SSAs have the same authority as regular NYPD officers but do not carry firearms.
72. Amended Complaint, *supra* note 16, at 1–2.
73. *Id.* at 3.
74. *See, e.g.*, Harcourt & Ludwig, *supra* note 29. Whether there is proof of the strategy's effectiveness or not, some argue that the resulting "mass criminalization of people" would still be an unconscionable deepening of racial subordination, as nonwhites consistently composed at least 85 percent of NYPD arrests under the policy. *See* K. Babe Howell, *From Page to Practice and Back Again: Broken Windows Policing and the Real Costs to Law-Abiding New Yorkers of Color*, 34 N.Y.U. REV. L. & SOC. CHANGE 439, 439, 441 (2010); *cf. infra* note 245 and accompanying text (indicating more recent racial disparities in the context of NYPD stop-and-frisk practices).
75. Complaint at 1–2, Campaign for Fiscal Equity, Inc. v. State, 655 N.E.2d 661 (N.Y. 1995) (No. 93/111070).

1995.[76] While the court ordered the State to reform its school funding scheme, the City concurrently approached school problems by focusing on safety.[77]

In 1998, Mayor Rudolph Giuliani proposed transferring full control of school safety from the New York City Board of Education to the NYPD.[78] Despite objections from various stakeholders and community leaders claiming the plan would disrupt educational outcomes, transform schools into prison-like settings, and further strain relations between nonwhite youth and the NYPD,[79] the proposal was adopted in 1998 for a four-year period, after which it would be up for review.[80] An NYPD official responding to some of the objections was reported as saying, "[K]ids wouldn't be handcuffed or hauled away without good reason—and not without a principal's knowledge," adding, "We don't want to criminalize kids. We don't want to change the disciplinary process."[81]

Though most school principals found no change in school safety after the four-year mark, the takeover persisted, but without the plan formally being renewed, leaving no official policy to govern the NYPD's control.[82] The transfer of control at the four-year mark cost the City approximately $100 million.[83] Around the same time, the New York high court again found that City schools were desperately lacking funds and that students were "not receiving the constitutionally-mandated opportunity for a sound basic education."[84] The court declared a "systemic failure" as "tens of thousands of students [were] placed in overcrowded classrooms, taught by unqualified teachers, and provided with inadequate facilities."[85] In its defense, the State claimed that the City failed to make the same efforts to fund its schools that other localities made, and that when the State did inject funds into the schools to compensate for inequalities, the City would deduct that amount from its own contribution, leaving the

76. *Campaign for Fiscal Equity, Inc.*, 655 N.E.2d at 664–71. See *infra* Part IV.B for a summary of the court's reasoning in sustaining this claim on certain grounds and for dismissing it on others.
77. NYCLU, CRIMINALIZING THE CLASSROOM, *supra* note 46, at 8.
78. *Id.*
79. *See id.*; *see also* Susan Edelman & David Seifman, *Board Gives Cops Control of School Safety*, N.Y. POST, Sept. 17, 1998, at 18 (describing the "raucous public debate" at which community members expressed fear that "a cop-controlled security force would intimidate students and treat them like criminals").
80. NYCLU, CRIMINALIZING THE CLASSROOM, *supra* note 46, at 8.
81. Susan Edelman & Naomi Toy, *NYPD Officially Takes Charge of School Safety*, N.Y. POST, Dec. 22, 1998, at 22 (paraphrasing and quoting an assistant NYPD chief) (internal quotation marks omitted).
82. NYCLU, CRIMINALIZING THE CLASSROOM, *supra* note 46, at 8.
83. *Id.*
84. Campaign for Fiscal Equity, Inc. v. State, 801 N.E.2d 326, 340 (N.Y. 2003) (referring to the New York Constitution, discussed *infra* Part IV.A).
85. *Id.* at 336.

inequalities in place.[86] Several months after the court's opinion, the City entered a new phase in its school–police program, and the number of officers patrolling school halls climbed even higher.[87]

The name of the broken windows policing strategy itself demonstrates the incongruity of its application to schoolchildren. The strategy was introduced at a time when New York City "reigned as the murder capital of America," with 2245 homicides in 1990.[88] In light of this fact, literally breaking a window was a relatively minor, low-priority crime. However, for a New York City school student in 1990, intentionally breaking a window would likely have been punished as a serious offense. Today, doing so could be deemed "dangerous or violent behavior" under the school system's disciplinary code and punishable by a one-year suspension or expulsion.[89] School police find the school equivalent of "broken windows," leading to the arrests or threatened arrests of students caught eating food outside the cafeteria, carrying a cell phone, or arguing with a teacher.[90] For the mostly black and Latino students in the most criminalized New York City schools,[91] noncriminal incidents like these constitute a staggering 77 percent of all school police interventions.[92] With no clear description of their responsibilities and no accountability to the schools,[93] school officers are largely free to respond to trivial misbehavior with the full force of state authority, creating a generation of nonwhite New York City children who are removed

86. *Id.* at 344. The court found this assertion accurate but still held the State ultimately accountable. *Id.*

87. *See* NYCLU, CRIMINALIZING THE CLASSROOM, *supra* note 46, at 9.

88. Chris Mitchell, *The Killing of Murder*, N.Y. MAG., Jan. 14, 2008, at 18, *available at* http://nymag.com/news/features/crime/2008/42603. Compare this with Los Angeles's 983 murders, the second highest of any city in 1990. *Violent Offenses Rose 10% in 1990, FBI Report Shows*, L.A. TIMES, Apr. 29, 1991, at A14.

89. N.Y.C. DEP'T OF EDUC., CITYWIDE STANDARDS OF INTERVENTION AND DISCIPLINE MEASURES 20, 23 (2010), *available at* http://www.ps85q.org/DiscCode2011.pdf (setting forth the range of disciplinary actions for different levels of school infractions).

90. NYCLU, CRIMINALIZING THE CLASSROOM, *supra* note 46, at 12, 14.

91. In the Impact Schools, black and Latino students make up 90 percent of the student population, as compared to a 71 percent citywide average. NAT'L ECON. & SOC. RIGHTS INITIATIVE, TEACHERS TALK 24 (2008), *available at* http://www.nesri.org/sites/default/files/Teachers_ Talk.pdf. White students make up 4.6 percent of the student population at Impact Schools, as compared to the 14.2 percent citywide average. DRUM MAJOR INST. FOR PUB. POLICY, A LOOK AT THE IMPACT SCHOOLS 2 (2005), *available at* http://www.drummajor institute.org/pdfs/impact%20schools.pdf.

92. NYCLU, CRIMINALIZING THE CLASSROOM, *supra* note 46, at 20.

93. *Cf.* Lisa H. Thurau & Johanna Wald, *Controlling Partners: When Law Enforcement Meets Discipline in Public Schools*, 54 N.Y.L. SCH. L. REV. 977, 979–80 (2010) ("A decade after police have become ubiquitous presences in schools across the country, the day-to-day activities and responsibilities of SROs still remain shrouded in mystery, are poorly understood by the public, parents, students, and even the courts, and are often subject to very different interpretations by police and school officials in each district.").

or perpetually at risk of being removed from school and "placed in suspension centers, alternative schools, and juvenile detention facilities."[94]

B. The Impact Schools Initiative

In 2004, the City further blurred the line between the education and criminal justice systems. It launched the Impact Schools Initiative, which infused many schools with more police officers, instituted zero-tolerance policies with harsh discipline for minor rule violations, expedited the removal of students to alternative schools, and deployed over two-hundred uniformed, armed officers to join the SSAs already stationed at designated Impact Schools.[95] The City selected the Impact Schools because they were particularly unsafe, but the schools were also far below the City average in nearly all areas affecting student educational outcomes.[96] Since the school system was violating the state constitution by failing to provide students a basic education, the wisdom of further criminalizing the poorest and most segregated, overcrowded, and academically failing schools was questionable.[97] Moreover, the incorporation of the broken windows strategy into education all but ensured substantial harm to students of color.[98]

C. The Direct Effects of NYPD Officers in the Schools

As a positive effect, the NYPD asserts that, from the 1998 transfer of control to the police department through 2009, school crime dropped by

94. *See* NAACP, *supra* note 13.
95. *See* DRUM MAJOR INST. FOR PUB. POLICY, *supra* note 91, at 2; NYCLU, CRIMINALIZING THE CLASSROOM, *supra* note 46, at 9.
96. *See* Brady et al., *supra* note 21, at 468 (finding that Impact School students' reading and math skills were far below the city average and that Impact Schools were some of the largest in the city and "had the least stable and experienced teachers, the largest student–teacher ratios, and the lowest per student expenditures"); *see also* NYCLU, CRIMINALIZING THE CLASSROOM, *supra* note 46, at 21 (finding that the per-pupil spending on books and librarians at Impact Schools dropped by 5.8 percent after the initiative, despite *rising* by 12.5 percent citywide).
97. In the Impact Schools, black and Latino students make up 90 percent of the student population, as compared to a 71 percent citywide average. NAT'L ECON. & SOC. RIGHTS INITIATIVE, TEACHERS TALK 24 (2008), *available at* http://www.nesri.org/sites/default/files/Teachers_Talk.pdf. White students make up 4.6 percent of the student population at Impact Schools, as compared to the 14.2 percent citywide average. DRUM MAJOR INST. FOR PUB. POLICY, *supra* note 91, at 4.
98. *See* DRUM MAJOR INST. FOR PUB. POLICY, *supra* note 91, at 2.

34 percent.[99] It is unclear, though, whether this drop resulted from the NYPD school policies or from other factors affecting the overall drop in City crime.[100] Tellingly, there have been no significant crime rate changes at the police-heavy Impact Schools.[101]

The negative trends are likely more directly attributable to the NYPD takeover of school discipline. Aside from funds allocated to security measures, monetary resources for criminalized schools, already below the state constitutional baseline, have remained in short supply.[102] In 2004, schools with permanent metal detectors spent an average of $9,602 per pupil, compared to the citywide average of $11,282; and only 53 percent of these schools had librarians, compared to the citywide average of 73 percent.[103] In addition to receiving fewer services despite their more pressing needs, highly criminalized schools like the Impact Schools suffered from a chief cause of educational disruption: overcrowding.[104] Predictably, as the Impact Schools increasingly resembled prisons, the students disengaged, with the rates of attendance and SAT participation falling after the initiative launched.[105]

The effects are especially harmful for the over 93,000 students attending New York City schools with permanent metal detectors.[106] Over half of these

99. Sruthi Gottipati, *City Council Mulls Report Card for School Safety Agents*, COLUM. JOURNALIST, Dec. 18, 2009, http://www.columbiajournalist.org/www/42-city-council-mulls-report-card-for-school-safety-agents/story.

100. While there are no substantial studies specific to New York City on the correlation between school police and crime reduction in schools, there is little reason to think that experts would reach a different conclusion than those looking at these policies nationally. These researchers note that there is no compelling evidence indicating that criminalized school policies have a positive effect on school safety and student behavior. *See* Eric Blumenson & Eva S. Nilsen, *One Strike and You're Out? Constitutional Constraints on Zero Tolerance in Public Education*, 81 WASH. U. L.Q. 65, 76 n.53 (2003) (citing the various studies failing to establish the effectiveness of zero-tolerance discipline); *supra* note 44 and accompanying text.

101. Brady et al., *supra* note 21, at 469–73. Further, there may be reasons to be skeptical of the NYPD data given reports of the Department manipulating crime statistics, leading some to believe that "top bosses pressure supervisors into cooking the books." Philip Messing et al., *NYPD Stats Were Captain Cooked*, N.Y. POST, Feb. 7, 2010, at 22.

102. *See* Brady et al., *supra* note 21, at 462; *cf. supra* note 45 and accompanying text (discussing the connection between incarceration and school funding).

103. NYCLU, CRIMINALIZING THE CLASSROOM, *supra* note 46, at 21.

104. *See* Rabinowitz, *supra* note 65, at 191–92 (stating that overcrowding endangers students and impedes academic success). The Impact Schools averaged 111 percent capacity and were increasing after the initiative, compared to the citywide average, which was 4.8 percent lower and steadily decreasing. DRUM MAJOR INST. FOR PUB. POLICY, *supra* note 91, at 6.

105. Brady et al., *supra* note 21, at 469, 470–72, 475. This result is consistent with the psychological concept of disidentification, which is discussed *infra* Part III.B.2.

106. *See* NYCLU, CRIMINALIZING THE CLASSROOM, *supra* note 46, at 7, 9 (indicating that New York City schools with permanent metal detectors tend to have particularly harsh police practices and a high level of educational disruption).

students reported police frisking them and searching their pockets, and 76 percent reported police searching their backpacks.[107] Eighty-two percent reported being late to class because of the metal detectors, with 20 percent being late ten or more times in the last month; and nearly a quarter of teachers reported that students were "always late to first period class because of metal detectors."[108]

Students in schools like the Impact Schools begin each weekday as criminal suspects, submitting to searches and pat-downs by police who are "often belligerent, aggressive, and disrespectful."[109] In a 2008 survey of New York City teachers, about half said that school officers were "aggressive" and "combative" with students, and over one-third said that the officers "never or rarely treat students with respect."[110] Though the officers were ostensibly hired to serve the students by keeping them safe, according to 64 percent of the teachers, the officers "never or rarely make the students feel safe."[111]

Schools without permanent metal detectors can also become prison-like settings on any given school day. In 2006, the NYPD began deploying dozens of officers to conduct roving metal detector scans.[112] During these scans, according to 90 percent of teachers surveyed, students are late for class and can wait as long as three hours, due to lines and the chaotic atmosphere, before entering a classroom.[113] It is difficult to justify this disruption given that, over an eight-month period, 99 percent of the items confiscated during the roving scans were cell phones or iPods. The NYPD classified less than 1 percent of the contraband as weapons, and not one confiscated item was classified as a firearm.[114]

As a result of officers' poor treatment of students, nearly one official complaint has been filed for every four school officers.[115] This has led educational advocates to call for guidance counselors to handle more situations

107. *Id.* at 16.
108. NAT'L ECON. & SOC. RIGHTS INITIATIVE, *supra* note 91, at 26; NYCLU, CRIMINALIZING THE CLASSROOM, *supra* note 46, at 17.
109. NYCLU, CRIMINALIZING THE CLASSROOM, *supra* note 46, at 7.
110. NAT'L ECON. & SOC. RIGHTS INITIATIVE, *supra* note 91, at 22–24.
111. *Id.* at 23.
112. NYCLU, CRIMINALIZING THE CLASSROOM, *supra* note 46, at 9.
113. NAT'L ECON. & SOC. RIGHTS INITIATIVE, *supra* note 91, at 26; NYCLU, CRIMINALIZING THE CLASSROOM, *supra* note 46, at 7.
114. NYCLU, CRIMINALIZING THE CLASSROOM, *supra* note 46, at 19. Concern over weapons in schools has also led to arguably exaggerated responses from school administrators, including the New York City middle school principal who threatened a nine-year-old boy with suspension for playing with a two-inch LEGO toy gun. *Two-Inch LEGO Gun Gets 4th Grader in Trouble*, TODAY, Feb. 4, 2010, http://today.msnbc.msn.com/id/35234742/ns/today-today_people.
115. Amended Complaint, *supra* note 16, at 37. This figure from 2009 may be misleadingly low, as parents were given inaccurate information about how to file a complaint. *Id.*

instead of police officers.[116] This call, however, is unlikely to be met in a city with 2200 fewer guidance counselors than school police officers.[117]

D. *B.H. v. City of New York*

In 2010, the NYCLU filed *B.H. v. City of New York*, seeking systemic reform of the NYPD's policies and practices in New York City public schools.[118] Several school police incidents preceding *B.H.* and documented in a 2007 NYCLU report[119] illustrate the need for the relief sought by the *B.H.* class action.

