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Students of the Mass Incarceration Nation

KATAYOON MAJD*

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INTRODUCTION

Sometimes no one speaks the truth better than a child. Several years ago, while working as a guardian *ad litem* in the District of Columbia child welfare system, I represented Michael;¹ he was a precocious seven-year-old African-American boy who had been removed from his home, separated from his siblings, and placed in foster care after suffering serious physical abuse. I visited him at his local public elementary school one day, and as we sat in a common area talking, Michael spotted a school police officer casually walking by. Michael grabbed my arm, pointed at the officer, and exclaimed, “Look at him! That’s an officer of the law! He’s got a gun! In an elementary school! Do you see it?” I told Michael I saw. He shook his head and declared, “You gotta get me outta here . . . this is no place for a child.”

Michael’s educational experience is not unique. More than half a century after *Brown v. Board of Education*² ruled that “separate but equal” education conditions were unconstitutional, educational equity in the United States remains elusive. Since the 1970s, public schools have become more racially segregated.³ Students of color and English

1. “Michael” is not the student’s real name.

2. 347 U.S. 483 (1954).

3. See John Brittain et al., *Racial Disparities in Educational Opportunities in the United States*, 6 SEATTLE J. FOR SOC. JUST. 591, 595, 600 (2008), available at <http://www.lawyerscommittee.org/projects/admin/education/documents/files/0007.pdf> (noting that while the average white

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Language Learner⁴ students continue to experience large achievement gaps, unequal access to higher education, low graduation rates, high rates of suspension and expulsion,⁵ and unequal access to educational resources.⁶ Racial disparities also exist in special education and gifted and talented programs.⁷ A number of factors have contributed to these inequities.⁸ This Article focuses on one of these factors: the mass incarceration of people of color.

Over the last three decades, the country's criminal justice systems have punished a stunning number of people—disproportionately African-American men—and excluded them from mainstream society.⁹ Though the United States accounts for 5% of the total world population, it houses 25% of the world's prisoners.¹⁰ It does so despite enjoying historically low crimes rates.¹¹ America's obsession with

child attends a school where 77% of other students are white, the average black student attends a high school where only 30% of other students are white).

4. An English Language Learner is a "national-origin-minority student who is limited-English-proficient." See *Developing Programs for English Language Learners: Glossary*, U.S. DEP'T OF EDUC., OFFICE FOR CIVIL RIGHTS, <http://www2.ed.gov/about/offices/list/ocr/ell/glossary.html> (last visited Dec. 27, 2010).

5. Brittain et al., *supra* note 3, at 596, 603; see also Laleh Ispahani, ACLU, *Race & Ethnicity in America: Turning a Blind Eye to Injustice* 1, 137-38 (2007), available at http://www.aclu.org/files/pdfs/humanrights/cerd_full_report.pdf (reporting that, in 2005, 58% of African-American and 54% of Latino fourth-grade students scored below the basic reading level for their grade, compared to only 36% of students overall; in 2001, the four-year high school graduation rate in school districts with a majority of students of color was 56.4% compared to 74.1% in majority white school districts; and in high-poverty school districts the graduation rate was 57.6% compared to 76% in low-poverty school districts).

6. See 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, 252-58 (2003); Chauncey D. Smith, Note, *Deconstructing the Pipeline: Evaluating School-to-Prison Pipeline Equal Protection Cases Through a Structural Racism Framework*, 36 *FORDHAM URB. L.J.* 1009, 1033-34 (2009).

7. Russell J. Skiba, Suzanne E. Eckes & Kevin Brown, *African American Disproportionality in School Discipline: The Divide Between Best Evidence and Legal Remedy*, 54 *N.Y.L. SCH. L. REV.* 1071, 1107 (2009-2010).

8. The "continued racial inequality in educational opportunities" stems from several factors including: underperforming, poorly financed schools; low teacher quality; large class sizes; inadequate facilities; school assignment policies that promote segregation; school district boundaries that are coterminous with town boundaries and local land use, zoning, and taxation powers; the practice of ability grouping and tracking which consistently places minority students in lower level classes; failure to counteract differences in socio-economic status; and lower expectations by school personnel of minority students. Brittain et al., *supra* note 3, at 596.

9. Glenn C. Loury, *Crime, Inequality & Social Justice*, *DAEDALUS*, Summer 2010, at 134, 135.

10. Glenn C. Loury & Bruce Western, *The Challenge of Mass Incarceration in America*, *DAEDALUS*, Summer 2010, at 3, 6.

11. See JENNIFER L. TRUMAN & MICHAEL R. RAND, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, *CRIMINAL VICTIMIZATION*, 2009, at 3 (2010), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/cv09.pdf> (noting that the overall violent crime rate has dropped steadily since 1994); see also HOWARD N. SNYDER & MELISSA SICKMUND, OFFICE OF JUVENILE JUSTICE

incarceration has “mystified and appalled” criminologists in other countries,¹² for “[n]ever in the civili[z]ed world have so many been locked up for so little.”¹³ Today, as Paul Butler explains, “[w]e define too many acts as crimes, punish too many people far longer than their crimes warrant, and therefore have too much incarceration.”¹⁴

In this era of mass incarceration, young people of color, especially African-American students, are vulnerable. The misguided “lock ‘em up” mentality that pervades the adult criminal justice system has also been applied to the juvenile justice system, with no recognition of the developmental differences between youth and adults or of the research that has emerged in the last fifteen years about what works—and what does not—in responding to youth misbehavior and delinquency.¹⁵ At the same time, many schools have embraced the prevailing culture of punishment, employing surveillance and social control measures that mirror those of the justice system and relying on exclusionary measures to respond to student misbehavior. And because youth have diminished rights at school and in juvenile court,¹⁶ they are often defenseless in the face of governmental overreaching. As a result, youth are being removed from school settings and treated

& DELINQUENCY PROGRAMS, JUVENILE OFFENDERS AND VICTIMS: 2006 NATIONAL REPORT, at iii (2006), available at <http://www.ojjdp.gov/ojstatbb/nr2006/downloads/NR2006.pdf> (finding that juvenile violent crime arrests have dropped consistently since 1994).

12. Sasha Abramsky, *Toxic Persons: New Research Shows Precisely How the Prison-to-Poverty Cycle Does Its Damage*, SLATE (Oct. 8, 2010, 7:34 AM), <http://www.slate.com/id/2270328/> (quoting Adam Liptak, *Inmate Count in U.S. Dwarfs Other Nations*, N.Y. TIMES, Apr. 23, 2008, at A1).

13. *Rough Justice in America: Too Many Laws, Too Many Prisoners*, ECONOMIST, July 22, 2010, at 33, available at <http://www.economist.com/node/16636027>.

14. PAUL BUTLER, LET'S GET FREE: A HIP-HOP THEORY OF JUSTICE 26 (2009).

15. See Mark Soler, Dana Shoenberg & Marc Schindler, *Juvenile Justice: Lessons for a New Era*, 16 GEO. J. ON POVERTY L. & POL'Y 483, 484, 489-97 (2009).

16. See, e.g., *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646 (1995) (upholding the constitutionality of random urinalysis for students participating in extracurricular athletics); *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675 (1986) (holding that a student's two-day suspension from school for making a sexually suggestive speech at a school assembly did not violate the First Amendment); *New Jersey v. T.L.O.*, 469 U.S. 325 (1985) (upholding the constitutionality of a search of a student's purse as part of an investigation of smoking at school); *Schall v. Martin*, 467 U.S. 253, 265 (1984) (holding that a state preventive detention scheme for juveniles did not violate due process because “juveniles, unlike adults, are always in some form of custody”); *McKeiver v. Pennsylvania*, 403 U.S. 528, 550 (1971) (holding there is no federal constitutional right to a jury trial in delinquency cases).

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as criminals for rather typical adolescent behaviors,¹⁷ with disastrous consequences to their educational opportunities and achievement.¹⁸

The connection between education and incarceration has been examined in the literature.¹⁹ Educational failure significantly increases an individual's risk of engaging in delinquency or crime.²⁰ In addition, a robust body of work has identified a "school-to-prison pipeline" or "schoolhouse to jailhouse track" to describe the numerous factors, including resource disparities in urban schools, inadequate educational opportunities, zero-tolerance policies,²¹ presence of law enforcement on campus, perverse incentives created by the No Child Left Behind Act's high-stakes testing regime, and denial of special education services that combine to funnel youth from the education system into the justice system.²² As United States Assistant Attorney

17. See Terrie Moffitt, *Adolescence-Limited and Life-Course-Persistent Antisocial Behavior: A Developmental Taxonomy*, 100 PSYCHOL. REV. 674, 675 (1993) (explaining that the overwhelming majority of youth who engage in delinquent behavior will desist from such behavior as they mature and that delinquency is a "normal part of teenage life").

18. See, e.g., AARON KUPCHIK, HOMEROOM SECURITY: SCHOOL DISCIPLINE IN AN AGE OF FEAR 8 (2010); DANIEL J. LOSEN & RUSSELL J. SKIBA, S. POVERTY LAW CTR., SUSPENDED EDUCATION: URBAN MIDDLE SCHOOLS IN CRISIS 11 (2010), available at http://www.splcenter.org/sites/default/files/downloads/publication/Suspended_Education.pdf; Michael P. Krezmien et al., *Juvenile Court Referrals and the Public Schools: Nature and Extent of the Practice in Five States*, 26 J. CONTEMP. CRIM. JUST. 273, 274 (2010); Russell Skiba et al., *Are Zero Tolerance Policies Effective in the Schools? An Evidentiary Review and Recommendations*, 63 AM. PSYCHOLOGIST 852, 854 (2008), available at <http://www.apa.org/pubs/info/reports/zero-tolerance.pdf>.

19. See Nkechi Taifa & Catherine Beane, *Integrative Solutions to Interrelated Issues: A Multidisciplinary Look Behind the Cycle of Incarceration*, 3 HARV. L. & POL'Y REV. 283, 289-90 (2009) ("There is considerable evidence that educational failure is a significant risk factor for delinquent or criminal behavior. Deficiencies in educational systems, destructive school discipline policies, truancy, and the seeming inability of schools to identify and service disadvantaged youth who are in need of special educational services are directly related to the cycle of incarceration.").

20. See Jessica Feerman, Marsha Levick & Ami Mody, *The School-to-Prison Pipeline . . . and Back: Obstacles and Remedies for the Re-enrollment of Adjudicated Youth*, 54 N.Y.L. SCH. L. REV. 1115, 1123 (2009-2010) (noting that youth in the juvenile justice system on average read at a level four to five years below their grade level); Taifa & Beane, *supra* note 19, at 289-90 (noting that 70% of incarcerated adults are functionally illiterate); Bruce Western & Becky Pettit, *Incarceration & Social Inequality*, DAEDALUS, Summer 2010, at 8, 18, available at http://www.mitpressjournals.org/doi/pdf/10.1162/DAED_a_00019 (explaining that state prisoners on average have achieved only a 10th grade education and about 70% have no high school diploma).

21. See Skiba et al., *supra* note 18, at 856, 860, available at <http://www.apa.org/pubs/info/reports/zero-tolerance.pdf> (defining zero tolerance as a "philosophy or policy that mandates the application of predetermined consequences, most often severe and punitive in nature, that are intended to be applied regardless of the gravity of the behavior, mitigating circumstances, or situational context").

22. See generally ADVANCEMENT PROJECT, EDUCATION ON LOCKDOWN: THE SCHOOLHOUSE TO JAILHOUSE TRACK 1, 7 (2005) [hereinafter EDUCATION ON LOCKDOWN], available at <http://www.advancementproject.org/sites/default/files/publications/finaleolrep.pdf> (outlining the increasing police presence on school campuses); CHILDREN'S DEF. FUND, AMERICA'S CRADLE

General for Civil Rights Thomas Perez recently acknowledged, “We have failed all our children—and our society—if an education becomes a pathway to prison. It is a moral imperative that education instead serves as a road to success.”²³

However, the connection between education and incarceration does not flow solely in one direction. This Article argues that the racialized and politicized criminal and juvenile justice policies that have led to the mass incarceration of people of color have also exacerbated racial disparities in education. The single-minded focus on punishment in the criminal and juvenile justice systems has impacted how schools handle certain student behaviors, with devastating consequences. Today, these two systems—the education and justice systems—have developed a “symbiotic relationship,”²⁴ effectively working together to lock out large numbers of youth of color from societal opportunity and advantage. In addition to these direct impacts on youth, mass incarceration has other ramifications for education policy. States spend significant amounts of money on corrections—money that could better be spent on education.²⁵ And schools are often not prepared to help students grapple with the host of negative impacts that are associated with having a parent or guardian locked up behind bars.

This Article argues that in order to be successful, educational equity reform efforts must be accompanied by wide scale juvenile and criminal justice reform. A window of opportunity currently exists for such wide scale reform. Crime rates are down,²⁶ and the costs of mass

TO PRISON PIPELINE (2007), available at <http://www.childrendefense.org/child-research-data-publications/data/cradle-prison-pipeline-report-2007-full-highres.pdf>; CATHERINE Y. KIM, DANIEL J. LOSEN & DAMON T. HEWITT, THE SCHOOL-TO-PRISON PIPELINE: STRUCTURING LEGAL REFORM 2010); NAACP LEGAL DEF. & EDUC. FUND, DISMANTLING THE SCHOOL TO PRISON PIPELINE (2010), available at http://naacpldf.org/files/publications/Dismantling_the_School_to_Prison_Pipeline.pdf; Johanna Wald & Daniel J. Losen, *Defining and Redirecting a School-to-Prison Pipeline*, 2003 NEW DIRECTIONS FOR YOUTH DEV. 99, at 9, 11.

23. Thomas E. Perez, Assistant Attorney Gen., U.S. Dep’t of Justice, Civil Rights Div., Address at the Civil Rights and School Discipline: Addressing Disparities to Ensure Equal Educational Opportunity Conference (Sept. 27, 2010), available at http://www.justice.gov/crt/speeches/perez_eosconf_speech.php.

24. Smith, *supra* note 6, at 1011 (citing Loïc Wacquant, *Deadly Symbiosis: When Ghetto and Prison Meet and Mesh*, 3 PUNISHMENT & SOC’Y 95, 108 (2001)).

25. See Steven Hawkins, *Mass Incarceration in America: Education vs. Incarceration*, AM. PROSPECT, Jan. 2011, at A18, available at http://www.prospect.org/cs/articles?article=education_vs_incarceration (claiming that the costs of incarceration have “claimed an increasing share of state and local government spending” and “starved essential social programs—most notably education”).

26. See U.S. DEP’T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, STATE-BY-STATE AND NATIONAL TRENDS, available at <http://bjs.ojp.usdoj.gov/dataonline/Search/Crime/State/RunCrimeS->

incarceration are becoming unsustainable.²⁷ Given the budget crises facing the states, some policymakers needing to slash spending have shown receptivity to calls for adopting more cost-effective alternatives to incarceration.²⁸ In fact, due primarily to these fiscal concerns, in 2009, for the first time in forty years, the rate of adult incarceration in state prisons nationwide retreated slightly, by 0.3%.²⁹

At this critical time, educational equity advocates—and all others concerned about social justice—should join forces with criminal and juvenile justice reformers to call for the dismantling of the mass incarceration system. Given the numerous devastating impacts that mass incarceration is having on education and social mobility within communities of color, social justice advocates would benefit from thinking more holistically and working more collaboratively across issue-specific silos to advance a common agenda for racial justice. 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. If one policy problem is solved in isolation, another manifestation of the punitive drive to push youth out of schools and into the justice system is likely to arise elsewhere. By working together to advance a holistic social justice reform agenda that includes challenging mass incarceration, advocates have the greatest chance of making long-lasting progress in the fight for equity.

tatebyState.cfm (Search “United States Total” and “Number of Violent Crimes”) (providing statistics for violent and property crime rates for every year between 1960 and 2007).

27. In 2008, for example, states spent an estimated \$52 billion on corrections. When considering all levels of government, an estimated \$68 billion goes to corrections. PEW CTR. ON THE STATES, ONE IN 31: THE LONG REACH OF AMERICAN CORRECTIONS 1 (2009) [hereinafter THE LONG REACH OF AMERICAN CORRECTIONS], available at http://www.pewcenteronthestates.org/uploadedFiles/PSPP_1in31_report_FINAL_WEB_3-26-09.pdf.

28. See MARK LIPSEY ET AL., CTR. FOR JUVENILE JUSTICE REFORM, IMPROVING THE EFFECTIVENESS OF JUVENILE JUSTICE PROGRAMS: A NEW PERSPECTIVE ON EVIDENCE-BASED PRACTICE 9 (2010), available at <http://cjjr.georgetown.edu/pdfs/ebp/ebppaper.pdf> (noting that “[l]arge budget deficits have caused some states to rethink high juvenile confinement rates”); Michelle Alexander, *Obama’s Drug War*, THE NATION, Dec. 27, 2010, available at <http://www.thenation.com/article/156997/obamas-drug-war> (noting that “at least eighteen legislatures have reduced or eliminated harsh mandatory minimum sentences, and more than two dozen have restored early-release programs and offered treatment instead of incarceration for some drug offenders”); Rebecca Ruiz, *Eyes on the Prize: Our Moral and Ethical Duty to End Mass Incarceration*, AM. PROSPECT, Jan.-Feb. 2011, at A3, available at <http://www.nxtbook.com/nxtbooks/americanprospect/20110102specialreport/#/2> (explaining that the fiscal crisis has caused “even the staunchest advocates of incarceration” to consider alternatives).

29. See generally PEW CTR. ON THE STATES, PRISON COUNT 2010: STATE POPULATION DECLINES FOR THE FIRST TIME IN 38 YEARS (2010), available at http://www.pewcenteronthestates.org/uploadedFiles/Prison_Count_2010.pdf?n=880 [hereinafter PRISON COUNT 2010] (highlighting that during the same time, the number of federal inmates actually increased).

