Fordham Urban Law Journal

Volume 36 | Number 5 Article 5

2009

Deconstructing the Pipeline: Evaluating School-to-Prison Pipeline Equal Protection Cases through a Structural Racism Framework

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DECONSTRUCTING THE PIPELINE: EVALUATING SCHOOL-TO-PRISON PIPELINE EQUAL PROTECTION CASES THROUGH A STRUCTURAL RACISM FRAMEWORK

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"A man working in a munitions factory explains that he is not killing; he's just trying to get out a product. The same goes for the man who crates bombs in that factory. He's just packaging a product. He's not trying to kill anyone. So it goes until we come to the pilot who flies the plane that drops the bomb. Killing anyone? Certainly not, he's just pushing a button . . . . [Lastly] there is a Vietnamese peasant, dead, but not killed, you might say. The consequence is there, but born of a process so fragmented as not to register in the consciousness of those involved in it."[1]

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1. CHARLES PAYNE, GETTING WHAT WE ASK FOR: THE AMBIGUITY OF SUCCESS AND FAILURE IN URBAN EDUCATION 37 (1984).

INTRODUCTION

The U.S. criminal justice and education systems wreak havoc upon today's minority population.[2] Among adults, minorities disproportionately bear the brunt of "tough-on-crime"[3] policies, such as mandatory sentencing, three strikes laws, and the death penalty.[4] For instance, thirty-two per-

2. Today's U.S. education and criminal justice systems arguably coincide with America's history of maintaining "peculiar institutions." Kenneth Stampp originally coined the phrase "peculiar institution" in describing slavery as an oppressive institution. *See generally* KENNETH M. STAMPP, THE PECULIAR INSTITUTION: SLAVERY IN THE ANTE-BELLUM SOUTH (5th ed. 1967). Later, sociologist Loïc Wacquant declared that, like slavery, both prisons and ghettos are peculiar institutions that control and oppress black people. *See* Loïc Wacquant, *Deadly Symbiosis: When Ghetto and Prison Meet and Mesh*, 3(1) PUNISHMENT & SOC'Y 95, 108 (2001). This Note sets the U.S. criminal justice and education systems alongside the "peculiar institutions" of slavery, ghettos, and prisons, as all being forms of structural racism that oppress people of color.

3. "The 'tough on crime' movement refers to a set of policies that emphasize punishment as a primary, and often sole, response to crime." *The Rise of the Modern "Tough on Crime" Movement*, *in* DEFENDING JUSTICE: AN ACTIVIST RESOURCE KIT 43, (Shah ed., 2005), *available at* http://www.publiceye.org/defendingjustice/pdfs/chapters/toughcrime.pdf. Tough on crime policies include the elimination of rehabilitation programs, "[m]andatory sentencing, [t]hree strikes [laws], truth-in-sentencing, quality of life policing, zero tolerance, and various other proposals that result in longer and harsher penalties . . . ." *Id.*

4. *See* JENNIFER WARREN, THE PEW CENTER ON THE STATES, ONE IN 100: BEHIND BARS IN AMERICA 2008 6 (2008), *available at* http://www.pewcenteronthestates.org/uploadedfiles/

cent of black males and seventeen percent of Latino males are incarcerated during their lifetime, compared to just six percent of white males.[5] Further, despite only being thirteen percent of the national citizenry, blacks constitute forty-two percent of prisoners on death row.[6] Similarly, contemporary schools disproportionately punish minority students.[7] While blacks and Latinos each account for seventeen percent of U.S. K-12 enrollment, they respectively comprise thirty percent and twenty percent of all twelfth-grade suspensions and expulsions.[8] Before twelfth grade, "black students, compared to whites, are two to five times as likely to be suspended at a younger age."[9] In some states, more than thirty percent of the black student population is suspended each year.[10] This focus on punishing adult and youth minorities has blurred the pedagogical distinctions between America's education and criminal justice systems. Indeed, as students of color disparately transfer from schools to prisons, one can rightly say that America's education and criminal justice systems now bear a symbiotic relationship.[11]

This school-prison harmoniousness is illustrated by the life trajectory of students of color who are suspended or expelled. After being pushed out of

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8015 PCTS_Prison08_FINAL_2-1-1_FORWEB.pdf (reporting that among all adult men, one in fifteen black males are in prison, and one in thirty-six Hispanic males are in prison, compared to just one in every one-hundred and six white males).

5. *See* THE SENTENCING PROJECT, FACTS ABOUT PRISONS AND PRISONERS (2009).

6. *Compare* Press Release, U.S. Census Bureau, Facts for Features, Black History Month: February 2007 (Dec. 5, 2006), *available at* http://www.census.gov/Press-Release/www/releases/archives/facts_for_features_special_editions/007862.html_(noting that as of July 2005, blacks made up 13.4% of the total U.S. population); *with* TRACY L. SNELL, U.S. DEP'T OF JUSTICE, CAPITAL PUNISHMENT, 2005 6 (2006), *available at* http://www.ojp.usdoj.gov/bjs/pub/pdf/cp05.pdf (noting that in 2005, blacks constituted 42% of prisoners on death row).

7. *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, 255-56 (2004) (reporting that "[b]etween 1972 and 2000, the percentage of white students suspended for more than one-day rose from 3.1% to 6.14%. During the same period, the percentage for black students had risen from 6% to 13.2%."); *see also*, Pedro A. Noguera, *Schools, Prisons, and Social Implications of Punishment: Rethinking Disciplinary Practices*, 42(4) THEORY INTO PRAC. 341, 342-43 (2003) [hereinafter *Schools, Prisons, and Social Implications of Punishment*]; Ivan E. Watts & Nirmala Erevelles, *These Deadly Times: Reconceptualizing School Violence by Using Critical Race Theory and Disability Studies*, 41(2) AM. ED. RES. J. 271, 271 (2004).

8. *See* Augustina Reyes, *The Criminalization of Student Discipline Programs and Adolescent Behavior*, 21 ST. JOHN'S J. LEGAL COMMENT. 73, 104-05 (2006).

9. JACQUELINE JORDAN IRVINE, BLACK STUDENTS AND SCHOOL FAILURE: POLICIES, PRACTICES AND PRESCRIPTIONS 16 (1990).

10. *See* Losen, *supra* note 7, at 255.

11. *See* Wacquant, *supra* note 2, at 108 (stating that public schools located in ghettos have become similar to prisons by operating as institutions of confinement that aim to control rather than to educate).

school, students of color face daunting odds of being criminalized at virtually every juncture of the criminal justice system. In New York City, for example, eighty-five percent of all stop-and-frisk encounters are administered on blacks and Latinos.[12] National figures show that after being stopped, black youth account for thirty percent of all juvenile arrests, despite only being seventeen percent of the juvenile population.[13] After arrest, black youth make up sixty-two percent of all juveniles prosecuted as adult defendants.[14] Once prosecuted, black youth are nine times more likely than white youth to receive an adult prison sentence.[15] Cumulatively, "black juveniles are about four times as likely as their white peers to be incarcerated."[16]

Many students, educators, lawyers, and civil rights advocates refer to the aforementioned progression as the "school-to-prison pipeline" (the "pipeline").[17] The phrase "school-to-prison pipeline" conceptually categorizes an ambiguous, yet seemingly systematic, process through which a wide range of education and criminal justice policies and practices collectively result in students of color being disparately pushed out of school and into prison.[18] Zero-tolerance policies illustrate how the intersection of education and criminal justice policies leads to disparate minority student pushout and potential incarceration.[19] The Gun Free Schools Act of 1994 ("GFSA"),[20] for example, was originally adopted for the purpose of promoting "school safety by declaring zero tolerance for weapons in public

12. N.Y. CIVIL LIBERTIES UNION, STOP-AND-FRISK FACT SHEET (2008), *available at* http://www.nyclu.org/files/stop_and_frisk_fact_sheet_012008.pdf.

13. *See* HILARY O. SHELTON ET AL., CAMPAIGN FOR YOUTH JUSTICE, CRITICAL CONDITION: AFRICAN AMERICAN YOUTH IN THE JUSTICE SYSTEM 1 (2008), *available at* http://campaignforyouthjustice.org/documents/AfricanAmericanBrief.pdf.

14. *Id.*

15. *Id.*

16. CHILDREN'S DEFENSE FUND, AMERICA'S CRADLE TO PRISON PIPELINE 37 (2007), *available at* http://www.childrensdefense.org/child-research-data-publications/data/cradle-prison-pipeline-report-2007-full-highres.html (statistics based on children born in 2001).

17. *See generally* Reyes, *supra* note 8; *Deconstructing the School-to-Prison Pipeline*, NEW DIRECTIONS FOR YOUTH DEVELOPMENT, No. 99, Fall 2003.

18. *See generally Deconstructing the School-to-Prison Pipeline*, *supra* note 17; *see also* Katherine May, *By Reason Thereof: Causation and Eligibility Under the Individuals with Disabilities Education Act*, 2009 BYU EDUC. & L.J. 173, 187 (2009).

19. *See* Adira Siman, *Challenging Zero Tolerance: Federal and State Legal Remedies for Students of Color*, 14 CORNELL J.L. & PUB. POL'Y 327, 329 (2005) (stating that zero tolerance policies are disparately applied to minority students).

20. 20 U.S.C. § 7151 (2002).

schools."[21] Yet since the GFSA's implementation, schools have expanded the use of zero-tolerance policies to areas neither contemplated nor addressed by the initial enactment.[22] Traditional adolescent behavior, such as talking out of turn or doodling on a desk, may now be treated as a punishable offense—like disorderly conduct or vandalism—that provides grounds for both school and criminal sanction.[23] For instance, at a New York City public school, zero tolerance for age-appropriate behavior led to a five year old Latino kindergartener being handcuffed and removed from school for having a temper tantrum in class, despite the fact that he suffered from attention deficit disorder.[24]

To be sure, zero-tolerance policies are not the only, or predominant, pipeline factor. Rather, the disparate transfer of minority students from schools to prisons commonly occurs through a much more dynamic process, such as through the intersection of zero-tolerance policies and educational "tracking." Used by "the vast majority of American public schools,"[25] tracking is the practice of separating students into homogenous ability groups such as "gifted" and, by implication, "not gifted," in order to provide particularized academic instruction.[26] Ostensibly, separating students into homogenous ability groups "allows for individualized instruction, the development of more positive self-concepts, and more effective and efficient instruction."[27] Many education experts acknowledge, however, "that rigid differentiating instruction—[which occurs] by tracking stu-

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21. 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).

22. The expansion of zero-tolerance policies now includes the suspension or expulsion of "[s]tudents of all ages for possession of 'weapons' such as paper clips, nail files, and a toy ax used in a Halloween costume; drugs, including aspirin, midol, and white-out; and general misbehavior such as humming and tapping on a desk, which was classified as 'defiance of authority.'" Siman, *supra* note 19, at 331-32.

23. *See id.*

24. *See NYCLU: Shocking Treatment of Kindergartner Should be Wake-Up Call Regarding Police in Schools*, Jan. 25, 2008, http://www.nyclu.org/node/1606; Carrie Melago, *5-Year-Old Boy Handcuffed in School, Taken to Hospital for Misbehaving*, DAILY NEWS, Jan. 25, 2008, *available at*, http://www.nydailynews.com/news/2008/01/25/2008-01-25_5yearold_boy_handcuffed_in_school_taken_.html. Moreover, with blacks only accounting for seventeen percent of the student population during the 2000 to 2001 school year, the racially disparate application of zero-tolerance policies resulted in thirty-four percent of black students being suspended and thirty percent being expelled. In comparison, whites were sixty-two percent of the national student population during the 2000 to 2001 school year, yet they only accounted for forty-eight and forty-nine percent of all suspensions and expulsions, respectively. *See* Siman, *supra* note 19, at 333-34.

25. Losen, *supra* note 7, at 254.

26. *See* IRVINE, *supra* note 9, at 9-10.

27. *Id.*

dents as low, middle, and high—is particularly harmful to minority students who are disproportionately placed in lower tracks."[28] Disparately placing minority students in lower tracks is harmful not only because it results in inequitable curricula, but also because low tracked students are subjected to instructional methods[29] that stimulate disruptive behavior.[30] Taken together, zero-tolerance policies and tracking reveal the pipeline's inter-institutional character: tracking fuels minority student disruptive behavior, which—depending on the particular transgression—may result in suspension, expulsion, or incarceration because of zero-tolerance policies. Evaluated in isolation, however, neither tracking nor zero-tolerance policies fully show how education and criminal justice policies and practices intersect in a manner which leads to students of color being disparately pushed out of school and into prison.[31]

Since the emergence of anti-pipeline legal scholarship in the 1990s, most articles have examined pipeline factors, such as zero-tolerance policies, in isolation rather than collectively.[32] Yet in doing so, past works also indicate that the pipeline is an "inter-institutional" system.[33] Critical race scholars have argued that taking a restricted approach to structural issues legitimizes faulty notions of racism by working within equal protection paradigms that fail to account for systemic inequality.[34] *Washington v.*

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28. Losen, *supra* note 7, at 254.