One such incident occurred at Wadleigh Secondary School in 2006, when dozens of officers conducted a roving metal detector scan, confiscating cell phones, food, and school supplies.[120] That day, over one-third of the students were marked late for class, some missing up to three periods, and attendance dropped by about 10 percent.[121] Officers ignored teacher requests to stop cursing at students and arrested students for noncriminal violations—or, in Carlos's case, no apparent violation at all.[122] Rather than give the police his cell phone, which he used to communicate with his mother about his forty-hour-per-week work schedule, Carlos called his mother to come pick him up. When two officers interrogated Carlos, he told them his mother was one block away, and they should talk to her. Instead, the officers arrested Carlos without informing the school or his mother, who arrived at the campus and "began a frantic search for her child."[123] At Wadleigh, 100 percent of the students are nonwhite.[124]

At Samuel J. Tilden High School, an Impact School, one student, Biko, was running late for class when an officer told him to go to the "focus room"—the school's detention center.[125] When Biko pleaded with the officer to let him go to class, the officer slammed Biko against a wall, pepper-sprayed him, and

116. NAACP, *supra* note 13.
117. Amended Complaint, *supra* note 16, at 3.
118. *Id.*
119. NYCLU, CRIMINALIZING THE CLASSROOM, *supra* note 46.
120. *Id.* at 6. No exceptions were made—the police seized one girl's phone despite her pleas that she needed it for medical emergencies relating to her pacemaker. *Id.*
121. *Id.* In other schools, roving metal detector scans provoked even steeper drops in attendance. During a scan at Aviation High School, attendance dropped by about 24 percent, equaling five hundred children who were at home or on the streets when they normally would have been in school. *See id.* at 11; *infra* Appendix, Table 3 (noting that 89 percent of Aviation High students are nonwhite).
122. NYCLU, CRIMINALIZING THE CLASSROOM, *supra* note 46, at 11.
123. *Id.*
124. *See infra* Appendix, Table 3.
125. NYCLU, CRIMINALIZING THE CLASSROOM, *supra* note 46, at 14.

arrested him.[126] In another incident at Tilden, fifteen-year-old Aisha was stopped by an officer and sent to the detention room after finishing an exam late and then heading to lunch.[127] Another officer came up behind Aisha, grabbed her backpack dragging her along with it, yelled at her to go to the detention room, and then pushed her.[128] Aisha asked the officer for his badge number, to which he responded by twisting her arm behind her back, pushing her face against the wall, and handcuffing her.[129] Aisha was taken to the police precinct and cuffed to a pole. Then, without being charged with a crime or seeing a judge or lawyer, an officer convinced Aisha to agree to probation and an anger-management class.[130] At Samuel J. Tilden High School, 100 percent of the students are nonwhite.[131]

Because of incidents like these, the NYCLU filed *B.H. v. City of New York*, which alleges, among other things, that the City is liable pursuant to 42 U.S.C. § 1983 for maintaining a policy, practice, and custom of "unreasonably seizing and unlawfully arresting" students without probable cause and using excessive force against students in violation of the Fourth and Fourteenth Amendments to the U.S. Constitution. The lawsuit also claims that the City is liable under the Fourteenth Amendment for committing abuses against students that violate their substantive due process rights.[132] The plaintiff class seeks declaratory and injunctive relief, including a court order requiring the City to take a number of affirmative steps to reform police practices in schools, including developing written guidelines and a student complaint process, revising the disciplinary policies for school officers found to have committed abuses, transferring some control of school safety to school administrators, and improving school officer training.[133]

These claims are illustrated by the stories of the named plaintiffs. One named plaintiff was fourteen years old when she was pushed out the doors of

126. *Id.*
127. *Id.* at 14–15; *see also* Amended Complaint, *supra* note 16, at 29–30.
128. NYCLU, CRIMINALIZING THE CLASSROOM, *supra* note 46, at 14–15; *see also* Amended Complaint, *supra* note 16, at 29–30.
129. NYCLU, CRIMINALIZING THE CLASSROOM, *supra* note 46, at 14–15; *see also* Amended Complaint, *supra* note 16, at 29–30.
130. NYCLU, CRIMINALIZING THE CLASSROOM, *supra* note 46, at 14–15; *see also* Amended Complaint, *supra* note 16, at 29–30.
131. *See infra* Appendix, Table 1.
132. Amended Complaint, *supra* note 16, at 62–63. The same allegations are made against individual school police officers for their specific acts against a named plaintiff. *Id.*
133. *Id.* at 65–66. Plaintiffs' counsel also seeks compensatory damages for individual named plaintiffs. *Id.* at 66.

Maxwell High School and repeatedly punched in the head by an officer.[134] She was detained at a juvenile detention center overnight and not allowed to see her mother. The next day, without having seen a judge or lawyer, an officer convinced her to agree to enter a probation program.[135] At Maxwell High School, 99 percent of the students are nonwhite.[136]

As asserted in *B.H.*, students are not the only ones hauled to police precincts. Nearly one-fifth of educators surveyed intervened in police–student incidents, sometimes leading officers to arrest teachers and administrators.[137] In 2007, Principal Mark Federman of the East Side Community High School intervened when he saw officers arresting one of his honor students in a public and embarrassing manner.[138] Federman repeatedly asked the officer to take the student out through a discreet back entrance instead of the main entrance in front of hundreds of classmates, but the officer refused.[139] When Federman then stood in front of one of the main entrance doors, the officer handcuffed and arrested him.[140] At his trial, the judge dismissed all charges, stating, "Unfortunately, this incident highlights the tension between school[s] . . . and the NYPD concerning a principal's authority . . . [over] school disciplinary matters and protecting [students'] emotional and physical wellbeing."[141] The East Side Community High School is 95 percent nonwhite.[142]

Though every *B.H.* named plaintiff in the Amended Complaint attended a school that was 98, 99, or 100 percent nonwhite, and though at least twenty of the other criminalized schools cited in the lawsuit are between 95 and 100 percent nonwhite,[143] the confines of modern antidiscrimination law force the lawsuit to remain silent on the issues of race and equal educational opportunity.

134. *Id.* at 24–26.
135. *Id.*
136. *See infra* Appendix, Table 1.
137. NAT'L ECON. & SOC. RIGHTS INITIATIVE, *supra* note 91, at 28; *see* Amended Complaint, *supra* note 16, at 13–15.
138. *See* People v. Federman, 852 N.Y.S.2d 748, 750 (Crim. Ct. 2008); Amended Complaint, *supra* note 16, at 13.
139. *Federman*, 852 N.Y.S.2d at 750.
140. *Id.* at 749–50.
141. *Id.* at 751.
142. *See infra* Appendix, Table 3.
143. *See infra* Appendix, Table 2. Four schools cited in the lawsuit have nonwhite populations under 95 percent, and four others have no available racial data as of January 25, 2011.

III. FILLING OUT THE STORY: THE RACIAL NATURE OF THE HARM

Nonwhite students attend highly criminalized New York City schools at rates far above their overall enrollment proportion; and, even if there were no numerical disparity, the substance of the harm to nonwhite students would still be disproportionately severe. As elaborated in Part IV, by making the harm to educational opportunities of nonwhite children beyond its reach, antidiscrimination law forces lawsuits like *B.H.* to tell a fractured story, thus precluding racial claims of class members and obscuring the systemic problems for which a remedy is most needed.[144]

This Part is divided into the interrelated lenses of school-to-prison pipeline, psychological effects, citizenship, and economic system. Together, these frameworks help tell a fuller—though by no means complete[145]—story that includes the actual substance of the harm to nonwhite students.[146]

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144. This Comment generally and this Part specifically focus on the nature of the harms to nonwhite students that I argue should be understood as deprivations of equal protection and equal educational opportunity. The questions of what kind of relief should be sought and what form the remedy should take are of critical importance but can only be assessed once the nature and scope of the alleged harm are properly understood. Such questions in the educational civil rights context have also been the subject of substantial and challenging debate. For one influential example, see Derrick A. Bell, Jr., *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation*, 85 YALE L.J. 470 (1976). While I do not offer specific proposals for the nature of the relief to be sought, I do submit that, just as policy experts call for students to be involved in formulating safety policies in their schools (*supra* Part II.B), it is the students, their parents, and their local community members who should be at the forefront of deciding what sort of relief should be asked of the courts.

145. The pervasive nature of the harm can be understood from many other angles and through more specialized exploration within each discipline touched on in this Part. For one example, the psychological impact I discuss in Part III.B, *infra*, could be further illuminated from a medical, physical health perspective. *See infra* note 220 (indicating the cardiological effects that correspond to the psychological impact).

146. Implicit in this analysis is the notion that drawing from other disciplines to adjudicate rights-based legal claims is within the capabilities of the courts. While examples of courts using multidisciplinary research to inform and support such decisions abound, so do criticisms of the way the U.S. Supreme Court has "inconsistently adopted and often misused this research to augment its opinions." Donald N. Bersoff & David J. Glass, *The Not-So* Weisman*: The Supreme Court's Continuing Misuse of Social Science Research*, 2 U. CHI. L. SCH. ROUNDTABLE 279, 279 (1995); *see, e.g.*, *id.* at 293–94 (stating in reference to the Court's use of social science in *Brown v. Board of Education*, 347 U.S. 483 (1954), that, "under the cruel glare of scientific scrutiny, the . . . studies and . . . survey were sharply criticized for their methodological ineptness, lack of pertinence, and faulty conclusions"). Such criticism, though, does not militate against the use of multidisciplinary findings and analyses, but rather calls for a more principled and intellectually honest application. *Cf.* Donald N. Bersoff, *Autonomy for Vulnerable Populations: The Supreme Court's Reckless Disregard for Self-Determination and Social Science*, 37 VILL. L. REV. 1569, 1575 & n.24, 1597 (1992) (stating that "the Supreme Court's seemingly increasing antagonism to social science evidence" is a "source of great frustration," but also noting that courts are more receptive to

A. School-to-Prison Pipeline

THE POOL PLAYERS.
SEVEN AT THE GOLDEN SHOVEL.

We real cool. We
Left school. We

Lurk late. We
Strike straight. We

Sing sin. We
Thin gin. We

Jazz June. We
Die soon.

—Gwendolyn Brooks, *We Real Cool*[147]

Flooding schools with police officers has the direct effect of pushing children toward the track to prison. For many nonwhite students, school criminalization reflects the racial profiling, police harassment, and disproportionate incarceration that they see in their communities.[148] When many associate young, black men more with prisons than with higher education,[149] making a 93 percent black (and zero percent white)[150] school like Tilden High resemble a prison has a crushing effect, particularly on students like Biko and Aisha who have already been traumatized by school police practices.[151] Officers in criminalized schools have imposed harsh discipline for relatively minor infractions,

social science research "when they believe it will enhance the elegance of their opinions" and, in those cases, may "misuse[] and abuse[] social science evidence").

147. GWENDOLYN BROOKS, *We Real Cool*, *in* THE BEAN EATERS 17, 17 (1960). As discussed *infra* Part IV, one way that antidiscrimination law perpetuates racial subordination is by suppressing nonwhite voices in the legal process. In Parts III and IV, the pervasiveness of the harm caused by police officers in criminalized schools is in part conveyed through nonwhite voices in poetry, music, film, and television.

148. *See* NAT'L ECON. & SOC. RIGHTS INITIATIVE, *supra* note 91, at 24. As of June 30, 2008, "Among inmates held in custody in prisons or jails, black males were incarcerated at 6.6 times the rate of white males." Press Release, U.S. Dep't of Justice, Growth in Prison and Jail Populations Slowing (Mar. 31, 2009), *available at* http://www.ojp.usdoj.gov/newsroom/pressreleases/2009/BJS090331.htm.

149. *Cf. More Blacks, Latinos in Jail Than College Dorms*, MSNBC.COM, Sept. 27, 2007, http://www.msnbc.msn.com/id/21001543.

150. *See infra* Appendix, Table 1.

151. *See supra* Part II.D.

causing irreparable harm to youths, who, because of their age, are particularly deserving of the opportunity to improve their behavior and achieve social and economic mobility.[152]

School discipline disproportionately affects nonwhite students in two ways: (1) they are punished more severely than is warranted by their infraction; and (2) they are disciplined more often as compared to white students and given worse punishments for the same offenses.

1. Disproportionate Discipline: Not Doing a Crime but Still Doing the Time

The staggering proportion of students in mostly nonwhite schools arrested for minor, noncriminal violations demonstrates the disproportionate severity relative to the students' infraction.[153]

Arresting or threatening to arrest juveniles for behavior that was once seen as a natural part of childhood and handled by educators has received wide condemnation.[154] The U.N. General Assembly urges countries to pass laws prohibiting the practice and warns that, "in the predominant opinion of experts, [labeling] a young person as . . . 'delinquent' . . . contributes to the development of a consistent pattern of undesirable behaviour."[155] Studies corroborate the United Nations's warning, indicating that a "counter-reaction to coercive disciplin[e] . . . may be fairly typical, and suggest that punishment-based approaches to school discipline may escalate rather than deter school disruption."[156] Studies

152. In the context of sentencing youth convicted of crimes, the Supreme Court has noted that "[j]uveniles' susceptibility to immature and irresponsible behavior means their irresponsible conduct is not as morally reprehensible as that of an adult" and that "[t]heir own vulnerability and comparative lack of control over their immediate surroundings mean juveniles have a greater claim than adults to be forgiven for failing to escape negative influences in their whole environment." Roper v. Simmons, 543 U.S. 551, 553 (2005). This same principle should be recognized by courts when school criminalization effectively sentences poor students of color to lives of marginalization, poverty, and prison.

153. *See supra* notes 90–94 and accompanying text (discussing how 77 percent of all New York City school police interventions are for noncriminal offenses); *see also* NYCLU, CRIMINALIZING THE CLASSROOM, *supra* note 46, at 20.

154. *See* Majd, *supra* note 26, at 346–47 ("[Y]outh are being removed from school settings and treated as criminals for rather typical adolescent behaviors, with disastrous consequences to their educational opportunities and achievement."); Bob Herbert, Op-Ed., *School to Prison Pipeline*, N.Y. TIMES, June 9, 2007, at A15 (citing a racial justice advocate condemning the fact that "behavior that in my time would have resulted in a trip to the principal's office is now resulting in a trip to the police station"); *see also supra* Part II.B.

155. G.A. Res. 45/112, *supra* note 38, at (V), ¶ 56, (I), ¶ 5(f).

156. SKIBA, *supra* note 14, at 14. Skiba humanizes these studies by quoting a disciplined student: "I figure if I'm going to get in trouble, I'm gonna annoy [the disciplinarian] as much as I can.

also show that all aggressive and intrusive school security measures, not limited to police enforcement of noncriminal rules, can "produce alienation and mistrust," "increase . . . student misbehavior," "[cause the] development of . . . oppositional behavior," and impede "a cooperative learning environment by producing hostility and fear."[157]

As a result, hostile police practices and zero-tolerance policies contribute to the misbehavior that may cyclically lead to an arrest or suspension, significantly increasing a student's risk of recidivism, academic decline, dropout from school, and incarceration.[158] Thus, students of color in poor school districts—the most likely to be exposed to police officers and criminalized security measures at school—are at a heightened risk for arrest or harsh discipline for minor offenses, potentially setting them directly on the prison track.

2. Disproportionate Discipline: It's Not All Right, Unless You're White

By making punishment and suspicion constant elements of school life, police exacerbate the already troubling trend of disproportionately frequent discipline for nonwhite students. Racial disparities in school discipline, which have been documented for at least thirty-five years,[159] are stark. For example, black students make up 34 percent of nationwide suspensions despite comprising 17 percent of the school population.[160] Nonwhite students are far more likely than white students to be arrested, suspended, expelled, or exposed to corporal punishment for the same type of conduct.[161] Such disparities cannot be considered rational, as nonwhite students do not misbehave with any

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[H]e deserve it, if he gonna keep singling me out. . . . If you know you're already getting in trouble, why shut up?" *Id.* (citations omitted).

157. Beger, *supra* note 21, at 340–41.

158. NYCLU, *Testimony of the New York Civil Liberties Union Before the New York City Department of Education on Proposed Changes to the 2010–2011 Citywide Standards of Intervention and Discipline Measures* 4, June 23, 2010, http://www.nyclu.org/files/releases/6.23.10_DisciplineCode Testimony.pdf [hereinafter *NYCLU Testimony*]; *see also* NAACP, *supra* note 13.

159. *See* CHILDREN'S DEF. FUND, SCHOOL SUSPENSIONS: ARE THEY HELPING CHILDREN? 63–79 (1975).