Part I of this Article provides an overview of how the United States came to incarcerate more people than any other nation in the world, despite enjoying historically low crime rates. Part I also links the politicization and racialization of crime in the public discourse to the punitive criminal and juvenile justice policies that have led to the mass incarceration of people of color, and argues that youth are uniquely vulnerable to these policies.

Part II details the impact that this punitive trend in the justice system has had on educational policies and practices. As justice systems have become more punitive, schools have responded to student behavior with measures associated with crime control. Specifically, schools are relying on exclusionary policies, such as school suspensions, expulsions, and referrals to juvenile court, rather than adopting pedagogical responses to student behavior. As a result, many students, particularly students of color, are being criminalized for fairly typical adolescent behaviors, and the focus for many schools today is on “behavior management and social control” rather than the promotion of learning, critical thinking, and educational achievement.³⁰

Part III explores two factors that make challenging the punitive treatment of youth of color by both the education and the justice systems particularly difficult. This includes the fact that youth generally have fewer rights than adults both at school and in juvenile court.³¹ In addition, the interconnected nature of the education and justice systems has created a dynamic by which challenging policies in just one system or the other is unlikely to achieve long-lasting reform.

Part IV details the numerous harms that have resulted from the collaboration between schools and courts to criminalize youth. The

30. See Pedro Noguera, *Schools, Prisons and the Social Implications of Punishment: Rethinking Disciplinary Practices*, 42 *THEORY TO PRACTICE* 341, 342 (2003), available at http://www.inmotionmagazine.com/er/pn_rethink.html; see also DANIEL J. LOSEN & RUSSELL J. SKIBA, S. POVERTY LAW CTR., *SUSPENDED EDUCATION: URBAN MIDDLE SCHOOLS IN CRISIS* 1, 11 (2010), available at http://www.splcenter.org/sites/default/files/downloads/publication/Suspended_Education.pdf (“One of the goals of public schooling is to prepare children to participate in our democracy, and become productive law-abiding citizens.”).

31. See, e.g., *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646 (1995) (upholding the constitutionality of random urinalysis for students participating in extracurricular athletics); *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675 (1986) (holding that a student’s two-day suspension from school for making a sexually suggestive speech at a school assembly did not violate the First Amendment); *New Jersey v. T.L.O.*, 469 U.S. 325 (1985) (upholding the constitutionality of a search of a student’s purse as part of an investigation of smoking at school); *Schall v. Martin*, 467 U.S. 253, 265 (1984) (holding that a state preventive detention scheme for juveniles did not violate due process because “juveniles, unlike adults, are always in some form of custody”); *McKeiver v. Pennsylvania*, 403 U.S. 528, 550 (1971) (holding there is no federal constitutional right to a jury trial in delinquency cases).

collaboration has exacerbated racial inequities in education by decreasing educational opportunities and outcomes for many students of color, limiting their employment prospects, damaging their health and psychological well-being, and impacting how they view both authority and themselves. Ultimately, these factors combine to facilitate the eventual entry of many students of color into the adult criminal justice system.

Part V describes additional negative ramifications of mass incarceration for education policy. These include the fact that outsized state corrections budgets are limiting the available state funding for education. In addition, many students have a parent or guardian who is currently—or has previously been—incarcerated, and schools are often not equipped to meet the needs of these students.

The Article concludes in Part VI by arguing that education advocates, justice system reformers, and others concerned about racial justice and equity should join forces to advance a more holistic and collaborative reform agenda that includes challenging criminal and juvenile justice policies. Such a reform effort is integral in the fight for educational equity. To help lay the groundwork for such a reform effort, this Article provides a few concrete policy recommendations that educational equity advocates and justice system reformers can pursue together. While acknowledging that the obstacles are great, this Article argues that advocates must work with the communities most impacted by mass incarceration to fundamentally change how society views issues of race, crime, and punishment.

I. THE DRIVE TO PUNISH: THE MASS INCARCERATION OF AFRICAN-AMERICANS AND OTHER PEOPLE OF COLOR

The nation's criminal and juvenile justice systems are characterized by a drive to punish.³² Over the last few decades, crime has become politicized and racialized, and this in turn has facilitated the adoption of criminal and juvenile justice laws and policies that are strikingly punitive. Despite enjoying historically low crime rates, the

32. Sacha M. Coupet, *What to Do with the Sheep in Wolf's Clothing: The Role of Rhetoric and Reality About Youth Offenders in the Constructive Dismantling of the Juvenile Justice System*, 148 U. PA. L. REV. 1303, 1306-07 (2000) (arguing that “[a] drive to punish young offenders for their supposed increasingly violent behavior has guided reform measures over the past three decades and has steered the juvenile justice system from rehabilitative to retributive aims”); see also BUTLER, *supra* note 14, at 4 (noting that the “rush to punish is out of control”).

United States has an “addiction to incarceration,”³³ according to James Bell, an expert on racial disparities in the juvenile justice system. Young African-American males have become prime targets for this societal addiction.³⁴ In fact, studies indicate that people perceive African-American youth as more mature, dangerous, and deserving of punishment than white youth, even though these perceptions are not supported by demographic data on crime rates.³⁵ The racially disparate and punitive criminal and juvenile justice policies have meant that for the first generations of African-American men coming of age in the aftermath of the civil rights movement, “the prison now looms as a significant institutional influence on [their] life chances.”³⁶

A. The Criminal Justice System

The United States is the global leader in incarceration, surpassing all other countries both in terms of total numbers and per capita rates of people behind bars.³⁷ In 2008, the nation reached a milestone; that year, the Pew Center on the States reported that one in every hundred adults was behind bars.³⁸ And when considering the several million others who are on parole or probation,³⁹ one in every thirty-one adults nationwide was under some form of correctional control.⁴⁰

The United States did not always incarcerate so many people. The number of incarcerated people skyrocketed from fewer than 350,000 people in 1972 to approximately 2.3 million people in 2009.⁴¹ This explosion in prison populations does not reflect a similar increase in crime rates, as one might expect.⁴² In fact, incarceration rates have continued to climb to their highest levels while crime rates have

33. See James Bell Calls for End to Nation’s Addiction to Incarceration at the NAACP 101st Conference in Kansas City, W. HAYWOOD BURNS INST. FOR JUV. JUST. FAIRNESS & EQUITY (Aug. 10, 2010), <http://burnsinstitute.org/article.php?id=243>.

34. See JONATHAN SIMON, GOVERNING THROUGH CRIME: HOW THE WAR ON CRIME TRANSFORMED DEMOCRACY AND CREATED A CULTURE OF FEAR 19 (2010).

35. Elizabeth S. Scott & Laurence Steinberg, *Blaming Youth*, 81 TEX. L. REV. 799, 807 (2003).

36. Western & Pettit, *supra* note 20, at 11.

37. Abramsky, *supra* note 12.

38. PRISON COUNT 2010, *supra* note 29, at 1.

39. Abramsky, *supra* note 12.

40. THE LONG REACH OF AMERICAN CORRECTIONS, *supra* note 27, at 4.

41. MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS 8 (2010).

42. See BUTLER, *supra* note 14, at 25-26 (“When crime goes up, we lock up more people. When crime goes down, we lock up more people. When the crime rate stays the same, we lock up more people.”); see also Loury, *supra* note 9, at 135 (explaining that crimes rates increased in 1970s, fell then rose again in 1980s, and increased before sharply decreasing again in the 1990s).

dropped to historic lows.⁴³ The Pew Center on States attributes the growth in prison populations to “sentencing, release and other correctional policies that determine who goes to prison and how long they stay.”⁴⁴ Specifically, mass incarceration can be linked to the War on Drugs, officially launched by President Reagan and expanded by Presidents George H.W. Bush and Bill Clinton.⁴⁵ The War on Drugs spurred the adoption of wide-scale, “tough on crime” legislation, including mandatory minimums that removed discretion in sentencing, “three strikes” laws that required up to life imprisonment for the commission of a third, typically violent felony offenses, and “truth in sentencing laws” which required offenders to serve 85% of their sentences before they can be released.⁴⁶ The mass incarceration that has resulted from these policies has been exorbitantly expensive; in 2008, for example, the costs of corrections in the country totaled an estimated \$68 billion.⁴⁷

People of color disproportionately and overwhelmingly experience the devastating impacts of these punitive policies. One in eleven African-Americans and one in twenty-seven Latinos are under some form of correctional control, compared to one in forty-five whites.⁴⁸ The statistics for young African-American men are even more shocking. One in nine African-American males between the ages of twenty and thirty-four is incarcerated,⁴⁹ and *one out of every three* young black males lives under some form of criminal justice control, whether in prison, on probation or parole, or awaiting trial.⁵⁰

An obvious explanation for these racial disparities—that different racial groups commit crimes at different rates—is not supported by the data.⁵¹ Though violent crime rates are higher for African-

43. See TRUMAN & RAND, *supra* note 11, at 3.

44. THE LONG REACH OF AMERICAN CORRECTIONS, *supra* note 27, at 4.

45. ALEXANDER, *supra* note 41, at 47-57; Marc Mauer, *Why Are Tough on Crime Policies So Popular?*, 11 STAN. L. & POL'Y REV. 9, 10 (1999) (“The inception of the war on drugs . . . led to dramatic changes in the composition of offenders in the criminal justice system.”); Loïc Wacquant, *Deadly Symbiosis: When Ghetto and Prison Meet and Mesh*, 3 PUNISHMENT & SOC'Y 95, 96 (2001).

46. Mauer, *supra* note 45, at 10-11.

47. THE LONG REACH OF AMERICAN CORRECTIONS, *supra* note 27, at 11.

48. *Id.* at 7.

49. Jennifer Gonnerman, *Slammed: Welcome to the Age of Incarceration*, MOTHER JONES, July-Aug. 2008, at 44, available at <http://motherjones.com/politics/2008/07/slammed-welcome-age-incarceration>.

50. BUTLER, *supra* note 14, at 27. Conversely, a young white man has a 6% chance of going to prison, while a young African-American man has a 32% chance of the same. *Id.*

51. Mauer, *supra* note 45, at 15 (“[T]here is much research that concludes that a significant portion of the racial disparities observed in the criminal justice system result from drug policies,

Americans, these differential rates do not explain the scale of racial disparities existing in the criminal justice system.⁵² Instead, data indicates that the disparate treatment of drug offenders is largely driving the disparities.⁵³ Even though most illegal drug users and dealers are white, three-fourths of all individuals in prison for drug offenses are people of color.⁵⁴ Studies consistently show that rates of illegal drug use and sale are very similar among different racial and ethnic groups.⁵⁵ 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.⁵⁶

This racially disparate criminal justice system is all the more morally suspect given that the overreliance on incarceration undermines public safety over the long term and wreaks wide-ranging harm on communities of color.⁵⁷ Time spent in prison actually increases the likelihood an individual will commit another crime after release because it hampers one's ability to find a job, severs ties to one's family and community, negatively impacts attitudes about crime, and lessens one's respect for the law.⁵⁸ Individuals with criminal records are also routinely barred from eligibility for public benefits, food stamps, public housing, and student loans—the basic tools they need to successfully re-enter society, support themselves, and contribute meaningfully to their communities.⁵⁹ Thus, it should come as little surprise that 67.5% of inmates are rearrested within three years of release.⁶⁰

sentencing policies, and decision-making by criminal justice practitioners that disproportionately harm minorities and poor people.”).

52. See Loury, *supra* note 9, at 139.

53. *Id.* at 135.

54. ALEXANDER, *supra* note 41, at 96-97.

55. *Id.* at 97.

56. *Id.*

57. Mauer, *supra* note 45, at 13 (“The relative ineffectiveness of more and longer prison sentences in reducing crime is well known among criminologists and practitioners in the field of criminal justice.”); see also Dorothy E. Roberts, *The Social and Moral Cost of Mass Incarceration in African American Communities*, 56 STAN. L. REV. 1271, 1304-05 (2004) (arguing that “the extent of U.S. incarceration is not only morally unjustifiable, but morally repugnant”).

58. BUTLER, *supra* note 14, at 32-33 (2009) (research shows that incarceration reduces crime up to a point, after which continuing to incarcerate more people may actually increase crime); Loury, *supra* note 9, at 137.

59. Michael Pinard, *Collateral Consequences of Criminal Convictions: Confronting Issues of Race and Dignity*, 85 N.Y.U. L. REV. 457, 459-60 (2010); see also Taifa & Beane, *supra* note 19, at 283 (“[B]ecause all too often one’s life opportunities after imprisonment are abysmally limited, recidivism becomes inevitable.”).

60. See *Recidivism: Summary Findings*, U.S. DEP’T OF JUST., BUREAU OF JUST. STAT., <http://bjs.ojp.usdoj.gov/index.cfm?ty=tp&tid=17> (last visited Jan. 25, 2011) (detailing recidivism rates).

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If mass incarceration fails to make us safer, diminishes the life chances of people of color, and wastes precious taxpayer dollars, why do we insist on locking up so many people? Part of the answer lies in the politicization of crime.⁶¹ As James Forman points out, “Our appetite for vengeance sometimes seems insatiable: politicians make careers out of being tough on crime, only to lose elections to those who are yet tougher.”⁶² Research has shown that public concerns about crime do not reflect actual crime rates but rather “the extent to which elites highlight these issues in political discourse.”⁶³ The media also fans the flames through sensationalistic coverage of violent crime.⁶⁴

The rest of the answer lies in the racialization of crime.⁶⁵ Crime simultaneously has been defined by—and defines—race.⁶⁶ In *The New Jim Crow: Mass Incarceration in the Age of Colorblindness*, Michelle Alexander argues that the mass incarceration of people of color is a new racial caste system that represents the “most damaging manifestation of the backlash against the Civil Rights Movement.”⁶⁷ Arguing that the War on Drugs has been waged overwhelmingly in poor communities of color,⁶⁸ Alexander makes a compelling case that, “[l]ike Jim Crow (and slavery), mass incarceration operates as a tightly networked system of laws, policies, customs, and institutions that operate collectively to ensure the subordinate status of a group defined largely by race.”⁶⁹ As Alexander explains, since the collapse

61. Mauer, *supra* note 45, at 13 (noting that crime has not always been a staple political issue, as it is today).

62. See James Forman, Jr., *Why Care About Mass Incarceration?*, 108 MICH. L. REV. 993, 993 (2010); see also BUTLER, *supra* note 14, at 38 (noting that crime policy is often driven by emotion, rather than logic); Loury, *supra* note 9, at 134 (“[D]eclarations of ‘war’ against crime (and, most noticeably, against *criminals*) are a primary means by which political aspirants now signal their bona fides to their electorates.”); Mauer, *supra* note 45, at 14 (“[W]hile rates of crime and drug use change gradually over time, public concern about these issues often shifts dramatically in relation to political initiatives.”).

63. Mauer, *supra* note 45, at 14.

64. *Id.* at 15.

65. See SIMON, *supra* note 34, at 22-23 (2010) (describing the theory that “[c]rime was first exploited by white southern politicians seeking firmer ground for resisting the Civil Rights movement and its demands. . . . Later, Republican politicians seeking to appeal to disaffected southern Democrats could use crime to implicitly signal sympathy with the resentments of those voters.”).

66. Wacquant, *supra* note 45, at 117 (describing how “the centuries-old *association of blackness with criminality*” has been solidified in the era of mass incarceration of African-Americans, which has provided a “powerful common-sense warrant for ‘using color as a proxy for dangerousness’ ”).

67. ALEXANDER, *supra* note 41, at 11.

68. *Id.* at 96-97; see also Loury, *supra* note 9, at 135.

69. ALEXANDER, *supra* note 41, at 13. Alexander defines “racial caste” as “a stigmatized racial group locked into an inferior position by law and custom.” *Id.* at 222. She argues, “[I]t is

of Jim Crow, “it is no longer socially permissible to use race, explicitly, as justification for discrimination, exclusion, or social contempt. Rather, we use our criminal justice system to associate criminality with people of color and then engage in the prejudiced practices we supposedly left behind.”⁷⁰ The fact that the discrimination is deeply embedded into our laws and policies, rather than explicitly endorsed, makes mass incarceration that much more difficult to challenge. Those in favor of the status quo can easily dismiss the incarcerated population as makers of their own fate. However, when the statistics are examined, it becomes clear that the mass incarceration problem is one of racial injustice, more than simply one of bad crime policy.

B. The Juvenile Justice System

The juvenile justice system plays an important role in supporting and perpetuating the system of mass incarceration. Originally, separate juvenile court systems were created based on the notion that youth are more amenable to rehabilitation than adults.⁷¹ The system had two goals: to protect youth from the “stigma and brutality of criminal justice” and to remedy the factors that were driving their delinquency.⁷² However, as the criminal justice system has become more punitive, the juvenile justice system has responded to youth behavior with increasingly harsher and less rehabilitative responses. As a result, the juvenile justice system casts a wide net, intervening—often unnecessarily—in the lives of many youth, predominately youth of color, and thereby increasing the chances that those youth will struggle in school and in life.⁷³

The push for more adult-like responses to juvenile crime coincided with the politicization and racialization of crime generally during the last four decades when *youth of color* became prime targets for

because drug crime is racially defined in the public consciousness that the electorate has not cared much what happens to drug criminals—at least not the way they would have cared if the criminals were understood to be white.” *Id.*

70. Michelle Alexander, *The New Jim Crow: How Mass Incarceration Turns People of Color into Second-Class Citizens*, AM. PROSPECT, Jan. 7, 2011, at A19, available at http://www.prospect.org/cs/articles?article=the_new_jim_crow.

71. See Jeffrey Fagan, *The Contradictions of Juvenile Crime & Punishment*, DAEDALUS, Summer 2010, at 43, 44.

72. *Id.* at 56.