29. Studies show that problematic instructional methods applied in low-ability groups include teachers more often criticizing students placed in lower ability groups, teachers having lower expectation for students placed in lower ability groups, and teachers giving less feedback to questions from students placed in low-ability groups. *See* IRVINE, *supra* note 9, at 13 (citing J.B. DUSEK, TEACHER EXPECTANCIES (1985)).

30. *Id.* at 12.

31. In *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), the United States Supreme Court "[r]ecognized that discrimination can become institutionalized through racially neutral practices . . . ." John A. Powell, *Structural Racism: Building upon the Insights of John Calmore*, 86 N.C. L. REV. 791, 795 (2008). The *Griggs* Court stated that "practices, procedures, or tests neutral on their face, and even neutral in terms of intent, cannot be maintained if they operate to 'freeze' the status quo of prior discriminatory employment practices." *Griggs*, 401 U.S. at 430. Thus, the Court recognized that even in the absence of a discriminatory motive, contemporary racism may exist via past racial discrimination being institutionalized through the use of race-neutral policies and practices today.

32. *See, e.g.*, Siman, *supra* note 19; Solari & Balshaw, *supra* note 21; *see also* Janet E. Mosher, *Lessons in Acess to Justice: Racialized Youths and Ontario's Safe Schools*, 46 OSGOODE HALL L.J. 807, 827 (2008) (largely reducing the school-to-prison pipeline to its criminalization dimension alone).

33. Regarding the meaning of "inter-institutional system," see Powell, *supra* note 31, at 796 ("Structural racism or racialization emphasizes the interaction of multiple institutions in an ongoing process of producing racialized outcomes."). Regarding references to the pipeline as inter-institutional, see Reyes, *supra* note 8, at 104-05.

34. *See generally* Kimberlè W. Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Anti-Discrimination Law*, 101 HARV. L. REV. 1331 (1988);

Davis[35] illustrates this problem because it requires equal protection claimants to prove that facially race-neutral measures have a discriminatory purpose, or are administered for the purpose of discriminating on the basis of race.[36] Critical race scholars argue that *Washington*'s motive standard downgrades the Constitution's equal protection mandate to an illusory promise because proving the existence of a discriminatory motive in a racist system is an impractical, and thus insurmountable, barrier.[37]

This Note confronts the *Washington* equal protection paradigm by evaluating the school-to-prison pipeline from a structural racism standpoint.[38] A structural racism approach can aid courts striving for a holistic understanding of pipeline cases by emphasizing "the ways in which individual and institutional behavior interact across domains and over time to produce unintended consequences with clear racialized effects."[39] Thus, in contrast to *Washington*'s motive-centered approach, a structural racism lens exposes the pipeline's racist processes, such as in the zero-tolerance policy and tracking intersectional illustration discussed above. In order to help courts approach pipeline equal protection cases through a structural racism lens, this Note deconstructs the pipeline into a structural racism framework that accounts for the pipeline's racist processes and enables pipeline harms to be mitigated. This Note concludes that examining pipeline equal protection cases through a structural racism framework allows students of color to be more adequately protected than under a motive-centered approach.

Part I of this Note provides background information on the pipeline in order to establish a conceptual base for understanding how the pipeline's racist processes can be analyzed in terms of equal protection law. Part II

Charles R. Lawrence, III, *The Id, The Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 319 (1987).

35. 426 U.S. 229 (1976).

36. *See* Lawrence, *supra* note 34, at 319.

37. Social science research shows that, regardless of intentions to discriminate, racism unconsciously occurs through systemic processes. *See id.*; Jerry Kang, *Trojan Horses of Race*, 118 HARV. L. REV. 1489 (2005); Powell, *supra* note 31, at 791.

38. *See* Paul J. Hirschfield, *Preparing for Prison?: The Criminlization of School Discipline in the USA*, 12 THEORETICAL CRIMINOLOGY 79, 79 (2008) ("Most theoretical explanations [of student discipline] fail to situate school criminalization in a broader structural context . . . .").

39. Powell, *supra* note 31, at 791. Evaluating how the pipeline causes racial harm through inter-institutional interactions is important because racism now presents itself in ways that are "far more subtle, indirect, and ostensibly nonracial . . . ." Thomas F. Pettigrew, *New Patterns of Racism: The Different Worlds of 1984 and 1964*, 37 RUTGERS L. REV. 673, 686 (1985). More specifically, unlike the *de jure* racial discrimination used to subjugate millions of people of color from the time of the American conquest through Jim Crow, contemporary racial harm less frequently occurs as a result of intentional or outright discrimination. *See id.* at 686-700; PAYNE, *supra* note 1, at 38.

discusses two contrasting approaches to pipeline equal protection case evaluation: motive-centered analysis and structural racism analysis. Part III delineates a structural racism framework that can be used to evaluate pipeline equal protection cases. Specifically, Part III deconstructs historical and inter-institutional actions that contribute to the pipeline and places them in three categorical dimensions—criminalization, sorting, and economic policy. Together, these dimensions largely encompass the pipeline's racism. Finally, Part IV examines the pipeline in praxis by deconstructing a recent education equal protection case, *Williams v. California*,[40] via the structural racism framework delineated in Part III.

I. DEFINING THE SCHOOL-TO-PRISON PIPELINE

In order to provide a conceptual backdrop for understanding judicial approaches to pipeline equal protection cases, Part I defines the school-to-prison pipeline. Part I.A provides education and criminal justice statistics that convey the systemic nature of the pipeline's racially disparate harm. Part I.B discusses the ambiguous nature in which past legal scholars have referred to the pipeline and provides a working definition for the term.

A. Racial Inequities in the U.S. Education and Criminal Justice Systems

Statistics demonstrate that as a person's level of education increases, her chances of becoming incarcerated decrease.[41] For instance, sixty-nine percent of all incarcerated adults never finish high school, seventy-five percent of juveniles in adult prisons fail to complete tenth grade, and thirty-three percent of all incarcerated juveniles do not have a fourth-grade reading level.[42] As a whole, high school dropouts are three-and-a-half times more likely to become incarcerated than high school graduates.[43] This negative

40. Williams v. California, No. 312236 (Cal. Super. Ct., S.F. County, filed May 17, 2000).

41. *See* Becky Pettit & Bruce Western, *Mass Imprisonment and the Life Course: Race and Class Inequality in U.S. Incarceration*, 69 AM. SOC. REV. 151, 162 (2004).

42. *See* Losen, *supra* note 7, at 257. In addition, figures also show that, among black men born between 1965 and 1969, thirty percent were incarcerated by 1999 if they did not attend college, and sixty percent were incarcerated by 1999 if they did not complete high school. *See* Pettit & Western, *supra* note 41, at 162.

43. *See* Sam Dillon, *Study Finds High Rate of Imprisonment Among Dropouts*, N.Y. TIMES, Oct. 8, 2009, at A12, *available at* http://www.nytimes.com/2009/10/09/education/09dropout.html ("On any given day, about one in every ten young male high school dropouts is in jail or juvenile detention, compared with one in thirty-five young male high school graduates . . . .") (citing ANDREW SUM ET AL., CTR. FOR LABOR MARKET STUDS., NORTHEASTERN UNIV., THE CONSEQUENCES OF DROPPING OUT OF HIGH SCHOOL: JOBLESSNESS AND

correlation between education and incarceration depicts a more troubling picture when viewed along color lines because blacks and Latinos account for a disproportionate share of undereducated Americans.[44] For example, while the 2004 national high school graduation rate was sixty-eight percent for all students and seventy-five percent for whites, the graduation rates for blacks and Latinos were fifty and fifty-three percent, respectively.[45] In 2005, while only thirty-six percent of white fourth graders failed to read at grade level, fifty-eight percent of black, and fifty-four percent of Latino fourth graders, failed to read at grade level.[46]

National figures also show that minorities are disproportionately punished by America's schools.[47] During the 2005 to 2006 school year, for example, white students constituted approximately sixty-seven percent of the student population, but only accounted for fifty-three percent of all corporal punishments.[48] In the same year, black students constituted seventeen percent of the student population and were corporally punished at over two times the rate of white students.[49] Similarly, black students also constituted seventeen percent of the student population during the 2000 to 2001 school year, but accounted for thirty-four percent of suspensions, and thirty-one percent of expulsions.[50] In comparison, whites constituted sixty-

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JAILING FOR HIGH SCHOOL DROPOUTS AND THE HIGH COST FOR TAXPAYERS 10 (2009), *available at* http://www.clms.neu.edu/publication/documents/The_Consequences_of_Dropping_Out_of_High_School.pdf).

44. *See* DANIEL LOSEN ET AL., THE CIVIL RIGHTS PROJECT: HARVARD UNIVERSITY, CONFRONTING THE GRADUATION RATE CRISIS IN TEXAS 9 (2006), *available at* http://www.civilrightsproject.ucla.edu/research/dropouts/texas_10-17-06.pdf (reporting that minority students graduate at disproportionately low levels).

45. AM. CIVIL LIBERTIES UNION, RACE & ETHNICITY IN AMERICA: TURNING A BLIND EYE TOWARD JUSTICE 138 (2007) [hereinafter RACE & ETHNICITY] (citing GARY ORFIELD ET AL., LOSING OUR FUTURE: HOW MINORITY YOUTH ARE BEING LEFT BEHIND BY THE GRADUATION RATE CRISIS 2 (2004)), *available at* http://www.aclu.org/pdfs/humanrights/cerd_full_report.pdf.

46. *Id.* at 137.

47. *Id.* at 147-48.

48. *See* NATIONAL CENTER FOR EDUCATION STATISTICS, DIGEST OF EDUCATION STATISTICS (2007), *available at* http://nces.ed.gov/programs/digest/d07/tables/dt07_040.asp; THE CENTER FOR EFFECTIVE DISCIPLINE, CORPORAL PUNISHMENT IN U.S. PUBLIC SCHOOLS: NUMBER OF STUDENTS STRUCK EACH YEAR IN U.S. PUBLIC SCHOOLS (2008), *available at* http://stophitting.com/index.php?page=statesbanning.

49. RACE & ETHNICITY, *supra* note 45, at 148.

50. *Id.* at 147. In addition, black students in New Jersey are 60 times more likely to be suspended than white students. *Id.*

two percent of the student population, and only accounted for forty-eight percent of suspensions and forty-nine percent of expulsions.[51]

After being pushed out of school through suspension or expulsion, people of color are far more likely to end up in the criminal justice system.[52] For example, in New York City during 2006, eighty-nine percent of all stop-and-frisk encounters were administered on people of color.[53] Among those stops, fifty-five percent were administered on blacks, an amount over two times their population percentage.[54] Controlling for age shows that, after being stopped, black youth account for thirty percent of nationwide juvenile arrests, despite comprising only seventeen percent of the juvenile population.[55] After arrest, black youth make up sixty-two percent of all juveniles prosecuted as adult defendants.[56] Once prosecuted, "black youth are nine times more likely than white youth to receive an adult prison sentence."[57] Cumulatively, a black student's chances of being incarcerated are roughly four times greater than those of a white student.[58] In addition, while only one in seventeen white males will be incarcerated during his lifetime, one in every six Latino males faces the same fate.[59] Together, blacks and Latinos account for over sixty percent of America's 2.3 million prisoners,[60] despite comprising only twenty-five percent of the national citizenry combined.[61] Comparatively, whites constitute seventy percent of the national citizenry, yet only account for thirty-five percent of America's prisoners.[62]

B. Defining the School-to-Prison Pipeline

Often in passing, legal scholars use the phrase "school-to-prison pipeline" to describe the existence of vast racial disparities in the U.S. educa-

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51. THE CENTER FOR EFFECTIVE DISCIPLINE, U.S. CORPORAL PUNISHMENT AND PADDLING BY STATE AND RACE (2008), http://www.stophitting.com/index.php?page=statesbanning.

52. *See* CHILDREN'S DEFENSE FUND, *supra* note 16, at 37.

53. *See* N.Y. CIVIL LIBERTIES UNION, *supra* note 12.