160. NAACP, *supra* note 13.

161. *See id.*; Majd, *supra* note 26, at 365 ("Extensive research findings show that African-American, Latino, and Native-American youth, in particular, are more likely to be suspended and expelled from school and to face corporal punishment."); *see also* ADVANCEMENT PROJECT, *supra* note 22, at 15 (stating that black students "are punished more severely for less serious . . . infractions"); SKIBA, *supra* note 14, at 12 (same); Am. Psychological Ass'n Zero Tolerance Task Force, *supra* note 44, at 854–55 (stating that exclusionary discipline is disproportionately enforced against Latino and American Indian students and students with disabilities).

greater frequency than white students.[162] These trends are particularly troubling in the New York City school system, where, between 1999 and 2009, black students made up one-third of the student population but over half of all suspensions,[163] and where nearly half of all offenses listed in the Discipline Code, including lateness and wearing a hat, can result in "removal from classroom" or suspension.[164]

The vagueness of many school rules combined with the vagueness of officer responsibilities (including the NYPD command to "remove 'unruly' children")[165] make it likely that the police, who often "are involved in every facet of school discipline," will mete out punishment excessively, or at least inconsistently.[166] Schools with police officers tend to be in poor communities of color, so it is more likely that the commonplace behavior of nonwhite students gets criminalized. Students of color tend to be arrested under broad, discretionary charges, like disorderly conduct and disturbing the peace,[167] and tend to be punished (either by educators or school officers) for violations that require subjective judgment by enforcers, such as loitering, disrespect, or noise.[168] White students, however, tend to be disciplined for specific, readily discernible, serious violations like endangerment and drugs.[169] Thus, nonwhite students are at a higher risk of having their behavior misinterpreted as a violation or crime. This risk is elevated when officers are assigned to schools without adequate training in student behavior or cultural response techniques.[170] These officers are likely to impose unnecessary discipline that may have been avoided through an "[ ]understanding

162. Anne Gregory et al., *The Achievement Gap and the Discipline Gap: Two Sides of the Same Coin?*, 39 EDUC. RES. 59, 62 (2010). There may, though, be a reverse racial disparity for drug use, as a higher percentage of white students have drugs available to them at school than black students. *See* U.S. DEP'T OF EDUC., *supra* note 20, at 35 (indicating that a higher percentage of white students have drugs available to them at school than black students); *cf.* Majd, *supra* note 26, at 354 ("Even though most illegal drug users and dealers are white, three-fourths of all individuals in prison for drug offenses are people of color. . . . And where studies have found differences, they have found that white youth are more likely to be involved with illegal drug dealing than people of color.").

163. NYCLU, CRIMINALIZING THE CLASSROOM, *supra* note 46, at 18. The suspension proportion for black students is likely much higher when looking at a more recent period, as the averages in the cited study included two years before the adoption of No Child Left Behind, which may have spurred a steep rise in exclusionary discipline. *See infra* notes 175–177 and accompanying text.

164. N.Y.C. DEP'T OF EDUC., *supra* note 89, at 12, 18; *NYCLU Testimony*, *supra* note 158, at 3–5.

165. Amended Complaint, *supra* note 16, at 4.

166. *NYCLU Testimony*, *supra* note 158, at 3.

167. *See* Majd, *supra* note 26, at 368–69.

168. SKIBA, *supra* note 14, at 12; *see also* NYCLU, CRIMINALIZING THE CLASSROOM, *supra* note 46, at 19.

169. *See supra* notes 168, 162.

170. *See* Russell J. Skiba et al., *African American Disproportionality in School Discipline: The Divide Between Best Evidence and Legal Remedy*, 54 N.Y.L. SCH. L. REV. 1071, 1089 (2009/10).

of cultural norms of social interaction"[171] and to penalize students for, in the eyes of the disciplined students, simply not being white.[172] While the same concern may exist regarding school officials,[173] school police are in a unique position to harm students by involving them at a young age in the criminal justice system.

Racial disparities in discipline continue to grow as extensive testing regimes and strict sanctions imposed on schools by federal law drive policies that push out students perceived as likely to drag down test scores.[174] Zero-tolerance policies and exclusionary discipline have expanded since the passage of the No Child Left Behind Act (NCLB),[175] which created harsh penalties for schools with

171. NYCLU, CRIMINALIZING THE CLASSROOM, *supra* note 46, at 14. Whether disproportionately enforced discipline, particularly when attributable to lack of cultural understanding, varies depending on the race of the officer deserves further exploration. However, in the broader policing context, the correlation between the officer's race and the practices at issue appears to be minimal. *See, e.g.*, Stephen D. Mastrofski & James J. Willis, *Police Organization Continuity and Change: Into the Twenty-First Century*, 39 CRIME & JUST. 55, 95 (2010) ("Although a number of studies document a difference between black and white officers' beliefs and attitudes, most studies of actual behavior fail to find a difference in such things as arrest, use of force, demeanor, methods of restoring order, and engaging in community policing."); *cf. infra* note 247 (discussing a similar question regarding the disconnect between the role of school police officers in reifying economic hierarchy and the position of officers within the economic hierarchy).

172. Nonwhite students report that disrespect, communication differences, and being "purposefully pushed to the edge where they were . . . encouraged to be hostile were the primary causes" of disciplinary issues. SKIBA, *supra* note 14, at 12 (citation omitted). This notion especially applies to NYPD officers who refuse to treat students with respect and bring tension and violent, "macho" attitudes into schools. *See supra* notes 109–111 and accompanying text; *see also* Frank Rudy Cooper, *"Who's the Man?": Masculinities Studies,* Terry *Stops, and Police Training*, 18 COLUM. J. GENDER & L. 671, 674 (2009) (describing the tendency of officers to act "macho" and engage in "masculinity contests" with civilians). Popular black music reflects this understanding of school police attitudes. *See, e.g.*, THE GETO BOYS, CITY UNDER SIEGE (Rap-A-Lot Records 1990) (describing school police as having been bullied in high school and then coming back as police officers and "snapping necks").

173. *See, e.g.*, Avarita L. Hanson, *Have Zero Tolerance School Discipline Policies Turned Into a Nightmare?*, 9 U.C. DAVIS J. JUV. L. & POL'Y 289, 373 (2005) (expressing concern with school officials having "plenary review of student actions" and potentially resorting to "unnecessary, unfair, and perhaps racist enforcement of zero tolerance policies").

174. *See* Blumenson & Nilsen, *supra* note 100, at 67–68 ("[P]ublic school personnel have a number of powerful incentives to keep zero tolerance policies in place: federal aid is contingent on mandatory expulsions for weapons offenses; teachers are loathe to abandon a policy that efficiently rids the classroom of troublemakers; and school administrators benefit because expelled students are often poor students who score poorly on the standardized tests that are increasingly used to evaluate schools."); *see also* ADVANCEMENT PROJECT, *supra* note 21, at 5.

175. 20 U.S.C. §§ 6301–7941 (2006); *see* ADVANCEMENT PROJECT, *supra* note 21, at 5–6 (discussing the connection between NCLB and the increased use of zero-tolerance discipline to remove students from regular education); *see also* STUART BIEGEL, EDUCATION AND THE LAW 461–62 (2d ed. 2006). However, instead of taking measures to improve student performance, statistics indicate that schools may be using "harsh discipline policies [as] a convenient method to remove certain students and thereby mask educational deficiencies." NAACP, *supra* note 13. This most

low test scores, including state takeover and mandatory reorganization.[176] In the four-year period after President George W. Bush signed NCLB into law, the number of expulsions for nonwhite students increased, with the number of expulsions per black student rising by 33 percent, while the number of expulsions per white student decreased over this period.[177] Since schools have a strong incentive to remove students believed to be poor test-takers and have the increased means to do so given the expanded presence and role of school police, nonwhite students are likely to be caught in a deeply entrenched cycle of disproportionate discipline. Schools use criminalized security measures to push out poor test-takers, and criminalized security measures cause students of color to underperform on tests (as elaborated in Part III.B). Aside from standardized tests, disproportionate discipline stunts nonwhite students' overall academic achievement,[178] impeding their opportunity to receive a meaningful education.[179] Ultimately, because of the police presence in highly criminalized schools, nonwhite students are the most likely either to be put directly on the prison track by being arrested in school, often for noncriminal offenses, or to be pushed toward that track by disproportionately severe and frequent exclusionary discipline.[180]

3. Normalizing Expectations of Prison

Given that one in nine black men aged 20–34 is incarcerated,[181] and one in three "young black males live under some form of criminal justice control,"[182] prison is likely something that black students are reminded of on a regular basis.

acutely affects nonwhite groups who perform worse than average on standardized tests and for whom disproportionately harsh discipline has become normalized. *See id.*

176. *See* BIEGEL, *supra* note 175.

177. ADVANCEMENT PROJECT, *supra* note 21, at 5, 20 (discussing statistics projected by the U.S. Department of Education).

178. *See* Gregory et al., *supra* note 162, at 60.

179. For a discussion of students' educational rights under federal and state law and the obstacles for plaintiffs claiming that disproportionate school discipline infringes on those rights, see *infra* Part IV.A–IV.B.

180. The notion of exclusionary discipline setting children up for a life of crime and unrealized potential is reflected in popular culture. *See, e.g.*, LEAN ON ME (Warner Brothers 1989) (depicting an expelled student's mother who says: "What happened this morning is an outrage! My boy's no criminal! He and those [other expelled] children belong in school, not back out on the streets! . . . Some of those children are smart. They're just discouraged [by] what chances they got out there, what kind of jobs they got waiting for them. What chance do they have now?").

181. Adam Liptak, *More Than 1 in 100 Adults Are Now in Prison in U.S.*, N.Y. TIMES, Feb. 29, 2008, at A14.

182. Majd, *supra* note 26, at 353. This statistic includes those who are "in prison, on probation or parole, or awaiting trial." *Id.*

Routine police contact in many nonwhite communities, combined with students in schools that resemble prisons,[183] creates a culture of low expectations and fatalist attitudes.[184] The constant police presence in criminalized schools represents to students that the school's priority is controlling, not educating, them, and that prison is a normal and expected outcome.[185] This message is reinforced by the merger of the criminalized culture students see inside their schools and the mass incarceration they see in their communities.[186]

For some, school criminalization begs the question of when a school crosses over into being a "school" in name only. New York City students and teachers describe their criminalized schools as feeling like "a jail cell," "a fortress," "Rikers," or "baby Rikers,"[187] and describe being treated "like criminals rather than children" or "like criminals, like we're animals."[188] Sociologist Loïc Wacquant views this as an example of the merger between American prisons and urban ghettos, painting an alarming image of how this process plays out in schools:

> Like inmates, these children are herded into decaying and overcrowded facilities built like bunkers, where undertrained and underpaid teachers, hampered by a shocking penury of equipment and supplies—many schools have no photocopying machines, library, science laboratory, or even functioning bathrooms, and use textbooks that are thirty-year-old rejects from suburban schools—strive to regulate conduct so as to maintain order and minimize violent incidents. The physical plant

183. *See id.* at 361, 368–69 ("[M]any schools now literally resemble prisons, fully equipped with surveillance technologies[,] . . . full-time law enforcement officers[,] . . . metal detectors, video surveillance cameras, security check points, and drug-sniffing dogs.").

184. For examples of these harmful effects, see *supra* notes 155–157; *infra* notes 199, 255–256 and accompanying text.

185. *See* Loïc Wacquant, *Deadly Symbiosis: When Ghetto and Prison Meet and Mesh*, 3 PUNISHMENT & SOC'Y 95, 108 (2001), *available at* http://www.uakron.edu/centers/conflict/docs/Wacquant.pdf (stating that inner city schools have "deteriorated to the point where they operate in the manner of *institutions of confinement* whose primary mission is not to educate but to ensure 'custody and control'—to borrow the motto of many departments of corrections"); *see also* Price, *supra* note 37, at 546 ("No longer is education the primary goal; rather, the system emphasizes controlling children."). In popular culture, this is reflected in television series like *The Wire*, in which a social work field researcher working with black students in a Baltimore school says, "[T]he whole damn school . . . ; it's training for the street. The building's the system. We the cops." *The Wire: Corner Boys* (HBO television broadcast Nov. 5, 2006).

186. *See* Majd, *supra* note 26, at 382 (stating that "the lowest-performing schools tend to be located in communities with the highest incarceration rates").

187. NYCLU, CRIMINALIZING THE CLASSROOM, *supra* note 46, at 9, 10, 14, 16.

188. *Id.* at 12–13. These descriptions of criminalized schools are also reflected in popular black music. *See, e.g.*, DEAD PREZ, THEY SCHOOLS (Relativity Records 2000) (describing how school officers search black students, take them away in handcuffs, and make the school like "a military compound," prompting students to drop out).

> of most establishments resembles fortresses, complete with concertina wire on outside fences, bricked up windows, heavy locks on iron doors, metal detectors at the gates and hallways patrol[l]ed by armed guards who conduct spot checks and body searches between buildings. Over the years, essential educational programs have been cut to divert funds for more weapons scanners, cameras, emergency telephones, sign-in desks, and security personnel, whose duty is to repel unwanted intruders from the outside and hem students inside the school's walls.[189]

These schools, already severely lacking in resources and student services, further hamper their students with the stigma of criminalization and, often, tainted academic and criminal records. In these mostly nonwhite schools, the prison track has become the norm, and academic achievement the aberration.

B. Psychological Effects

> By what sends
> the white kids
> I ain't sent:
> I know I can't
> be President.
> What don't bug
> them white kids
> sure bugs me:
> We know everybody
> ain't free.
>
> —Langston Hughes, *Children's Rhymes*[190]

The law's role in racial subordination has been extensively explored,[191] and blacks have described its psychological effects since the first African slaves were brought to the American colonies.[192] In this psychological analysis of the harm caused by police in criminalized schools, the underlying notion is that nonwhites routinely negotiate racial identity and their responses to racism in ways that

189. Wacquant, *supra* note 185, at 108.
190. LANGSTON HUGHES, *Children's Rhymes*, *in* THE PANTHER & THE LASH 49 (1967).
191. For an overview of these themes in the field of critical race theory, see Kimberlé Crenshaw et al., *Introduction*, *in* CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT, at xxxii (Kimberlé Crenshaw et al. eds., 1995).
192. *See, e.g.*, UKAWSAW GRONNIOSAW, A NARRATIVE OF THE MOST REMARKABLE PARTICULARS IN THE LIFE OF JAMES ALBERT UKAWSAW GRONNIOSAW, AN AFRICAN PRINCE, AS RELATED BY HIMSELF (1772).

whites rarely need to consider.[193] In this context, I explore the concepts of stigma and stereotype threat to identify the psychological effects of NYPD-like practices on students of color and the entrenched nature of the harm.

1. Stigma

Stigma is the anxiety-inducing discrepancy between a person's sense of social identity and the inferior social identity ascribed to that person by others based on an attribute considered unrespectable.[194] This profound harm befalls a child who leaves her house in the morning a happy and complete person, only to arrive at school and learn that others view her identity as that of a criminal suspect.[195] Stigmatic harm is particularly salient for nonwhite children. Adolescence, the critical period for all identity development,[196] is particularly formative for racial identity development, which may already be marked by high anxiety and low self-actualizing tendencies.[197] Given this volatile period in a child's life, the stigma of being treated like a criminal in school, especially when the child knows that her white cohorts are not, can be devastating.[198]

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193. Indeed, the ability of whites to not consciously think of themselves as white exemplifies the cognitive aspect of white privilege. *See* Barbara J. Flagg, "*Was Blind, but Now I See": White Race Consciousness and the Requirement of Discriminatory Intent*, 91 MICH. L. REV. 953, 957 (1993) (referring to this concept as the "transparency phenomenon").

194. *See* ERVING GOFFMAN, STIGMA 2–5, 12–13 (1963).

195. This division in one's identity, and the accompanying psychosocial racial divisions in American society, was forcefully stated outside the stigma context by W.E.B. Du Bois at the turn of the twentieth century:

> [T]he Negro is a sort of seventh son, born with a veil, and gifted with second-sight in this American world,—a world which yields him no true self-consciousness, but only lets him see himself through the revelation of the other world. It is a peculiar sensation, this double-consciousness, this sense of always looking at one's self through the eyes of others, of measuring one's soul by the tape of a world that looks on in amused contempt and pity. One ever feels his twoness,—an American, a Negro; two souls, two thoughts, two unreconciled strivings; two warring ideals in one dark body, whose dogged strength alone keeps it from being torn asunder.