73. See ANNIE E. CASEY FOUND., A ROAD MAP FOR JUVENILE JUSTICE REFORM 3, 10-11 (2009), available at http://www.aecf.org/~media/PublicationFiles/AEC180essay_booklet_MECH.pdf (stating that “our juvenile courts are prosecuting many youth for misconduct that was previously handled informally,” which harms youth and noting that youth who are incarcerated in the juvenile justice system will achieve less educational attainment).

society's punitive urges.⁷⁴ During the 1970s-1990s, conservative Republican politicians exploited racial divisions in the nation, advocating for certain crime and welfare policies in order to gain political advantage.⁷⁵ Racially tinged rhetoric and sensationalistic media coverage "put a black face on youth crime" and misled the public into thinking that juvenile crime was rapidly rising.⁷⁶ In the late 1980s and early 1990s, when black youth homicide rates rose,⁷⁷ some researchers predicted an impending wave of violent youth that Princeton University's John Dilulio called "super-predators."⁷⁸ "Super-predator" quickly became "a code word for young Black males."⁷⁹ In response, policy-makers called for greater punishment for youth who committed crimes.⁸⁰

Despite the hysterical predictions, the super-predators never materialized; however, a new "tough on crime" era had already taken hold. Between 1992 and 1999, almost every state and the District of Columbia passed laws that made it easier to try youth in adult courts.⁸¹ Several states also enacted mandatory minimum sentences for youth in the juvenile justice system.⁸² In the years that followed, many states amended their juvenile delinquency codes to include a greater focus on punishment, retribution, and incapacitation,⁸³ and relaxed the confidentiality protections for juvenile records, which had been a hallmark of the juvenile justice system.⁸⁴

74. Barry C. Feld, *Race, Politics, and Juvenile Justice: The Warren Court and the Conservative "Backlash"*, 87 MINN. L. REV. 1447, 1451-52 (2003).

75. *Id.* at 1451.

76. *Id.* at 1507.

77. *Id.* at 1452.

78. *Id.* at 1451-52, 1523; Soler, Shoenberg & Schindler, *supra* note 15, at 486.

79. Kenneth B. Nunn, *The End of Adolescence: The Child as Other: Race and Differential Treatment in the Juvenile Justice System*, 51 DEPAUL L. REV. 679, 712 (2002).

80. Feld, *supra* note 74, at 1506; *see also* Scott & Steinberg, *Blaming Youth*, *supra* note 35, at 807 (describing that this response to juvenile crime reflected "a moral panic, in which the media, politicians, and the public reinforce each other in an escalating pattern of alarmed reaction to a perceived social threat"). When high profile juvenile crimes, like a school shooting, occur, the media disproportionately focuses on them. As a result, "collective perceptions of the threat become distorted, as alarmed public discourse is reinforced by vivid images of the crime and the victims." *Id.*

81. NAT'L CTR. FOR JUVENILE JUSTICE DIFFERENT FROM ADULTS: AN UPDATED ANALYSIS OF JUVENILE TRANSFER AND BLENDED SENTENCING LAWS, WITH RECOMMENDATIONS FOR REFORM 5 (2008), available at www.modelsforchange.net/publications/181.

82. Fagan, *supra* note 71, at 48.

83. *Id.* at 45; Kristin Henning, *Eroding Confidentiality in Delinquency Proceedings: Should Schools and Public Housing Authorities Be Notified?*, 79 N.Y.U. L. REV. 520, 536 (2004).

84. *See* Henning, *supra* note 83.

Today, the impacts of this punitive tide are plainly evident. The reforms of the 1990s have substantially increased the numbers of incarcerated youth, both in the adult and juvenile justice systems, as well as the length of time they remain incarcerated.⁸⁵ On any given day, over one hundred thousand youth are held in correctional placements or juvenile detention facilities,⁸⁶ and an estimated four hundred thousand youth annually experience some period of incarceration in the juvenile justice system.⁸⁷ The majority of these youth do not belong there. In 2003, for example, only 24% of incarcerated youth were locked up for violent felonies,⁸⁸ and each year thousands of youth are incarcerated for status offenses (misbehaviors such as running away from home or skipping school) even though they have committed no crime whatsoever.⁸⁹

Despite the juvenile justice system's rehabilitative origins, the primary purpose of incarcerating youth in the system cannot fairly be said to be treatment, but rather punishment.⁹⁰ Incarceration actually undermines rehabilitation by interrupting family relationships, school engagement, and employment—the very factors that help protect against delinquency.⁹¹ The ineffectiveness of incarceration as a delinquency intervention is borne out in recidivism studies, which find that between 50% and 80% of incarcerated youth are rearrested within two to three years of leaving correctional facilities.⁹² Better alternatives exist. A rich body of research has documented that certain community-based programs are not only less expensive than incarceration,

85. Elizabeth S. Scott & Laurence Steinberg, *Social Welfare and Fairness in Juvenile Crime Regulation*, 71 LA. L. REV. 35, 44 (2010).

86. A ROAD MAP FOR JUVENILE JUSTICE REFORM, *supra* note 73, at 10.

87. *Id.*

88. *Id.* at 8-9.

89. See EDGAR S. CAHN, JOINT CTR. FOR POL. & ECON. STUDIES, HOW THE JUVENILE JUSTICE SYSTEM REDUCES LIFE OPTIONS OF MINORITY YOUTH 3 (2006), available at <http://www.jointcenter.org/publications1/publication-PDFs/Dellums%20PDFs/EdgarCahn.pdf> (finding that African-Americans are also more likely than other youth to be petitioned to court for a status offense and sent to an out-of-home placement).

90. Fagan, *supra* note 71, at 43.

91. BARRY HOLMAN & JASON ZIEDENBERG, JUSTICE POLICY INST., THE DANGERS OF DETENTION: THE IMPACT OF INCARCERATING YOUTH IN DETENTION AND OTHER SECURE FACILITIES 1, 2 (2006), available at http://www.justicepolicy.org/images/upload/06-11_REP_DangersOfDetention_JJ.pdf; see also C. Antoinette Clarke, *Bridging the Gap: An Interdisciplinary Approach to Juvenile Justice Policy*, 56 DEPAUL L. REV. 927, 944-45 (2007) (explaining that incarceration can disrupt positive adolescent development); Taifa & Beane, *supra* note 19, at 293-95 (describing protective factors).

92. A ROAD MAP FOR JUVENILE JUSTICE REFORM, *supra* note 73.

but also effective at reducing recidivism rates and improving education outcomes.⁹³

While the juvenile system has become more “adult-like,” it remains preferable to trying youth in the adult criminal justice system. Youth convicted in adult courts receive virtually no appropriate rehabilitative and education services and suffer the consequences of having a criminal record.⁹⁴ Yet, each year, approximately two hundred thousand youth are tried in the adult criminal justice system, mostly for nonviolent offenses, and each day, approximately seventy-five hundred youth are detained in adult jails.⁹⁵ Policies allowing youth to be tried in adult courts are likely counterproductive and harmful. A 2007 meta-analysis of research by the Centers for Disease Control and Prevention found that youth in the adult system are more likely to engage in future violence than similarly situated youth kept in the juvenile justice system.⁹⁶ The apparent ineffectiveness of these policies in reducing crime is all the more troubling given that youth in adult jails are significantly more likely to be sexually assaulted and physically abused,⁹⁷ and to commit suicide than youth in juvenile facilities.⁹⁸ According to Jeffrey Fagan, “[E]ven short-term exposure for youths to adult prisons has risks for youths and for public safety. To the extent that legislators ignored these risks, the wholesale transfer of minors to the criminal courts was a reckless experiment.”⁹⁹

93. See Scott & Steinberg, *Social Welfare and Fairness in Juvenile Crime Regulation*, *supra* note 85, at 74-80; see also FED. ADVISORY COMM. ON JUVENILE JUSTICE, ANNUAL REPORT 26 (2008), available at <http://www.facjj.org/annualreports/FACJJ%20Annual%20Report%2008.pdf> (quoting ABA’s Presidential Working Group on the Unmet Legal Needs of Children and their Families).

94. CAMPAIGN FOR YOUTH JUSTICE, JAILING JUVENILES: THE DANGERS OF INCARCERATING YOUTH IN ADULT JAILS IN AMERICA 1, 13 (2007) [hereinafter JAILING JUVENILES], available at http://www.campaignforyouthjustice.org/documents/CFYJNR_JailingJuveniles.pdf.

95. CAMPAIGN FOR YOUTH JUSTICE, KEY FACTS: YOUTH IN THE JUSTICE SYSTEM 1, 4 (2010), available at http://www.campaignforyouthjustice.org/documents/FS_KeyYouthCrimeFacts.pdf.

96. Robert Hahn et al., *Effects on Violence of Laws and Policies Facilitating the Transfer of Youth from the Juvenile to the Adult Justice System*, 56 CTRS. FOR DISEASE CONTROL & PREVENTION, No. RR-9 (Nov. 30, 2007), available at www.cdc.gov/mmwr/pdf/rr/tr5609.pdf; see also Richard E. Redding, *Juvenile Transfer Laws: An Effective Deterrent to Delinquency?*, JUV. JUST. BULL. (DOJ/Off. of Juv. Just. & Delinquency Prevention, Washington, D.C.), June 2008, at 1, available at <http://www.ncjrs.gov/pdffiles1/ojdp/220595.pdf> (finding that “the bulk of the empirical evidence suggests that transfer laws [probably] have little . . . general deterrent effect” on would-be juvenile offenders).

97. JAILING JUVENILES, *supra* note 94, at 10-11, 13.

98. *Id.* at 10-11.

99. Fagan, *supra* note 71, at 46.

Consistent with the demographic trends for adults in the criminal justice system, youth of color are also disproportionately represented in both the juvenile and criminal justice systems. Between 2002 and 2004, for example, African-Americans comprised 16% of the youth nationwide, but 28% of juvenile arrests, 30% of court referrals, 37% of detained youth, 38% of youth placed out of their home, 34% of youth waived to adult court, and 58% of youth locked in adult prisons.¹⁰⁰ Latino youth also receive disproportionately harsh treatment in delinquency cases compared to their white peers.¹⁰¹ Researchers have concluded that, “the over-representation of African-American youth in the juvenile justice system is the result of a number of direct and indirect factors that cannot be explained by differential involvement in crime alone.”¹⁰²

II. SCHOOLS AS PARTNERS IN MASS INCARCERATION: THE SURVEILLANCE, EXCLUSION, AND CRIMINALIZATION OF STUDENTS OF COLOR

Schools have—unwittingly or not—served as “accomplices” to the project of mass incarceration.¹⁰³ Even though schools remain

100. NAT'L COUNCIL ON CRIME & DELINQUENCY, AND JUSTICE FOR SOME: DIFFERENTIAL TREATMENT OF YOUTH OF COLOR IN THE JUSTICE SYSTEM 37 (2007) [hereinafter AND JUSTICE FOR SOME], available at http://www.nccd-crc.org/nccd/pubs/2007jan_justice_for_some.pdf.

101. Neelum Arya et al., *America's Invisible Children: Latino Youth and the Failure of Justice*, POL'Y BRIEF (NCLR/Campaign for Youth Just., Washington, D.C.), 2009, at 10, available at http://www.campaignforyouthjustice.org/documents/CFYJPB_InvisibleChildren.pdf; see also JOSÉ D. SAAVEDRA, NAT'L COUNCIL OF LA RAZA, JUST THE FACTS: A SNAPSHOT OF INCARCERATED YOUTH 1 (2010), available at http://issuu.com/nclr/docs/file_jj_fact_sheet?mode=embed&layout=http%3A%2F%2Fskin.issuu.com%2Fv%2Fflight%2Flayout.xml&showFlipBtn=true. Latinos make up 19% of all ten- to seventeen-year-olds, yet they represent 25% of youth who are incarcerated. See *id.*

102. Joanna M. Lee, Laurence Steinberg & Alex R. Piquero, *Ethnic Identity and Attitude Toward the Police Among African American Juvenile Offenders*, 38 J. CRIM. JUST. 781, 782 (2010); see also AND JUSTICE FOR SOME, *supra* note 100, at 21 (noting that in 2003, African-American youth comprised only 25% of youth found guilty of drug offenses, but 40% of the youth placed out of home for such offenses); PHILLIP BEATTY, AMANDA PETTERUTI & JASON ZIEDENBERG, JUSTICE POLICY INST., THE VORTEX: THE CONCENTRATED IMPACT OF DRUG IMPRISONMENT AND THE CHARACTERISTICS OF PUNITIVE COUNTIES 1, 7 (2007), available at http://www.justicepolicy.org/images/upload/07-12_REP_Vortex_AC-DP.pdf (citing a study by the Department of Justice's Office of Juvenile Justice and Delinquency Prevention that found that white youth report selling drugs at higher rates than African-American youth, but are half as likely to be arrested for drug offenses); A ROAD MAP FOR JUVENILE JUSTICE REFORM, *supra* note 73, at 9-10.

103. KUPCHIK, *supra* note 18, at 37, 40; see Wacquant, *supra* note 45, at 36, 40 (“The 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 hyperghetto to the demeanor, tactics, and interactive style of the correctional officers many of them are bound to encounter shortly after their school days are over.”).

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among the safest places for youth,¹⁰⁴ they have embraced many of the punitive policies of the criminal and juvenile justice systems and incorporated them into their responses to student discipline.¹⁰⁵ Specifically, schools over-rely on suspensions, expulsions, arrests, and referrals to juvenile court to punish students for violating school rules. In addition, many schools now literally resemble prisons, fully equipped with surveillance technologies and full-time law enforcement officers. Significantly, the students most impacted by these punitive school policies are similar demographically to those most likely to be entangled with the criminal justice system—that is, low-income males of color.¹⁰⁶

Though educational inequities that “mirror the outside world” may “seem normal and acceptable,”¹⁰⁷ the disproportionate exclusion of students of color and their disproportionate involvement in the justice system are not inevitable.¹⁰⁸ Quite the contrary, they stem from explicit policy choices to use crime control as the defining paradigm for education policy.¹⁰⁹ Schools undoubtedly have a right and responsibility to maintain safety and order within the educational environment, including keeping weapons and drugs off campus and protecting students from bullying and harassment. But schools have made the choice to adopt punitive, exclusionary methods similar to those used in the justice system over pedagogical ones.¹¹⁰ In fact, sociologist Loïc Wacquant has equated public schools in what he calls the “hyperghetto” to “*institutions of confinement* whose primary mission is not to educate but to ensure ‘custody and control.’ ”¹¹¹

104. See EDUCATION ON LOCKDOWN, *supra* note 22, at 11; KUPCHIK, *supra* note 18, at 15 (noting that the Centers for Disease Control reported that in 1996, there was less than a one in a million chance that a student would be killed or commit suicide in or near school; in 2005, that number was one in 3.2 million).

105. See SIMON, *supra* note 34, at 220; see also Michelle Fine et al., “Anything Can Happen with Police Around”: Urban Youth Evaluate Strategies of Surveillance in Public Places, 59 J. SOC. ISSUES 141, 145 (2003) (illustrating that low-income youth of color in urban areas “are being squeezed out of public spaces and placed under scrutiny and threat of criminalization when they are in public sites, and even at home”).

106. See Allison Ann Payne & Kelly Welch, *Racial Threat and Punitive School Discipline*, 57 SOC. PROBS. 25, 26 (2010).

107. KUPCHIK, *supra* note 18, at 33.

108. *Id.*

109. *Id.* at 22-23; see generally SIMON, *supra* note 34.

110. See Noguera, *supra* note 30, at 346 (noting school discipline practices “often bear a striking similarity to the strategies used to punish adults in society. Typically, schools rely on some form of exclusion or ostracism to control the behavior of students.”).

111. Wacquant, *supra* note 45, at 108; see also ALEXANDER, *supra* note 41, at 167.

Suspensions, expulsions, arrests, and referrals to juvenile court merely exacerbate the problems they are supposed to correct, as described below. In choosing to adopt these counterproductive policies, schools have eschewed more effective responses to student behavior. For example, research shows that an effective method for responding to student discipline is Positive Behavioral Interventions and Supports (“PBIS”),¹¹² an approach to promoting positive student behaviors that focuses on developing school-wide norms and expectations; training teachers and staff on effective classroom management techniques and the use of positive reinforcement; and providing early, individualized, and positive interventions for misconduct.¹¹³ PBIS has been shown to improve school climate, reduce disciplinary issues, improve academic engagement and achievement,¹¹⁴ decrease school arrests, improve attendance, and reduce the risk of future delinquency and drug use.¹¹⁵ In addition, restorative discipline, modeled after restorative justice interventions, are also promising; such interventions focus on addressing the needs of the victims, offenders, and the school community, rather than focusing merely on punishment of the offender.¹¹⁶

Schools’ insistence on using counterproductive and excessively punitive measures in the face of better alternatives seems illogical, but it is consistent with education theories that suggest that one’s social position determines what one is taught in school.¹¹⁷ Schools prepare students for the work force and therefore prepare students differently

112. See ADVANCEMENT PROJECT, TEST, PUNISH, AND PUSH OUT: HOW “ZERO TOLERANCE” AND HIGH-STAKES TESTING FUNNEL YOUTH INTO THE SCHOOL-TO-PRISON PIPELINE, (2010) [hereinafter TEST, PUNISH, AND PUSH OUT], available at http://www.advancementproject.org/sites/default/files/publications/rev_fin.pdf; ELIZABETH SULLIVAN & DAMEKIA MORGAN, FAMS & FRIENDS OF LA.’S INCARCERATED CHILD. & NAT’L ECON & SOC. RTS. INITIATIVE, PUSHED OUT: HARSH DISCIPLINE IN LOUISIANA SCHOOLS DENIES THE RIGHT TO EDUCATION: A FOCUS ON THE RECOVERY SCHOOL DISTRICT IN NEW ORLEANS 24-25 (2010), available at http://www.nesri.org/fact_sheets_pubs/Pushed_Out_Report.pdf.

113. SULLIVAN & MORGAN, *supra* note 112, at 24; see also N.Y.C.L. UNION & ANNEBERG INST. FOR SCH. REFORM, available at http://www.nyclu.org/files/publications/nyclu_pub_safety_with_dignity.pdf (describing examples of effective school discipline practices).