54. *Id.* Moreover, thirty percent of all 2006 New York City police stops were administered on Latinos. *See id.*

55. *See* SHELTON, *supra* note 13, at 19.

56. *See id.* at 26.

57. *See* CHILDREN'S DEFENSE FUND, *supra* note 16, at 38.

58. *Id.* at 37.

59. *Id.*

60. *See* WARREN, *supra* note 4, at 5-6.

61. *See* CENSUSSCOPE, POPULATION BY RACE, http://www.censusscope.org/us/chart_race.html.

62. *See* WILLIAM SABOL, U.S. DEP'T OF JUSTICE, PRISONERS IN 2006 7 (2007), *available at* http://ojp.usdoj.gov/bjs/pub/pdf/p06.pdf.

tion and criminal justice systems.[63] In doing so, scholars often use different, yet interrelated, concepts to vaguely identify the pipeline.[64] For example, throughout *The Criminalization of Student Discipline Programs and Adolescent Behavior*, Professor Augustina Reyes uses the phrases "school-to-prison pipeline" and "school-to-jail pipeline" to refer to students entering the criminal justice system *after* being removed from schools.[65] Conversely, in *Racial Disparities in Educational Opportunities in the United States*, the Lawyers' Committee for Civil Rights Under Law vaguely defines the pipeline as academic underachievement combined with harsh school discipline methods *within* schools.[66] At bottom, the pipeline "has escaped clear definition."[67] This Note identifies the pipeline as a conceptual framework used to understand how policies and practices—primarily from, but not limited to, the education and criminal justice systems—intersect in a manner which cumulatively results in students of color being disproportionately pushed out of school and into prison.[68]

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63. *See* Losen, *supra* note 7, at 257; RACE & ETHNICITY, *supra* note 45, at 138.

64. *See, e.g.*, Losen, *supra* note 7, at 257 ("The adult prison and juvenile justice systems are stocked with black youths who fell into a school-to-prison pipeline."); Reyes, *supra* note 8, at 95 ("By sending adolescents to county detention centers and juvenile, county, or municipal courts for behavior issues like dress code violations and food fights, schools are criminalizing irksome juvenile behavior and prepping students for the school to prison pipeline.").

65. *See, e.g.*, Reyes, *supra* note 8, at 95 ("When students are arrested, they enter the school-to-jail pipeline.").

66. *See* Lawyers' Committee for Civil Rights Under Law, *Racial Disparities in Educational Opportunities in the United States: Violations of the International Convention on the Elimination of All Forms of Racial Discrimination*, 6(2) SEATTLE J. FOR SOC. JUST. 591, 606 (2008).

67. R.A. Lenhardt, *Understanding the Mark: Race, Stigma, and Equality in Context*, 79 N.Y.U. L. REV. 803, 815 (2004) (explaining that racial stigma has escaped clear definition). While the school-to-prison pipeline has escaped clear definition, it should be noted that Johanna Wald and Daniel Losen have compiled various school-to-prison pipeline articles into a valuable report. *See generally Deconstructing the School-to-Prison Pipeline*, *supra* note 17.

68. Most references to the pipeline bear three commonalities—structure, linguistic meaning, and contextual usage—from which this Note's understanding derives. The structure of the phrase "school-to-prison pipeline" clearly highlights two domains, the education and criminal justice systems, by using the words "school" and "prison." In addition, the use of "to," which is often preceded and followed by hyphens, indicates that the education and criminal justice systems are start and endpoints, respectively. The linguistic meaning of "pipeline" suggests that "school-to-prison pipeline" refers to a process, or series of actions, that start in schools and end in prisons. In *Merriam-Webster's Dictionary*, for example, "pipeline" is defined as, "[a] process or channel of supply . . . [a] state of development, preparation, or production." MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 943 (2003). Further, "process" is defined as, "[a] series of actions or operations conducing to an end . . ." *Id.* at 990. Thus, combining "pipeline" together with "school-to-prison"—which alone is taken to mean that the education and criminal justice systems are domains, serving as start

The school-to-prison pipeline gives rise to a number of legal claims because pipeline policies and practices harm youth in numerous ways. For instance, because the administration of zero-tolerance or other exclusionary policies often results in students of color being disparately pushed out of school, such policies may give rise to claims under the Equal Protection Clause of the Fourteenth Amendment, Title VI of the Civil Rights Act of 1964, § 1983 of Title 42 of the U.S. Code, and state equal protection and right to education clauses.[69] The next Part of this Note examines the school-to-prison pipeline in light of equal protection law.

II. EVALUATING SCHOOL-TO-PRISON PIPELINE EQUAL PROTECTION CASES: MOTIVE-CENTERED ANALYSIS VS. STRUCTURAL RACISM ANALYSIS

As shown in Part I.A, students of color are disproportionately victimized by the school-to-prison pipeline.[70] This victimization largely exists because of *Washington v. Davis*'s requirement that equal protection be interpreted narrowly by requiring proof of a discriminatory motive.[71] In contrast, structural racism takes an expansive approach[72] to equal protection

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and endpoints, respectively—presents that the school-to-prison pipeline is a process, or series of actions, starting in schools and ending in prisons. In addition, because "school-to-prison pipeline" is often used within the context of discussing equality for students of color, this Note identifies the school-to-prison pipeline as a process through which students of color are disproportionately transferred from schools to prisons. *See, e.g.*, Losen, *supra* note 7, at 257 ("The adult prison and juvenile justice systems are stocked with black youth who fell into a school-to-prison pipeline."); RACE & ETHNICITY, *supra* note 45, at 146 ("The 'school-to-prison pipeline' [is] responsible for funneling vast numbers of minority children into the juvenile and criminal justice systems rather than graduating them from high school.").

69. *See* Siman, *supra* note 19, at 335-62. Frances Solari and Julienne Balshaw present that zero-tolerance policies may give rise to claims under the Due Process Clause of the Fourteenth Amendment. *See* Solari & Balshaw, *supra* note 21, at 165-67. In *RV v. New York City Department of Education*, a class of New York City students sued the New York City Department of Education for excluding them from school. 321 F. Supp. 2d 538, 540-43 (E.D.N.Y. 2004). The plaintiffs alleged that the Department of Education faced pressure to satisfy high-stakes testing requirements imposed by the State of New York. In order to meet testing requirements, numerous New York City high schools attempted to pushout "[d]ifficult to educate students" by, *inter alia*, placing them in General Education Diploma programs, and not allowing them to attend school if they became pregnant. *RV* was dismissed in June 2004 following a settlement between the parties. *Id. See also* U.S. CONST. amend. XIV.

70. *See supra* Part I.A.

71. *See generally* Lawrence, *supra* note 34.

72. *See* Crenshaw, *supra* note 34, at 1341-43 (explaining that antidiscrimination law is generally interpreted through one of two ideological approaches: the expansive view or the restrictive view):

> The expansive view stresses equality as a result, and looks to real consequences for African-Americans. It interprets the objective of antidiscrimination law as the

analysis by looking at the cumulative effect of historical and inter-institutional actions. Part II.A explains motive-centered equal protection analysis, its application to the pipeline, and its problems. Part II.B explains how structural racism equal protection analysis provides an alternative approach by integrating critical race theory and systems science in order to account for the nebulous nature of systemic racism.

A. Motive-Centered Equal Protection Analysis

Under the Fourteenth Amendment's Equal Protection Clause, no state may "deny to any person within its jurisdiction the equal protection of the laws."[73] Since *Korematsu v. United States*, race-based equal protection cases have been subject to strict scrutiny,[74] a standard of review which requires that a challenged policy serve a compelling state interest and be narrowly tailored in its means.[75] For the vast majority of equal protection cases based on race, a claimant's success depends upon whether the policy being challenged serves a compelling state interest.[76] In *Washington v.*

> eradication of the substantive conditions of Black subordination and attempts to enlist the institutional power of the courts to further the national goal of eradicating the effects of racial oppression. The restrictive vision, which exists side by side with this expansive view, treats equality as a process, downplaying the significance of actual outcomes. The primary objective of antidiscrimination law, according to this vision, is to prevent future wrongdoing rather than redress present manifestations of past injustice. 'Wrongdoing,' moreover, is seen primarily as isolated actions against individuals rather than as a societal policy against an entire group . . . . Moreover, even when injustice is found, efforts to redress it must be balanced against, and limited by, competing interest of white workers—even when those interests were actually created by the subordination of Blacks. The innocence of whites weighs more heavily than do the past wrongs committed upon Blacks and the benefits that whites derived from those wrongs.

Id.

73. The first section of the Fourteenth Amendment fully declares, "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1.

74. In *Korematsu v. United States*, 323 U.S. 214 (1944), the United States Supreme Court affirmed the conviction of Toyosaburo Korematsu, a Japanese-American found in violation of Executive Order No. 9066 and Exclusion Order No. 34 which, among other things, excluded persons of Japanese ancestry from the Pacific Coast of the United States in order to prevent possible espionage and sabotage during World War II. In affirming Korematsu's conviction, the Court established that racial equal protection claims are subject to strict scrutiny by stating "that all legal restrictions which curtail the civil rights of a single racial group are immediately suspect . . . . It is to say that courts must subject them to the most rigid scrutiny." *Id.* at 216.

75. *See e.g.*, Washington v. Davis, 426 U.S. 229, 240 (1976).

76. *See id.*

Davis, the Supreme Court established that only intentional discrimination can violate the Equal Protection Clause, and that evidence of a discriminatory impact alone is insufficient.[77] Policies that explicitly classify persons on the basis of race are presumed to be intentionally discriminatory.[78] Conversely, facially race-neutral measures do not give rise to a presumption of discriminatory intent.[79]

Under *Washington*, an equal protection challenge against a facially neutral education or criminal justice policy that disproportionately harms minorities would likely fail. In *Fuller v. Decatur Public School Board of Education School District 61*,[80] black students who were expelled for fighting in bleachers at a high school football game claimed that their rights to equal protection were denied because their school board "maintained a policy and practice of arbitrary and disparate expulsions with regard to African-American students."[81] At trial, the plaintiffs provided evidence that black students constituted approximately forty-seven percent of their school district's student population, yet accounted for eighty-two percent of their district's expulsions during the 1996 to 1997 school year.[82] The court in *Fuller* concluded that the plaintiffs failed to satisfy *Washington*'s discriminatory motive requirement because they did not show that similarly situated white students were treated less harshly.[83]

Many critical legal scholars have concluded that *Washington*'s discriminatory intent requirement is problematic[84] because it places "a very heavy, and often impossible, burden of persuasion on [equal protection claimants]."[85] Professor Charles Lawrence contends that *Washington*'s focus on motive is faulty because cognitive psychology shows that, even in the absence of an outright intent to discriminate, people act according to uncon-

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77. In *Washington*, black police officer applicants brought a class action lawsuit against District of Columbia officials overseeing the administration of a literacy test required for police officer certification. The *Washington* claimants argued that their right to equal protection was violated because the District of Columbia's police officer literacy test disproportionately impacted minority applicants. *See id.* at 232-33. The United States Supreme Court upheld the District of Columbia police officer literacy test as constitutional because, although the literacy test disproportionately impacted minority applicants, it did not deny equal protection because there was no showing that the police department intended to exclude black applicants. *See id.* at 247-48.

78. *See id.* at 234.

79. *Id.* at 242.

80. Fuller v. Decatur Pub. Sch. Bd. of Educ. Sch. Dist. 61, 78 F. Supp. 2d 812 (C.D. Ill. 2000).

81. *Id.* at 823.

82. *Id.* at 824.

83. *See id.* at 825.

84. *See, e.g.*, Lawrence, *supra* note 34.

85. *Id.* at 319.

scious biases that make them behave discriminatorily.[86] Lawrence also points out that the *Washington* standard inadequately protects victims of discrimination because "the injury of racial inequality exists irrespective of the decisionmakers' motives."[87] Professor Alan Freeman has criticized *Washington* for its failure to take into account the existence of present and past inequalities, forms of "oppression, exclusion, compulsory reduced status, and derogatory cultural stereotyping."[88] Rather than considering concrete racial circumstances, Freeman views *Washington* as requiring the application of "timeless and abstract norms, unsullied by history or social reality."[89]

B. Structural Racism Equal Protection Analysis

Structural racism is a socio-legal paradigm that integrates critical race theory and systems science.[90] Critical race theory is a legal doctrine that focuses on "the historical centrality and complicity of law in upholding white supremacy . . . ."[91] Its proponents cite the Constitution's endorsement of slavery,[92] legalized racial segregation,[93] and neoconservative retrenchment of civil rights[94] as a few, among many, instances of racial bias ingrained within Anglo-American law. Consequently, critical race theory recognizes that legal doctrine is often subjectively contingent rather than

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86. *See id.* at 328-344.