W.E.B. DU BOIS, THE SOULS OF BLACK FOLK 6 (Wilder Publ'ns 2008) (1903).

196. Jessica T. DeCuir-Gunby, *A Review of the Racial Identity Development of African American Adolescents: The Role of Education*, 79 REV. EDUC. RES. 103, 104 (2009).

197. Robert T. Carter & A. Lin Goodwin, *Racial Identity and Education*, 20 REV. RES. EDUC. 291, 309–10 (1994).

198. *See* Christia Spears Brown & Rebecca S. Bigler, *Children's Perceptions of Discrimination: A Developmental Model*, 76 CHILD DEV. 533, 533 (2005) ("[P]erceiving . . . discrimination is likely to affect individuals' identity formation, . . . academic achievement, occupational goals, and mental and physical well-being."); *cf.* Josie Foehrenbach Brown, *Developmental Due Process: Waging a Constitutional Campaign to Align School Discipline With Developmental Knowledge*, 82 TEMP. L. REV. 929 (2009) (arguing that school discipline that deviates from the professional norms of developmental psychology creates significant harm and should be treated as prima facie evidence of a constitutional due process violation).

One example of this stigma is the social identity teachers may ascribe to nonwhite students, a group for whom many teachers may implicitly have lower academic and behavioral expectations.[199] Given studies indicating that teachers often have negative associations with and lower expectations for nonwhite children, it is highly likely that police officers, accustomed to arresting and searching young people of color, have more extreme negative associations and much lower expectations that inform their conduct.[200] Thus, during a critical, high-anxiety period of identity development, nonwhite students may be bombarded with implicit messages of low expectations from teachers or the impoverished school conditions and with explicit messages in the form of baseless suspicion and harassment from school police. This stigma is compounded for those nonwhite students who are herded daily through intrusive security devices by police officers and who are aware that at the white schools, students tend to walk, unbothered, into schools that instead use their funding for librarians and guidance counselors.[201]

199. *See* Carter & Goodwin, *supra* note 197, at 307 (stating that teachers may display negative attitudes and low expectations toward nonwhite students, thus "impact[ing] the[ir] racial identity development"); DeCuir-Gunby, *supra* note 196, at 114 (stating that black students perceive that teachers have lower expectations for them than for white students); Greg Wiggan, *Race, School Achievement, and Educational Inequality: Toward a Student-Based Inquiry Perspective*, 77 REV. EDUC. RES. 310, 317 (2007) ("[L]ow teacher expectations create obstacles for many minority students.").

200. *See, e.g.*, THE REAL WAR ON CRIME: THE REPORT OF THE NATIONAL CRIMINAL JUSTICE COMMISSION 108–09 (Steven R. Donziger ed., 1996) ("Most studies reveal what most police officers will casually admit: that race is used as a factor when the police decide to follow, detain, search, or arrest.").

201. While antidiscrimination law is discussed *infra* Part IV.B–IV.C, it should be noted that a showing of stigmatic harm, while less salient to the Supreme Court than intentional discrimination or racial classifications, is more persuasive than claims premised on, for example, disproportionate impact alone or de facto segregation. For intentional discrimination, see *infra* Part IV.B. For racial classifications, see *Adarand Constructors, Inc., v. Pena*, 515 U.S. 200, 235 (1995) (holding that racial classifications by any state actor regardless of purpose are subjected to strict scrutiny). For disproportionate impact alone, see *Personnel Administrator of Massachusettes v. Feeney*, 442 U.S. 256, 260 (1979) (upholding civil service hiring preferences that had a "devastating impact upon the employment opportunities of women"); *infra* Part IV.B. For de facto segregation, see *Parents Involved in Community Schools v. Seattle School District No. 1*, 551 U.S. 701 (2007) (prohibiting school districts from assigning children to public schools based on their race in order to foster racial integration); *Missouri v. Jenkins*, 515 U.S. 70 (1995).

The Court has invoked stigma in cases that most agree advance racial equality (*see, e.g.*, Plyler v. Doe, 457 U.S. 202, 223 (1982); Brown v. Bd. of Educ., 347 U.S. 483, 494 (1954)), but also in those that do not (*see, e.g.*, Shaw v. Reno, 509 U.S. 630, 631 (1993) (striking down a voter redistricting plan to increase black political representation because racial classifications "stigmatize persons")).

2. Education Identification and Stereotype Threat

Of course, many nonwhite students in criminalized schools care deeply about education and may receive the support necessary to overcome the pitfalls of stigma, disproportionate discipline, unwarranted arrests, and poor school quality. These students likely excel academically because they identify with the "education domain," meaning that school achievement is "a part of [their] self-definition, a personal identity to which [they are] self-evaluatively accountable."[202] For students to become education-identified, they must recognize education as a domain to which they belong, where their skills can provide them opportunities to succeed in school, which will translate into real-world success.[203] Yet, the harm to these students—the ones least likely to be on a prison track—can also be severe. The key question, according to social psychologist Claude M. Steele, is then, "What in the experience of [nonwhite students] might frustrate their identification with . . . school achievement?"[204]

In the context of this analysis, the answer is clear: Criminalized schools frustrate identification with education.[205] For nonwhite students, criminalized schools do this in the ways previously described, but they also do this more subtly by activating "stereotype threat," defined by Steele as "the threat of being viewed through the lens of a negative stereotype, or the fear of doing something that would inadvertently confirm that stereotype."[206] Nonwhite students must contend with two prevalent negative stereotypes: that they lack academic ability, and that they are criminals or potential criminals.[207] The combination of

202. Claude M. Steele, *A Threat in the Air: How Stereotypes Shape Intellectual Identity and Performance*, 52 AM. PSYCHOLOGIST 613, 613 (1997).

203. *Id.* One reason that black students in particular may not see education as a domain to which they belong is the substance of the education, a notion reflected in popular black music. *See, e.g.*, BOOGIE DOWN PRODUCTIONS, YOU MUST LEARN (Jive Records 1989) (criticizing black schools for not teaching black history: "'Cause you don't know that you ain't just a janitor / No one told you about Benjamin Banneker"); COMPTON'S MOST WANTED, HOOD TOOK ME UNDER (Orpheus Records 1992) (similarly criticizing schools for providing a "white education" and teaching a "white reality"); JUNGLE BROTHERS, ACKNOWLEDGE YOUR OWN HISTORY (Warner Brothers 1989) (criticizing schools for the same: "Yeah, I cut class, I got a D / 'Cause History meant nothing to me"); KRS-ONE, GET YOURSELF UP (Koch Records 2001) ("I teach my kids to watch the education they give 'em / 'Cause it's really all about street wisdom.").

204. Steele, *supra* note 202.

205. *See, e.g.*, ADVANCEMENT PROJECT, *supra* note 21, at 4 ("[Criminalization] turns students off to learning . . . ."); NAT'L ECON. & SOC. RIGHTS INITIATIVE, *supra* note 91, at 25 ("[Criminalization] . . . lead[s] to alienation towards school[.]").

206. Claude M. Steele, *Thin Ice: Stereotype Threat and Black College Students*, THE ATLANTIC, Aug. 1999, http://www.theatlantic.com/past/docs/issues/99aug/9908stereotype.htm.

207. *See infra* notes 345–348 and accompanying text (discussing the pervasive influence of negative racial stereotypes).

poor-quality, underfunded schools and criminalized security measures creates a chronic pressure that can cause disidentification—"a re-conceptualization of the self" that removes the education domain as a basis for self-identity and self-evaluation.[208] Ironically, the damaging process of disidentification is a means of survival, a no-win situation in which an education-identified student blunts the impact of being denigrated within that domain by dislodging it from her identity.[209]

Education-identified students, having overcome various structural obstacles to maintain their self-identity,[210] then find themselves having to rescue their "self-esteem by rendering as self-evaluatively irrelevant the domain [of education] in which the stereotype applies."[211] One might counter that this situation does not describe, for instance, an education-identified Impact School student who knows that she is not a delinquent, dismisses the security measures as just an annoyance, and thus remains identified with school and focused on academic achievement. However, as described below, stereotype threat combined with police in schools has a most insidious effect in this context, effectively depriving even the most education-identified nonwhite students of an equal educational opportunity.

To illustrate, Steele describes a scenario in which a black man stands at an ATM behind a white woman, and, worrying that she fears he will rob her, frets about how he can put her ease.[212] Though he knows that the criminal stereotype does not accurately characterize him, the anxiety of stereotype threat is still activated, illustrating that one's "daily life can be filled with recurrent situations in which this threat pressures adaptive responses."[213] This pressure profoundly impedes performance, even at the highest academic level. In a widely cited study, Steele found that black Stanford students tested equally to white students when they were told that the test was a research tool, thus neutralizing stereotype threat, but tested poorly compared to white students when they were told that the test measured "intellectual ability," thus activating stereotype

208. Steele, *supra* note 202, at 614.
209. A recent study on the link between social exclusion and physical pain indicates that, while forms of disidentification "may offer rejected people a temporary reprieve from feeling the intense pain or distress that can accompany threats to belongingness," they can be characteristic of "severe psychopathology" in the long run. *See* C. Nathan DeWall & Roy F. Baumeister, *Alone but Feeling No Pain: Effects of Social Exclusion on Physical Pain Tolerance and Pain Threshold, Affective Forecasting, and Interpersonal Empathy*, 91 J. PERSONALITY & SOC. PSYCHOL. 1, 1–3 (2006).
210. *See* Steele, *supra* note 202, at 617 (stating that these students have not internalized the stereotypes to the point of doubting their abilities).
211. *Id.* at 623.
212. *Id.* at 618.
213. *Id.*

threat.[214] Thus, it only takes a subtle reminder of the stereotype and the risk that the student may confirm it to trigger this threat in education-identified students. In studies finding reduced academic performance, the threat-activating agent was less laden with negative racial associations than arbitrary police searches, daily metal detectors scans, and pat-downs.

One theory that works in conjunction with stereotype threat to explain the circular nature of the harm to nonwhite students is Glenn C. Loury's "self-confirming racial stereotype." This theory states that a stereotyper, by conducting himself according to how he racially classifies others, brings about the events that reinforce his initial stereotype.[215] Loury and Steele's theories may interact in a critical way. Consider a school officer who believes that young, black men commit a large percentage of crimes in the city. The officer then associates young, black men with crime, not with academic achievement, and is thus more aggressive and demeaning, either explicitly or implicitly, in interactions with black male students. On the day of a high-stakes standardized test, one such student at the school interacts with the officer and realizes he is being treated with baseless suspicion and stereotyped as a potential criminal. The officer's conduct thus triggers stereotype threat in the student, causing him to perform worse on the test than he would have absent his encounter with the officer. When the school's overall test results come in, the officer reads that black male students as a group performed poorly. As a result, the officer feels confirmed in his stereotype that young black males tend to be criminals, not scholars.[216]

In the same scenario, the depth of the harm to the student may depend on the extent to which he identified with the domain of education. To modify the prior example, suppose that same student graduated from eighth grade at the top of his class and is now attending an Impact High School where he must go through criminalized security measures daily and interact with the officer mentioned above. Knowing that such measures do not exist at mostly white schools, these interactions make the student acutely aware of the stereotypes

214. *Id.* at 620. Stereotype threat may even depress performance for elite white, male students, who are likely the least susceptible to stigma or self-doubt. *See* CLAUDE M. STEELE, WHISTLING VIVALDI AND OTHER CLUES TO HOW STEREOTYPES AFFECT US 90–92 (2010) (describing a study in which strong white male math students performed significantly worse on a test than a control group after being told that Asians tend to perform better on such tests than whites).

215. GLENN C. LOURY, THE ANATOMY OF RACIAL INEQUALITY 23 (2002).

216. This premise is not just hypothetical. At a 99 percent nonwhite New York City school (*see infra* Appendix, Table 3), a teacher asked the valedictorian to meet her to talk about the Advanced Placement test the student would be taking that morning. Though the teacher instructed a school officer to let the student into the school early, when the student arrived, the officer refused and made her wait for an hour, causing her to rush to get ready for the three-hour exam. *See* NYCLU, CRIMINALIZING THE CLASSROOM, *supra* note 46, at 17.

associated with his race. Fearful of confirming negative racial stereotypes that did not weigh on his mind in eighth grade, the pressure impedes his academic performance, causing emotional pain that he cures through disidentification—by removing school achievement from his identity. This student likely would have continued to succeed if he were able to "trust that stereotypes about [his race would] not have a limiting effect in [his] school world."[217] Such trust, though, is absent in highly criminalized, nonwhite schools.

This effect of depressing academic performance is increasingly significant due to test-driven laws and policies like NCLB, which uses high-stakes tests to determine a school's funding and influence children's future.[218] Further, the nonwhite students most likely to be hindered on a test by stereotype threat are also the most likely to have to pass a test in order to graduate, as the schools imposing high school exit exams tend to be in predominantly nonwhite communities.[219] With the rise in testing and school criminalization acting as triggers, burdens like stereotype threat put many nonwhite students onto low educational tracks "as reliably as their . . . grandparents were steered into segregated schools."[220]

C. Citizenship

> Jails and prisons are designed to break human beings, to convert the population into specimens in a zoo—obedient to our keepers but dangerous to each other.
>
> —Angela Davis [221]

217. Steele, *supra* note 202; *see also* Beger, *supra* note 21, at 341; *supra* note 69 and accompanying text regarding "trust." Steele recommends that schools hire nonwhite teachers as role models to reduce the harm of stereotype threat. Steele, *supra* note 202, at 625. This suggestion may be relevant to some highly criminalized schools, particularly at the higher administrative positions, but it would likely take a good deal more to meaningfully neutralize stereotype threat. However, the efficacy of Steele's suggestion to fostering equal educational opportunity, if convincingly demonstrated, should cast doubt on the Supreme Court's conclusion that having nonwhite role models in schools is not a compelling interest. *See* Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 272–74 (1986).

218. *See* ADVANCEMENT PROJECT, *supra* note 21, at 3–7; *supra* Part III.A.2 (discussing the relationship between high-stakes testing and racially disproportionate discipline).

219. The twenty-three states that impose high school exit tests contain 74 percent of the country's nonwhite students. ADVANCEMENT PROJECT, *supra* note 21, at 21.

220. Claude M. Steele, *Not Just a Test,* THE NATION, May 3, 2004, at 38, 38. The harm of high-stakes testing amid stereotype threat extends further than one may imagine. One study found that "the blood pressure of black students performing a difficult cognitive task under stereotype threat was elevated compared with that of black students not under stereotype threat or white students in either situation." *Id.*

221. ANGELA DAVIS, AN AUTOBIOGRAPHY 52 (1974).

"All discussions of education are at essence discussions of citizenship."[222] In the state of New York, students are legally entitled to an education that prepares them to be "civic participants capable of voting and serving on a jury."[223] U.S. Supreme Court justices have recognized that education is the "very foundation of good citizenship"[224] and a "vital civic institution for the preservation of a democratic system,"[225] that "studies plainly essential to good citizenship must be taught,"[226] and that there is a "direct relationship between participation in the electoral process and level of educational attainment."[227] However, NYPD-like practices in criminalized schools directly suppress the values of citizenship in nonwhite students.

1. Civic Participation

The first way in which school police deny students the opportunity for civic participation is the most direct. By increasing the likelihood that students develop criminal and disciplinary records, criminalized schools deny students the academic advancement needed for civic participation. Moreover, these practices, by increasing the likelihood of incarceration (as discussed in Part III.A), will also take many students out of the electorate at some point in their lives.[228] Schools with police officers are the most likely to saddle their students with criminal records by formally reporting offenses to the police department. Correspondingly, the schools with the largest percentage of white students are the least likely to officially report the same criminal offenses that schools with mostly nonwhite students report to the police.[229] The result for nonwhite students in criminalized schools with police officers is not just unequal educational opportunity, but an unequal opportunity to participate in public life as a citizen.