114. See OSEP CTR. ON POSITIVE BEHAV. INTERVENTIONS & SUPPORTS EFFECTIVE SCHOOL-WIDE INTERVENTIONS, WHAT IS SCHOOL-WIDE POSITIVE BEHAVIORAL INTERVENTIONS & SUPPORTS? 1 (2009), available at <http://pbis.org/common/cms/documents/WhatIsPBIS/WhatIsSWPBS.pdf>; SULLIVAN & MORGAN, *supra* note 112, at 24.

115. See S. POVERTY LAW CTR., EFFECTIVE DISCIPLINE FOR STUDENT SUCCESS: REDUCING STUDENT AND TEACHER DROPOUT RATES IN MISSISSIPPI 6 (2008), available at http://www.splcenter.org/images/dynamic/main/effective_discipline.pdf; see also Brittain et al., *supra* note 3, at 616.

116. Deborah Gordon Klehr, *Addressing the Unintended Consequences of No Child Left Behind and Zero Tolerance: Better Strategies for Safe Schools and Successful Students*, 16 GEO. J. ON POVERTY L. & POL’Y 585, 609 (2010).

117. KUPCHIK, *supra* note 18, at 32.

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.¹¹⁸ In a nation where overwhelming numbers of African-American boys and men are incarcerated, and thereby removed from the work force altogether, the reproduction of hierarchies in schools suggests that African-American males are likely to be denied meaningful educational opportunities.¹¹⁹ Indeed, available evidence suggests that this theory is playing out in practice.

A. Zero-Tolerance Policies

Zero-tolerance policies are a prime example of the use of punitive responses for student misbehavior. Just as the politicization of juvenile crime generally led to a more punitive juvenile justice system, the politicization of school violence, specifically, prompted schools to adopt numerous mechanisms to control and punish young people,¹²⁰ including punishing youth for off-campus conduct.¹²¹ In 1994, at the height of the “tough on crime” era, the United States Congress passed the Gun-Free Schools Act requiring schools to expel for no less than one year—and refer to the justice system—students who brought firearms on campus, though the law allowed for modifications on a case-by-case basis.¹²² States ran with the “zero tolerance” concept, applying it to even non-violent offenses, such as school disruption, truancy,

118. *Id.* at 32-33.

119. *See id.* at 32-36; *see also* ALEXANDER, *supra* note 41, at 207 (describing sociologist Loïc Wacquant’s argument that mass incarceration “does not seek primarily to benefit unfairly from black labor, as earlier caste systems have, but instead views African Americans as largely irrelevant and unnecessary to the newly structured economy—an economy that is no longer driven by unskilled labor”); Paul Hirschfield, *School Surveillance in America*, in *SCHOOLS UNDER SURVEILLANCE: CULTURES OF CONTROL IN PUBLIC EDUCATION* 38, 49 (Torin Monahan & Rodolfo D. Torre eds., 2010) (“Teachers who aim to prepare students for an economic and criminal justice system that tightly monitors and subordinates them may register less opposition to more intrusive forms of school surveillance. Judged against this goal, morning rituals of submission at the metal detector may even hold some pedagogical value.”).

120. Hirschfield, *supra* note 119, at 38, 49; *see also* KUPCHIK, *supra* note 18, at 24 (“Public schools have nevertheless become a stage for the airing of public anxieties and conflicts, including racial conflicts, fear of crime, and concern over growing needs of youth.”).

121. *See* KIM, LOSEN & HEWITT, *supra* note 22, at 95 (explaining that courts have held that school officials can punish students for off-campus conduct if there is a nexus between that conduct and school activities); Skiba, Eckes & Brown, *supra* note 7, at 1084; *see also* Frank D. LoMonte, *Shrinking Tinker: Students Are “Persons” Under Our Constitution—Except When They Aren’t*, 58 AM. U. L. REV. 1323, 1325 (2009) (discussing the ability of schools to punish off-campus speech).

122. *See* 20 U.S.C. § 7151 (2006).

and refusal to obey teachers and administrators.¹²³ Schools incorporated principles of punitive criminal justice policies into their responses to student behavior,¹²⁴ including mandatory minimum sentencing (by imposing mandatory punishments for various students behaviors), three strikes laws (by mandating exclusion of students after three disciplinary violations), and the “broken windows” theory of aggressive policing for minor or trivial offenses (by attaching serious consequences to typical student misbehaviors, such as talking in class).¹²⁵

Zero-tolerance policies have significantly increased suspensions and expulsions of students even for offenses that pose little or no safety threat.¹²⁶ Students of color, along with lesbian, gay, bisexual and transgender youth,¹²⁷ students with disabilities,¹²⁸ homeless

123. Michael P. Krezmien et al., *supra* note 18, at 273-74; *see also* Skiba, Eckes & Brown, *supra* note 7, at 1084; Frances P. Solari & Julienne E.M. Balshaw, *Outlawed and Exiled: Zero Tolerance and Second Generation Race Discrimination in Public Schools*, 29 N.C. CENT. L.J. 147, 149 (2007).

124. *See, e.g.*, KUPCHIK, *supra* note 18, at 14 (“[S]chools have borrowed a variety of policies and practices from the criminal justice system.”).

125. TEST, PUNISH, AND PUSH OUT, *supra* note 112, at 1, 10; *see also* James Q. Wilson & George L. Kelling, *Broken Windows: The Police and Neighborhood Safety*, ATL. MONTHLY Mar. 1982, available at <http://www.theatlantic.com/magazine/archive/1982/03/broken-windows/4465/> (proposing the Broken Windows theory that neighborhoods where graffiti, litter, shattered glass, and other symbols of neglect exist become magnets for crime and delinquency). Commentators have argued that the Broken Windows theory of law enforcement—that police should aggressively enforce minor offenses—has had negative consequences. *See, e.g.*, K. Babe Howell, *Broken Lives from Broken Windows: The Hidden Costs of Aggressive Order-Maintenance Policing*, 33 N.Y.U. REV. L. & SOC. CHANGE 271 (2009).

126. *See* RUSSELL J. SKIBA, IND. EDUC. POLICY CTR., ZERO TOLERANCE, ZERO EVIDENCE: AN ANALYSIS OF SCHOOL DISCIPLINARY PRACTICES 19 (2000), available at <http://www.indiana.edu/~safeschl/ztze.pdf>; Krezmien et al., *supra* note 18, at 274; *see also* KIM, LOSEN & HEWITT, *supra* note 22, at 2 (noting that between 1973 and 2006, for example, the percent of African-American students suspended at least once in a given year more than doubled, from 6% to 15%).

127. *See* Kathryn E.W. Himmelstein & Hannah Brückner, *Criminal-Justice and School Sanctions Against Nonheterosexual Youth: A National Longitudinal Study*, 127 PEDIATRICS 49, 55 (Jan. 2011), available at <http://pediatrics.aappublications.org/cgi/reprint/127/1/49> (concluding that nonheterosexual youth suffer disproportionate educational and criminal justice punishments that cannot be explained by more frequent illegal or transgressive behaviors); *see also* DIGNITY IN SCH. CAMPAIGN, NATIONAL RESOLUTION FOR ENDING SCHOOL PUSHOUT 1 (2009) [hereinafter NAT’L RESOLUTION FOR ENDING SCH. PUSHOUT], available at http://www.dignityinschools.org/files/DSC_National_Resolution.pdf; KATAYOON MAJD, JODY MARKSAMER & CAROLYN REYES, EQUITY PROJECT, HIDDEN INJUSTICE: LESBIAN, GAY, BISEXUAL, AND TRANSGENDER YOUTH IN JUVENILE COURTS 75-78 (2009), available at http://www.equityproject.org/pdfs/hidden_injustice.pdf.

128. *See* PETER E. LEONE ET AL., NAT’L CTR. ON EDUC., DISABILITY & JUVENILE JUSTICE, SCHOOL FAILURE, RACE, AND DISABILITY: PROMOTING POSITIVE OUTCOMES, DECREASING VULNERABILITY FOR INVOLVEMENT WITH THE JUVENILE DELINQUENCY SYSTEM 1, 3, 16 (Oct. 15, 2003), available at http://www.edjj.org/Publications/list/leone_et_al-2003.pdf; SKIBA, *supra* note 126, at 11-12; Michael P. Krezmien et al., *Suspension, Race, and Disability: Analysis of*

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youth; foster youth; immigrant youth; English Language Learners; and pregnant and parenting teens, have been disproportionately impacted by these policies.¹²⁹ 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.¹³⁰ For example, African-American suspension rates are three times that of white students,¹³¹ and African-American students are 3.5 times as likely to be expelled as white students.¹³²

There is no evidence that the higher rates of discipline for African-American students merely reflect more behavior problems among those students.¹³³ Even when controlling for other factors (such as misbehavior, attitudes, academic performance, parental attention, school characteristics, and socio-economic status), researchers have found that African-American students are generally disciplined more frequently and more punitively for less serious offenses than white students.¹³⁴ Furthermore, schools are significantly more likely to discipline African-American male students for subjective reasons (such as “disrespect”) than they are white or female students.¹³⁵ Moreover, those schools with greater proportions of African-American students are more likely to respond to student misbehavior with punitive measures rather than restorative responses, even when controlling for other factors such as delinquency rates, socio-economic status, gender, urbanicity, and staff training.¹³⁶ This effect is even greater when school delinquency and disorder are low.¹³⁷

Statewide Practices and Reporting, 14 J. EMOTIONAL & BEHAV. DISORDERS 217, 217-18 (2006); see also Joseph B. Tulman, *Disability and Delinquency: How Failures to Identify, Accommodate and Serve Youth with Education-Related Disabilities Leads to Their Disproportionate Representation in the Delinquency System*, 3 WHITTIER J. CHILD & FAM. ADVOC. 3, 28 (2003).

129. NAT'L RESOLUTION FOR ENDING SCH. PUSHOUT, *supra* note 127.

130. SKIBA, *supra* note 126, at 19; LOSEN & SKIBA, *supra* note 30, at 2; see also Anne Gregory, Russell J. Skiba & Pedro A. Noguera, *The Achievement Gap and the Discipline Gap: Two Sides of the Same Coin?*, 39 EDUC. RESEARCHER 59, 59-68 (2010); Solari & Balshaw, *supra* note 123, at 150 (“In Tennessee, for example, more than 38% of Latino public school students have been suspended.”).

131. LOSEN & SKIBA, *supra* note 30, at 3 (noting that the racial discipline gap in suspension rates has grown greater since the 1970s, when African Americans were twice as likely as white students be suspended).

132. NAT'L RESOLUTION FOR ENDING SCH. PUSHOUT, *supra* note 127.

133. See Russell J. Skiba et al., *The Color of Discipline: Sources of Racial and Gender Disproportionality in School Punishment*, 34 URB. REV. 317, 334-35 (2002), available at <http://www.indiana.edu/~safeschl/cod.pdf>.

134. Payne & Welch, *supra* note 106, at 28-29.

135. See *id.*

136. *Id.* at 40, 42.

137. *Id.*

It is therefore likely that these consistent racial disparities indicate systematic bias in how discipline decisions are made.¹³⁸ A Task Force of the American Psychological Association concluded that racially disproportionate discipline might be the result of inadequate classroom management training for teachers, lack of culturally competent practices, and racial stereotypes.¹³⁹ Some have also argued that the No Child Left Behind Act (which imposes sanctions on schools whose students, collectively and disaggregated by racial subgroups, do not make “adequate yearly progress” in their performance on high-stakes tests) provides an incentive to use these zero-tolerance policies to push out the students with the greatest academic needs.¹⁴⁰

B. Surveillance and Arrests of Students of Color on Campus

The clearest manifestation of the application of crime control measures to the school setting is the increasing reliance by schools on law enforcement and the juvenile courts to manage student behavior. Students face more surveillance at school than anywhere else,¹⁴¹ even though researchers have found little to no deterrent impact of police surveillance on campus.¹⁴² In fact, the Advancement Project, a civil rights organization, has argued that public school students are “outside of prison and jail inmates, perhaps the most policed group in

138. SKIBA, *supra* note 126, at 18-19; Skiba, Eckes & Brown, *supra* note 7, at 1107 (“[W]hen the primary reasons for black disciplinary over-referral are not serious, safety-threatening behaviors, but rather more subjective and interactional behaviors such as non-compliance, disrespect, and loitering, it is hard to imagine that the school system is not making some contribution to disparate outcomes in school discipline.”); *see also* KUPCHIK, *supra* note 18, at 170 (“African Americans are targeted by school actors because of some reason other than their actual misbehaviors.”).

139. Skiba et al., *supra* note 18, at 854; *see also* Solari & Balshaw, *supra* note 123, at 151 (citing Judith Browne, Daniel Losen & Johanna Wald, *Zero Tolerance: Unfair, With Little Recourse*, in ZERO TOLERANCE: CAN SUSPENSION AND EXPULSION KEEP SCHOOLS SAFE? (Russell Skiba & Gil Noam eds., 2001)).

140. *See* No Child Left Behind, 20 U.S.C. § 6311 (2006); DIGNITY IN SCHOOLS.ORG, FEDERAL POLICY, ESEA REAUTHORIZATION, AND THE SCHOOL-TO-PRISON PIPELINE 3 (2010) [hereinafter ESEA REAUTHORIZATION], available at <http://www.dignityinschools.org/content/federal-policy-esea-reauthorization-and-school-prison-pipeline> (explaining that suspension and expulsion rates have risen dramatically since No Child Left Behind was enacted); TEST, PUNISH, AND PUSH OUT, *supra* note 112, at 18; Linda Darling-Hammond, *Race, Inequality, and Educational Accountability: The Irony of ‘No Child Left Behind’*, 10 RACE ETHNICITY & EDUC. 245, 252 (2007); Deborah Gordon Klehr, *Addressing the Unintended Consequences of No Child Left Behind and Zero Tolerance: Better Strategies for Safe Schools and Successful Students*, 16 GEO. J. POVERTY L. & POL’Y 585, 602 (2010).

141. *See* KUPCHIK, *supra* note 18, at 85 (“The surveillance over students by the police is far greater than they face outside school.”).

142. Krezmien et al., *supra* note 18, at 274.

the country right now.”¹⁴³ Forty-one states require schools to report students to law enforcement for various misbehaviors on campus.¹⁴⁴ And in the last decade, the number of law enforcement officers stationed permanently on campuses, commonly referred to as school resource officers (“SROs”), has significantly increased.¹⁴⁵ The sheer scale of police presence in some urban districts is astounding. The New York Police Department’s School Safety Division is larger than the entire police force of the District of Columbia, Detroit, Boston, and Las Vegas.¹⁴⁶ Other school districts, like Los Angeles Unified School District, have established their own police departments, fully equipped with canine patrols.¹⁴⁷

Significantly, school crime rates do not seem to justify these measures. Schools remain among the safest places for youth.¹⁴⁸ For example, between 1992 and 2005, the Bureau of Justice Statistics found that annual rates of serious violent crimes were lower at school than away from school.¹⁴⁹ When acts of school violence do occur, they typically involve fistfights and very rarely involve weapons.¹⁵⁰

Perhaps not surprisingly, the increasing collaboration between schools and law enforcement and the presence of surveillance equipment has reportedly increased the number of youth referred to juvenile courts for minor misbehaviors that in the past would have likely been handled by school administrators.¹⁵¹ While data on arrests of

143. TEST, PUNISH, AND PUSH OUT, *supra* note 112, at 10.

144. LOSEN & SKIBA, *supra* note 30, at 13.

145. Lisa H. Thureau & Johanna Wald, *Controlling Partners: When Law Enforcement Meets Discipline in Public Schools*, 54 N.Y.L. SCH. L. REV. 977, 978 (2009-2010). In addition to the implementation of zero-tolerance and fear over high-profile schools shootings like that at Columbine High School in 1999, the increase in SROs can be traced to federal funding for school officers through the COPS program; *see also* TEST, PUNISH, AND PUSH OUT, *supra* note 112, at 15 (noting that between 1999 and 2005, for example, the percent of students between the ages of twelve and fifteen attending a school with a police officer or security guard increased 50%).

146. TEST, PUNISH, AND PUSH OUT, *supra* note 112, at 15.

147. *Id.*

148. *See* EDUCATION ON LOCKDOWN, *supra* note 22, at 11; KUPCHIK, *supra* note 18, at 15 (noting that the Centers for Disease Control reported that in 1996, there was a one in a million chance that a student would be killed or commit suicide in or near school; in 2005, that number was one in 3.2 million).

149. *See* RACHEL DINKES ET AL., U.S. DEP’T OF EDUC. & U.S. DEP’T OF JUSTICE, NCES 2008-021/NCJ 219553, INDICATORS OF SCHOOL CRIME AND SAFETY: 2007 6 (2007).

150. Krezmien et al., *supra* note 18, at 274.

151. Thureau & Wald, *supra* note 145, at 978; *see also* ADVANCEMENT PROJECT, OPPORTUNITIES SUSPENDED: THE DEVASTATING CONSEQUENCES OF ZERO-TOLERANCE AND SCHOOL DISCIPLINE 1, 13-15 (July 15, 2002), available at <http://www.advancementproject.org/sites/default/files/publications/opsusp.pdf>; KUPCHIK, *supra* note 18, at 85 (“[S]chool resource officers often look for ways to redefine misbehavior as criminal, even when the label doesn’t apply.”); Marsha L. Levick & Robert G. Schwartz, *Changing the Narrative: Convincing Courts to Distinguish be-*

students at school are not regularly reported,¹⁵² the available data suggest that surveillance at school is associated with more student arrests¹⁵³ and that large numbers of youth are being referred for minor, not serious, offenses.¹⁵⁴ A recent longitudinal study of SROs revealed that between 1995 and 2004, in four of five states studied, the proportion of juvenile court referrals from schools increased.¹⁵⁵ The researchers found “a strong possibility that schools are using the juvenile courts to handle school misbehavior without consideration of the negative and deleterious effects on children or the juvenile delinquency system.”¹⁵⁶

Again, students of color are disproportionately impacted. SROs are most likely to be found in schools in urban neighborhoods with high poverty,¹⁵⁷ and many schools in low-income communities of color¹⁵⁸ physically resemble prisons, with fortress-like layouts, metal detectors, video surveillance cameras, security check points, and drug-

tween Misbehavior and Criminal Conduct in School Referral Cases, 9 U.D.C. L. REV. 53 (2007); Skiba et al., *supra* note 18, at 76.