87. *Id.* at 319.

88. Alan Freeman, *Antidiscrimination Law: The View from 1989*, 64 TUL. L. REV. 1407, 1411 (1990).

89. *Id.* Freeman presents that, at its core, *Washington* aims to isolate and stop individual instances of discrimination "in an otherwise non-discriminatory social realm." *Id.* at 1412.

90. *See generally* Daria Roithmayr, *Them That Has, Gets*, 27 MISS. C. L. REV. 373 (2008).

91. CRENSHAW ET AL., CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT FORWARD xi (1995) [hereinafter CRITICAL RACE THEORY].

92. More specifically, the Constitution contains at least three provisions that endorse slavery. Article I, Section 2, Clause 3 requires the apportionment of seats in the House of Representatives on the basis of the "whole Number of free Persons" in each state. Article I, Section 9, Clause 1 prohibited Congress from outlawing the "Importation of such Persons as any of the States now existing shall think proper" until 1808. Lastly, Article IV, Section 2, Clause 3—also known as the fugitive slave clause—requires states to "deliver up" any "Person held to Service or Labor in one State" who escaped into their territory.

93. *See, e.g.*, Plessy v. Ferguson, 163 U.S. 537 (1896).

94. Many scholars have discussed how neoconservatives have led the retrenchment of civil rights since the 1970s. *See generally* Crenshaw, *supra* note 34; Francisco Valdes, *Beyond Sexual Orientation in Queer Legal Theory: Majoritarianism, Multidisciplinary, and Responsibility in Social Justice Scholarship or Legal Scholars as Cultural Workers*, 75 DENV. U. L. REV. 1409, 1434-43 (1998); Eric K. Yamamoto et al., *Dismantling Civil Rights: Multiracial Resistance and Reconstruction*, 31 CUMB. L. REV. 523, 543-55 (2001).

fair, objective, and neutral.[95] Critical race theory evaluates "the entire edifice of contemporary legal thought and doctrine from the viewpoint of law's role in the construction and maintenance of social domination and subordination."[96] Systems science is a social science methodology which recognizes that "the world is a complex system" composed of interconnected actions that affect one another.[97] Systems science "experiments in causal attribution show that people tend to assume a single or primary cause for a given effect."[98] In doing so, people often fail to recognize the dynamic nature in which circumstances occur as a result of multiple causes.[99] Systems science looks at the cumulative effect of actions occurring over time and across domains in order to accurately account for the complex nature of events.[100]

By incorporating both critical race theory and systems science, a structural racism approach evaluates historical and inter-institutional processes in order to determine how they cumulatively result in racial harm.[101] Thus, rather than making motive dispositive, structural racism analysis takes an expansive approach to equal protection by looking at the concrete realities

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95. *See* Crenshaw, *supra* note 34, at 1344 ("There simply is no self-evident interpretation of civil rights inherent in the terms themselves. Instead, specific interpretations proceed largely from the world view of the interpreter.").

96. CRITICAL RACE THEORY, *supra* note 91, at xi.

97. John D. Sterman, *Learning In and About Complex Systems*, 10 SYS. DYNAMICS REV. 291, 291 (1994).

98. Powell, *supra* note 31, at 796.

99. *See id.*; Brief for Caucus for Structural Equity as Amicus Curiae Supporting Respondents at *13, Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 551 U.S. 701 (2007) (Nos. 05-908, 05-915), 2006 WL 2882691.

100. The cumulative effect of inter-institutional actions occurring overtime and across domains is exhibited through the following narrative:

> Were we to look more closely at some particular Black child, we might find that some first-grade teacher in a slum school decided he had little chance to learn much because children who looked like him, dressed like him, and talked like him seldom did well in school and so the teacher, having many other responsibilities, made only the most minimal attempts to teach him. Accordingly, some sixth-grade teacher found him so far beneath the skill level at which she had been trained to teach that she taught him nothing at all; and therefore some high school counselor later took one look at the child's record and suggested that he might do well in shop courses; and so some personnel officer four years later looks at the youngster's performance on an employment test (which is likely to be quite unrelated to the ability to do the job in any case) and suggests that the young man maybe look elsewhere and come back when he has some experience.

PAYNE, *supra* note 1, at 38-39. *See also* Rebecca M. Blank, *Tracing the Economic Impact of Cumulative Discrimination*, 95(2) AM. ECON. REV. 99 (2005).

101. *See generally* Richard Delgado & Jean Stefancic, *Why Do We Tell the Same Stories? Law Reform, Critical Librarianship, and the Triple Helix Dilemma*, 42 STAN. L. REV. 207 (1989).

that actions collectively produce.[102] The systems science foundation of structural racism analysis necessitates a holistic recognition of past racial subordination's lingering effects, as well as present-day racial inequities dispersed across domains.[103] Moreover, structurally racist processes need not entail identifiable intentional racists[104] because they include implicit biases[105] and subconsciously racist people[106] that "act in accord with established norms of fair play, perhaps even with the best interests of [racial minorities] at heart."[107] Thus, the increasingly fragmented and covert nature of structural racism makes its existence nebulous and difficult to identify because no single bad actor may exist.[108] Historical and inter-institutional interplay and consequent results are thus key to structural racism analysis.[109]

Gaston County v. United States[110] illustrates the Supreme Court's use of a structural racism approach to determine whether an antidiscrimination law was violated. In *Gaston*, the Court relied on the presence of education discrimination, via past *de jure* segregation, in order to strike down a facially race-neutral North Carolina literacy test requirement for voter registration[111] as violating the Voting Rights Act of 1965.[112] The Court concluded that Gaston "[C]ounty deprived its black residents of equal educational opportunities, which in turn deprived them of an equal chance to pass the literacy test."[113] Thus, even though Gaston County's literacy test was a facially neutral measure, which in itself did not appear to be racially discriminatory, it resulted in the discriminatory effect of black disenfranchisement through its intersection with past education discrimination.[114] Accordingly, in *Gaston*, the Court used a structural racism

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102. *See* Crenshaw, *supra* note 34, at 1341-43.

103. *See* PAYNE, *supra* note 1, at 38-41.

104. *Id.* at 39.

105. *See generally* Lawrence, *supra* note 34, at 339-45; Kang, *supra* note 37, at 1494-95; Anthony Greenwald, et al., *Measuring Individual Differences in Implicit Cognition: The Implicit Association Test*, 74(6) J. OF PERSONALITY & SOC. PSYCHOL. 1464 (1998).

106. *See generally* Lawrence, *supra* note 34, at 339-45; Kang, *supra* note 37, at 1494.

107. PAYNE, *supra* note 1, at 39.

108. This in turn makes societal indifference to racism and racial harm much easier than during Jim Crow and preceding eras. *See* PAYNE, *supra* note 1, at 37-41; MICA POLLOCK, BECAUSE OF RACE: HOW AMERICANS DEBATE HARM AND OPPORTUNITY IN OUR SCHOOLS 12 (2008).

109. PAYNE, *supra* note 1, at 37-41.

110. 395 U.S. 285 (1969).

111. *Id.* at 296-97; *see also* Powell, supra note 31, at 798.

112. 42 U.S.C. §§ 1973b(a), (c).

113. *Gaston*, 395 U.S. at 291.

114. *Id.* at 296-97.

approach by looking at the cumulative effect of discrimination in multiple domains, the education and election systems, over time—past and present.[115]

Many critical race scholars argue that equal protection should be evaluated through a structural racism approach in order to account for "concrete historical experience[s] rather than [rely on] timeless abstract norms."[116] From a structural racism perspective, the cumulative effect of past and current inequities across domains provides the proper basis for determining whether the Equal Protection Clause's mandate is satisfied.[117] In terms of the pipeline racial inequities presented in Part I.A, under a structural racism approach, such inequities provide support for a finding that U.S. education and criminal justice system policies and practices may be in violation of the Equal Protection Clause. Although there may be an absence of discriminatory intent, a structural racism approach recognizes that racial disparities may exist because of past and present institutional imbalances.[118] Thus, rather than making motive dispositive, a structural racism approach looks at whether education and criminal justice policies and practices interact to result in racial harm.[119] The next section of this Note uses a structural racism approach to examine how the pipeline denies students of color equal opportunities.

III. DECONSTRUCTING THE SCHOOL-TO-PRISON PIPELINE

Part III uses a structural racism approach to examine how the school-to-prison pipeline denies students of color equal opportunities by pushing them out of school and into prison. Specifically, Part III deconstructs historical and inter-institutional pipeline processes in order to show how the pipeline leads to racially disparate harm. Part III.A presents the pipeline as largely being the culmination of three categorical dimensions—criminalization, sorting, and economic policy. The subsequent sections discuss each of these dimensions.

A. The School-to-Prison Pipeline's Structural Dimensions

This section posits that historical and present-day actions that contribute to the pipeline can be categorized into three dimensions—criminalization,

115. *Id.* at 293-97.

116. Freeman, *supra* note 88, at 1411.

117. *Id.*

118. *See generally* Daria Roithmayr, *Locked in Inequality: The Persistence of Discrimination*, 9 MICH. J. RACE & L. 31 (2003).

119. *See, e.g.*, *id.* at 34-35.

sorting, and economic policy. Together, these dimensions form a structural racism framework that largely encompasses the dynamic nature of disparate minority student pushout and incarceration. Thus, in contrast to a motive-centered approach, evaluating the pipeline's criminalization, sorting, and economic dimensions reveals how fragmented inequities have a drastically unequal cumulative impact on students of color.

Criminalization refers to a contemporary symbiotic relationship between educational and carceral methods that makes schools function like penal institutions aiming to control and punish, rather than educate, students. Criminalization arguments put forth by anti-pipeline advocates generally fall within three categories:[120] (1) redefining age-appropriate adolescent behavior as deviant penal conduct warranting suspension, expulsion, or incarceration;[121] (2) administering carceral treatment on students, such as subjecting students to searches and seizures by police personnel and dogs;[122] and (3) socializing students into acting defiantly through exposure to carceral school environments and treatment.[123]

The pipeline's sorting dimension encompasses policies and practices that stratify students into social hierarchies which determine their chances of being pushed out of school and incarcerated.[124] At a macro level, students are sorted through housing policies and practices that result in racially segregated communities, schools, and districts.[125] Macro-sorting contributes to the pipeline by locating students of color in underachieving schools that entail disproportionately high pushout and incarceration rates. Students are also stratified at a micro-level through education policies and practices, such as standardized testing and tracking, that racially segregate students *within* schools.[126] Micro-sorting contributes to the pipeline by dispropor-

120. To be sure, however, this Note's discussion of criminalization is not all-inclusive. Rather, this Note categorizes three prominent types of criminalization arguments in order to explain what criminalization is, and how criminalization is a prominent pipeline dimension.

121. Hirshfield, *supra* note 38, at 80.

122. *See id.*; Noguera, *supra* note 7, at 342 ("Disciplinary practices in schools often bear a striking similarity to strategies used to punish adults in society.").

123. "A large body of research has shown that . . . exclusion[ary] practices can create a self-fulfilling prophesy and result in a cycle of antisocial behavior that can be difficult to break." Noguera, *supra* note 7, at 343. Criminalizing students, or treating them like they are "[d]efiant, maladjusted, and difficult to deal with . . . [makes students] more likely to internalize these labels and act out in ways that match the expectations that have been set for them . . . ." *Id.* at 342-43.

124. *See id.* at 345-47.

125. *See* Daria Roithmayr, *Locked in Segregation*, 12 VA. J. SOC. POL'Y & L. 197, 198-200 (2004).