222. john a. powell, *The Tensions Between Integration and School Reform*, 28 HASTINGS CONST. L.Q. 655, 655 (2001).
223. Campaign for Fiscal Equity, Inc. v. State, 655 N.E.2d 661, 666 (N.Y. 1995).
224. Brown v. Bd. of Educ., 347 U.S. 483, 493 (1954).
225. Abington Sch. Dist. v. Schempp, 374 U.S. 203, 230 (1963) (Brennan, J., concurring).
226. Pierce v. Soc'y of Sisters, 268 U.S. 510, 534 (1925).
227. San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 114 (1973) (Marshall, J., dissenting).
228. *Cf. Felony Disenfranchisement Laws in the United States*, SENTENCING PROJECT (Mar. 2010), http://www.sentencingproject.org/doc/publications/fd_bs_fdlawsinusMar11.pdf. Thirteen percent of black men are presently disenfranchised, seven times the national average. *Id.*
229. *See* Torres & Stefkovich, *supra* note 56, at 450, 465; *see also* U.S. DEP'T OF EDUC., *supra* note 20, at 96–99 (showing that schools that are 50 percent or less white report a higher percentage of all offenses reported to police than schools that are at least 95 percent white).

The second way school police deny students the opportunity for civic participation is through the suppression of traits and values that allow one to thrive within a community and advance in public society. This suppression takes multiple forms. First, through excessive, disproportionately enforced discipline, school police cause nonwhite students to mistrust law enforcement, lose faith in the legal system, and hold negative views toward public institutions.[230] As Justice Stevens stated, "The schoolroom is the first opportunity most citizens have to experience the power of government. . . . The values they learn there, they take with them in life."[231] Second, as discussed in Part III.D, underfunded nonwhite schools tend to penalize traits that are valued in civil society, such as creativity, assertiveness, and independence.[232] School police compound that suppression by making it risky for a student to do anything to stand out, including being outspoken and engaging in free expression.[233] Lastly, the traits that these schools and the police reward—subordinacy and conformity—are not traits primarily favored for community leaders or politicians. Nor are these traits fostered in wealthier, predominantly white schools, which instead favor values like leadership, student participation, decisionmaking, and autonomy.[234] In other words, criminalized schools patrolled by police officers attempt to instill in students those traits compatible with acquiescence to the status quo and attempt to suppress in students those traits compatible with leading others to win reforms and improve the social and material conditions affecting their opportunities in life.[235]

230. *See* ACLU, *supra* note 37, at 10 (stating that students who witness a classmate get arrested for a minor violation develop distrust of law enforcement); Elizabeth A. Brandenburg, Comment, *School Bullies—They Aren't Just Students: Examining School Interrogations and the* Miranda *Warning*, 59 MERCER L. REV. 731, 764 (2008) (arguing that police must be prevented from depriving students of their rights "to ensure that [students] do not lose faith in the legal system . . . [because] everyone suffers when children do not trust the legal system, and we end up with more crime in the long run").

231. New Jersey v. T.L.O., 469 U.S. 325, 385–86 (1985) (Stevens, J., concurring in part and dissenting in part).

232. *See* SAMUEL BOWLES & HERBERT GINTIS, SCHOOLING IN CAPITALIST AMERICA 137–38 (1975) (finding a link between such traits being penalized in New York City high schools and also disfavored by supervisors for low-level workers); *see, e.g.*, HIGH SCHOOL (Osti Films 1968) (documentary) (School Administrator: "It's nice to be individualistic, but there are certain places to be individualistic." Female Student: "I didn't mean to be individualistic.").

233. *See* Hanson, *supra* note 173, at 9–10 ("Zero tolerance policies have a significant limiting effect on students' freedom of expression."); *NYCLU Testimony*, *supra* note 158, at 5–9 (reporting that NYPD school practices threaten student free speech).

234. *See* BOWLES & GINTIS, *supra* note 232, at 137–38.

235. *Cf.* Wacquant, *supra* note 185, at 108 ("[T]he carceral atmosphere of schools and the constant presence of armed guards in uniform in the lobbies, corridors, cafeteria, and playground of their establishment habituates the children of the [modern ghetto] to the demeanor, tactics, and

2. Civil Liberties

Following from the suppression of civic engagement, the repressive practices of school police officers and the deference courts give to schools to restrict students' rights have conditioned many nonwhite students to view civil liberties as utterly alienable and bestowed at the grace of the school. School police methods that are "destructive of personal liberty" inevitably make students "feel that they have been dealt with unfairly."[236] This is particularly true for nonwhite students who may already feel unfairly treated by police, resulting in heightened mistrust of the law.[237]

While the Supreme Court has refused to equate schools and prisons for the purpose of the Fourth Amendment[238]—a point telling in that it had to be made—the Court has given school police wide discretion for suspicionless, blanket searches[239] in an "unclear, unprecedented, and unnecessary departure from . . . Fourth Amendment standards."[240] The combination of wide police discretion and the vague NYPD command to "remove 'unruly' children"[241] all but ensures that the Fourth Amendment rights of nonwhite New York City children will continue to erode.[242]

Further, police and prosecutorial pressure push nonwhite students toward prison by encouraging them "to accept plea deals for crimes they were coerced into confessing at school" and through convictions based on evidence that would be inadmissible in a nonschool context.[243] Given the procedural latitude afforded to officers, police use the school setting as a convenient location to circumvent safeguards that would apply if the officer detained, questioned, or arrested the student outside the school.[244]

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interactive style of the correctional officers many of them are bound to encounter shortly after their school days are over.").

236. *T.L.O.*, 469 U.S. at 373–74 (Stevens, J., concurring in part and dissenting in part).

237. *See supra* note 230 and accompanying text. This unfair treatment is reflected in popular black music. *See, e.g.*, DEAD PREZ, *supra* note 188 (voicing student anger over how the school police "were always present" and constantly searching through students' possessions).

238. *See T.L.O.*, 469 U.S. at 338–39.

239. As Justice O'Connor has pointed out, in giving schools this wide discretion, the Court actually may be restricting Fourth Amendment rights in schools to a greater degree than in prisons. *See* Veronia Sch. Dist. v. Acton, 515 U.S. 646, 681 (1995) (O'Connor, J., dissenting).

240. *T.L.O.*, 469 U.S. at 354 (Brennan, J., concurring in part and dissenting in part); *see also Acton*, 515 U.S. at 673–74 (O'Connor, J., dissenting).

241. Amended Complaint, *supra* note 16, at 4.

242. *See* Beger, *supra* note 21, at 345 ("In the absence of a general framework for evaluating school searches by the police, . . . courts have eroded the Fourth Amendment rights of school children.").

243. *See* Brandenburg, *supra* note 230, at 745–46.

244. *See id.*

Thus, students of color in police-heavy schools are made to feel powerless and lose faith in the availability of civil liberties and other legal protections. This process of disempowerment prepares nonwhite children for the treatment they receive when they exit the school doors and step into the New York City streets, where 90 percent of people stopped-and-frisked by the NYPD are nonwhite, despite being less likely than whites to have committed an offense and the actual arrest rate from these stops being extremely low.[245]

D. Economic System

> The paradox of education is precisely this—that as one begins to become conscious, one begins to examine the society in which he is being educated.
>
> —James Baldwin [246]

While there are innumerable factors contributing to racial economic inequality in the United States, school police play the specific role of abetting poor, nonwhite schools in preparing students for a subordinated position when, or if, they enter the workforce.[247] Just as with civic participation, school police disproportionately deprive nonwhite students of economic opportunities by increasing the likelihood that students will have disciplinary or criminal records that prevent them from getting hired, and by encouraging them to adopt traits that are disfavored for all but the most menial jobs. The function of schools in reproducing white racial and economic hegemony has led to calls for educators "to transform schools from being sorting mechanisms in the larger global

245. Press Release, Ctr. for Constitutional Rights, New NYPD Data Shows Record Number of Stop-and-Frisks in 12-Month Period (Feb. 11, 2009), *available at* http://ccrjustice.org/newsroom/press-releases/new-nypd-data-shows-record-number-stop-and-frisks-12-month-period; *see also* Fabricant, *supra* note 29, at 377 (stating that aggressive stop-and-frisk policing in New York City "is indiscriminate and directed largely at law-abiding young black and Latino men [and that i]n public housing projects, the practice has resulted in widespread and systemic arrests of factually innocent people on charges of criminal trespassing").

246. James Baldwin, *A Talk to Teachers*, SATURDAY REV. (1963), *available at* http://richgibson.com/talktoteachers.htm.

247. *See supra* notes 232–235 and accompanying text; *see also* Majd, *supra* note 26, at 362–63 ("Schools prepare students for the work force and therefore prepare students differently depending on what roles they assume each student will play in the economy. In this way, schools reproduce and reinforce the social inequities that exist in the labor market."). The fact that police officers (along with teachers) are in a subordinated economic position compared to other professionals highlights the structural nature of the harm at issue and the frequent disjuncture between the actors causing the immediate harm and any rational motivation for them to do so. *Cf. supra* note 171 (regarding the relationship between police officers' race and racially disproportionate police practices).

market—where people of color . . . are prepared to fit a particular role in society."[248] For over one-quarter of black and Latino children in the United States, this role will involve living below the poverty line—for over one-third of black and Latino children, it already does.[249]

The correlation between education and the workforce is based on the idea of schooling as a mechanism for capitalist reproduction, wherein schools "replicate the relationships of dominance and subordinancy in the economic sphere."[250] Poor students of color "are concentrated in schools whose repressive . . . authority structures and minimal possibilities for advancement mirror the characteristics of inferior job situations."[251] NYPD-like practices in criminalized schools epitomize repressive authority, disadvantaging students by negatively influencing student attitudes and communication skills—the two most important predictors of job success, outweighing both cognitive ability and actual academic performance.[252] Therefore, even those students who remain education-identified and graduate at the top of their class will likely be hampered in the workplace by the traits that were instilled in them by heavily policed, criminalized schools.

Similarly, as students advance from one grade to the next, they are likely to question the value of the traits to which they are consistently asked to conform. That is, because improving oneself and honing one's marketable skills are fundamental to schooling, students likely start out seeing concepts like subordinancy and discipline[253] as having instrumental value in reaching a desirable destination later in life. As students get older, they will likely realize that the practices and mores in their criminalized, racially segregated schools actually may harm their future economic interests.[254] As a result, students will

248. Gerardo R. López, *The (Racially Neutral) Politics of Education*, 39 EDUC. ADMIN. Q. 68, 71 (2003).

249. *See* CARMEN DENAVAS-WALT ET AL., U.S. CENSUS BUREAU, INCOME, POVERTY, AND HEALTH INSURANCE COVERAGE IN THE U.S.: 2009, at 62–67 (2010), *available at* http://www.census.gov/prod/2010pubs/p60-238.pdf. The percentages of black and Latino children younger than eighteen living under the poverty line were both steadily increasing as of 2009. *Id.* at 65, 67.

250. BOWLES & GINTIS, *supra* note 232, at 131–32.

251. *Id.*

252. SAMUEL BOWLES & HERBERT GINTIS, SCHOOLING IN CAPITALIST AMERICA REVISITED 10–12 (2001), *available at* http://www.scribd.com/doc/4199364/Bowles-and-Gintis-Schooling-in-Capitalist-America-Revisited. For the effects that school police can have on attitude and communication skills, see SKIBA, *supra* note 14 and accompanying text; Beger, *supra* note 21, at 340–41; Hanson, *supra* note 173, at 323–28 and accompanying text.

253. *See* BOWLES & GINTIS, *supra* note 232, at 137–38.

254. The work of influential social theorist Robert K. Merton on how social structures pressure nonconforming behavior has instructive implications on this point. Merton writes about social groups for whom "activities originally conceived as instrumental are transmuted into self-contained practices, lacking further objectives." Robert K. Merton, *Social Structure and Anomie*, *in* SOCIAL THEORY 225, 226–28 (Charles Lemert ed., Westview Press 3d ed. 2004) (1938). His main

likely develop disillusionment with the educational system, understanding their life choices to be limited to accepting a position at the lowest economic rung or taking their chances in illegal enterprises.[255] The result for nonwhite students is a harmful cycle of deprived opportunity. Due to their criminalized schools, these students lack the traits favored by nonmenial jobs; and, due to the "perceived job ceiling for Black workers . . . , Black students [feel] alienated from school."[256] Thus, NYPD-like practices in criminalized schools obstruct nonwhite students from attaining the social equality derived from true citizenship and the material equality derived from the fair opportunity to compete in the economic system.

* * *

The lenses of school-to-prison pipeline, psychological effects, citizenship, and economic system illustrate the deep and expansive scope of the harm that NYPD-like practices, combined with other criminalized school elements, have on both the most at-risk and the most education-identified nonwhite students. This harm effectively denies these students a fair and equal opportunity to attend a school that will help, not hurt, their chances in life. The racial perspectives essential to any adequate analysis of the harm, though, remain outside the boundaries of antidiscrimination law and are thus forced out of the narratives in lawsuits like *B.H.* Though federal and state education laws establish various school standards and student rights, modern antidiscrimination law has effectively

assertion is that "aberrant behavior may be regarded sociologically as a symptom of the dissociation between culturally prescribed aspirations and socially structured avenues for realizing these aspirations." *Id.* at 228. In this discussion, the culturally prescribed aspirations would be those of successfully absorbing the lessons imparted in school in order to maximize earning capacity and/or social status later on. In poor, criminalized schools, the dissociation is particularly striking because the socially structured avenues of realizing these aspirations appear to be present as a natural component of education but are soon discovered by students to be illusory and, worse, economically impeding.

255. In reality, many likely do not see this as an actual choice; life at a low and stagnant economic position is not a rational option. In the song "Things Done Changed" by The Notorious B.I.G., for example, he lists his available life options as music, basketball, or drug dealing: "If I wasn't in the rap game / I'd probably have a key knee deep in the crack game / Because the streets is a short stop / Either you're slingin' crack rock or you got a wicked jump shot." THE NOTORIOUS B.I.G., *Things Done Changed*, *on* READY TO DIE (Bad Boy Records 1994).

256. Wiggan, *supra* note 199, at 319; *cf.* KANYE WEST, SCHOOL SPIRIT (Roc-A-Fella Records 2004) (feeling alienated from school after seeing his school valedictorian graduating and then working as a waiter at a chain restaurant); COOLEY HIGH (American International Pictures 1975) (depicting a black student discouraged and mocked by his peers because he "want[s] to be something besides a factory worker or a football player").

rendered such laws toothless for nonwhite students in criminalized schools like New York City's.

IV. NO REMEDY IN THE LAW

Statutes and case law pertaining to equal educational opportunity and discrimination in schools are numerous, but they are presently inadequate to address the most serious harm to nonwhite students in criminalized schools. Likewise, lawsuits that narrow their claims to fit into the confines of what courts will recognize have only a limited ability to address something as systemic as the school-to-prison pipeline.[257]

A. Right to an Equal Educational Opportunity

The Supreme Court has held that there is no fundamental right to an education under the U.S. Constitution.[258] However, the Court has also recognized that "education is one of the most important services performed by the State,"[259] that it has "supreme importance" in "maintaining our basic institutions,"[260] that "its deprivation [has a lasting impact] on the life of the child,"[261] that "[p]roviding public schools ranks at the very apex of the function of a State,"[262] and that, as stated in *Brown v. Board of Education*, "education is perhaps the most important function of state."[263] The *Brown* Court continued, "[I]t is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity . . . is a right which must be made available to all on equal terms."[264] Similarly, Congress passed

257. *Cf.* Majd, *supra* note 26, at 349 ("Isolated policy reforms or lawsuits addressing only one aspect of the education or justice system without attending to the interconnections between the two systems are unlikely to fully dismantle the culture of punishment targeting students of color."). Majd compellingly makes the case for a broad advocacy approach aimed simultaneously at the education and criminal justice systems. Recognizing the unique racial harm described in Part III, *supra*, as an equal protection violation, I argue, is an important step in telling the full story of the harm and providing the foundations for a broad, interconnected approach.

258. *See* San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 2 (1973). The Court, though, recognized that "some identifiable quantum of education" might be constitutionally protected, but this right would be triggered only in a most extreme case. *Id.*

259. *Id.*

260. Plyler v. Doe, 457 U.S. 202, 221 (1982).

261. *Id.*

262. Wisconsin v. Yoder, 406 U.S. 205, 213 (1972).

263. 347 U.S. 483, 493 (1954).