152. JOHANNA WALD & LISA THURAU, CHARLES HAMILTON HOUSTON INST. FOR RACE & JUSTICE, *FIRST DO NO HARM: HOW EDUCATORS AND POLICE CAN WORK TOGETHER MORE EFFECTIVELY TO PRESERVE SCHOOL SAFETY AND PROTECT VULNERABLE STUDENTS 2* (2010), available at <http://www.charleshamiltonhouston.org/assets/documents/news/FINAL%20Do%20No%20Harm.pdf>.

153. See ACLU OF N. CAL., *BALANCING THE SCALES OF JUSTICE: AN EXPLORATION INTO HOW LACK OF EDUCATION, EMPLOYMENT, AND HOUSING OPPORTUNITIES CONTRIBUTE TO DISPARITIES IN THE CRIMINAL JUSTICE SYSTEM* iii (2010) [hereinafter *BALANCING THE SCALES OF JUSTICE*] (explaining that students who have law enforcement presence on campus are more likely to be arrested, arrested at a young age, expelled, and suspended); CLAYTON CNTY. PUB. SCH., *BLUE RIBBON COMMISSION ON SCHOOL DISCIPLINE: EXECUTIVE REPORT 47* (2007), available at <http://www.clayton.k12.ga.us/departments/studentservices/handbooks/BlueRibbonExecutiveReport.pdf> (attributing a jump in school-referred delinquency cases in Clayton County, Georgia, from ninety in 1996 to twelve hundred in 2004 to the presence SROs at schools); ELORA MUKHERJEE, N.Y. CIV. LIB. UNION, *CRIMINALIZING THE CLASSROOM: THE OVER-POLICING OF NEW YORK CITY SCHOOLS 17-18* (March 2007), available at http://www.nyclu.org/pdfs/criminalizing_the_classroom_report.pdf.

154. See *EDUCATION ON LOCKDOWN*, *supra* note 22, at 15, 32. For example, of the 4002 students in the Houston Independent School District arrested in 2002, 17% were for minor offenses such as disruption, and 26% were for disorderly conduct. In the Chicago Public Schools in 2003, approximately 40% of these 8500 student arrests were for simple assault or battery, which typically involve minor scuffles; *TEST, PUNISH, AND PUSH OUT*, *supra* note 112, at 18 (explaining that during the 2007-2008 school year, 69% of Florida student arrests on campus were for misdemeanor offenses).

155. Krezmien et al., *supra* note 18, at 286.

156. *Id.* at 290 (noting that such practice “unduly burdens the police, the juvenile courts, and the juvenile corrections systems”).

157. Hirschfield, *supra* note 119.

158. *Id.* at 38, 49 (“[U]rban schools composed largely of minority students make up 14% of the nation’s middle and high schools yet represent 75% of the surveyed middle and high schools that scan students daily with metal detectors.”); see also *TEST, PUNISH, AND PUSH OUT*, *supra* note 112, at 16; Payne & Welch, *supra* note 106, at 28-29.

sniffing dogs.¹⁵⁹ The vague nature of many delinquent offenses also makes students of color particularly susceptible to racially disparate enforcement. For instance, African-American students are frequently punished for being insubordinate, disrespectful to authority, or threatening, all of which resemble “stereotypes of African Americans as aggressive and disorderly.”¹⁶⁰ Indeed available data suggest that students of color (as well as low-income students and students with disabilities) are often disproportionately arrested at schools¹⁶¹ even though they are not likely to commit more offenses.¹⁶²

C. The Role of Juvenile Courts in Criminalizing Students

Schools would not be able to continue having youth arrested and referred to juvenile courts if the courts were not willing to accept these cases, yet juvenile courts regularly hear cases originating from schools for offenses like “disorderly conduct” and “disturbing the peace.”¹⁶³ The vague nature of such laws allows even the most common of adolescent behaviors to be re-categorized as a crime.¹⁶⁴ As the Advancement Project points out, “fighting in the hallway becomes a ‘battery’ or even ‘aggravated battery’; swiping a classmate’s headphones can be classified as ‘theft’ or ‘robbery’; and talking back to an officer or a teacher is ‘disorderly conduct.’”¹⁶⁵ Some states have even created new categories of delinquent offenses that are specific to

159. See KUPCHIK, *supra* note 18, at 14-15 (noting that 41% of middle schools and 61% of high schools used drug-sniffing dogs at least once during 2005-2006); TEST, PUNISH, AND PUSH OUT, *supra* note 112, at 4, 16 (“In New York City, on any given day, over ninety-three thousand children—predominantly students of color—have to pass through security stations with metal detectors, bag-searches, and pat-downs administered by police personnel before getting to class.”); HIRSCHFELD, *supra* note 119, at 3 (noting that between 1999 and 2006, the percentage of schools nationwide using one or more video surveillance cameras increased from 19% to 43%).

160. See KUPCHIK, *supra* note 18, at 163, 183.

161. Thureau & Wald, *supra* note 145, at 980; see also BALANCING THE SCALES OF JUSTICE, *supra* note 153, at 6.

162. See EDUCATION ON LOCKDOWN, *supra* note 22, at 8; MUKHERJEE, *supra* note 153, at 20; Skiba, *supra* note 133 (“If anything, African-American students appear to receive more severe school punishments for less severe behavior.”); see also TEST, PUNISH, AND PUSH OUT, *supra* note 112, at 15 (explaining that, for instance, African-American students in Florida were 2½ times as likely as their white peers to be arrested and referred to the juvenile justice system in 2007-2008; that African-American students in Colorado were twice as likely, and Latino students 50% more likely, than white students to be arrested; and that in Philadelphia, African-American students were 3½ times, and Latinos were 60% more likely, to be arrested than whites).

163. EDUCATION ON LOCKDOWN, *supra* note 22, at 15.

164. See TEST, PUNISH, AND PUSH OUT, *supra* note 112, at 6.

165. *Id.* at 16.

school misconduct.¹⁶⁶ In these states, students can be prosecuted for delinquent offenses such as “disrupting classes, talking back to teachers, and loitering or trespassing on school grounds.”¹⁶⁷ At least fourteen states have laws that criminalize “disturbing schools,” which can be “interpreted so broadly as to include almost any student misbehavior.”¹⁶⁸ Treating such behaviors as criminal goes against developmental psychology research showing that during adolescence, “youth can be expected to challenge authority, whether at home, or at school, and do not consistently exercise good judgment.”¹⁶⁹ In fact, delinquent conduct is a normal part of adolescence, and most youth will “age out” of delinquency without any intervention.¹⁷⁰

Once youth become involved in the court system, they often unnecessarily penetrate to the deep end of the system. Court orders can set up youth on probation to fail.¹⁷¹ For instance, it is typical for youth who are referred to the court system for truancy to be put on probation with the condition that they attend school regularly.¹⁷² Because juvenile justice systems often lack adequate rehabilitative services,¹⁷³ the underlying reasons that drove the student to skip school in the first place might remain unaddressed. When this happens, the chances are good that the student will skip school again. This only pushes the youth deeper into the system and, in many states, can re-

166. See generally Julius Menacker & Richard Mertz, *State Legislative Responses to School Crime*, 85 EDUC. L. REP. 1 (1993) (reviewing state statutes in thirty-six states relating to school crime specifically).

167. KIM, LOSEN & HEWITT, *supra* note 22, at 122-23.

168. Thureau & Wald, *supra* note 145, at 979 n.6; see also CATHERINE Y. KIM & I. INDIA GERONIMO, ACLU, POLICING IN SCHOOLS: DEVELOPING A GOVERNANCE DOCUMENT FOR SCHOOL RESOURCE OFFICERS IN K-12 SCHOOLS 1, 8-9 (2009), available at http://www.aclu.org/pdfs/racialjustice/whitepaper_policingschools.pdf (noting that disturbing schools was the most common offense in South Carolina’s juvenile courts in 2007-2008).

169. LOSEN & SKIBA, *supra* note 30, at 11.

170. See Moffitt, *supra* note 17 (explaining that the majority of youth who engage in delinquent behavior will desist from such behavior as they mature); see also Scott & Steinberg, *Social Welfare and Fairness in Juvenile Crime Regulation*, *supra* note 85, at 39.

171. See Megan M. Sulok, *Extended Jurisdiction Juvenile Prosecutions: To Revoke or Not to Revoke*, 39 LOY. U. CHI. L.J. 215, 270 (2007) (“If a judge merely gives a juvenile a laundry list of probation conditions to accomplish, he is setting the juvenile up for failure.”).

172. See, e.g., BLUEPRINT FOR KY. CHILD., REDUCING THE USE OF DETENTION FOR STATUS OFFENSES IN KENTUCKY 8 (2009), available at www.kyouth.org/documents/09brief_StatusOffensesFinal2.pdf.

173. Peter Greenwood, *Prevention and Intervention Programs for Juvenile Offenders*, 18 FUTURE OF CHILD., no. 2, 2008 at 205, available at http://futureofchildren.org/publications/docs/18_02_09.pdf (“Only about [five] percent of the youth who could benefit from [evidence-based] programs now have the opportunity to do so. Juvenile justice options in many communities remain mired in the same old tired options of custodial care and community supervision.”).

sult in incarceration for violating the judge's order. Court involvement becomes another, high-stakes means of surveillance rather than a way to rehabilitate youth.

III. PATERNALISM, DIMINISHED RIGHTS, AND THE HYDRAULICS OF PUNISHMENT

Two factors make it particularly difficult to challenge the punitive treatment of youth of color by both the education and the justice systems.¹⁷⁴ First, youth generally have fewer rights than adults both at school and in juvenile court.¹⁷⁵ Second, the “symbiotic relationship”¹⁷⁶ that has developed between the education and justice systems has meant that challenging policies in just one system or the other is not likely to fully address the problems that have been created by mass incarceration.

A. Paternalism to Justify Diminished Rights

The longstanding paternalism towards youth under the law makes them particularly vulnerable to governmental overreaching. First, through compulsory attendance laws, the state requires that youth attend school, under threat of punishment.¹⁷⁷ Then, once at school, the state subjects these students to heavy surveillance and punitive discipline regimes, punishing them for rather typical adolescent behaviors. Though students are vulnerable to referral to the justice system, their rights in the school setting are generally diminished.¹⁷⁸ As a result of all these factors, it is arguably easy for law enforcement to use the school setting to round up youth and label them as “criminal.”

Of particular relevance is the law pertaining to students' rights in the context of school searches and interrogations. In *New Jersey v. T.L.O.*, the Supreme Court held that the Fourth Amendment prohibition on searches and seizures applies in school settings. Under *T.L.O.*, however, school personnel acting on their own initiative need

174. For a comprehensive overview of legal theories to challenge various aspects of the school to prison pipeline, see KIM, LOSEN & HEWITT, *supra* note 22.

175. *See supra* note 16.

176. Smith, *supra* note 6, at 1011 (citing Wacquant, *supra* note 45, at 108).

177. *See* NAT'L CTR. FOR SCH. ENGAGEMENT, COMPULSORY ATTENDANCE LAWS BY STATE (2003), available at <http://www.schoolengagement.org/TruancyPreventionRegistry/Admin/Resources/Resources/15.pdf>.

178. *See* Dennis D. Parker, *Discipline in Schools after Safford Unified School District #1 v. Redding*, 54 N.Y.L. SCH. L. REV. 1023, 1024 (2009-2010); Susan Stuart, *In Loco Parentis in the Public Schools: Abused, Confused, and in Need of Change*, 78 U. CIN. L. REV. 969, 969 (2010).

only have reasonable suspicion that a *school rule has been violated*, rather than meeting the stricter standard that applies to law enforcement who must have probable cause *that a crime has been committed* to conduct a search.¹⁷⁹ Thus, a school official can search a student if there are “reasonable grounds for suspecting that the search will turn up evidence that the student has violated . . . either the law or the rules of the school” and the measures used are “reasonably related to the objectives of the search and not excessively intrusive in light of the age and sex of the student and the nature of the infraction.”¹⁸⁰ In contrast, outside law enforcement who enter the school to investigate a crime and initiate a search are bound by the stricter probable cause standard and cannot “circumvent” the standard by asking school officials to conduct the search for them.¹⁸¹ Courts differ as to what standard applies to searches conducted by SROs. Several lower courts have found that SROs must only meet the reasonable suspicion standard, reasoning that SROs are more closely connected to the school than the police department, while other courts treat SROs like other law enforcement and require they meet the probable cause standard.¹⁸²

In addition, students’ rights with respect to school interrogations are also diminished. The Supreme Court has not yet addressed the applicability of *Miranda v. Arizona*¹⁸³ in the school context, although at the time of this writing the Court had decided to hear a case concerning a 13-year-old student interrogated by police at school.¹⁸⁴ State courts have found *Miranda* applies in certain school situations; some lower state courts have found that *Miranda* applies when an

179. *New Jersey v. T.L.O.*, 469 U.S. 325 (1985). *But see* Josh Kagan, *Reappraising T.L.O.’s “Special Needs” Doctrine in an Era of School-Law Enforcement*, 33 J. L. & EDUC. 291 (2004) (questioning the continued applicability of *T.L.O.* given the expansion of police presence on campuses in recent years); Paul Holland *Schooling Miranda: Policing Interrogation in the Twenty-First Century Schoolhouse*, 52 LOYOLA L. REV. 39, 41 (2006) (arguing that “modern school-policing practices have undermined *T.L.O.*’s continued vitality”).

180. *T.L.O.*, 469 U.S. at 342. *But see* *Safford Unified Sch. Dist. No. 1 v. Redding*, 129 S.Ct. 2633 (2009) (holding a strip search of a thirteen-year-old student alleged to have possessed pain killers unconstitutional).

181. *See* KIM, LOSEN & HEWITT, *supra* note 22, at 121.

182. *Id.*; *see, e.g., In re William V.*, 111 Cal. App. 4th 1464, 1469-71 (2003); *Florida v. D.S.*, 685 So. 2d 41, 43 (Fla. Dist. Ct. App. 1996); *T.S. v. Indiana*, 863 N.E.2d 362, 371, 375 (Ind. App. 2007); *People v. Dilworth*, 661 N.E.2d 310, 317 (Ill. 1996); *Commonwealth v. J.B.* 719 A.2d 1058, 1066 (Pa. Super. Ct. 1998). *But see* *Georgia v. Scott*, 630 S.E.2d 563 (Ga. Ct. App. 2006) (holding that a school resource officer is considered a law enforcement officer for Fourth Amendment purposes).

183. 384 U.S. 436 (1966).

184. *See* *J.D.B. v. North Carolina*, 131 S.Ct. 502 (2010).

SRO or police officer alone conducts a custodial interrogation.¹⁸⁵ Generally, school officials acting alone do not have to comply with *Miranda*.¹⁸⁶ Jurisdictions vary as to what the applicable law is when school personnel and law enforcement work together to interrogate a student.¹⁸⁷ Some lower courts consider whether the school administrator was acting at the behest of law enforcement, or law enforcement controlled the investigation, while others do not.¹⁸⁸

Once youth are referred to juvenile court, they also possess fewer rights than adults in criminal court. Since their inception, juvenile courts have been characterized by a paternalistic philosophy that justifies denying due process rights to youth in the name of serving their best interests.¹⁸⁹ In the 1967 case *In re Gault*, the Supreme Court held that youth have a constitutional right to counsel in delinquency cases under the Fourteenth Amendment Due Process Clause. (The Court also held that youth have the right to notice of the charges and to confront and cross-examine witnesses, as well as the privilege against

185. KIM, LOSEN & HEWITT, *supra* note 22, at 120; *see also In re Interest of C.H.*, 763 N.W.2d 708 (Neb. 2009) (holding that *Miranda* applied when law enforcement questioned student in principal's office); *In re R.H.*, 791 A.2d 331, 333-34 (Pa. 2002) (finding custodial interrogation when SRO conducted the interrogation); *In re D.A.R.*, 73 S.W.3d 505, 512-13 (Tex. App. 2002) (finding that *Miranda* applied to SRO interrogation); *see also Holland*, *supra* note 179.

186. KIM, LOSEN & HEWITT, *supra* note 22, at 118; *see, e.g., In re Navajo Cnty. Juvenile Action No. JV91000058*, 901 P.2d 1247, 1249 (Ariz. Ct. App. 1995); *People v. Pankhurst*, 848 N.E.2d 628, 636 (Ill. App. 2006); *People v. Shipp*, 239 N.E.2d 296, 298 (Ill. App. 1968); *Commonwealth v. Ira I.*, 791 N.E.2d 894, 901 (Mass. 2003); *see also Pollnow v. Glennon*, 594 F. Supp. 220, 224 (S.D.N.Y. 1984), *aff'd*, 757 F.2d 496 (2d Cir. 1985).

187. KIM, LOSEN & HEWITT, *supra* note 22, at 120; *see, e.g., M.H. v. Florida*, 851 So. 2d 233 (Fla. Dist. Ct. App. 2003) (finding that SRO's mere presence does not amount to custodial interrogation requiring *Miranda* warnings where SRO escorted a seventh grader to a school official's office, school official interrogated student, and SRO asked only one question); *In re J.C.*, 591 So. 2d 315, 316 (Fla. Dist. Ct. App. 1991) (finding no custodial interrogation in a situation in which an assistant principal questioned student in front of SRO and SRO might have asked a couple questions but SRO involvement was *de minimis*); *J.D. v. Commonwealth*, 591 S.E.2d 721, 725 (Va. Ct. App. 2004) (explaining that where SRO is present but silent while associate principal questioned student, *Miranda* warnings not required because SRO did not direct questioning and student was not in custody); *see also 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, 560 (2009).