126. *See* Christopher Jencks, *Racial Bias in Testing*, *in* THE BLACK-WHITE TEST SCORE GAP 55, 55-56 (Christopher Jencks & Meredith Phillips eds., 1998) (explaining that racial biases in standardized testing negatively impact minority students); JEANNIE OAKES, KEEP-

tionately placing minority students into underachieving classes that stimulate antisocial behavior and entail disparate pushout and incarceration rates.[127]

The pipeline's economic policy dimension refers to education finance policies that lead to racially disparate, and often inadequate, public school funding. Racially inequitable funding places minority students on the blighted side of an uneven playing field by inhibiting their access to resources necessary for academic progression.[128] For example, numerous education and legal experts acknowledge that financing public education through local property taxes results in property-poor school districts—in which minority students disproportionately reside—having far less money, and thus resources, than districts located in affluent communities.[129]

B. The School-to-Prison Pipeline's Criminalizing Dimension

The overuse of zero-tolerance policies is, perhaps, the chief example of criminalization.[130] Zero-tolerance policies are measures that mandate predetermined punishment for designated student behaviors with little room for discretionary evaluation by school officials.[131] The growth of zero-tolerance policies stems from the Gun Free Schools Act of 1994,[132] a school safety law that declared zero tolerance for weapons in public schools.[133] Since 1994, however, school districts have expanded zero-tolerance policies far beyond weapons prohibitions.[134] Zero-tolerance policies are now applied to traditional age-appropriate adolescent conduct through the prescription of suspension or expulsion for actions "such as tardiness, class absences, disrespect, and noncompliance."[135] Despite this expansion, research shows that zero-tolerance policies do not improve

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ING TRACK: HOW SCHOOLS STRUCTURE INEQUALITY 3 (1985) (explaining that tracking practices unfairly place minority students in low performing academic ability groups).

127. *See* Jencks, *supra* note 126, at 55-56; OAKES, *supra* note 126, at 3.

128. *See* NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC., DISMANTLING THE SCHOOL-TO-PRISON PIPELINE 4-5 (2007), *available at* http://www.naacpldf.org/content/pdf/pipeline/Dismantling_the_School_to_Prison_Pipeline.pdf.

129. *See id.*

130. *See id.* at 3, 9; *see generally* ELORA MUKHERJEE, NEW YORK CIVIL LIBERTIES UNION, CRIMINALIZING THE CLASSROOM: THE OVER-POLICING OF NEW YORK CITY PUBLIC SCHOOLS (2007), *available at* http://www.nyclu.org/pdfs/criminalizing_the_classroom_report.pdf.

131. *See* Solari & Balshaw, *supra* note 21, at 148-49.

132. 20 U.S.C. § 7151 (2004).

133. Solari & Balshaw, *supra* note 21, at 148-49.

134. *Id.* at 149.

135. *Id.*

school safety.[136] Harms resulting from zero-tolerance policies include, *inter alia*, students being denied educational instruction through suspension or expulsion, students developing low self-esteem, and students becoming distrustful of school officials and other authority figures.[137] Like other pipeline factors, zero-tolerance policies are administered at racially unbalanced rates.[138] For example, African American children represent seventeen percent of public school enrollment nationwide, but thirty-four percent of all out-of-school suspensions. White students, on the other hand, represent sixty-two percent of public school enrollment, but only forty-eight percent of out-of-school suspensions.[139]

Students of color are also criminalized through methods other than zero-tolerance policies. Many of America's poor, urban, and predominately minority schools maintain prison-like atmospheres that make students of color feel like criminals.[140] Descriptively, many inner-city students attend overcrowded and structurally deteriorating facilities[141] that "resemble . . . fortresses, complete with [barbed]-wire . . . fences, bricked up windows, [and] heavy locks on iron doors."[142] Poor, predominately minority schools are

136. *See* A. Troy Adams, *The Status of School Discipline and Violence*, 567 ANNALS AM. ACAD. POL. & SOC. SCI. 140, 148 (2000) ("[V]irtually no data suggest that zero tolerance policies reduce school violence. In fact, a National Center for Education Statistics study found that, after four years of implementation, zero-tolerance policies had no appreciable effect on reducing violence. Strikingly, those schools where zero tolerance was deployed were less safe than those without harsh policies. This suggests that certainty of punishment provides no assurance that safer schools will be created."); Kevin P. Brady, *Zero Tolerance or (In)tolerance Policies? Weaponless School Violence, Due Process, and the Law of Student Suspensions and Expulsions: An Examination of* Fuller v. Decatur Public School Board of Education School District, 2002 BYU EDUC. & L.J. 159, 165 (2002).

137. *See* Siman, *supra* note 19, at 332.

138. *See* Adams, *supra* note 136, at 147; Brady, *supra* note 136, at 179-80; Ruth Zweifler & Julia De Beers, *The Children Left Behind: How Zero Tolerance Impacts Our Most Vulnerable Youth*, 8 MICH. J. RACE & L. 191, 204-06 (2002). Moreover, studies show that racial profiling and unconscious racism often intentionally or unwittingly cause students of color to be disparately targeted for criminalization. Solari & Balshaw, *supra* note 21, at 150 ("Much like the minority experience in other settings, minority students are subject to racial profiling in the application of zero tolerance policies."); *see also* CHARLES J. OGLETREE, JR., ALL DELIBERATE SPEED: REFLECTIONS ON THE FIRST HALF CENTURY OF *BROWN V. BOARD OF EDUCATION* 302 (2004).

139. *See* Siman, *supra* note 19, at 334. These statistics are only for the 2000-2001 school year. *Id.*

140. *See* Wacquant, *supra* note 2, at 108 (explaining that carceral school atmospheres habituate urban students to the mannerisms and socialization styles used in correctional systems).

141. *Id.*

142. *Id.*

regularly placed on "lock-down"[143] by armed police personnel raiding or continuously patrolling school facilities.[144] School districts have even gone as far as completely transferring control over school safety to local police departments.[145] Some schools have police precincts outfitted with holding stations on their campus.[146] Traditional jailhouse procedures like handheld magnetometer inspections, searches and seizures, and continuous video-surveillance are now customarily administered in predominately minority schools.[147] A pipeline case filed in the Atlanta Independent School System indicates that students have been required to assume spread-eagled frisking positions, and to raise their shirts so that their stomachs and bras, in the case of females, are exposed.[148] Female students in Atlanta have also been subjected to the degrading process of having to ask teachers for menstruation pads because they were prohibited from bringing feminine hygiene products to school.[149] These, and many other, carceral policies, practices and environmental transformations make many minority youth feel like criminals in juvenile detention facilities, rather than students being educated at schools.[150]

C. The School-to-Prison Pipeline's Sorting Dimension

1. The Pipeline's Macro-Sorting Dimension

Macro-sorting contributes to the pipeline by racially segregating communities which, in turn, results in racially segregated schools. Macro-sorting consists of past *de jure*, and current *de facto*, housing policies and practices—such as racially restrictive covenants and exclusionary zoning—that collectively cause racial isolation among students. Macro-sorting dates

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143. *Id.* (stating that placing students "under lock for the day" is a central purpose of urban schooling); *see generally* ADVANCEMENT PROJECT, EDUCATION ON LOCKDOWN: THE SCHOOLHOUSE TO JAILHOUSE TRACK (2005), *available at* http://www.advancementproject.org/reports/FINALEOLrep.pdf.

144. *See* MUKHERJEE, *supra* note 130, at 6.

145. The New York City Department of Education, Los Angeles Unified School District, Clark County Nevada School District, and Miami-Dade Public Schools have all shifted school safety responsibility from local school boards to police forces. *See generally id.*

146. *See id.* at 15. In New York City public schools, for example, "[e]very day, over ninety-three thousand children cannot get to classes without passing through a gauntlet of metal detectors, bag-searches, and pat-downs administered by police personnel . . . ." *Id.* at 7.

147. *See id.* at 10.

148. Harris v. Atlanta Indep. Sch. Sys., No. 2008CV147828, at 22 (N.D. Ga. filed Mar. 11, 2008).

149. *Id.* at 23.

150. MUKHERJEE, *supra* note 130, at 7.

back to the Great Migration of blacks from southern states to the northeast and west coast.[151] Vile racism in the South and economic shifts caused by the Great Depression and World War II led over four hundred thousand blacks beyond the Mason-Dixon line between 1930 and 1940.[152] In response to the mass infiltration of blacks, white northerners, with the aid of local and federal governments,[153] administered an array of racially exclusionary housing policies and practices that created *de jure* segregation.[154] For example, white homeowners used racially restrictive covenants—homeownership agreements prohibiting real property transfers to minorities—to preserve white communal homogeneity and, hence, supremacy.[155] The Federal Housing Administration (the "FHA") contributed to racial segregation through institutionalizing redlining—the practice of determining mortgage credit worthiness based on neighborhood racial composition—through federal loan programs. FHA redlining "made it economical for middle-class families to leave [cities]"[156] because "[b]lack neighborhoods were less desirable under FHA guidelines and therefore subject to higher interest rates and higher rates of mortgage denials."[157] With superior economic status,[158] whites moved from cities to suburbs in large numbers.[159]

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151. Roithmayr, *supra* note 125, at 215.

152. *Id.* at 222.

153. *See, e.g.*, Adam Gordon, *The Creation of Homeownership: How New Deal Changes in Banking Regulation Simultaneously Made Homeownership Accessible to Whites and Out of Reach for Blacks*, 115 YALE L.J. 186 (presenting that the Federal Housing Administration's mortgage insurance program, section 203(b), discriminated against racial minorities by imposing underwriting guidelines that encouraged racial exclusion).

154. Roithmayr, *supra* note 125, at 214-22.

155. *Id.* at 217-18.

156. Powell, *supra* note 31, at 801.

157. Andrene Smith, *A Different World: Financial Determinants of Well-Being in New Orleans in Black and White*, 14 GEO. J. ON POVERTY L. & POL'Y 179, 182 (2007).

158. *See* MELVIN L. OLIVER & THOMAS M. SHAPIRO, BLACK WEALTH/WHITE WEALTH: A NEW PERSPECTIVE ON RACIAL EQUALITY (1995).

159. *Thompson v. United States Department of Housing and Urban Development* exemplifies the institutionalization of macro-sorting policies and practices. 348 F. Supp. 2d 398 (D. Md. 2005). *Thompson* was a class action suit filed in 1995 on behalf of more than 12,500 public housing families living in Baltimore, Maryland alleging, *inter alia*, that the Department of Housing and Urban Development ("HUD") violated the equal protection rights of black public housing residents by building a fence between their development and a neighboring white community, and that HUD violated the FHA by failing to take proper steps to desegregate the Baltimore region. *Id.* at 428, 452; Complaint at 1, Thompson v. U.S. Dept. of Hous. and Urban Dev., 348 F. Supp. 2d 398 (D. Md. 2005) (No. 95-309). More specifically, HUD steered public housing development towards Baltimore city which, in turn, "effectively restricted low-income minority families to segregated neighborhoods in the central city." Powell, *supra* note 31, at 808. "During the 1990s, 89% of public housing units developed with HUD's support in the Baltimore Region were in Baltimore City. The majority—more than 67%—of the City's Section 8 voucher holders lived in census tracts

Although *de jure* housing segregation was eventually banned under the Fair Housing Act[160] and accompanying case law,[161] contemporary housing policies and practices continue to cause *de facto* racial segregation in more covert ways. For example, since the 1960s many local communities have enacted exclusionary-zoning policies and local land-use ordinances that restrict residential development to single-family homes.[162] Exclusionary zoning policies contribute to residential segregation by inhibiting rental housing development which, in turn, "limit[s] in-migration by African American and Latino families."[163] Moreover, studies show that the majority of state-sponsored low income tax credit housing developments are located in central cities rather than suburbs or exurbs.[164] The disparate location of assisted housing developments in central cities causes segregation by channeling minorities, who disproportionately rely on assisted living, into urban areas.[165] The cross-generational effect of past *de jure*, and contemporary *de facto*, discriminatory housing policies and practices has been the growth of "chocolate cities and vanilla suburbs" throughout America.[166]

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that were 70 to 100% black." *Id.* In 2005, the United States District Court, District of Maryland held that HUD's actions constituted a failure to provide housing free from discrimination and, as a result, violated the FHA. *Thompson*, 348 F. Supp. 2d at 465.

160. 42 U.S.C. § 3601.

161. *See* Shelly v. Kraemer, 334 U.S. 1 (1948) (holding that the enforcement of racially restrictive covenants by state courts violates the Equal Protection Clause of the Fourteenth Amendment). It should be noted, however, that *Shelly v. Kraemer* did not prohibit homeowners from voluntarily continuing to use racially restrictive covenants without judicial enforcement. *Id.* at 13.

162. *See* ROLF PENDALL, JOINT CTR. FOR HOUS. STUDIES OF HARVARD UNIV., FROM HURDLES TO BRIDGES: LOCAL LAND-USE REGULATIONS AND THE PURSUIT OF AFFORDABLE RENTAL HOUSING (2007), *available at* http://www.jchs.harvard.edu/publications/rental/revisiting_rental_symposium/papers/rr07-11_pendall.pdf. In addition, discriminatory housing practices—such as, racial steering and predatory lending—continue to cause racially-segregated communities today. *See* Powell, *supra* note 31, at 802.