264. *Id.*; *see also* Freeman v. Pitts, 503 U.S. 467 (1992) (addressing factors constituting a quality education in the context of desegregation litigation).

NCLB "to ensure that all children have a fair, equal, and significant opportunity to obtain a high-quality education."[265] Congress further endeavored to "meet[] the educational needs of low-achieving children in our Nation's highest-poverty schools" and to "clos[e] the achievement gap between high- and low-performing children, especially the achievement gaps between minority and nonminority students, and between disadvantaged children and their more advantaged peers."[266] Thus, it might be that the right to an education is not fundamental in name only.[267]

Nevertheless, state law is the source of most educational rights, with the U.S. Constitution and federal law imposing only a minimum baseline of protections.[268] Several states, through their constitutions or courts, have explicitly created substantive legal standards governing the right to an education,[269] including the standard of an equal educational opportunity.[270] Some states define their educational guarantees in terms that closely track the ways in which children are harmed by the police practices discussed in Part III. The New Jersey Supreme Court, for instance, has held that students have a right under the state constitution to "an education that will prepare [them] for a meaningful role in society, one that will enable them to compete effectively in the economy . . . and to

265. 20 U.S.C. § 6301 (2006).
266. *Id.*
267. *Cf.* BIEGEL, *supra* note 175, at 117 (inferring a legal mandate of equal dignity among students).
268. *See, e.g.*, Debra P. v. Turlington, 644 F.2d 397, 402 (5th Cir. 1981) ("The state's plenary powers over education come from the powers reserved to the states through the Tenth Amendment, and usually they are defined in the state constitution."). *Debra P.* recognized this state power but applied important limits imposed by the U.S. Constitution and federal law, as more fully discussed in Part IV.C.1, *infra*.
269. For examples of state courts wrestling with what an education must consist of in order to not violate students' state constitutional rights, see, for example, *Butt v. California*, 842 P.2d 1240 (Cal. 1992) (setting a baseline for school quality that must be met in order for schools to comply with the California Constitution, which was interpreted to hold the right to an education as a fundamental interest by *Serrano v. Priest*, 487 P.2d 1241 (Cal. 1971)); *Rose v. Council for Better Education, Inc.*, 790 S.W.2d 186 (Ky. 1989) (setting forth various factors giving meaning to the Kentucky state constitutional requirement that the state legislature must provide "an efficient system of common schools throughout the state").
270. *See, e.g.*, MONT. CONST. art. X, § 1 ("It is the goal of the people to establish a system of education which will develop the full educational potential of each person. Equality of educational opportunity is guaranteed to each person of the state."); Tenn. Small Sch. Sys. v. McWherter, 851 S.W.2d 139, 140 (Tenn. 1993) (interpreting the state constitution to guarantee "that the educational opportunities provided by the system of free public schools be substantially equal"); *cf.* Marty Strange, *Equitable and Adequate Funding for Rural Schools: Ensuring Equal Educational Opportunity for All Students*, 82 NEB. L. REV. 1, 1 (2003) ("Since the early 1970's, state court litigation has been brought in forty-six of the fifty states, with plaintiffs asserting legal claims under state equal protection and education clauses. Overall, plaintiffs have prevailed in a majority of these cases.").

participate as citizens and members of their communities."[271] And, importantly for this discussion, it was under the New York State Constitution that New York's high court sustained plaintiffs' claims in *Campaign for Fiscal Equity, Inc. v. State*.[272] Over the thirteen years of litigation, the court clarified the educational rights of all New York students. New York must "offer all children the opportunity of a sound basic education," which includes "the basic literacy, calculating, and verbal skills necessary to enable children to eventually function productively as civic participants capable of voting and serving on a jury."[273] The court further espoused requirements for "physical facilities and pedagogical services," mandating specific minimal standards for school buildings, teacher quality, learning materials, and classroom resources.[274] As demonstrated in Parts II and III, almost every state constitutional right espoused by the court is abridged to some degree by school police practices in criminalized New York City schools.

These educational guarantees found in state constitutions, state and federal court opinions, and state and federal statutes are unlikely to provide a remedy for the sort of systemic educational harm caused by the type of school police practices described in *B.H.* State courts, like those in New York and New Jersey, that have interpreted their state constitutions' educational clauses in a way that demanded systemic change have done so primarily in the context of school funding. When inadequate funding is at issue, many courts have been willing to intervene, provoking at least two recent legislative efforts to limit the power of the courts specifically regarding school funding.[275] When it comes to school security and students' Fourth Amendment rights, however, courts are guided by the Supreme Court in affording a substantial amount of deference to school officials[276] and have begun applying that same deference to school police

271. Abbott v. Burke, 693 A.2d 417, 428 (N.J. 1997) (interpreting the state constitution's guarantee of a "thorough and efficient" education).

272. 655 N.E.2d 661 (N.Y. 1995); *see supra* Part II.A.

273. *Campaign for Fiscal Equity, Inc.*, 655 N.E.2d at 666; *see also* Campaign for Fiscal Equity, Inc. v. State, 861 N.E.2d 14, 50, 52 (N.Y. 2006) (quoting *Campaign for Fiscal Equity, Inc.*, 655 N.E.2d at 666).

274. *Campaign for Fiscal Equity, Inc.*, 655 N.E.2d at 666; *see also Campaign for Fiscal Equity, Inc.*, 861 N.E.2d at 60.

275. *See* John Dayton & Anne Dupre, *Blood and Turnips in School Finance Litigation: A Response to Building on Judicial Intervention*, 36 J.L. & EDUC. 481, 492–93 (2007) (describing such legislation proposed in 2005 in Kansas and Missouri).

276. *See* Johnson v. City of Lincoln Park, 434 F. Supp. 2d 467, 475 (E.D. Mich. 2006) (interpreting *New Jersey v. T.L.O.*, 469 U.S. 325 (1985), as "specifically indicat[ing] a certain level of deference to the school's interest in an orderly learning environment"); *see also* Safford Unified Sch. Dist. No. 1 v. Redding, 129 S. Ct. 2633 (2009) (granting qualified immunity to a school official who ordered a strip search of a thirteen-year-old girl because of suspicion that she violated school rules by providing another student with ibuprofen); *id.* at 2651 (Thomas, J., concurring in part and

officers.[277] Given that courts afford such deference in cases in which there is a clearly understood link between the school security measures and students' Fourth Amendment rights, it is not surprising that few opinions exist regarding the less clearly understood relationship between security measures and students' educational rights.

It is likely for this reason that the *B.H.* plaintiffs, while claiming that the challenged NYPD practices "severely compromise students' ability to learn,"[278] do not assert violation of students' "constitutionally-mandated opportunity for a sound basic education"[279] as a cause of action. Courts recognize the educational rights granted under state law as property interests that cannot be deprived without due process, but finding a violation in such cases typically requires a direct deprivation of education, such as removal from school, without any meaningful procedure.[280] If a plaintiff's claim does not rise to this level, it is unlikely courts will stray from their typically deferential position.[281] There may be some hope for students in criminalized schools who bring due process claims,[282] but

dissenting in part) (criticizing the majority for questioning the importance of the school rule in relation to the strip search); C.B. v. Driscoll, 82 F.3d 383, 383 (11th Cir. 1996) (affirming summary judgment in a school discipline case "in light of the exceedingly limited rights of public school students facing school discipline"); *see also* Beger, *supra* note 21, at 337 ("Courts are increasingly showing deference to school officials' power to regulate students' conduct in the name of security with less emphasis on students' privacy rights.").

277. The *T.L.O.* Court limited its holding to school officials, specifically stating that it was not deciding any Fourth Amendment issues related to police officers or criminal prosecutions. *See* *T.L.O.*, 469 U.S. at 341 n.7, 333 n.3. Since then, many courts have applied the *T.L.O.* reasoning regarding school officials to school police officers, holding them to a lower Fourth Amendment reasonableness standard than is demanded of police officers generally. *See* Lisa H. Thurau & Johanna Wald, *Controlling Partners: When Law Enforcement Meets Discipline in Public Schools*, 54 N.Y.L. SCH. L. REV. 977, 985 (2009/10); Torres & Stefkovich, *supra* note 56, at 458 ("With the rise in prominence of law enforcement officers in the schools, virtually all courts now recognize security guards and school police, including municipal police officers assigned to a school, as agents of the school and thus as subject to the lesser standard of reasonable suspicion.").

278. Amended Complaint, *supra* note 16, at 4.

279. Campaign for Fiscal Equity, Inc. v. State, 801 N.E.2d 326, 340 (N.Y. 2003) (referring to the New York Constitution, discussed *infra* Part IV.B).

280. *See, e.g.*, Goss v. Lopez, 419 U.S. 565, 581 (1975) (holding that suspended students must be given notice of their alleged infraction and some opportunity to respond to the allegation).

281. *See* Skiba et al., *supra* note 170, at 1079–80, 1110 (stating that courts rarely hold for students in school disciplinary cases when the school provides at least a minimal level of process).

282. In 2009, the ACLU settled a lawsuit against the public officials who oversaw the Atlanta Independent School System and the private company they contracted to run an alternative school for students removed from regular education. *See* Harris et al. v. Atlanta Independent School System*: Atlanta Alternative School Case*, ACLU, Dec. 18, 2009, http://www.aclu.org/racial-justice/harris-et-al-v-atlanta-independent-school-system. The plaintiff class alleged pervasive Fourth Amendment violations as well as violations of due process under the Fourteenth Amendment on the grounds that the school was depriving children of their "property right to an adequate public education" under Georgia state law. Verified Second Amended Complaint

such successes are rare and, as with Fourth Amendment claims, courts have failed to recognize the unique harm, including educational harm, that criminalized school practices have on students of color.[283]

B. Federal Antidiscrimination Law

The New York Court of Appeals in *Campaign for Fiscal Equity, Inc.*, dismissed plaintiffs' federal claim under the Fourteenth Amendment's Equal Protection Clause,[284] but sustained it under Title VI of the Civil Rights Act of 1964.[285] Today, neither source of rights would provide a remedy.

1. Equal Protection Clause of the Fourteenth Amendment

The court rejected plaintiffs' equal protection claim because plaintiffs failed to show that the disproportionate impact of the state's funding scheme on nonwhite students was the result of intentional discrimination.[286] The court relied on the Supreme Court's decisions in *Washington v. Davis*[287] and *Arlington Heights v. Metropolitan Housing Development Corp.*,[288] which imposed the rule that an equal protection claim is only valid if the claimant can show that discriminatory intent was a motivating factor in the state policy.[289] Though the Court recognized that such discriminatory intent can be inferred given certain factors, this approach is disfavored for the vast majority of discrimination

at 1–3, Harris v. Atlanta Indep. Sch. Sys., No. 1:08-cv-01435 (N.D. Ga. Mar. 31, 2009), *available at* http://www.aclu.org/files/pdfs/crimjustice/harrisvaiss_complaint.pdf. While a court might categorize, for example, the alleged "violence inflicted upon students by teachers[,] administrators[,] . . . school resource officers and police officers" solely under the Fourth Amendment cause of action, overwhelming evidence, like that discussed in Part III, demonstrates that this likely amounts to a deprivation of an adequate public education as well. *Id.* at 39–40.

283. *See* Majd, *supra* note 26, at 376–77 (stating that school criminalization "has exacerbated racial inequities in education by leading to decreased educational opportunities and more negative school climates"); *supra* Part III (describing multiple ways in which nonwhite students can be permanently disadvantaged and pushed toward the school-to-prison pipeline by police practices in criminalized schools).
284. U.S. CONST. amend. XIV, § 1.
285. 42 U.S.C. § 2000(d) (2006) ("No person . . . shall, on the ground of race, . . . be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."); Campaign for Fiscal Equity, Inc. v. State, 655 N.E.2d 661, 661, 664–71 (N.Y. 1995).
286. *Campaign for Fiscal Equity, Inc.*, 655 N.E.2d at 669.
287. 426 U.S. 229 (1976).
288. 429 U.S. 252 (1977).
289. *See id.* at 266–68; *Davis*, 426 U.S. at 242–43.

claims.[290] Further, inferring the discriminatory intent necessary to sustain an equal protection claim is especially unlikely in the education context due to the deference courts give to school officials over education policy and to police officers over security policy.

To illustrate, the Fifth Circuit in *Tasby v. Estes*[291] rejected plaintiffs' equal protection claims where evidence demonstrated that a school district with a history of "judicial determinations of racial discrimination in [its] student disciplinary policies and practices" was disciplining black students more frequently and more harshly than all other students.[292] Despite its recognition of a "statistically significant disparity between the frequency and severity of punishment accorded black and white students,"[293] the court found this to be of "limited probative value" because it was not "traced to a racially discriminatory purpose."[294] As discussed in Part IV.A, courts are highly deferential to school and police officials in the area of school security. Through this deference, combined with the increasingly difficult burden on plaintiffs to prove illegal discrimination,[295]

290. *See Arlington Heights*, 429 U.S. at 266–68 (stating that, in "rare" cases, intent might be inferred from a clear pattern of disparate outcomes in combination with other factors that cannot be explained on nonracial grounds); *Davis*, 426 U.S. at 242–43. One frequently cited example of the Court inferring impermissible discriminatory intent is *Hunter v. Underwood*, 471 U.S. 222 (1985), in which the Court struck down a state constitutional provision where, though the Court did not find the legislature to presently have discriminatory intent, the provision had a disparate effect on blacks and was originally enacted during a constitutional convention with the stated purpose of establishing white supremacy. However, more recent cases cast doubt on courts' receptiveness to such reasoning, even on similar facts. *See, e.g.*, Hayden v. Paterson, 594 F.3d 150, 164–165 (2d Cir. 2010) (rejecting plaintiffs' equal protection claim where "plaintiffs undoubtedly have alleged sufficient facts to establish the disproportionate *impact* of New York's felon disenfranchisement laws on Blacks and Latinos, as compared with Whites" and where the laws at issue "plausibly admit of racist origins").

291. 643 F.2d 1103 (5th Cir. 1981).

292. *Id.* at 1107–08.

293. *Id.* at 1107.

294. *Id.* at 1108; *see also* Fuller v. Decatur Pub. Sch. Bd. of Educ. Sch. Dist. 61, 78 F. Supp. 2d 812, 824–25 (C.D. Ill. 2000) (rejecting students' equal protection claim because the evidence that black students comprised 46–48 percent of the student body but comprised 82 percent of all expelled students was "statistical speculation" upon which "this court cannot make its decision"), *aff'd*, 251 F.3d 662 (7th Cir. 2001).

295. The *Tasby* court's statement that the plaintiffs' statistical evidence was of "limited probative value," 643 F.2d at 1108, is likely more salient today, when there is doubt over the value of statistical evidence of discrimination even under federal laws for which disparate impact alone is sufficient to stake out a claim of discrimination. *See* Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541, 2550–58 (2011) (finding the plaintiffs' statistical evidence of sex-based employment discrimination insufficient to satisfy the commonality requirement for class certification in a lawsuit claiming violations of Title VII of the Civil Rights Act of 1964, which does not require a showing of discriminatory intent).

courts have virtually eliminated the ability for nonwhite students, like the *B.H.* plaintiffs, to have their stories and claims of unique racial harm heard by a court.

The principle that evidence of the defendant's discriminatory purpose, not evidence of a disparate racial impact, is necessary for a cognizable equal protection claim is often referred to as the intent doctrine or, as Alan Freeman more scathingly frames it, a doctrine of "unequal but irrelevant."[296] As discussed in Part IV.C, there is much criticism of how the intent doctrine has shaped equal protection jurisprudence,[297] and education reformers in particular have feared that, because "many of the inequities in public school programs occur[] as a result of facially neutral practices that could not be linked to any overt discriminatory intent, . . . [this line of cases] significantly limited the ability of education plaintiffs to prevail."[298]

2. Federal Statutes

The court in *Campaign for Fiscal Equity, Inc.* sustained plaintiffs' claim under Title VI, which bars programs receiving federal funds from racially discriminating.[299] The court found that "[p]roof of discriminatory *effect* suffices to establish [Title VI] liability,"[300] and thus found potential liability because nonwhite New York City students unjustifiably "receive[d] less aid as a group

296. Alan Freeman, *Antidiscrimination Law From 1954 to 1989: Uncertainty, Contradiction, Rationalization, Denial*, *in* THE POLITICS OF LAW 285 (David Kairys ed., 1998). The intent doctrine in the school context seems to have preceded *Washington v. Davis*. *See* Milliken v. Bradley, 418 U.S. 717, 745 (1974) (striking down a school integration plan meant to remedy a city's intentional segregation because the plan implicated suburban school districts for which no intentional discrimination could be shown); *infra* note 337, further discussing *Milliken*.