188. *See KIM, LOSEN & HEWITT, supra* note 22, at 120. 22, at 120; *see, e.g., New Hampshire v. Tinkham*, 719 A.2d 580, 583-84 (N.H. 1998) (holding that *Miranda* warnings are not required where the school official is not acting as an instrument or agent of police); *see also State v. J.T.D.*, 851 So. 2d 793, 796 (Fla. Dist. Ct. App. 2003) (same); *In re Welfare of G.S.P.*, 610 N.W.2d 651 (Minn. Ct. App. 2000) (finding custodial interrogation existed where a school official and school liaison officer questioned a student together); *New Hampshire v. Heirtzler*, 789 A.2d 634 (N.H. 2002) (finding an agency relationship between school officials and law enforcement); *In re W.R.*, 675 S.E.2d 342, 344 (N.C. 2009).

189. *See Katayoon Majd & Patricia Puritz, The Cost of Justice: How Low-income Youth Continue to Pay the Price of Failing Indigent Defense Systems*, 16 GEO. J. ON POVERTY L. & POL'Y 543, 553-56 (2009).

self-incrimination.)¹⁹⁰ In practice, however, though more than four decades have passed since *Gault* was decided, youth are regularly denied effective assistance of counsel in delinquency courts across the nation.¹⁹¹ In addition, youth are sometimes coerced into pleading guilty in order to avail themselves of the services of the juvenile court system.¹⁹² The irony, of course, is that in many instances, the juvenile justice system fails to provide meaningful rehabilitative services.¹⁹³ Moreover, the Supreme Court has held there is no federal constitutional right to a jury trial in delinquency cases,¹⁹⁴ and most states deny youth a right to jury trial.¹⁹⁵ The Court has also upheld the constitutionality of preventive detention of youth in delinquency cases.¹⁹⁶

Barriers to legal remedies also exist for youth who want to challenge their exclusions from schools and referrals to juvenile court. Even though research indicates that suspensions and expulsions do not reduce school behavior problems,¹⁹⁷ courts will typically defer to schools' decisions about how to maintain a safe learning environment.¹⁹⁸ As long as schools can justify the discipline decision "by a legitimate educational interest," a student is unlikely to win a challenge to a discipline decision.¹⁹⁹ In addition, the intent standard in Equal Protection doctrine, as well as case law regarding Title VI of the Civil Rights Act of 1964, has erected a formidable barrier for youth

190. *In re Gault*, 387 U.S. 1 (1967).

191. See Patricia Puritz et al., *A Call for Justice: An Assessment of Access to Counsel and Quality of Representation in Delinquency Proceedings*, ABA JUVENILE JUSTICE CTR. 1, 3 (1995), available at <http://www.njdc.info/pdf/cfjfull.pdf> (providing a nationwide assessment of juvenile indigent defense representation); see also *Assessments*, NAT'L JUVENILE DEFENDER CTR., <http://www.njdc.info/assessments.php> (last visited Jan. 3, 2010).

192. Patricia Puritz & Katayoon Majd, *Ensuring Authentic Youth Participation in Delinquency Cases: Creating a Paradigm for Specialized Juvenile Defense Practice*, 45 FAM. CT. REV. 466, 472 (2007).

193. FED. ADVISORY COMM. ON JUVENILE JUSTICE, ANNUAL REPORT 26 (2008) [hereinafter FEDERAL ADVISORY COMM. ON JUVENILE JUSTICE], available at <http://www.facjj.org/annualreports/FACJJ%20Annual%20Report%202008.pdf> (quoting ABA's Presidential Working Group on the Unmet Legal Needs of Children and their Families); Greenwood, *supra* note 173 ("Only about [five] percent of the youth who could benefit from [evidence-based] programs now have the opportunity to do so. Juvenile justice options in many communities remain mired in the same old tired options of custodial care and community supervision.").

194. *McKeiver v. Pennsylvania*, 403 U.S. 528, 550 (1971).

195. Barry C. Feld, *The Constitutional Tension Between Apprendi and McKeiver: Sentence Enhancements Based on Delinquency Convictions and the Quality of Justice in Juvenile Courts*, 38 WAKE FOREST L. REV. 1111, 1114 (2003).

196. *Schall v. Martin*, 467 U.S. 253 (1984).

197. Skiba, Eckes & Brown, *supra* note 7, at 1074.

198. *Id.* at 1080.

199. *Id.* But see Parker, *supra* note 178, at 1027 (explaining that the recent *Redding v. Safford* decision "signals a willingness of the Court to subject decisions of school to some level of scrutiny").

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who believe that they have experienced racially discriminatory school discipline decisions and juvenile court involvement.²⁰⁰

Thus, students of color are, in many respects, at the mercy of two very powerful systems—the education and justice systems—which have chosen to adopt policies that are both counterproductive and harmful. Students are forced by law to go to school; at school, they are closely watched, searched and interrogated without the same constitutional protections afforded to adults. They are deemed criminal for even the most typical of adolescent behaviors. Once referred to juvenile court, they are likely to be denied their constitutional right to counsel and subjected to a system, rehabilitative in name, but actually quite punitive in function. And if they feel their rights have been violated, the courthouse door is often effectively shut to them. It is difficult to imagine a better system for efficiently targeting young people of color and ushering them into the mass incarceration system.

B. The Hydraulics of Punishment

The effective collaboration between the education and justice systems, both of which are characterized by a deeply engrained punitive culture, is hard to challenge piecemeal. If one avenue of punishment is shut off, it is likely that a new outlet for punishment will be created. For example, the federal Individuals with Disabilities Education Act (“IDEA”) provides rights and entitlements to youth with disabilities who are in need of special education and places certain restrictions on the suspension and expulsion of youth with special education needs.²⁰¹ In 1994, a Tennessee federal district court held that a school system violated a special education student’s rights when it referred that student to juvenile court without providing the due process protections required under IDEA when a special education student faces a “change in placement.”²⁰² In response, Congress subsequently amended the IDEA to explicitly state that schools are not prohibited from referring a student with disabilities to juvenile court.²⁰³ Although a school cannot use juvenile court referrals as a way to circum-

200. Skiba, Eckes & Brown, *supra* note 7, at 1109.

201. 20 U.S.C. § 1400 et seq. (West 2007 & Supp. 2010).

202. *Morgan v. Chris L.*, 927 F. Supp. 267, 270-271 (E.D. Tenn. 1994), *aff’d*, 106 F.3d 401 (6th Cir. 1997) (unpublished table decision), *cert. denied*, 520 U.S. 1271 (1997).

203. See 20 U.S.C. §1415(k)(6)(A) (2006); KIM, LOSEN & HEWITT, *supra* note 22, at 132-33; Dean Hill Rivkin, *Decriminalizing Students with Disabilities*, 54 N.Y.L. SCH. L. REV. 909, 935-38 (2009-10).

vent its obligations under the IDEA,²⁰⁴ commentators have noted that schools are doing just and that the 1997 IDEA amendments have led to an increased reliance on juvenile courts to handle misbehavior by students with disabilities.²⁰⁵ This example shows just how difficult it is to change—with one successful lawsuit or policy victory—a punitive culture that does not respect the individual dignity of the most disadvantaged students.²⁰⁶ Without a more holistic restructuring of the system of laws and policies that support mass incarceration, as well as a significant challenge to the racialization and politicization of crime that gave rise to the system, isolated policy wins might merely lead to the adoption of a new and different mechanism for pushing youth out of schools and into the justice system.²⁰⁷

IV. THE NEGATIVE IMPACTS OF THE PUNITIVE REGIME AT SCHOOL AND IN COURT

The adoption of criminal justice philosophies and practices by schools has had several negative impacts.²⁰⁸ It has exacerbated racial inequities in education by leading to decreased educational opportuni-

204. KIM, LOSEN & HEWITT, *supra* note 22, at 132-33; Rivkin, *supra* note 203, at 937.

205. Rivkin, *supra* note 203, at 939-40.

206. See also Lucie E. White, *To Learn and Teach: Lessons from Driefontein on Lawyering and Power*, 1988 WIS. L. REV. 699, 749 (1988) (noting the difficulty of changing “institutional structures and cultural patterns” and explaining, “a coalition of civil rights groups might succeed in getting a legislature to make housing discrimination illegal. Yet in spite of this formal victory, the actual practice of residential discrimination might persist for years. A judge might find that an agency is out of compliance with the law in its day-to-day practices toward the poor. Yet institutional and cultural factors may nonetheless prevent that judge from devising a remedy that will solve the problem.”). See generally Thomas B. Stoddard, *Bleeding Heart: Reflections on Using the Law to Make Social Change*, 72 N.Y.U. L. REV. 967, 978 (1997) (identifying four factors that must be in place in order for a new law to change culture rather than just create a new rule; these include the following: “(1) A change that is very broad or profound; (2) Public awareness of that change; (3) A general sense of the legitimacy (or validity) of the change; and (4) Overall, continuous enforcement of the change”).

207. See ALEXANDER, *supra* note 41, at 221 (“The notion that all of these reforms can be accomplished piecemeal—one at a time, through disconnected advocacy strategies—seems deeply misguided.”).

208. The American Bar Association and the American Psychological Association have taken positions against zero-tolerance policies. For information about the ABA position, see AM. BAR ASS’N, ABA JUVENILE JUSTICE POLICIES: ZERO TOLERANCE POLICY (2000), available at <http://www.abanet.org/crimjust/juvjus/zerotolreport.html>; ABA Opposes “Zero Tolerance” in Schools, ABC NEWS, <http://abcnews.go.com/US/story?id=94043&page=1> (last visited Jan. 27, 2011). For the American Psychological Association’s recommendations on zero-tolerance, see Skiba et al., *supra* note 18, 854. In addition, the National Council of Juvenile and Family Court Judges called on juvenile court judges to work with school systems to keep student misbehaviors out of courts. NAT’L COUNCIL OF JUVENILE & FAMILY COURT JUDGES, JUVENILE DELINQUENCY GUIDELINES: IMPROVING COURT PRACTICE IN JUVENILE DELINQUENCY CASES 190 (2005), available at <http://www.ncjfcj.org/images/stories/dept/ppcd/pdf/JDG/juveniledelinquencyguidelinescompressed.pdf>.

ties and more negative school climates. In addition, it has limited the employment prospects and damaged the health and psychological well-being of students, while undermining the students' respect for the law. Ultimately, these factors place youth at greater risk for future criminal justice involvement. Thus, the punitive policies of the schools and juvenile courts merely facilitate, rather than prevent, the eventual entry of many students of color into the adult criminal justice system.

A. Harms of Punitive and Exclusionary School Policies

Without addressing the issues underlying students' behaviors, school exclusion only harms students' academic and employment prospects.²⁰⁹ Exclusion from school—whether by suspension, expulsion or arrest—means youth are spending less time in class, which contributes to any educational disadvantage they are already experiencing.²¹⁰ Students who are excluded from school are more likely to perform poorly academically,²¹¹ drop out or fail to graduate on time.²¹² Schools with high suspension rates also have poorer standardized achievement test scores.²¹³

In addition, research has shown that zero-tolerance policies are counterproductive in terms of improving student behavior.²¹⁴ In fact, school exclusion policies are likely to exacerbate the very behavior problems they are supposed to address.²¹⁵ At least one study has found that measures like SROs, metal detectors, or zero-tolerance policies may actually be associated with increased levels of disorder in a school.²¹⁶ And once youth are excluded from school, they become *more* likely to enter the juvenile justice system.²¹⁷

209. KUPCHIK, *supra* note 18, at 8; LOSEN & SKIBA, *supra* note 30, at 11 (describing that exclusionary disciplinary tactics increase students' risk of education failure and drop out and do not "better prepare students for adulthood").

210. See Payne & Welch, *supra* note 106, at 41.

211. Krezmien et al., *supra* note 18, at 274.

212. Skiba et al., *supra* note 18, at 854.

213. Skiba, Eckes & Brown, *supra* note 7, at 1078.

214. Skiba et al., *supra* note 18, at 854, 857, 860.

215. KUPCHIK, *supra* note 18, at 4-9; TEST, PUNISH, AND PUSH OUT, *supra* note 112, at 17; Krezmien et al., *supra* note 18, at 274; Skiba, Eckes & Brown, *supra* note 7, at 1077 (noting that "suspension functions as a reinforcer . . . rather than as a punisher" of misbehavior).

216. Krezmien et al., *supra* note 18, at 274.

217. See Joseph C. Gagnon & Peter E. Leone, *Alternative Strategies for School Violence Prevention in NEW DIRECTIONS FOR YOUTH DEVELOPMENT* 101 (2002), available at <http://digilib.gmu.edu:8080/xmlui/bitstream/1920/277/1/alternative%2520strategies%2520for%2520school%2520violence.pdf>.

Similarly, studies show that high rates of suspensions, expulsions, and law enforcement surveillance at school are associated with less satisfactory school climates.²¹⁸ Rather than making youth feel safe, SROs seem to have the opposite effect.²¹⁹ A national study found that SROs “can contribute to a climate of anxiety and stress for both teachers and students while doing little to prevent violence.”²²⁰ Another study found that students view school police as more threatening than gang members or bullies.²²¹ The researchers explained that “[p]olice in schools may provide a psychological benefit for administrators, staff, parents, and the adult public; however, their presence may pose a psychological threat to students.”²²²

B. Harms of Juvenile Court Involvement

Referring youth to the juvenile justice system compounds the disadvantages associated with school suspensions and expulsions. For example, a first-time arrest during high school nearly doubles the odds that a youth will drop out of high school; if the arrest results in a court appearance, it nearly quadruples the odds the youth will drop out.²²³ In addition, a juvenile adjudication brings with it many collateral consequences that can follow youth into adulthood including: the denial of certain educational and employment opportunities; bars on military service, student loans, and public housing;²²⁴ sex offender registration requirements for certain offenses;²²⁵ negative immigration conse-

218. TEST, PUNISH, AND PUSH OUT, *supra* note 112, at 17; Skiba et al., *supra* note 18, at 854.

219. See TEST, PUNISH, AND PUSH OUT, *supra* note 112, at 17 (finding that 64% of New York City teachers reported that SROs rarely or never makes students feel safe, and only 6% believed that they always make students feel safe).

220. SULLIVAN & MORGAN, *supra* note 112, at 20.

221. Arrick Jackson, *Police-School Resource Officers' and Students' Perception of the Police and Offending*, 25 POLICING: AN INT'L J. OF POLICE STRATEGIES & MGMT. 631, 647 (2002).

222. *Id.*

223. Gary Sweeten, *Who Will Graduate? Disruption of High School Education by Arrest and Court Involvement*, 23 JUST. Q. 462, 473 (2006), available at http://www.masslegalservices.org/system/files/H.S.ed_and_arrest_-_ct_involvement_study_by_Sweeten.pdf.

224. Michael Pinard, *The Logistical and Ethical Difficulties of Informing Juveniles About the Collateral Consequences of Adjudications*, 6 NEV. L.J. 1111, 1114-15 (2006).

225. See *id.* at 1114; AMANDA PETTERUTI & NASTASSIA WALSH, JUSTICE POLICY INST., REGISTERING HARM: HOW SEX OFFENSE REGISTRIES FAIL YOUTH COMMUNITIES 9 (2008); see also Adam Walsh Child Protection and Safety Act of 2006, Pub. L. No. 109-248, 120 Stat. 587 (2006) (requiring certain youth convicted in criminal court or adjudicated in juvenile court to register as sex offenders).

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quences for non-citizen youth;²²⁶ and the use of adjudications to enhance sentences in future criminal cases.²²⁷

Once they enter the justice system, youth who are incarcerated rather than placed on probation face particularly devastating impacts. The quality of education that youth receive while incarcerated is typically abysmal,²²⁸ and approximately 66% of youth who leave juvenile justice facilities end up dropping out of school.²²⁹ However, the harms of incarceration extend well beyond education. Youth in detention and secure confinement facilities experience high rates of sexual abuse and a suicide rate four times greater than that of the general population.²³⁰ Once released, youth face discouraging odds. Compared with other groups of youth, incarcerated youth “will achieve less educationally, work less and for lower wages, fail more frequently to form enduring families, experience more chronic health problems (including addiction), and suffer more imprisonment.”²³¹

C. Impact on Legal Socialization

Unduly punitive responses to youth can also impact their views on the legal system, which in turn can affect their willingness to abide by society’s laws. During adolescence, youth undergo a process of legal socialization through which they develop their beliefs about the law, and negative experiences can affect their assessment of the legitimacy of the legal systems that affect them.²³² By exposing youth to severe consequences, such as juvenile court involvement for minor offenses, society merely diminishes the deterrent impact of these sanc-

226. See RANDY HERTZ ET AL., TRIAL MANUAL FOR DEFENSE ATTORNEYS IN JUVENILE COURT 276-78 (ALI-ABA, 2d ed. 2007).

227. *Id.*

228. See Peter E. Leone & Candace A. Cutting, *Appropriate Education, Juvenile Corrections, and No Child Left Behind*, 26 BEHAV. DISORDERS 260, 260 (2004) (“Historically, education programs in juvenile corrections have been underfunded and neglected by the larger education community.”); Peter E. Leone et al., *Organizing and Delivering Empirically Based Literacy Instruction to Incarcerated Youth*, 13 EXCEPTIONALITY 89, 90 (2005) (“Many correctional education programs lack the awareness and resources necessary to organize and deliver appropriate general, remedial, and special education services.”).

229. Feerman, Levick & Mody, *supra* note 20, at 1117.

230. See *Fast Facts*, NAT’L JUVENILE JUSTICE NETWORK, <http://njjn.org/fastfacts.html> (last visited Dec. 26, 2010).

231. A ROAD MAP FOR JUVENILE JUSTICE REFORM, *supra* note 73, at 1 (citing He Len Chung, Michelle Little & Laurence Steinberg, *The Transition to Adulthood for Adolescents in the Juvenile Justice System: A Developmental Perspective*, in ON YOUR OWN WITHOUT A NET: THE TRANSITION TO ADULTHOOD FOR VULNERABLE POPULATIONS 68 (D.Wayne Osgood et al. eds., 2005)).