163. Powell, *supra* note 31, at 802; ROLF PENDALL ET AL., THE BROOKINGS INST. METRO. POLICY PROGRAM, FROM TRADITIONAL TO REFORMED: A REVIEW OF THE LAND USE REGULATIONS IN THE NATION'S 50 LARGEST METROPOLITAN AREAS 6 (2006). At their best, exclusionary housing policies are a justified way of protecting property values, access to public services, and low tax rates. PENDALL, *supra* note 162, at 2.

164. Lance Freeman, *Siting Affordable Housing: Location and Neighborhood Trends of Low Income Housing Tax Credit Developments in the 1990s*, THE BROOKINGS INSTITUTION, Apr. 2004, http://www.brookings.edu/reports/2004/04metropolitanpolicy_freeman.aspx.

165. *See id.*; JESSE MCKINNON, U.S. CENSUS BUREAU, THE BLACK POPULATION IN THE UNITED STATES: MARCH 2002 2 (2003) (presenting that inner-city, urban, and suburban regions are segregated by race, such that blacks disproportionately reside closer to inner-cities).

166. *See* MCKINNON, *supra* note 165. In addition to racial segregation, many contemporary communities are also segregated along class lines. Moreover, although the phrase "chocolate cities and vanilla suburbs" connotes a black/white binary, many of today's urban areas are filled with a variety of people of color to be sure. *See generally id.*

The macro-sorting of America's communities has caused many school districts to be situated within racially monolithic areas that lack the diversity necessary for integrated school assignment.[167]

Macro-sorting is a significant pipeline factor because, as noted by Professor Martha Minow, "green follows white;"[168] that is, segregation correlates with education funding levels. On average, white students attend schools among a student body in which thirty percent of students are poor,[169] while black and Latino students attend schools with sixty-five and sixty-six percent poor student populations, respectively.[170] "High poverty schools are very likely to be poorly funded schools, marked by large, sometimes overcrowded classes; weak curricula; insufficiently trained teachers and high teacher turnover; low standardized test scores; high grade reten-

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167. Consequently, as was the case under Jim Crow, today, most minority students attend predominately minority schools, and most white students attend predominately white schools. While roughly 17% of white students attend inner-city schools, 50% of black students do. CHRISTOPHER SWANSON, EDUC. POLICY CTR., THE URBAN INST., WHO GRADUATES? WHO DOESN'T? A STATISTICAL PORTRAIT OF PUBLIC HIGH SCHOOL GRADUATION, CLASS OF 2001, *available at* http://www.urban.org/UploadedPDF/410934_WhoGraduates.pdf. *See, e.g.*, Martha Minow, *After* Brown*: What Would Martin Luther King Say?*, 12 LEWIS & CLARK L. REV. 599, 607-08 (2008) ("In 2000, 72% of African-American students nationwide attended predominantly minority schools, compared with 63% in 1980; 37% of African-American and 38% of Hispanic students in 2000 attended schools with 90% or more minority enrollment."). Restrictions on integrated school assignment were also amplified by the United States Supreme Court's decisions in *Milliken v. Bradley* and *Parents Involved in Community Schools v. Seattle School District No. 1*. *See* Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 551 U.S. 701 (2007); Milliken v. Bradley, 418 U.S. 717 (1974). In *Milliken v. Bradley*, the United States Supreme Court reversed a United States district court interdistrict school desegregation plan. 418 U.S. at 753. The district court ordered an interdistrict desegregation plan encompassing fifty-three suburban schools surrounding Detroit because it concluded that a Detroit-only remedy would make the Detroit school system more black and, consequently, lead to white flight from Detroit schools. *Id.* at 738-39. The Supreme Court held that federal courts lack the power to impose interdistrict remedies for school segregation absent the showing of an interdistrict equal protection violation or an intradistrict equal protection violation having interdistrict effects. *Id.* at 744-45. In *Parents Involved*, school districts in Seattle, Washington and Louisville, Kentucky voluntarily adopted racially integrative school assignment plans that explicitly used race to determine which schools students were assigned to. 551 U.S. at 709-10. The United States Supreme Court struck down the Seattle school district assignment plan as an unconstitutional violation of the Equal Protection Clause and narrowly upheld the Louisville school district plan as being constitutionally permissible. *Id.* at 735.

168. Minow, *supra* note 167, at 608.

169. JOHN LOGAN, ET AL., LEWIS MUMFORD CTR. FOR COMPARATIVE URBAN AND REG'L RESEARCH, CHOOSING SEGREGATION: RACIAL IMBALANCE IN AMERICAN PUBLIC SCHOOLS, 1990-2000 (2002), *available at* http://eric.ed.gov/ERICDocs/data/ericdocs2sql/content_storage_01/0000019b/80/1a/a2/6f.pdf.

170. *Id.*

tion and [push]out rates; and low rates of parental involvement."[171] Moreover, housing mobility experiments have found that teenagers located in poor inner-city areas are more likely to engage in criminal behavior and, thus, become incarcerated.[172] Accordingly, despite the fall of Jim Crow and formal *de jure* racial barriers,[173] macro-sorting disparately locates students of color in underachieving schools that entail higher rates of pushout[174] and incarceration.[175]

2. The Pipeline's Micro-Sorting Dimension

Similar to macro-sorting factors that cause racially segregated communities and, consequently, schooling, numerous education policies and practices stratify students along racial lines *within* schools. Two prominent micro-sorting policies and practices—standardized testing and tracking—serve as useful examples of how stratification within schools contributes to educational inequity, racially disparate pushout, and incarceration.

a. Racially Biased Standardized Testing

Standardized testing is racially biased against minority students[176] in a manner which inhibits their ability to graduate from high school and attain college admittance.[177] Standardized testing thus contributes to the pipeline by aiding minority student pushout.[178] Conventional wisdom asserts that standardized tests are a useful method of objectively evaluating student achievement, ability, and intelligence.[179] An abundance of education research shows, however, that standardized tests are filled with numerous ra-

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171. Brief for Caucus for Structural Equity as Amicus Curiae Supporting Respondents at 22, Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 551 U.S. 701 (2007) (Nos. 05-908, 05-915), 2006 WL 2882691.

172. Jens Ludwig et al., *Urban Poverty and Juvenile Crime: Evidence From a Randomized Housing-Mobility Experiment*, 116 Q.J. ECON. 655, 655 (2001).

173. Brown v. Bd. of Educ., 347 U.S. 483 (1954).

174. Brief for Caucus for Structural Equity as Amicus Curiae Supporting Respondents, *supra* note 171, at 22.

175. Ludwig et al., *supra* note 172, at 655, 674-75.

176. Jencks, *supra* note 126, at 83-84.

177. *See id.* at 74. Standardized tests are required for high school graduation in many states, as well as for college admission.

178. *See* Deborah N. Archer, *Failing Students or Failing Schools?: Holding States Accountable for the High School Dropout Crisis*, 12 LEWIS & CLARK L. REV. 1253, 1256 (2008) (stating that Congress has responded "to concerns that NCLB's standardized testing requirementes would have a discriminatory impact on the graduation rates of people of color").

179. *See* RICHARD HERRNSTEIN & CHARLES MURRAY, THE BELL CURVE: INTELLIGENCE AND CLASS STRUCTURE IN AMERICAN LIFE (1994).

cial biases including labeling bias, content bias, methodological bias, prediction bias, and selection system bias.[180] Moreover, cognitive psychology studies show that psychological processes, such as stereotype threat, cause standardized tests to be racially inaccurate predictors of academic ability and intelligence.[181]

Among the racial biases associated with standardized testing, stereotype threat and selection system bias have both been found to have considerably harmful effects on students of color.[182] Stereotype threat is a psychological process through which negative stereotypes about a group of people cause individuals within the group to suffer psychological distress that negatively affects their behavior.[183] For example, studies show that stereotypes depicting black students as, on average, less intellectually gifted than white students depresses black student standardized test performance.[184] When placed in an environment that triggers the stereotype of black intellectual inferiority, such as taking the SATs, black students may feel "the risk of being judged or treated stereotypically, or of doing something that would inadvertently confirm the stereotype."[185] Testing under such anxiety stimulating conditions resultantly causes black students to underperform.[186]

Selection system bias is a form of standardized testing bias that occurs when standardized tests are used to measure academic or intellectual potential instead of another diagnostic tool that entails less racial disparity.[187] "Selection system bias arises when three conditions are met: (1) [potential academic] performance depends partly on cognitive skills and partly on other traits; (2) it is easy to measure cognitive skills but hard to measure the other traits that determine performance; and (3) the racial disparity in cognitive skills is larger than the racial disparity in the other, unmeasured traits that influence performance."[188] When all three of these factors exist, such as in the use of standardized tests for high school graduation or college admittance, people who do not perform as well in the chosen selection system are disadvantaged because less biased evaluation methods are not used.[189]

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180. Jencks, *supra* note 126, at 55.

181. *See* Claude M. Steele & Joshua Aronson, *Stereotype Threat and the Test Performance of Academically Successful African Americans*, *in* THE BLACK-WHITE TEST SCORE GAP 402 (Christopher Jencks & Meredith Phillips eds., 1998).

182. *See* Jencks, *supra* note 126, at 70, 84.

183. *See id.* at 70.

184. *See id.*

185. Steele & Aronson, *supra* note 181, at 403.

186. *Id.*

187. *See* Jencks, *supra* note 126, at 55.

188. *Id.* at 57.

189. *Id.* at 57-58.

Standardized testing functions as a micro-sorting factor that contributes to disparate minority student pushout in at least three ways. First, standardized tests cause minority students to receive an unequal education because they cause minority students to be inappropriately placed in special education and low-performing classes at disparate rates.[190] Second, standardized tests inhibit minority student high school graduation and college admittance because many states require students to pass a standardized test in order to graduate from high school and matriculate to college.[191] Lastly, courts have concluded that education research shows that "teachers acting under false assumptions because of low test scores will treat the disadvantaged student in such a way as to make him conform to their low expectations; this *acting out* process—the self-fulfilling prophecy—makes it appear that the false assumptions were correct, and the student's real talent is wasted."[192]

b. Racially Biased Educational Tracking

"Tracking" refers to an educational practice used by the vast majority of schools in which students are sorted according to "academic ability" for the purpose of providing academically homogenous, and presumably, appropriate instruction.[193] For example, school districts throughout the nation send students on diverging educational paths by placing them in vocational rather than college-bound courses, and by labeling students as intellectually

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190. For example, in *Larry P. v. Riles*, the Court of Appeals for the Ninth Circuit held that the use of IQ tests for determining special education placement disparately discriminated against black students by inaccurately placing them in special education classes. 793 F.2d 969, 972 (9th Cir. 1984). In *Larry P.*, a "plaintiff class . . . consisting 'of all black San Francisco schoolchildren who ha[d] been classified as mentally retarded on the bases of IQ test results'" brought an action for declaratory and injunctive relief against the San Francisco Superintendent of Schools, California Superintendent of Schools, the San Francisco Board of Education, and State Board of Public Instruction. *Id.* at 972. Plaintiffs alleged, *inter alia*, violations of Title VI of the Civil Rights Act of 1964, the Education for All Handicapped Children Act, section 504 of the Rehabilitation Act, and the equal protection clauses of the California and U.S. Constitutions. *Id.* These plaintiffs were placed in special education classes which were "not designed to help students learn the skills necessary to return to the regular instructional program." *Id.* at 973. The court affirmed the holding that the IQ test administered was not validated for the purpose of special education placement and that the IQ test had a disparate racial effect on black students. *Id.* at 981, 983.

191. COMM. ON APPROPRIATE TEST USE, NAT'L RESEARCH COUNCIL, HIGH STAKES: TESTING FOR TRACKING, PROMOTION, AND GRADUATION 163-83 (Jay P. Heubert & Robert M. Hauser eds., 1999).

192. Hobson v. Hansen, 269 F. Supp. 401, 514 (D.D.C. 1967) (emphasis added).

193. *See* PEDRO A. NOGUERA, SCHOOL REFORM AND SECOND-GENERATION DISCRIMINATION: TOWARD THE DEVELOPMENT OF EQUITABLE SCHOOLS 2 (2007) [hereinafter SCHOOL REFORM]; Losen, *supra* note 7, at 254.