297. *See, e.g.*, Charles R. Lawrence, *The Id, the Ego, and Equal Protection: Reckoning With Unconscious Racism*, 39 STAN. L. REV. 317, 319 (1987) ("[C]ivil rights advocates have been virtually unanimous in condemning [*Washington v.*] *Davis* and its progeny.").

298. BIEGEL, *supra* note 175, at 316. Some courts, though, may be more likely to sustain an individual student's equal protection claim regarding abusive school police practices when the claim is based on race plus another protected class status. In *Banks v. Modesto City School District*, No. CVF046284, 2005 WL 2233213, at *1 (E.D. Cal. Sept. 9, 2005), a black, 13-year-old girl with autism was pepper-sprayed by a school officer (who was never trained regarding students with disabilities) after the girl responded aggressively to teasing by classmates. Later that month, when the girl became agitated after being forced by school officials to see the same officer again, the officer placed her in handcuffs. *Id.* at *2. The court sustained the girl's equal protection claim, finding that it could be inferred that she "was treated differently based on her race *and/or* status as a disabled student." *Id.* at *11 (emphasis added).

299. 42 U.S.C. § 2000(d) (2006).

300. Campaign for Fiscal Equity, Inc. v. State, 655 N.E.2d 661, 669 (N.Y. 1995).

and per pupil than their nonminority peers."[301] The legality of such reasoning, however, was upended in 2001, when the U.S. Supreme Court extended the intent doctrine to govern Title VI claims,[302] thus precluding students like the *B.H.* plaintiffs from relying on the channel used by the plaintiffs in *Campaign for Fiscal Equity, Inc.*[303] Today, it is unclear whether disproportionate impact claims could be made under certain federal statutes, including NCLB, which provides "among the most race-conscious legislative remedies to racial inequity in K–12 education since Title VI."[304] However, current trends make success unlikely, particularly for practices like the NYPD's, which may be perceived as having a less direct effect on student educational outcomes.[305]

C. Critique of the Limits of Law

In a case like *B.H.*, the two main obstacles to asserting an equal protection claim or a due process claim challenging the deprivation of educational rights are the doctrines of deference and intent.[306] I argue below that students of color

301. *Id.* at 670. Such a finding of racial inequality in school funding is not unique. *See* Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1709, 1753 n.203 (1993) ("The underfunding of schools in Black districts continues, although no longer based on explicitly racial criteria. . . . [B]ecause of the convergence of housing and employment discrimination, and the lack of political power of poor school districts, Blacks disproportionately experience the racist impact of less than equal funding to poor school districts." (citations omitted)).
302. *See* Alexander v. Sandoval, 532 U.S. 275 (2001).
303. *Cf.* Skiba et al., *supra* note 170, at 1090–92 (citing past cases in which students brought successful discrimination claims that would be "decided differently if heard today, due to the impact of . . . *Washington v. Davis* and *Alexander v. Sandoval*"). *But see* Zachary W. Best, Note, *Derailing the Schoolhouse-to-Jailhouse Track: Title VI and a New Approach to Disparate Impact Analysis in Public Education*, 99 GEO. L.J. 1671, 1684–85 (2011) (explaining that after *Sandoval* there is still the possibility of Title VI disparate impact complaints being heard in agency proceedings by the Department of Education, which has the power to revoke school funding).
304. Daniel J. Losen, *Challenging Racial Disparities: The Promise and Pitfalls of the No Child Left Behind Act's Race-Conscious Accountability*, 47 HOW. L.J. 243, 246 (2004).
305. *Id.* The potential for meaningful remedies under NCLB is limited, as claims can only be brought by the "agency charged with administering [NCLB]," not by a harmed student. Horne v. Flores, 129 S. Ct. 2579, 2598 n.6 (2009). Despite this, some education experts, like Biegel, are hopeful that NCLB and other education law developments will prevent the intent doctrine cases from impeding certain education reform efforts. *See* BIEGEL, *supra* note 175, at 310. One potentially useful statute might be 42 U.S.C. § 5633(a)(22) (2006) ("[To receive federal grants, states must] address juvenile delinquency prevention efforts . . . designed to reduce . . . the disproportionate number of . . . minority group [members] who come into contact with the juvenile justice system.").
306. This Comment reflects the underlying assumption that the nonwhite students at heavily policed, criminalized schools would be better off if they could assert equal protection claims. Thus, examining antidiscrimination law critiques contrary to this assumption is beyond the scope of this Comment, though some such critiques could indeed provide a different and illuminating perspective on this issue. *See, e.g.*, Mark Tushnet, *An Essay on Rights*, 62 TEX. L. REV. 1363 (1984).

harmed by NYPD-like practices in criminalized schools should be able to bring cognizable claims that overcome these obstacles. I then situate these practices as an example of the kind of racially subordinating legal deprivation for which legal relief is rarely available. The profound harm and the limited potential remedies make this issue an effective prism for seeing the disconnect between equal protection's intent doctrine and the reality for innumerable children of color who are pushed toward the prison track and denied an equal educational opportunity by school police practices.

1. Recognizing Racial Harm Under the Law

NYPD-like practices in criminalized schools deprive nonwhite students of an equal educational opportunity, divesting them of their property right to an adequate education[307] in violation of their right to due process[308] and discriminating against them on the basis of race in violation of the Fourteenth Amendment and various federal statutes.[309] The most analogous post–*Washington v. Davis* cases demonstrating the viability of these claims are not the previously discussed disparate discipline cases[310] or the Fourth Amendment cases,[311] neither of which recognized the effects of the challenged practices on students' ability to receive an equal educational opportunity. Rather, the most tailored analogy may be found in cases about state-imposed exit exams.[312] Below, I apply the framework the Fifth Circuit used in *Debra P. v. Turlington*,[313] decided several years after the foundational intent doctrine cases, to offer a principled way in which courts can recognize the racial and educational harms inflicted on the *B.H.* plaintiffs by NYPD practices.

In *Debra P.*, the Florida legislature, concerned about the quality of its public schools, established an exit exam policy, requiring students to pass a

307. *See, e.g.*, Campaign for Fiscal Equity, Inc. v. State, 801 N.E.2d 326, 340 (N.Y. 2003); see *supra* Parts IV.A and II.A for further discussion on the substance of New York's educational standards under the state constitution.

308. *See supra* Part IV.A.

309. *See supra* Part IV.B.

310. *See supra* notes 280, 291–295 and accompanying text (discussing *Goss v. Lopez* and *Tasby v. Estes*).

311. *See supra* notes 231, 236, 238, 276–277 (discussing *New Jersey v. T.L.O.*, 469 U.S. 325 (1985); *Johnson v. City of Lincoln Park*, 434 F. Supp. 2d 467 (E.D. Mich. 2006); *C.B. v. Driscoll*, 82 F.3d 383 (11th Cir. 1996)).

312. *See* Debra P. v. Turlington, 644 F.2d 397 (5th Cir. 1981) (discussed below); *cf.* Anderson v. Banks, 520 F. Supp. 472, 503, 509 (S.D. Ga. 1981) (invalidating a school's use of an exit examination on due process grounds, and, while struggling with the equal protection claim, noting that "[t]he conclusions on the due process claims dictate a harsher result for the school district than do the equal protection claims").

313. 644 F.2d 397.

standardized test to receive their diploma.[314] The students who failed the exam were disproportionately black.[315] A class action was filed on behalf of "all present and future twelfth grade black public school students in the State of Florida who have failed or who hereafter fail" the exit exam.[316] Plaintiffs alleged due process and equal protection violations under the Fourteenth Amendment and federal civil rights statutes.[317] The Fifth Circuit held that "the State may not constitutionally . . . deprive its students [of their diplomas] unless it has submitted proof of the curricular validity of the test."[318] Analyzing plaintiffs' equal protections claims, the court stated that, because the state failed to show that the test was fair, "it cannot be said to be rationally related to a state interest," as required by the Equal Protection Clause.[319] The court found that plaintiffs were not barred by the intent doctrine because the state failed to show that the disparate impact on black students "was not due to the present effects of past intentional segregation" and because, after school segregation was held unconstitutional, the state's "predominantly black schools remained inferior in physical facilities, course offerings, instructional materials, and equipment."[320]

The *Debra P.* court emphasized that it was not "in a position to determine educational policy" and praised the efforts of the legislature to require exit exams to improve school quality.[321] The court added, "We do not question the right of the state to condition the receipt of a diploma upon the passing of a test so long as it is a fair test of that which was taught. Nor do we seek to dictate what subjects are to be taught or in what manner."[322] Maintaining this deference to school officials, the court nevertheless found that the school was violating plaintiffs' due process rights because students have a property interest in their diploma after attending high school for four years and passing the required courses. The students had "a state-created 'understanding' that secures certain benefits and that supports claims of entitlement to those benefits."[323] Further,

314. *Id.* at 400–01.
315. *Id.* at 400.
316. *Id.*
317. *Id.* at 401–02.
318. *Id.* at 400.
319. *Id.* at 406 (relying on the district court's statement that "[i]f the test by dividing students into two categories, passers and failers, did so without a rational relation to the purpose for which it was designed, then the Court would be compelled to find the test unconstitutional [under the Equal Protection Clause]").
320. *Id.* at 407 (applying the approach to establishing intent permitted by *Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 266–68 (1977)).
321. *Id.* at 402.
322. *Id.* at 406.
323. *Id.* at 403–04.

the court found that the due process violation may go beyond the property interest concern, stating, "When [the violation] encroaches upon concepts of justice lying at the basis of our civil and political institutions, the state is obligated to avoid action which is arbitrary and capricious, does not achieve or even frustrates a legitimate state interest, or is fundamentally unfair."[324]

Like the Florida legislature, New York City, concerned about the safety of its public schools, gave the NYPD complete control over school security, with few guidelines or mechanisms for accountability. As a consequence, many students have been arrested for minor violations of school rules, injured by officers using excessive force, and have suffered a decline in educational achievement. These students are disproportionately black and Latino, giving rise to an equal protection claim. The customs and practices of the NYPD that harm nonwhite students have not been shown to be rationally related to the state interest of school safety.[325] And this disparate impact on students of color may be due to the present effects of past intentional discrimination: School segregation in New York was made illegal, but "[n]evertheless, as several cases have shown, the efforts of some governmental officials have continued the previous [New York] State policy of racial exclusion."[326] Further, as found by New York's high court, predominantly black schools have remained inferior by many educational measures.[327]

The New York City students need not challenge the right of the City to place NYPD officers in the schools, nor need they ask the court to determine school security policies. The court would properly defer to school and police officials on those issues. However, there is substantial evidence that NYPD practices deprive nonwhite students of their property interest in the educational benefits promised under the New York Constitution without due process. Further, as discussed in Parts II and III, in addition to "encroaching upon concepts of justice lying at the basis of our civil and political institutions," many experts have demonstrated that this violation directly frustrates the legitimate state interest in school safety and student achievement.

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324. *Id.* at 404.

325. *See supra* notes 21, 44 and accompanying text.

326. Campaign for Fiscal Equity, Inc. v. State, 655 N.E.2d 661, 682, 684 (N.Y. 1995) (Smith, J., dissenting) (arguing that, the intent doctrine cases notwithstanding, the "complaint states a valid equal protection claim under both the Federal and State Constitutions").

327. *See supra* Parts II.A, IV.A (discussing the *Campaign for Fiscal Equity, Inc.* litigation).

2. Critique of the Law's Failure to Recognize Racial Harm

Debra P. is largely an outlier in the post–*Washington v. Davis* era, its equal protection and due process reasoning unlikely to survive the intent doctrine in most courts. School-to-prison pipeline practices are apt examples of the type of uniquely racial harm that is precluded from lawsuits by the confines of antidiscrimination law under the Fourteenth Amendment and federal statutes. The example of students harmed by NYPD-like practices in criminalized schools helps illustrate the criticism of the intent doctrine that has grown ever since *Washington v. Davis*[328] in 1976.

Criticism of the intent doctrine from Supreme Court justices has tended to focus on the difficulty in most cases of determining intent,[329] the Court's departure from precedent in establishing the doctrine,[330] and, most bitingly, on the unprincipled and inappropriate nature of defining discrimination as a subjectively intended act by a party to be proven and determined in each case.[331] The intent doctrine, though, is unlikely to be departed from anytime soon, and cases like *Alexander v. Sandoval*[332] demonstrate that the Court is willing to upset established precedent in order to further limit discrimination claims.

Some critical theorists vociferously criticize the intent doctrine and other facets of modern antidiscrimination law, consistently paving new lines of argument and observation regarding the law's role in perpetuating racial subordination.[333] One critical line of analysis useful to this discussion is what Freeman has described as the law's "perpetrator perspective"[334] and what Kimberlé

328. 426 U.S. 229 (1976).
329. *See, e.g.*, Pers. Adm'r v. Feeney, 442 U.S. 256, 282 (1979) (Marshall, J., dissenting) ("[Absent omniscience], it will often be impossible to ascertain the . . . purpose of a given statute.").
330. *See, e.g.*, *Davis*, 426 U.S. at 266–67 (Brennan, J., dissenting) (criticizing the Court's departure from the doctrine of disparate impact in employment discrimination cases).
331. *See, e.g.*, Rogers v. Lodge, 458 U.S. 613, 643 (1982) (Stevens, J., dissenting) ("[C]onstitutional adjudication that is premised on a case-by-case appraisal of . . . subjective intent . . . cannot possibly satisfy the requirement of impartial administration of the law . . . embodied in the Equal Protection Clause."); City of Mobile v. Bolden, 446 U.S. 55, 141 (1980) (Marshall, J., dissenting) ("It is time to realize that manipulating doctrines and drawing improper distinctions under the . . . Fourteenth Amendment . . . make this Court an accessory to the perpetuation of racial discrimination. The plurality's requirement of proof of *intentional discrimination*, so inappropriate in today's cases, may represent an attempt to bury the legitimate concerns of the minority beneath the soil of a doctrine almost as impermeable as it is specious.").
332. 532 U.S. 275 (2001); *see supra* notes 302–303 (discussing the impact of *Alexander*'s extension of the intent doctrine to Title VI).
333. For one representative example, see Kimberlé Williams Crenshaw, *Race, Reform and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331 (1988).
334. *See* Alan Freeman, *Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine*, *in* CRITICAL RACE THEORY, *supra* note 191, at 30

Crenshaw has similarly described as the "discrimination approach."[335] These terms refer to the law's framing of discrimination as an aberration caused by a willful actor, thus legitimating all inequality that cannot be conclusively linked to a specific perpetrator's intent. The counterpoint to the intent doctrine is that many neutral policies are not neutral at all, but rather discriminatory as applied in a sharply unequal society with an explicitly racist history.[336] Thus, a policy with neutral and rational intent, like increasing school safety, can become a tool of racial oppression, inflicting on nonwhites profound, lasting injury that is overlooked from the perpetrator's perspective.

In the field of education, the intent doctrine and perpetrator perspective may be most entrenched.[337] Under the intent doctrine, absent proof of discriminatory intent, racial inequality is rationalized and normalized by redefining discrimination, transforming all objectively observed examples of racial inequality into the neutral and nondiscriminatory state of things. Therefore, most policies that predictably result in poor-quality or criminalized schools in communities of color are presumed to be rational.[338]

(characterizing the perpetrator perspective as holding that, unless the victim can show that an "identified blameworthy perpetrator" had discriminatory intent, instances of objective discrimination "are to be regarded as mere accidents, or 'caused,' if at all, by the behavior of ancestral demons whose responsibility cannot follow their successors in interest over time").

335. *See* Kimberlé Williams Crenshaw, *Foreword: Toward a Race-Conscious Pedagogy in Legal Education*, 4 S. CAL. REV. L. & WOMEN'S STUD. 33, 46 (1994) (stating that "minority perspectives are rendered irrelevant [by the intent doctrine,] in which the significance of the victim's experience of domination is minimized by the search for an actor who intentionally and irrationally discriminated against certain victims").