232. Lee, Steinberg & Piquero, *supra* note 102, at 782.

tions²³³ and makes students less likely to abide by the rules set for them. Procedural justice research suggests that individuals are more likely to view law enforcement as legitimate if they feel that law enforcement treats them fairly; in addition, people who view law enforcement as legitimate are more likely to comply with the law.²³⁴ Individuals typically judge legitimacy by assessing the fairness of the decision-making process, rather than the ultimate outcome, based on factors such as whether their views were considered, authorities treated them with respect, and the decision-maker was impartial.²³⁵— These considerations are likely to be especially important to students of color since research has found that members of stigmatized groups place even more weight on procedural fairness.²³⁶

This research seems to suggest punitive policies on campus that are viewed as unfair or not “evenly applied” might lead youth to lose respect for the law,²³⁷ feel more alienated from adult society, and have a harder time transitioning to adulthood.²³⁸ Perceptions of unfairness or disrespect by law enforcement might also lead youth to disengage from the political process and might exacerbate racial tensions.²³⁹ In this way, racially disparate and excessively punitive school discipline policies can negatively impact student behavior and public safety over the long term.

D. Psychological Impacts of Labeling Students as Criminal

Perhaps one of the most damaging effects of the mass incarceration era is that the education and justice systems are teaching students

233. Price, *supra* note 187, at 560; *see also* Thureau & Wald, *supra* note 145, at 1015 (highlighting a study of SROs in Massachusetts found that “youth perceive that once they are before a judge in juvenile court, they have no incentive to behave well”).

234. Lee, Steinberg & Piquero, *supra* note 102, at 781.

235. Miriam Aroni Krinsky & Jennifer Rodriguez, *Giving a Voice to the Voiceless: Enhancing Youth Participation in Court Proceedings*, 6 NEV. L.J. 1302, 1303 (2006); *see* Jonathan D. Casper, Tom Tyler & Bonnie Fisher, *Procedural Justice in Felony Cases*, 22 LAW & SOC’Y REV. 483, 486-87, 496-98 (1988); E. Allan Lind, P. Christopher Earley & Ruth Kanfer, *Voice, Control, and Procedural Justice: Instrumental and Noninstrumental Concerns in Fairness Judgments*, 59 J. PERSONALITY & SOC. PSYCHOL. 952 (1990); Tom R. Tyler, *Procedural Justice, Legitimacy, and the Effective Rule of Law*, 30 CRIME & JUST. 283, 292-94 (2003); Tom R. Tyler, *The Psychological Consequences of Judicial Procedures: Implications for Civil Commitment Hearings*, 46 SMU L. REV. 433, 439-42 (1992); *see also* Tom R. Tyler, *What Is Procedural Justice?: Criteria Used By Citizens to Assess the Fairness of Legal Procedures*, 22 LAW & SOC’Y REV. 103, 117, 127-28 (1988).

236. Tyler, *Procedural Justice*, *supra* note 235, at 342-43.

237. KUPCHIK, *supra* note 18, at 4.

238. Fine et al., *supra* note 105, at 155.

239. *Id.*

devastating lessons about themselves.²⁴⁰ As Glenn Loury has argued, “for young African-American men, coercion is the most salient feature of their encounters with the American state.”²⁴¹ Through their policies and practices, schools are teaching many African-American students and other students of color that they are dangerous criminals, who do not belong and have little to contribute to society, and the justice system’s reaction only solidifies these damaging lessons.²⁴²

Labeling students as criminals creates a self-fulfilling prophecy.²⁴³ Students deemed by authorities to be defiant and difficult might internalize these labels and begin acting in ways that reflect the expectations society places on them.²⁴⁴ Pedro Noguera argues that those students most likely to internalize the labels are those “who are not receiving the benefits of an education. Once they know that the rewards of education—namely, acquisition of knowledge and skills and ultimately, admission to college, and access to good paying jobs—are not available to them, students have little incentive to comply with school rules.”²⁴⁵ Some African-American youth might also embrace the stigma of criminality that has been put on them by teachers and the police as “an attempt to carve out a positive identity in a society that offers them little more than scorn, contempt, and constant surveillance” even though “embracing criminality—while a natural response to the stigma—is inherently self-defeating and destructive.”²⁴⁶ Thus, by affecting how youth see themselves, the racialized punitive policies at school and in the justice system are only setting youth up to fail.

240. See Loury, *supra* note 9, at 137 (noting that punitive policies serve both instrumental and expressive goals).

241. *Id.*

242. See ALEXANDER, *supra* note 41, at 157-160 (“Practically from cradle to grave, black males in urban ghettos are treated like current or future criminals.”).

243. See Tamar R. Birckhead, *Toward a Theory of Procedural Justice for Juveniles*, 57 BUFF. L. REV. 1447, 1500-01 (2009); Noguera, *supra* note 30, at 343; Parker, *supra* note 178, at 1024; see also KUPCHIK, *supra* note 18, at 40 (noting that “if schools treat youth as potential criminals rather than worthy citizens, they might be weakening [the] bond” that ties individuals to their communities).

244. See Noguera, *supra* note 30, at 343.

245. *Id.* at 343.

246. ALEXANDER, *supra* note 41, at 166-67; see also BUTLER, *supra* note 14, at 131.

V. SCHOOLS AS CASUALTIES OF MASS INCARCERATION

In addition to contributing to the mass incarceration of people of color, schools are also, in some ways, casualties of it.²⁴⁷ Mass incarceration has meant that many students suffer the negative impacts of having a parent or guardian behind bars, and schools are often not prepared to understand and address their unique needs. In addition, school budgets have suffered, at least indirectly, as a result of the skyrocketing costs of corrections.

A. Students with Parents Behind Bars

The impacts of mass incarceration—which are concentrated among African-American men who have dropped out of high school—extend well beyond the individual who is imprisoned.²⁴⁸ New research by Bruce Western and Becky Pettit reveals that mass incarceration creates social inequality—the effects of which are cumulative (in that they exacerbate the disadvantage of the most marginalized men in society) and intergenerational (in that the social inequality is transmitted from one generation to the next).²⁴⁹ Parental incarceration can undermine family stability and exacerbate socioeconomic disadvantage.²⁵⁰ As such, mass incarceration merely exacerbates the very problems it is purported to control.²⁵¹ It is thus no accident that the lowest-performing schools tend to be located in communities with the highest incarceration rates.²⁵²

In particular, children stand to suffer a host of harms when their parents are incarcerated. One in every twenty-eight children (2.7 million children total) has a parent currently behind bars, and two-thirds of these children's parents are incarcerated for non-violent offenses.²⁵³ Approximately ten million children have a parent who previously has been incarcerated.²⁵⁴ In 2008, 11% of African-American children and 3.5% of Latino children had a parent who was incarcer-

247. See Nicole L. Bracy, *Circumventing the Law: Students' Rights in Schools with Police*, 26 J. CONTEMP. CRIM. JUST. 294, 296 (2010).

248. See Western & Pettit, *supra* note 20, at 11.

249. *Id.* at 18.

250. *Id.*

251. *Id.*

252. See Hawkins, *supra* note 25 (citing forthcoming research conducted by the NAACP).

253. PEW CHARITABLE TRUSTS, COLLATERAL COSTS: INCARCERATION'S EFFECT ON ECONOMIC MOBILITY 4 (2010) [hereinafter COLLATERAL COSTS], available at http://www.pewcenteronthestates.org/uploadedFiles/Collateral_Costs.pdf?n=8653.

254. Martin H. Pritikin, *Is Prison Increasing Crime?* 2008 WIS. L. REV. 1049, 1067 (2008).

ated.²⁵⁵ In contrast, 1.75% of white children had an incarcerated parent.²⁵⁶

The available research on this population of youth is cause for alarm. Children of incarcerated parents are at risk of school failure. One study of families with incarcerated mothers found that, in about 75% of these families, the children were at least one academic grade level behind,²⁵⁷ and children of incarcerated mothers were more likely to attend an alternative school because of pregnancy, truancy, or violence.²⁵⁸ In addition, 23% of children whose fathers have been in prison are suspended or expelled from school, making them almost six times as likely as their peers to face these disciplinary measures.²⁵⁹

Parental incarceration is also “a strong risk factor (and possible cause) for a range of adverse outcomes for children,” including antisocial behavior, mental health problems, drug abuse, and unemployment.²⁶⁰ Boys of incarcerated parents, in particular, are at greater risk of developmental delays and behavioral problems.²⁶¹ Researchers have also suggested that parental incarceration might cause a child to feel stigmatized at school and resentful of authority, which together can lead to the child engaging in delinquent behavior.²⁶² The link between parental incarceration and a child’s own future involvement in the juvenile and criminal justice systems is particularly striking and speaks to the intergenerational impacts of mass incarceration.²⁶³ In fact, up to 50% of youth incarcerated in the juvenile justice system have a parent who is, or has been, incarcerated.²⁶⁴ In addition, having an incarcerated parent in prison makes a child five times more likely than other children to serve time in prison.²⁶⁵

255. Western & Pettit, *supra* note 20, at 16.

256. *Id.*

257. Joseph Cudjoe & Tony A. Barringer, *More Than Mere Ripples: The Interwoven Complexity of Female Incarceration and the African-American Family*, 2 MARGINS 265, 278 (2002).

258. *Id.* at 279-80.

259. COLLATERAL COSTS, *supra* note 253, at 4 (citing a study finding that 23% of children with a father who has served time in a jail or prison have been expelled or suspended from school, compared with just 4% of children whose fathers have not been incarcerated).

260. Joseph Murray & David P. Farrington, *The Effects of Parental Imprisonment on Children*, 37 CRIME & JUST. 133, 135 (2008).

261. Western & Pettit, *supra* note 20, at 15.

262. Pritikin, *supra* note 254, at 1067.

263. Western & Pettit, *supra* note 20, at 18.

264. Pritikin, *supra* note 254, at 1067.

265. Nekima Levy-Pounds, *Can These Bones Live? A Look at the Impacts of the War on Drugs on Poor African-American Children and Families*, 7 HASTINGS RACE & POVERTY L.J. 353, 373 (2010).

Despite the multiple negative impacts that parental incarceration has on youth, many school systems are simply not equipped to identify and appropriately address the range of needs of children growing up with a parent behind bars.²⁶⁶ Thus, the unnecessary incarceration of people of color—which often is concentrated in certain geographic regions and thus in certain school districts²⁶⁷—unnecessarily makes the schools’ task of educating students more difficult and exposes youth to a range of harms that affect their educational outcomes and life chances.

B. State Spending Decisions: Corrections vs. Education

Education budgets are another casualty of mass incarceration. The United States spends an astounding \$70 billion a year on the costs of adult imprisonment, juvenile detention, and parole and probation supervision.²⁶⁸ As prison growth has exploded, the amount of money the country spends on corrections has more than quadrupled in the last twenty years.²⁶⁹ State spending on education, on the other hand, has not increased at the same rate as corrections spending.²⁷⁰ In 2008-2009, thirty-three states spent a larger proportion of their general funds (which are meant to pay for public services) on corrections than prior years; during that same time spending on K-12 and higher education decreased.²⁷¹ As Steven Hawkins of the NAACP explains, “[w]ith tens of billions of dollars in prison spending annually, states are finding that there is simply less discretionary money available to invest in education, especially in these lean economic times.”²⁷² For

266. *Id.* at 371; see also MARCY VIBOCH, VERA INST. OF JUSTICE., CHILDHOOD LOSS AND BEHAVIORAL PROBLEMS: LOOSENING THE LINKS 12 (2005), available at <http://www.vera.org/download?file=91/Childhood%2Bloss.pdf> (arguing that school officials “should be skilled at identifying and responding to misbehavior related to a loss,” such as parental incarceration, and “should develop systematic methods for of addressing loss”).

267. See Western & Pettit, *supra* note 20, at 18 (noting the spatial concentration of the impacts of incarceration).

268. Hawkins, *supra* note 25.

269. See THE LONG REACH OF AMERICAN CORRECTIONS, *supra* note 27, at 1; see also Solomon Moore, PEW CTR. FOR CHARITABLE TRUSTS (March 3, 2009), http://www.pewtrusts.org/news_room_detail.aspx?id=49802.

270. SARAH LYONS & NATSASSIA WALSH, JUSTICE POLICY INST., MONEY WELL SPENT: HOW POSITIVE SOCIAL INVESTMENTS WILL REDUCE INCARCERATION RATES, IMPROVE PUBLIC SAFETY, AND PROMOTE THE WELL-BEING OF COMMUNITIES 1, 9 (2010), available at http://justicepolicy.org/images/upload/10-09_REP_MoneyWellSpent_PS-DC-AC-JJ.pdf; THE LONG REACH OF AMERICAN CORRECTIONS, *supra* note 27, at 1 (describing that corrections spending growth outpaced budget increases of all other essential government services except Medicaid, including education).

271. Hawkins, *supra* note 25.

272. *Id.*

example, Florida, a state that spends less per capita on K-12 students than any other state, reduced its education budget by \$332 million in 2008, but increased the corrections budget by \$308 million that same year.²⁷³

In addition, choices about how to spend existing education funds are being made with crime control in mind. At a time when the quality of education many students receive is sorely inadequate, states are choosing to spend precious public education funds on policing and surveillance techniques that have been shown to be unnecessary or counterproductive rather than on resources, such as high-quality teachers, which are important for improving the quality of education students receive.²⁷⁴ As sociologist Aaron Kupchik argues, “Since most juvenile crime occurs away from school, it makes little sense to cut afterschool programs that have been repeatedly shown to reduce delinquency, or to add to the number of police officers in schools, a practice that has shown little evidence of success. And yet this is precisely what many communities in the United States have done.”²⁷⁵ Given that these measures have been shown through research to be counterproductive, money spent on these resources is simply being wasted.

VI. ADVANCING EDUCATIONAL EQUITY THROUGH A COLLABORATIVE REFORM AGENDA

Given the close connection between the education and justice systems, and the ways in which the systems impact each other, educational equity advocates would benefit from joining forces with justice system advocates to call for a holistic restructuring of the system of laws and policies that support mass incarceration. Currently, a moment of opportunity exists—created by the economic crisis and low crime rates—to advance meaningful criminal and juvenile justice reform. By working across their issue-specific silos to create a radical

273. LYONS & WALSH, *supra* note 270, at 9.

274. See generally Linda Darling-Hammond, *Teacher Quality and Student Achievement: A Review of State Policy Evidence*, EDUC. POL’Y ANALYSIS ARCHIVES, Jan. 1, 2000, at 1, available at <http://epaa.asu.edu/ojs/article/viewFile/392/515> (suggesting that state policies regarding teacher education, licensing, hiring, and professional development may make a difference in teacher qualifications and capabilities).

275. KUPCHIK, *supra* note 18, at 5; see also SULLIVAN & MORGAN, *supra* note 112, at 19 (illustrating that in 2006-2007, the New Orleans Recovery School District spent \$2100 per student on security alone); TEST, PUNISH, AND PUSH OUT, *supra* note 112, at 4 (highlighting that New York City spends more than \$221 million on police and security, which represents a 65% increase in spending since 2002).

shift in how society views issues of race, crime, and punishment, education and justice advocates have the greatest chance of promoting equity in both the education and justice systems.

A. Opportunities for Challenging the Mass Incarceration System

Despite the formidable challenges that dismantling the mass incarceration system presents, a few factors have converged to create opportunities to revamp how society handles youth who misbehave at school and those who commit crimes. First, crime rates are down,²⁷⁶ creating a more hospitable political environment for reform. Second, the costs of incarceration have become unsustainable; and given the serious budget deficits in the states, policymakers are now more willing than any other time in recent memory to consider adopting more cost-effective alternatives to incarceration for both adults and youth.²⁷⁷ (Of course, the budget deficit simultaneously serves as an obstacle to maintaining and promoting many progressive reforms, as legislators nationwide are looking for ways to cut costs and many have reduced spending for juvenile justice programs.)²⁷⁸ A third factor is the seemingly greater receptivity of courts and policymakers to acknowledge that youth are different from adults in ways that impact how society should respond to their offending behavior. Well-established developmental and brain research demonstrates that youth have diminished decision-making capacities that have significance in culpability determinations.²⁷⁹ In 2005, the United States Supreme Court relied on this research to hold in *Roper v. Simmons* that the

276. See TRUMAN & RAND, *supra* note 11 (noting that the overall violent crime rate has dropped steadily since 1994); see also SNYDER & SICKMUND, *supra* note 11 (finding that juvenile violent crime arrests have dropped consistently since 1994).

277. See LIPSEY ET AL., *supra* note 28, at 9 (“Large budget deficits have caused some states to rethink high juvenile confinement rates.”); Alexander, *supra* note 28 (“[A]t least eighteen legislatures have reduced or eliminated harsh mandatory minimum sentences, and more than two dozen have restored early-release programs and offered treatment instead of incarceration for some drug offenders.”); Ruiz, *supra* note 28 (explaining the fiscal crisis has caused “even the staunchest advocates of incarceration” to consider alternatives).

278. See NAT’L JUVENILE JUSTICE NETWORK, THE REAL COSTS AND BENEFITS OF CHANGE: FINDING OPPORTUNITIES FOR REFORM DURING DIFFICULT FISCAL TIMES 1 (2010) [hereinafter THE REAL COSTS AND BENEFITS OF CHANGE], available at http://njjn.org/media/resources/public/resource_1613.pdf (“Advocates have worked for years to achieve reform, only to see the fruit of their efforts disappear due to short-sighted funding concerns.”). For suggestions about how to advance juvenile justice reform in difficult economic times, see *id.* at 6-10.

279. See Elizabeth S. Scott & Laurence Steinberg, *Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty*, 58 AM. PSYCHOLOGIST 1009, 1014 (2003).

juvenile death penalty is unconstitutional;²⁸⁰ in 2010, the Court referenced the research again in *Graham v. Florida* to ban life without parole sentences for youth under age eighteen in non-homicide cases.²⁸¹ These cases reflect a gradual shift away from two of the harshest sentences that had been applied to youth (though the United States' imposition of life without parole sentences for youth convicted of homicide continues to make the country an outlier in the world).²⁸² Advocates are advancing developmental arguments to undo other punitive aspects of juvenile justice, with some success.²⁸³ Finally, a rich body of research also exists about “what works” in responding to juvenile crime and misbehavior.²⁸⁴ The central question is not so much how to respond effectively to youth who commit either minor or serious offenses,²⁸⁵ but rather how to convince systems to abandon failed practices and instead embrace approaches proven to work.