"gifted" or, by implication, "not gifted."[194] The ostensible benefits of tracking include preventing high achievers from being held back, low achievers from falling behind, and helping underachieving students develop positive self-perceptions through avoiding comparison to high achievers.[195] However, an abundance of research shows that the purported benefits of tracking are based on faulty assumptions.[196] Specifically, studies show that tracking inhibits learning for students placed in low-ability groups and does not aid achievement for students placed in higher groups.[197] In addition, rather than improving underachieving student self-perceptions, tracking fosters low self-esteem[198] because students placed in lower tracks are stereotyped as "dumb."[199] Studies also show that tracking placements are determined based on the racially biased standardized testing mentioned in Part.III.C.2.a, as well as subjective student evaluations made by teachers and counselors.[200]

In addition, tracking intersects with macro-sorting because schools with predominately minority student populations, as a result of housing discrimination, provide more lower tracks and fewer "college gateway classes."[201] This intersection is a key pipeline-factor because it results in rigidly differentiated instruction that disproportionately harms minority students by placing them in lower tracks.[202] For instance, "data collected by the federal government shows that black and Latino students are far less likely to be identified as gifted and talented, or to be enrolled in advanced placement (AP) courses than whites."[203] The disparate placement of minorities in low performing groups results in students of color receiving less academic instruction because students placed in low-ability groups are often subjected to rote curricula that lead to inattentiveness and lower attendance rates.[204] Moreover, low-track students are more likely to exhibit antisocial behavior and drop out of school because they come to realize that

194. *See generally* OAKES, *supra* note 126, at 3.

195. *Id.* at 6. In regards to labeling students, in *Wisconsin v. Constantineau*, "[t]he Supreme Court ruled that a due process hearing was required before an individual could be labeled a 'drunkard,' a label determined by the Court to be stigmatizing." *Id.* at 178.

196. SCHOOL REFORM, *supra* note 193, at 2.

197. OAKES, *supra* note 126, at 7-8.

198. *Id.* at 8.

199. *Id.* at 8.

200. *Id.* at 9.

201. *See* Brief for Caucus for Structural Equity as Amicus Curiae Supporting Respondents at 26, Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 551 U.S. 701 (2007) (Nos. 05-908, 05-915), 2006 WL 2882691.

202. Losen, *supra* note 7, at 254.

203. *Id.*

204. *See* OAKES, *supra* note 126 at 99; IRVINE, *supra* note 9, at 9-16.

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."[205] Lastly, tracking's stimulation of antisocial behavior and expanded punishment under zero-tolerance policies, together, demonstrate that criminalization and sorting collectively push students of color out of school and into the criminal justice system.[206]

D. The School-to-Prison Pipeline's Economic Dimension

Our nation's two primary sources of public education funding, the No Child Left Behind Act[207] ("NCLB") and local property taxes, are both intertwined with policies that disparately harm students who are poor or of color.[208] Inadequate public school funding is a key pipeline factor because "[r]esource deficiencies—evidenced by a lack of experienced or certified teachers and guidance counselors, advanced instruction, early intervention

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205. *Schools, Prisons, and Social Implications of Punishment*, *supra* note 7, at 343. In the seminal tracking case, *Hobson v. Hansen*, the U.S. District Court for the District of Columbia concluded that a tracking system unconstitutionally deprived poor black students of their right to an equal educational opportunity. 269 F. Supp. 401, 406-07 (D.D.C. 1967). In *Hobson* the District of Columbia administered a tracking system in which students were "divided in separate, self-contained curricula or tracks ranging from 'Basic' for the slow student to 'Honors' for the gifted." *Id.* Student tracking placements were determined according to student performances on a standardized test that used white middle class students as the norm group. *Id.* at 407. The use of the standardized test resulted in black students' relegation to lower tracks that administered reduced educational curricula. *Id.* The court concluded that the tracking program was an unconstitutional denial of equal protection based on the following, as well as other, findings: (1) the standardized tests used to track students predicted social, racial, and economic advantages rather than academic ability; (2) the disproportionate placement of black students in lower tracks subjected black students to a reduced curricula that inhibited their opportunity to learn; (3) once placed in lower tracks, black students were essentially locked-in because the tracking system failed to provide compensatory education; and (4) the tracking system stigmatized black students by placing them in lower tracks. *See generally id.* Other notable cases that evaluate whether tracking denies equal protection include *McNeal v. Tate County School District*, 508 F.2d 1017 (5th Cir. 1975), and *United States v. Gadsden County School District*, 572 F.2d 1049 (5th Cir. 1978). In *McNeal*, the United States Court of Appeals for the Fifth Circuit held that a school district could not use a tracking system that resulted in racially segregated classrooms until the school district achieved unitary status without the presence of tracking in order to ensure that the placement of black children in lower groups was not due to past segregation. *See McNeal*, 508 F.2d at 1020-21. In *Gadsden*, the Fifth Circuit followed *McNeal*'s precedent by upholding a district court ruling that a tracking system could not be used because a school district failed to show that the disproportionate placement of blacks in lower tracks was not the result of past segregation. *See Gadsden County Sch. Dist.*, 572 F.2d at 1052.

206. *See Schools, Prisons, and Social Implications of Punishment*, *surpa* note 7, at 343; Adams, *supra* note 136, at 147-48; Brady, *supra* note 136.

207. *See generally* Losen, *supra* note 7.

208. *Id.*

programs, extracurricular activities, and safe, well equipped facilities—lock many students into second-class educational environments that neglect their needs and make them feel disengaged."[209]

NCLB is often identified as America's most problematic federal education policy.[210] Although NCLB distributes approximately $10 billion to school districts each year for the purpose of decreasing racial achievement gaps,[211] NCLB arguably has the opposite effect because it makes federal funds available to states through racially biased standardized testing[212] and punishment contingencies.[213] For example, under NCLB, schools and districts failing to meet testing benchmarks are penalized with "increasingly harsh interventions . . . such as, firing, taking over school boards, or closing schools completely."[214] These mechanisms punish, rather than help, America's most needy schools, which are disproportionately filled with poor minority students.[215] Although NCLB provides underperforming students an opportunity to transfer to another school within their district,[216] this "remedy" is more symbolic than effective because the pipeline's macro-sorting dimension makes "almost all schools within the same district have rampant inequities and low achievement."[217]

In addition to NCLB's racially disparate impact, most public education funds are generated through racially inequitable local property tax based finance policies. Property tax based education funding is racially inequitable because poorer school districts, which are disproportionately minority, generate less property tax revenues.[218] Since *San Antonio Independent School District v. Rodriguez*, property tax based school finance policies have been condoned under the law even though they cause students of col-

209. NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, *supra* note 128, at 3-4.

210. DEBORAH MEIER ET AL., MANY CHILDREN LEFT BEHIND: HOW THE NO CHILD LEFT BEHIND ACT IS DAMAGING OUR CHILDREN AND OUR SCHOOLS (Deborah Meier & George Woods eds., 2004).

211. Losen, *supra* note 7, at 244-45.

212. Lawyers' Committee for Civil Rights Under the Law, *Racial Disparities in Educational Opportunities in the United States*, 6 SEATTLE J. FOR SOC. JUST. 591, 612 (2008); *see supra* Part III.C.2.a.

213. Losen, *supra* note 7, at 245.

214. *Id.* at 258.

215. *See generally* MEIER ET AL., *supra* note 210.

216. Lawyers' Committee for Civil Rights Under the Law, *supra* note 212, at 613.

217. *Id.*

218. *Id.* at 608, 613; U.S. Census Bureau, Historical Poverty Tables, http://www.census.gov/hhes/www/poverty/histpov/hstpov2.html (last visited Sept. 22, 2009).

or to receive grossly inequitable educational resources.[219] Depriving students of color of equal opportunities is a key pipeline factor because "once [students] know that the rewards of education—namely, acquisition of knowledge, 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."[220]

IV. THE SCHOOL-TO-PRISON PIPELINE IN PRAXIS

Part IV uses a recent education equity case, *Williams v. California*,[221] to show how inter-institutional policies and practices interact in a manner which results in minority students being deprived of an equal education, and set on a path to prison. Part IV.A provides the factual background of *Williams*. Part IV.B uses the pipeline structural racism framework presented in Part III to examine how the *Williams* plaintiffs were denied equal opportunities. While the legal strategy advanced by the *Williams* plaintiffs did not highlight the presence of criminalization in California, Part IV.B.1 examines criminalizing factors that contribute to disproportionate minority incarceration in California. Parts IV.B.2 and 3 examine the presence of pipeline sorting and economic factors in California. Lastly, Part IV.B.4 explains how California's pipeline dimensions converged to deny students of color equal opportunities in *Williams*.

A. Factual Background: *Williams v. California*

The plaintiffs in *Williams v. California* filed suit on May 17, 2000, the forty-sixth anniversary of the *Brown v. Board of Education* decision.[222] Led by a coalition of civil rights organizations, including the American Civil Liberties Union and Mexican American Legal Defense Fund, eighteen San Francisco Bay Area public schools brought a class action lawsuit against the State of California for denying their students an equal and ade-

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219. *See generally* San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1 (1973); Dennis J. Condron & Vincent J. Roscigno, *Disparities Within: Unequal Spending and Achievement in an Urban School District,* 76(1) SOC. ED. 18 (2003).

220. *Schools, Prisons, and Social Implications of Punishment*, *supra* note 7, at 343.

221. Williams v. State of California, No. 312236 (Cal. Super. Ct., S.F. County 2000). It is important to note that *Williams* is not a case that challenges the pipeline in its entirety. The legal strategy advanced in *Williams* focuses primarily on showing that the pipeline's economic dimension cumulatively results in students of color being denied an equal and adequate education.

222. *See* First Amended Complaint for Injunctive and Declaratory Relief, Williams v. State of California, No. 312236 (Cal. Super. Ct., S.F. County, filed May 17, 2000) [hereinafter First Amended Complaint], *available at* http://www.decentschools.org/courtdocs/01FirstAmendedComplaint.pdf; Brown v. Bd. of Educ., 347 U.S. 483, 483 (1954).

quate education.[223] In August of 2000, *Williams* was expanded to a total of forty-six public schools throughout the State of California.[224]

The overwhelming majority of students represented by the *Williams* class were poor or of color. Among all forty-six schools, thirty-seven had student bodies in which over fifty percent of students qualified for free or reduced-price meals.[225] Forty-two of the schools had predominately minority student populations, and thirty of the schools had student bodies in which over thirty percent of students were learning English as a second language.[226] The physical condition of schools in *Williams* "shocked the conscience."[227] Students were forced to attend vermin and insect-infested schools without heating, air conditioning, or a sufficient number of functioning toilets.[228] Some of the schools enrolled up to one-hundred-and-fifty percent of their capacity,[229] making them so overcrowded that students had to stand or sit on counters during class.[230] "The growth of mold and fungus in many classrooms induce[d] asthma attacks and [lead] to regular illnesses among children and teachers."[231] "Leaky roofs, broken windows, peeling paint, defective electrical systems, and other indicia of maintenance long deferred [were] all too common in many [of the *Williams*] schools."[232] Numerous education experts concluded that the State of California failed to provide the *Williams* students with bare education essentials that other California students received.[233] Necessities like textbooks and instructional materials were insufficiently supplied.[234] As a result, students had to share outdated and run-down materials while at school.[235] Moreover, because the

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223. The named plaintiff, Eliezer Williams, was a black student who attended Luther Burbank Middle School in San Francisco. A large group of other California students were also named plaintiffs. The forty-six plaintiff schools were located in a total of nineteen school districts throughout California. *See* First Amended Complaint, *supra* note 222, at 12-20.

224. Christopher R. Lockard, *In the Wake of Williams v. State: The Past, Present, and Future of Education Finance Litigation in California*, 57 HASTINGS L.J. 385, 403 (2005).

225. First Amended Complaint, *supra* note 222, at 6-7.

226. *Id.* at 7.

227. *Id.* at 6.

228. *Id.*

229. Expert Report of Jeannie Oakes, *Access to Textbooks, Instructional Materials, Equipment, and Technology, Williams v. State,* No. 312236 (Cal. Super. Ct., S.F. County, filed May 17, 2000), at 9, *available at* http://www.decentschools.org/expert_reports/oakes_report.pdf.

230. First Amended Complaint, *supra* note 222, at 46.

231. *Id.* at 9.

232. *Id.*

233. *Id.* at 25.

234. *Id.* at 25-26.