336. This critique is tied to a similar critique of the Court's colorblindness doctrine, which has been used to strike down laws and policies meant to increase racial equality. Both critiques are "premised on the notion that a society once expressly organized around white supremacist principles does not cease to be a white supremacist society simply by formally rejecting those principles." Crenshaw, *supra* note 333, at 1336 n.20.

337. *See supra* note 296 (discussing *Milliken v. Bradley*, 418 U.S. 717 (1974)). In *Milliken*, the Court recognized that the government engaged in intentional racial discrimination by creating segregated schools and that the private sector engaged in intentional racial discrimination by creating segregation by neighborhood school attendance zones. *See Milliken*, 418 U.S. at 725–27; Harris, *supra* note 301, at 1756–57. Yet, the Court "reinterpreted all of these facts . . . to be neutral and, therefore, an inadequate predicate for intervention in an unfortunate but unrectifiable inequity." *Id.* at 1757.

338. *See* Freeman, *supra* note 334, at 41. Freeman also claims that school inequality was directly reinforced by the Court's upholding the police department's hiring test in *Washington v. Davis*, 426 U.S. 229 (1976). *See* Alan Freeman, *Antidiscrimination Law: The View From 1989*, 64 TUL. L. REV. 1407, 1436–37 (1990) (arguing that, by upholding a test that failed to predict actual job performance, the Court-sanctioned tests used for tracking in schools that "have a disproportionate impact on blacks and other minorities, while rewarding those who already own the predominant share of the nation's 'cultural capital[,]' [and that a]ny other result would have been seriously destabilizing to the whole structure of American meritocracy").

An alternative to the intent doctrine's perpetrator perspective is the "victim model,"[339] which prioritizes remedying the conditions of racial subordination and calls for formerly legally oppressed groups to have agency over those conditions that were previously outside their control.[340] To adapt antidiscrimination law to a victim perspective, the stories of harm told by those "on the bottom of discrimination" must be legally recognized.[341]

Underlying the critique of the perpetrator perspective is the fact that people of color are harmed by more than just formal, intentional discrimination.[342] Rather, the most devastating harm may come from the informal "unequal treatment of persons on the basis of race in the associations and relationships that are formed among individuals in social life."[343] For nonwhite students at criminalized schools, these two forms of discrimination overlap and work in tandem. Formal policies deprive their schools of funding and resources, while informal discrimination, like the daily indignity of NYPD-like practices, deprive the students of an equal educational opportunity.

NYPD-like practices can be viewed as one neutral policy working in concert with other sources of racial inequality to undermine equal educational

339. *See* Freeman, *supra* note 334, at 29–31. Crenshaw similarly frames her "domination model" alternative. *See* Crenshaw, *supra* note 335, at 47. Other alternative models have been proposed that are preferable to the intent doctrine but maintain the mainstream notion of objectivity. One such model from the psychology perspective is premised on the "connection between unconscious racism and the existence of cultural symbols that have racial meaning." Lawrence, *supra* note 297, at 324. Recognizing that racial discrimination is most often the result of pervasive "unconscious racial motivation," Lawrence proposes a more appropriate test for triggering strict scrutiny. *Id.* at 322, 324. The legal analysis would focus on the cultural meaning of a challenged policy, inferring intent from allegedly discriminatory governmental conduct that conveys a message imbued by the culture with racial significance. *Id.* at 324. Thus, it is likely that under this model, NYPD-like practices at mostly nonwhite schools would convey deeply racial meaning, thus deserving strict scrutiny.

340. *See* Crenshaw, *supra* note 335, at 47; Freeman, *supra* note 334, at 33. Under this model, *Brown*, for instance, would have empowered black communities to remedy the many causes of school inequality, rather than just recognizing "the right of black children to attend schools that are not intentionally segregated . . . ." *Id.* This notion is widely relatable and has been reflected in popular black culture. *See, e.g.*, DEAD PREZ, *supra* note 188 ("Until . . . we control the . . . school system / Where we reflect how we gon solve our own problems / [Black students] ain't gon relate to school."); *see also* Alex Poinsett, *Battle to Control Black Schools*, EBONY, May 1969, at 44, 44–45 (describing the "mounting national struggle by black people for control of black schools").

341. *See* Devon W. Carbado, *Race to the Bottom*, 49 UCLA L. REV. 1283 (2002); Mari J. Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 HARV. C.R.-C.L. L. REV. 323 (1987).

342. *See, e.g.*, LOURY, *supra* note 215, at 95–99 (describing "discrimination in contract").

343. *See id.* at 95–96, 99 (describing "discrimination in contact," which "can be just as debilitating for a racially stigmatized group [as discrimination in contract]").

opportunity.[344] Even under a broader application of the intent doctrine, some of those policies should give rise to cognizable discrimination claims because of their connection to racially motivated action. For example, criminalized schools that deprive nonwhite students of their educational rights also spur subordinating concepts like racial "civilization breakdown"[345] and inferior "innate ability,"[346] which become formally incorporated into the law[347] and implicitly bias state actors, including school police and educational decisionmakers.[348] At present, victim perspectives and expanded views of intent are rejected by antidiscrimination law, discouraging lawsuits like *B.H.* from discussing race. Listening to students' voices and considering their racial experiences, though, is essential for telling a more complete story and addressing the actual nature of the harm caused by police in criminalized schools.

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344. *See* Steele, *supra* note 220, at 39–40 (identifying harmful byproducts of "neutral" policies for black students, including underfunded schools, run-down facilities, poorly trained teachers, explicit or implicit differential treatment like corporal punishment and high suspension rates, low-ability grouping and special education tracking, pervasive low expectations, and lack of access to Advanced Placement and test-preparation courses).
345. *See, e.g.*, DINESH D'SOUZA, THE END OF RACISM 24, 477, 527 (1995); Dinesh D'Souza, *Improving Culture to End Racism*, 19 HARV. J.L. & PUB. POL'Y 785 (1996).
346. This concept, once the dominant view, maintains force. *See, e.g.*, RICHARD J. HERRNSTEIN & CHARLES MURRAY, THE BELL CURVE 299, 311 (1994) ("Races differ . . . in the profile of intellectual capacities. . . . It seems highly likely to us that both genes and the environment have something to do with [these] racial differences."). *The Bell Curve* was so influential that the Association of American Law Schools, in its amicus brief in *Grutter v. Bollinger*, 539 U.S. 306 (2003), a landmark affirmative action case, felt compelled to address its claims. *See* Brief of Amicus Curiae Association of American Law Schools in Support of Respondents at *25 n.4, *Grutter*, 539 U.S. 306 (No. 02-241), 2003 WL 399076. That many hold this belief is also reflected in popular culture. *See, e.g.*, LEAN ON ME, *supra* note 180 (depicting a principal telling nonwhite students: "I want to tell you what the people . . . think about your chances. They say you're inferior!"); STAND AND DELIVER (Warner Brothers 1988) (depicting a teacher telling his nonwhite students: "You already have two strikes against you: your name and your complexion. . . . [T]here are some people in this world who will assume that you know less than you do.").
347. As recently as 1984, a federal appeals court deciding a school discrimination case recited the state's argument that "natural selection has resulted in black persons having a 'gene pool' with lower intelligence than whites," an argument advanced at the 1979 trial and endorsed by "a number of key state officials." Larry P. v. Riles, 793 F.2d 969, 976 (9th Cir. 1984), *aff'g in part* 495 F. Supp. 926, 955 (N.D. Cal. 1979).
348. *See, e.g.*, Jerry Kang & Kristin Lane, *Seeing Through Colorblindness: Implicit Bias and the Law*, 58 UCLA L. REV. 465 (2010) (relying on social cognition empirical studies to identify implicit racial bias in public arenas like the classroom and the courtroom); David Benjamin Oppenheimer, *Understanding Affirmative Action*, 23 HASTINGS CONST. L.Q. 921, 946 (1996) ("[Because] so much discrimination is motivated by unconscious beliefs and stereotypes, minority group[s] . . . will be significantly harmed by unintended, non-malicious discrimination.").

CONCLUSION

I have argued that recognizing the racial perspectives of students harmed by officers in criminalized schools is necessary for legal relief that is adequately tethered to the reality of the harm. Such cognizability, by empowering students to assert legal claims most relevant to their everyday school life, has benefits beyond the legal process. It would encourage amplifying student voices to help educational decisionmakers identify effective ways of increasing school safety, which in turn would foster academic achievement and education-identification among students. Decrying school criminalization and demanding school safety are not contradictory, but rather part of a consistent voice that might call for the millions of dollars spent on criminalizing schools to instead be spent on safety-enhancing reforms like reducing overcrowding, hiring guidance counselors, increasing dropout prevention, and even employing school police, but under a cooperative partnership that is responsive to students' educational needs.

Should *B.H.* plaintiffs prevail, the conditions for New York City students in criminalized schools will improve. The substantial problems that would remain, though, are more subtle. By telling an obscured, raceless version of these students' reality, lawsuits combat racial inequality only incidentally and only when the harm happens to offend "race-neutral" rights. When this does occur, nonwhite students might notice something familiar: Just as the criminalized policies associated with their racial identities prevent identification with education, the legal policies that deny their racial identities prevent identification with or trust in the legal system.[349]

Despite the law's limited potential given the racially unequal social structure in which NYPD-like practices operate, recognizing certain neutral policies with racist impact as discrimination would incentivize state actors to avoid liability by addressing sources of racial inequality, instead of by just avoiding signals of intent. Right now, school criminalization and NYPD-like practices are providing the push that often leads students of color on to the track toward prison or a life of unrealized potential. Preventing this push by ending specific school police practices may indeed divert many students to a more promising future, but not as many as getting rid of the track.

349. *See* Harris, *supra* note 301, at 1777 (describing how the law immunizes racial inequities, "obscur[ing] and render[ing them] nearly invisible").

APPENDIX[350]

TABLE 1. New York City Schools Attended by the *B.H.* Named Plaintiffs[351]

Plaintiff	School Attended	Nonwhite Students
A.M.	Samuel J. Tilden High School	100 percent[352]
M.M.	Hunts Point School	99 percent[353]
D.B.	Maxwell High School	99 percent[354]
D.Y.	Lou Gehrig Junior High School	99 percent[355]
L.W.	Hillcrest High School	98 percent[356]
L.W. (transferred)	W.E.B. DuBois Academic High School	99 percent[357]

TABLE 2. Other Schools Cited in the *B.H.* Amended Complaint[358]

School Cited	Nonwhite Students
J.H.S. 383 (Philippa Schuyler)	100 percent[359]
I.S. 232	100 percent[360]

350. Percentages reflect either the most recent data available or data from the year in which the cited incident occurred. The data in this Appendix is taken from the specific school's Accountability and Overview Report. *See School Search*, N.Y.C. DEP'T OF EDUC., http://schools.nyc.gov (last visited Jan. 15, 2012). Accountability and Overview Reports are found by searching for the school name, following the "Statistics" link, following the "Accountability and Overview Reports" link for the given year, and then following the "Accountability and Overview Report" PDF link. The direct URL for the reports of each cited school appear in the footnotes, *infra*.
351. N.C., an additional named plaintiff, is not listed here because the student's high school currently has no racial data available.
352. https://www.nystart.gov/publicweb-rc/2008/8e/AOR-2008-331800011415.pdf.
353. https://www.nystart.gov/publicweb-rc/2009/a7/AOR-2009-320800010424.pdf.
354. https://www.nystart.gov/publicweb-rc/2007/89/AOR-2007-331900011660.pdf.
355. https://www.nystart.gov/publicweb-rc/2008/70/AOR-2008-320700010151.pdf.
356. https://www.nystart.gov/publicweb-rc/2008/b3/AOR-2008-342800011505.pdf.
357. https://www.nystart.gov/publicweb-rc/2009/71/AOR-2009-331700011489.pdf.
358. Four of the schools cited in the *B.H.* Amended Complaint had no available data: New York Harbor School, I.S. 291, United High School, and the New School for Arts and Sciences.
359. https://www.nystart.gov/publicweb-rc/2009/94/AOR-2009-333200010383.pdf.
360. https://www.nystart.gov/publicweb-rc/2009/5a/AOR-2009-320900010232.pdf.

School Cited	Nonwhite Students
Bronx Guild High School	99 percent[361]
J.H.S. 291	99 percent[362]
Progress High School	99 percent[363]
Bushwick School for Social Justice	99 percent[364]
Samuel Gompers High School	99 percent[365]
Evander Childs High School	99 percent[366]
Thomas Jefferson High School	99 percent[367]
Campus Magnet High School	99 percent[368]
High School for Law Enforcement and Public Safety	98 percent[369]
Urban Assembly School for Applied Math and Science	98 percent[370]
Murry Bergtraum High School for Business Careers	97 percent[371]
High School of Fashion Industries	95 percent[372]
Bryant High School	85 percent[373]
William A. Morris Middle School	77 percent[374]
RFK High School	73 percent[375]
Russell Sage Junior High School	63 percent[376]

361. https://www.nystart.gov/publicweb-rc/2009/12/AOR-2009-320800011452.pdf.
362. https://www.nystart.gov/publicweb-rc/2009/00/AOR-2009-333200010291.pdf.
363. https://www.nystart.gov/publicweb-rc/2009/e7/AOR-2009-331400011474.pdf.
364. https://www.nystart.gov/publicweb-rc/2009/8b/AOR-2009-333200011549.pdf.
365. https://www.nystart.gov/publicweb-rc/2009/33/AOR-2009-320700011655.pdf.
366. https://www.nystart.gov/publicweb-rc/2009/30/AOR-2009-321100011253.pdf.
367. https://www.nystart.gov/publicweb-rc/2009/23/AOR-2009-331900011507.pdf.
368. https://www.nystart.gov/publicweb-rc/2007/9c/AOR-2007-342900011494.pdf.
369. https://www.nystart.gov/publicweb-rc/2009/a8/AOR-2009-342800011690.pdf.
370. https://www.nystart.gov/publicweb-rc/2009/1f/AOR-2009-320900011241.pdf.
371. https://www.nystart.gov/publicweb-rc/2009/59/AOR-2009-310200011520.pdf.
372. https://www.nystart.gov/publicweb-rc/2008/7d/AOR-2008-310200011600.pdf.
373. https://www.nystart.gov/publicweb-rc/2009/95/AOR-2009-343000011445.pdf.
374. https://www.nystart.gov/publicweb-rc/2009/7e/AOR-2009-353100010061.pdf.
375. https://www.nystart.gov/publicweb-rc/2009/8c/AOR-2009-342500011670.pdf.
376. https://www.nystart.gov/publicweb-rc/2009/30/AOR-2009-342800010190.pdf.

TABLE 3. Racial Data Corresponding to Footnotes in This Comment

Footnote Number	Racial Data
5	There is no racial information available for the 25 Chicago children arrested or their middle school, but it can be inferred that most or all of the 25 students were black, given that the zip code in which the school is located is 95.5 percent black and the high school campus at the same location is 99.8 percent black.[377]
6	The ten-year-old girl with disabilities who was arrested attended a 99 percent nonwhite school.[378]
121	Aviation High School: 89 percent nonwhite.[379]
124	Wadleigh School: 100 percent nonwhite.[380]
142	East Side Community High School: 95 percent nonwhite.[381]
216	Paul Robeson High School: 99 percent nonwhite.[382]

377. *American Fact Finder*, U.S. CENSUS BUREAU, http://factfinder.census.gov/home/saff/main.html?_lang=en (last visited Dec. 12, 2011) (search for "60620"); *Perspectives Leadership Academy: At-a-Glance*, CHI. PUB. SCH., http://www.cps.edu/Schools/Pages/school.aspx? id=400061 (last visited Dec. 12, 2011).
378. https://www.nystart.gov/publicweb-rc/2009/20/AOR-2009-331600010025.pdf.
379. https://www.nystart.gov/publicweb-rc/2007/26/AOR-2007-342400011610.pdf.
380. https://www.nystart.gov/publicweb-rc/2007/ed/AOR-2007-310300011415.pdf.
381. https://www.nystart.gov/publicweb-rc/2008/39/AOR-2008-310100011450.pdf.
382. https://www.nystart.gov/publicweb-rc/2007/14/AOR-2007-331700011625.pdf.