B. Joining Forces Across Reform Efforts

At this moment of opportunity, educational equity advocates should join forces with justice reformers to advance a holistic vision of racial equity—what Professor Gary Blasi has called “practic[ing] prin-

280. *Roper v. Simmons*, 543 U.S. 551, 567-70 (2005) (citing developmental research that, compared to adults, adolescents have diminished decision-making ability, are vulnerable to coercion from peers, and have unformed identities).

281. *Graham v. Florida*, 130 S. Ct. 2011, 2026 (2010) (noting that “developments in psychology and brain science continue to show fundamental differences between juvenile and adult minds”).

282. In many respects, the United States is out of step with international norms regarding juvenile justice. For example, the *United Nations Guidelines on the Prevention of Juvenile Delinquency* state that schools “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.” See *United Nations Guidelines on the Prevention of Juvenile Delinquency [Riyadh Guidelines]*, A/RES/45/112, Annex, P 5 (Dec. 14, 1990), available at <http://www.un.org/documents/ga/res/45/a45r112.htm>. In addition, the United Nations Convention on the Rights of the Child mandates that youth be arrested, detained, or imprisoned “only as a measure of last resort and for the shortest appropriate period of time.” United Nations Convention on the Rights of the Child, art. 37(b), available at <http://www2.ohchr.org/english/law/crc.htm>.

283. See Scott & Steinberg, *Social Welfare and Fairness in Juvenile Crime Regulation*, *supra* note 85, at 35-36 n.4 (“In the past few years, policymakers have retreated somewhat from the punitive reforms of the 1990s, often pointing to research on juveniles’ developmental immaturity.”).

284. See Soler, Shoenberg & Schindler, *supra* note 15, at 489-97.

285. See *Reforming the Juvenile Justice System to Improve Children’s Lives and Public Safety: Hearing Before the Comm. on Education and Labor*, 111th Cong. 65 (2010) (statement of Steven Teske, Clayton County J.). Clayton County Judge Steven Teske bluntly told the United States House Committee on Education and Labor that to learn what programs are effective for youth in the justice system, they can “just Google it.” See *id.*

ciplined solidarity.”²⁸⁶ There is power in numbers.²⁸⁷ By focusing exclusively on education reform or exclusively on justice reform, advocates make themselves vulnerable to “the divide and conquer strategies of the opposition.”²⁸⁸ Nowhere is this susceptibility to “divide and conquer” strategies more evident than in the criminal and juvenile justice realms.²⁸⁹ Though creative and effective advocates are working to improve the criminal and juvenile justice systems, in relation to the scale and scope of mass incarceration, surprisingly few advocates are willing to stand up for those youth and adults who find themselves entangled with the justice system.²⁹⁰ For other social justice advocates who do not focus on justice system reform, it may be tempting to ignore “troublemakers” or “bad kids” in their advocacy. By disassociating themselves with those who society labels “criminal,” advocates might be making strategic determinations about their best chances for success on any particular issue.²⁹¹ However, social justice reform efforts that marginalize those involved with the criminal and juvenile justice systems risk falling short of their goals over the long term.²⁹²

Mass incarceration is best understood as a system of racial control rather than crime control.²⁹³ Its impacts reverberate across entire communities of color. True social and racial equality cannot be attained as long as crime remains racialized in the public discourse and those most marginalized in society remain disproportionately subject

286. See Gary Blasi, *Fifty Years After Brown v. Board: Five Principles for Moving Ahead*, 11 *ASIAN L.J.* 324, 327-28 (2004).

287. See *id.*

288. *Id.* at 327 (“Those of us lucky enough to have jobs talking and writing for a living tend to develop specialties, so do most advocates and activists. We focus on housing, on health, on welfare, on juvenile justice, on workers’ rights, or on education. And then we further specialize.”).

289. See, e.g., Joseph E. Kennedy, *The Jena Six, Mass Incarceration, and the Remoralization of Civil Rights*, 44 *HARV. C.R.-C.L. L. REV.* 477, 478-80 (2009) (describing “the marginalization of criminal justice issues as core civil rights concerns” and arguing that “[d]irectly challenging racially disproportionate mass incarceration is essential to ‘remoralizing’ and reinvigorating the quest for racial justice for those most vulnerable to other forms of discrimination. The mass incarceration of African Americans is the unguarded and badly exploited flank of the movement for racial justice. Defending that flank is important to civil rights progress on any other front.”).

290. See ALEXANDER, *supra* note 41, at 212 (“[W]hat is most striking about the civil rights community’s response to the mass incarceration of people of color is the relative quiet.”); Noguera, *supra* note 30, at 349.

291. See ALEXANDER, *supra* note 41, at 214 (“Advocates have found they are more successful when they draw attention to certain types of black people (those who are easily understood by mainstream whites as ‘good’ and ‘respectable’)”).

292. *Id.* at 217 (“We must face the realities of the new caste system and embrace those who are most oppressed by it if we hope to end the new Jim Crow.”).

293. *Id.* at 225.

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to the justice system. Poverty law crusaders, education equity advocates, child welfare reformers, LGBT activists, immigrants' and women's rights groups, civil rights organizations, and others who fight for social justice will have a difficult time achieving true equality for their various constituencies as long as the system of mass incarceration remains unchallenged. Only by banding together will advocates hold the greatest prospects for fundamentally changing how society treats communities of color. In Blasi's words, "[I]n solidarity there is power; in division there is inevitable defeat."²⁹⁴

C. Policy Priorities

In order to dismantle the systems' reliance on incarceration, move toward a more humane, rehabilitative approach to youth and promote a focus on prevention and positive interventions, a number of policy reforms are needed. Understanding that resources are limited, and it may be unrealistic for education advocates to develop the expertise and find the time to weigh in on all criminal and juvenile justice reform issues, below are a few concrete policy goals that lend themselves particularly well to cross-disciplinary advocacy.

At the federal level, two relevant laws are pending reauthorization. They include the No Child Left Behind Act,²⁹⁵ the federal education accountability law that imposes sanctions on schools whose students do not show yearly progress on standardized tests, and the Juvenile Justice and Delinquency Prevention Act,²⁹⁶ which sets federal requirements for state juvenile justice systems and conditions federal funding to states on compliance with those requirements.²⁹⁷ During the reauthorization process, education and juvenile justice advocates can collaborate to promote the strengthening of each of these laws in ways that will protect the rights of youth in both juvenile justice and education.²⁹⁸ Specifically, the No Child Left Behind Act should be amended to:

294. Blasi, *supra* note 286, at 328.

295. No Child Left Behind, Pub. L. No. 107-110, 115 Stat. 1425 (2002).

296. Juvenile Justice and Delinquency Prevention Act, Pub. L. No. 93-415, 88 Stat. 1109 (1974).

297. Under the Act, states receiving federal funds must abide by four core mandates, which include deinstitutionalizing status offenders, removing youth from adult jails and lock-ups with limited exceptions, requiring "sight and sound" separation in those instances in which youth are placed in adult facilities, and assessing and addressing racial disparities in the system. Juvenile Justice Delinquency Prevention Act of 1974, Pub. L. No. 93-415, 88 Stat. 1122 (1974).

298. For a more comprehensive list of recommendations regarding the reauthorization of the No Child Left Behind Act and the Juvenile Justice and Delinquency Prevention Act, see ACT 4

- Require schools to collect and report data on suspensions, expulsions, arrests, and referrals to juvenile court, disaggregated by race, ethnicity, English Language Learner status, sex, socioeconomic status, and special education status;²⁹⁹
- Create mechanisms for intervention to help schools adopt research-based responses to student behavior when disciplinary rates rise above certain levels;³⁰⁰
- Provide increased funding for schools to adopt research-based alternatives to suspensions, expulsions, and arrests of students who violate school rules or commit low-level offenses;³⁰¹ and
- Mandate collaboration between local stakeholders, including schools, law enforcement, prosecutors, defense attorneys, judges, probation officers, and others to establish procedures and programs that limit the use of juvenile courts for student misbehaviors.³⁰²

The Juvenile Justice and Delinquency Prevention Act³⁰³ should be strengthened to

- Eliminate the “valid court order exception” to the Act’s core requirement that states deinstitutionalize status offenders (or youth who commit non-criminal misbehaviors like skipping school). This exception, which allows judges to order youth incarcerated if they violate a court order, has come to “swallow the rule” in some states;³⁰⁴ and
- Provide more detailed guidance to states on how to comply with the Act’s core mandate requiring that states address “Disproportionate Minority Contact” (which refers to racial and ethnic disparities in the juvenile justice system) and hold states accountable for their efforts;³⁰⁵

JUVENILE JUSTICE, www.act4jj.org (last visited Jan. 27, 2011); ESEA REAUTHORIZATION, *supra* note 140, at 5; TEST, PUNISH, AND PUSH OUT, *supra* note 112, at 4, 8; Soler, Shoenberg & Schindler, *supra* note 15. For policy recommendations on issues related to zero-tolerance policies and school arrests, see TEST, PUNISH, AND PUSH OUT, *supra* note 112.

299. See ESEA REAUTHORIZATION, *supra* note 140, at 5.

300. *Id.*

301. *Id.*

302. *Id.*; FED. ADVISORY COMM. ON JUVENILE JUSTICE, *supra* note 193, at 13.

303. Juvenile Justice and Delinquency Prevention Act, Pub. L. No. 93-415, 88 Stat. 1109 (1974).

304. Patricia J. Arthur & Regina Waugh, *Status Offenses and the Juvenile Justice and Delinquency Prevention Act: The Exception that Swallowed the Rule*, 7 SEATTLE J. SOC. JUST. 555, 559, 560-64 (2009) (“[T]he VCO exception has resulted in the continued use of confinement as a response to status-offender behaviors, contrary to the original goal of the Act.”).

305. See W. HAYWOOD BURNS INST., ADORATION OF THE QUESTION: REFLECTIONS ON THE FAILURE TO REDUCE RACIAL & ETHNIC DISPARITIES IN THE JUVENILE JUSTICE SYSTEM 15

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- Extend the protections of the Act to youth tried in adult courts;³⁰⁶
- Expand federal funding for juvenile justice, including providing more funding incentives for states to comply with the Act and to adopt programs that are effective at intervening with youth in the justice system.³⁰⁷

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;³⁰⁸
- push for the decriminalization of low-level behaviors that pose no public safety threat, such as “disturbing schools” or “talking back to teachers” and prohibit the application of vague offenses like “disorderly conduct” or “disturbing the peace” to student conduct on school campus;
- eliminate zero-tolerance policies;
- promote the use of research-based interventions that are effective at reducing school discipline problems and improving school climate, such as PBIS, and other promising approaches, like restorative justice;
- ensure that services exist to address the needs of students with incarcerated parents;
- ensure that suspensions, expulsions, and arrests can only be used where immediate safety threats exist and where no other interventions are available;
- limit the ability of schools to refer cases to juvenile court for minor offenses and ensure that juvenile court is used only for more serious offenses and only as a last resort;
- end the justice system’s overreliance on detention and incarceration by creating community-based alternatives to incarceration, grounded in research on effective programs, and reserve detention and incarceration only as a last resort and only when no alternatives exist to protect public safety; and

(2008), available at http://burnsinstitute.org/downloads/BI%20Adoration%20of%20the%20Question_2.pdf.

306. See ACT 4 JUVENILE JUSTICE, JUVENILE JUSTICE AND DELINQUENCY PREVENTION ACT (“JJJPA”) RECOMMENDATIONS AND BACKGROUND (2010), available at http://act4jj.org/media/factsheets/factsheet_56.pdf.

307. *Id.*

308. For policy recommendations related to improving the effectiveness of SROs at keeping youth out of juvenile courts, see Thureau & Wald, *supra* note 145, at 977.

- create oversight and accountability mechanisms that empower community members to regularly review data on school discipline and juvenile justice at the local level and initiate a process for providing state intervention at the local level when data suggests that schools or courts are not meeting certain agreed-upon standards.³⁰⁹

In addition, advocates should ensure that more funding is available for K-12 education by attacking the problem of bloated corrections budgets. Specifically, advocates should:

- push for the creation of state funding structures (similar to those adopted in Ohio, Illinois, and other states) that create fiscal incentives for local jurisdictions to develop more community-based prevention and intervention services rather than rely on incarcerating youth far from their homes.³¹⁰ Some of the savings realized from reducing incarceration rates can be reinvested in school programs, such as PBIS, that have been shown through research to improve school climate and educational outcomes.
- advance adult sentencing reforms, such as reducing the use of incarceration for low-level and drug offenses, prohibiting the use of incarceration for technical probation and parole violations, and reducing the terms of probation and parole after someone has served his or her sentence.³¹¹

Finally, advocates should promote effective reentry for incarcerated youth by working to:

- limit the collateral consequences of juvenile adjudications through the imposition of more stringent confidentiality protections for juvenile records;
- improve the quality of education, including special education services, and other services that youth receive while incarcerated;

309. See ESEA REAUTHORIZATION, *supra* note 140, at 5 (recommending establishment of “a process by which unusually high disciplinary rates—as well as pronounced disparities in such rates along race, gender, disability, socioeconomic status, and language lines—trigger required technical assistance and support, rather than punishment, from state and local educational agencies”).

310. For a description of various state innovations to realign and reduce spending while preserving progressive programming, see THE REAL COSTS AND BENEFITS OF CHANGE, *supra* note 278.

311. See BUTLER, *supra* note 14, at 182 (noting that one study found that these three reforms would cut the prison population in half without any harm to public safety and with significant cost-savings to the public).

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- enhance reentry services for youth returning to school from correctional facilities; and
- eliminate barriers to school reenrollment for youth leaving correctional facilities, including ensuring that credits earned while incarcerated transfer to the youth's home school.³¹²

D. Shifting Public Consciousness

By joining forces to advance these policy reforms, educational equity advocates and justice system advocates can maximize their collective impact and make meaningful progress in the fight for racial justice. Policy reform alone, however, is unlikely to reverse the mass incarceration course on which we have set ourselves.³¹³ In order to significantly improve how society treats low-income communities of color, a more fundamental shift in public opinion is also needed.

Currently, the education and justice systems both bend heavily toward punishment. As long as young students of color are viewed as criminals-in-the-making by the social systems with which they have to interact daily, the likelihood remains that one repressive policy will merely be replaced with another. To sustain policy victories over the long term, even after the economy eventually rebounds and the budget incentives for reducing incarceration become less salient, it is necessary to shift society's views on crime and punishment.³¹⁴ Shifting public attitudes is critical,³¹⁵ given that the structural inequities that pervade the education and justice systems have, in many instances, come to feel normal to or expected by the public at large. Race and crime must be separated in the minds of the public.³¹⁶

Changing public consciousness requires sophisticated and dedicated work. Michelle Alexander argues that “nothing short of a major social movement” that “confront[s] squarely the critical role of race in the basic structure of our society” is needed.³¹⁷ Similarly, James Forman has argued that dismantling mass incarceration will require what Martin Luther King Jr. and his contemporaries possessed: the ability

312. ESEA REAUTHORIZATION, *supra* note 140, at 2.

313. See ALEXANDER, *supra* note 41, at 221 (“The notion that all of these reforms can be accomplished piecemeal—one at a time, through disconnected advocacy strategies—seems deeply misguided.”).

314. See *id.* at 222 (discussing the need for a fundamental shift in consciousness).

315. Stoddard, *supra* note 206, at 991.

316. See ALEXANDER, *supra* note 41, at 227 (arguing for the need for race-conscious advocacy to challenge the criminalization and demonization of black men).

317. *Id.* at 18.

to appeal to the broader public's self-interest while also making the "moral claims about segregation's fundamental inhumanity."³¹⁸ Thus, fiscal arguments about the societal costs of mass incarceration are important, but they cannot be the only arguments made in the fight to dismantle mass incarceration.³¹⁹ Advocates must not shy away from the moral arguments in their efforts to achieve equity.

Integral to such an effort to challenge the prevailing public discourse is the mobilization of communities disproportionately targeted for mass incarceration and affected by its attendant educational impacts. As Thomas Stoddard explained, "How change is made matters almost as much as what is, in the end, done."³²⁰ Advocates must work side-by-side with these communities, helping to build their voice in the movement, or else long-term success will not be achieved.³²¹ The education and justice systems must be held accountable to these communities. For far too long, these systems have intervened in the lives of many low-income children of color in the name of serving their best interests even though the interventions often caused more harm than good. In some cases, underlying this willingness to intervene is a notion that the families and communities cannot be trusted to rear the children themselves. Advocates only reinforce such stereotypes if they do not engage with and learn from the communities with the most to gain (or lose) from a movement to dismantle mass incarceration.

CONCLUSION

The goals of achieving educational equity and dismantling the system of mass incarceration in the United States are inextricably linked. Schools have adopted the punitive philosophies of and worked hand-in-hand with the justice system to perpetuate the mass incarceration of students of color. In addition, schools have suffered negative ramifications because of mass incarceration, including being ill-equipped to appropriately meet the needs of those students whose parents are behind bars and having to compete for funding in the face of skyrocketing corrections budgets. Reform movements cannot focus

318. Forman, Jr., *supra* note 62, at 1010.

319. See ALEXANDER, *supra* note 41, at 226-27 (discussing the dangers in relying on fiscal arguments to challenge mass incarceration).

320. Stoddard, *supra* note 206, at 977.

321. See ALEXANDER, *supra* note 41, at 212-14 (criticizing civil rights lawyers' insider strategy).

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on education or justice in isolation. To achieve sustainable improvements in the lives of students of color, advocates must unite with each other and join with communities to demand the end of harmful and counterproductive education and justice system policies that prioritize punishment and exclusion over education and opportunity.