235. *Id.*

State did not provide enough books for many of the *Williams* students to bring home, homework and studying often went undone.[236] In addition, many of the students did not have permanent teachers.[237] Among the teachers that were provided, the vast majority did not have full, nonemergency teaching credentials, and many were inadequately prepared "to teach students information covered in State tests required for promotion or graduation."[238]

The plaintiffs in *Williams* claimed that the State (1) violated California's Equal Protection Clauses by failing to provide tens of thousands of minority students with equal educational opportunities;[239] (2) violated its state constitutional duty to provide a free public education to each of the plaintiffs;[240] and (3) maintained predominately minority schools in such a decrepit fashion as to constitute racial discrimination in violation of Title VI of the Civil Rights Act of 1964.[241]

After more than four years of litigation,[242] on August 13, 2004, the parties in *Williams v. California* formed a settlement agreement (the "*Williams* settlement").[243] Under the *Williams* settlement, the State agreed to provide $800 million for emergency repairs to schools in the bottom three deciles of California's Academic Performance Index ("API").[244] School districts also received $25 million to assess the facility conditions of schools in the bottom three API deciles,[245] "and $138 million for new instructional materials for students attending schools ranked in the lowest two API deciles."[246] The State also agreed to extend funding of at least $200 million

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236. *Id.*

237. *Id.* at 26.

238. *Id.*

239. *Id.* at 70; *see* CAL. CONST. art. I, § 7(a); CAL. CONST. art. IV, § 16(a).

240. First Amended Complaint, *supra* note 222, at 70; see CAL. CONST. art. IX, § 1; CAL. CONST. art. IX, § 5.

241. First Amended Complaint, *supra* note 222, at 72; *see* 42 U.S.C. § 2000d (2009); 34 C.F.R. § 100.3(b)(2) (2009).

242. BROOKS ALLEN, THE WILLIAMS V. CALIFORNIA SETTLEMENT: THE FIRST YEAR OF IMPLEMENTATION 9 (2005), [hereinafter "THE WILLIAMS SETTLEMENT REPORT"] *available at* http://www.aclu-sc.org/attach/w/williams_first_year_report.pdf.

243. *Id.*; Settlement Implementation Agreement, *Williams v. California*, No. 312236 (Cal. Super. Ct., S.F. County), *available at* http://www.decentschools.org/settlement/Settlement_Implement_Agr.pdf. [hereinafter Settlement Agreement].

244. There are a total of 10 deciles in California's Academic Performance Index. THE WILLIAMS SETTLEMENT REPORT, *supra* note 242, at 10-11; Settlement Agreement, *supra* note 243.

245. THE WILLIAMS SETTLEMENT REPORT, *supra* note 242, at 11; Settlement Agreement, *supra* note 243.

246. THE WILLIAMS SETTLEMENT REPORT, *supra* note 242, at 11; Settlement Agreement, *supra* note 243.

for California's High Priority Schools Grant Program.[247] In total, the *Williams* settlement increased California education funding by approximately $1 billion.[248] On September 29, 2004, five measures implementing the *Williams* settlement were passed by the California legislature and signed by Governor Arnold Schwarzenegger.[249]

B. A Structural Racism Analysis of *Williams v. California*

1. Pipeline Criminalizing Factors in California

Under the sanction of both state and federal law, California public school and police officials engage in a wide variety of criminalizing policies and practices that contribute to disproportionate minority student pushout and incarceration. In California public schools, students are forced to walk through metal detectors, and subjected to handheld magnetometer inspections and police dog "sniff searches."[250] In cities like Los Angeles, San Bernardino, and Compton, the focus on carceral strategies in schools has led to the establishment of *school* police departments that are separate and distinct from that of their respective cities. [251] In the case of the Los Angeles Unified School District Police Department, police precincts are also stationed on school grounds.[252]

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247. The High Priority Grant Schools Program is a California program that "provides improvement grants to the lowest-performing 10% of schools in the State." THE WILLIAMS SETTLEMENT REPORT, *supra* note 242, at 11; Settlement Agreement, *supra* note 243.

248. THE WILLIAMS SETTLEMENT REPORT, *supra* note 242, at 10.

249. Senate Bill 550 and Assembly Bill 2727 "establish[ed] minimum standards [for] school facilities, teacher quality, and instructional materials, as well as accountability systems to enforce these standards." Assembly Bill 1550 required that California's multi-track, year-round school system end by 2012. Assembly Bill 3001 sought to ensure that qualified teachers were placed in low-performing schools and made it easier for highly qualified out-of-state teachers to obtain jobs in California. Lastly, Senate Bill 6 appropriated the *Williams* settlement's $800 million for facility repairs. THE WILLIAMS SETTLEMENT REPORT, *supra* note 242, at 11; Settlement Agreement, *supra* note 243.

250. FRANK R. KEMERER ET AL., CALIFORNIA SCHOOL LAW 399-400 (2005).

251. Los Angeles School Police Department, http://www.laspd.com/ (last visited Sept. 11, 2009); San Bernardino City Unified School District, http://www.sbcusd.k12.ca.us/index.aspx?NID=432 (last visited Sept. 11, 2009); The Officer Down Memorial Page, Inc., Compton Unified School District Police Department, http://www.odmp.org/agency/811-compton-unified-school-district-police-department-california (last visited Sept. 11, 2009).

252. For example, the addresses of Los Angeles' Daniel Webster Middle School and the Los Angeles Unified School District Police Department, West Division are both 11330 Graham Place, Los Angeles, CA 90064. *Compare* Daniel Webster Middle School, Contact, http://webstermiddle.org/apps/contact/?m=4714376 (last visited Sept. 11, 2009) *with* Los Angeles School Police Department, *Phone List,* http://www.laspd.com/phoneList.htm (last visited Sept. 11, 2009). In addition, the Los Angeles Unified School District has also installed metal detectors in all Los Angeles schools since 1997. *See* Anne McDermott, *U.S.*

California's carceral schooling methods were validated by legislation and case law. In *B.C. v. Plumas Unified School District*, for instance, the U.S. Court of Appeals for the Ninth Circuit indicated that drug-sniffing police dog searches may be administered on students.[253] In *In re Latasha W.*, the California Court of Appeals for the Second Circuit held that a student's Fourth Amendment right to be free from unreasonable searches and seizures is not violated if the student is subjected to random metal detector searches while at school.[254] In addition, California courts have upheld the detention of juveniles by school personnel,[255] as well as the searching of students by police officers at school.[256] Under California's *Gang Violence and Juvenile Crime Prevention Act*, California prosecutors now have the authority to decide whether juveniles as young as fourteen years of age

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Schools: Security by Metal Detector?, CNN, Dec. 2, 1997, http://www.cnn.com/US/9712/02/school.security/.

253. In *B.C. v. Plumas Unified School District*, B.C. and other high school students were told to exit their classroom and wait outside while a police dog sniffed their backpacks, jackets, and other belongings. While exiting from and returning to their classroom, B.C. and other students passed by the drug-sniffing police dog stationed outside the door. One of the students alerted the police dog. That student was taken away and further searched by school officials but no drugs were found. The United States Court of Appeals for the Ninth Circuit held that under the Fourth Amendment, police-dog sniffing of students at school constituted an unreasonable search and seizure, unless there was evidence of a significant school drug problem or a suspicion that an individual student possessed drugs. B.C. v. Plumas Unified Sch. Dist., 192 F.3d 1260 (9th Cir. 1999).

254. In *In re Latasha W.*, eight to ten high school students were subjected to a random hand-held metal detector search while at school one day. One student had a knife in her pocket. She was charged for bringing a knife on school grounds with a blade longer than 2.5 inches. The California Court of Appeals concluded that a student's Fourth Amendment right to be free from unreasonable searches and seizures was not violated if the student was subjected to a random metal detector search while at school. In re Latasha W., 70 Cal. Rptr. 2d 886 (Ct. App. 1998).

255. In *In re Randy G.*, the California Supreme Court affirmed a California Court of Appeals judgment that found school officials may detain a minor student on school grounds in the absence of a reasonable suspicion of criminal activity or school rule violation, so long as authority is not exercised in an arbitrary, capricious, or harassing manner. In re Randy G., 28 P.3d 239 (Cal. 2001).

256. In *In re Alexander B.*, a school official directed a school police officer to search a group of students at school. The school police officer found one of the students to be in possession of a knife. The minor was charged and found to have violated a statute prohibiting concealed weapons. The California Court of Appeals found that the student's Fourth Amendment rights were not violated when the student was searched by a police officer. In re Alexander B., 270 Cal. Rptr. 342 (Ct. App. 1990) (disapproved of on other grounds by *In re Randy G*, 28 P.3d 239 (Cal. 2001) (stating that detentions of minor students on school grounds do not offend the Constitution, so long as they are not arbitrary, capricious, or for the purposes of harassment)).

should be tried as adults.[257] Prior to the Act, judges had sole discretion to make that determination.[258]

2. *Pipeline Sorting Factors in California*

California has a lengthy macro-sorting history that stems from *de jure* and *de facto* racial segregation. In 1854, the San Francisco Board of Education initiated *de jure* racial segregation in California by establishing the state's first "colored school."[259] In 1872, twenty-two years before *Plessey v. Ferguson*,[260] the California Supreme Court established its "separate but equal" doctrine.[261] During World War II, President Franklin Delano Roosevelt exiled over seventy-thousand Japanese Americans from their California homes and placed them in internment camps between 1942 and 1944.[262] In addition, until the 1948 Supreme Court case of *Shelley v. Kramer*, racially restrictive covenants were used to isolate minorities in California.[263]

In 1946, California's formal racial segregation was eventually outlawed in *Mendez v. Westminister*.[264] With the fall of *de jure* exclusion, however, *de facto* segregation—as a result of school zoning boundaries, housing discrimination, and "white-flight"—soon took its place.[265] *Jackson v. Pasadena City School District* indicates that whites used racially gerrymandered school zones to transfer from predominately black to predominately white schools until at least the 1960s.[266] Court documents from *Spangler v. Pasadena City Board of Education* record the existence of *de facto* racial iso-

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257. CAL. WELF. & INST. CODE § 602(b) (West 2008).

258. Nicholas Espiritu, *(E)racing Youth: The Racialized Construction of California's Proposition 21 and the Development of Alternate Contestations*, 52 CLEV. ST. L. REV. 189, 198 (2005).

259. CHARLES WOLLENBERG, ALL DELIBERATE SPEED: SEGREGATION AND EXCLUSION IN CALIFORNIA SCHOOLS, 1855-1975 10 (1976). At the time, California law also provided that schools for students of color would be closed if enrollment fell below ten students. This resulted in some black students being left without a school to attend.

260. 163 U.S. 537 (1896).

261. Ward v. Flood, 48 Cal. 36, 48-52 (1874); *see also* WOLLENBERG, *supra* note 259, at 9, 21.

262. In *Korematsu v. United States*, the United States Supreme Court held President Roosevelt's *de jure* racial exclusionary order to be a constitutionally permissible exercise of executive authority during a time of war. Korematsu v. United States, 323 U.S. 214, 217, 223-24 (1944); *see also* WOLLENBERG, *supra* note 259, at 75.

263. Shelley v. Kraemer, 334 U.S. 1, 20-21, 23 (1948).

264. Mendez v. Westminister Sch. Dist., 64 F. Supp. 544, 550-51 (S.D. Cal. 1946); *see also* WOLLENBERG, *supra* note 259, at 108.

265. WOLLENBERG, *supra* note 259, at 26-27, 138.

266. Jackson v. Pasadena City Sch. Dist., 382 P.2d 878, 878-79 (Cal. 1963); WOLLENBERG, *supra* note 259, at 879-80.

lation policies—such as racially biased school board boundaries, transfer policies, and construction plans—in California in 1970.[267] *Crawford v. Los Angeles Board of Education* shows that extreme school segregation existed in California through the early 1980s:[268] roughly ninety percent of black students attended school with a black majority, two-thirds of Latinos attended schools with mostly Latinos, and eighty percent of whites attended schools with black populations lower than one percent.[269] Lastly, the racial demographics of the *Williams* schools indicate that macro-sorting persists in California.

3. Pipeline Economic Policies in California

Although the *Williams* settlement alone strongly suggests that California's education finance system is problematic,[270] the level of education funding that California provides compared to other states suggests that California's education finance system is arguably inadequate.[271] For example, while California currently has the ninth largest per capita income of all fifty states, it ranks fortieth in terms of average expenditures per K-12 student.[272] In addition to inadequacy, the *Williams* case indicates that California's education finance system results in racially inequitable schooling.[273]

In the late 1960s, California public schools received nearly sixty percent of their funding through local property taxes being paid directly to school districts.[274] Per student expenditures varied widely between school districts as a result of California's property tax based school financing system.[275] Affluent school districts spent far more money on each student than property-poor districts.[276] In Los Angeles, for example, students in the Baldwin

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267. Spangler v. Pasadena City Bd. of Educ., 311 F. Supp. 501, 508-10 (C.D. Ca. 1970); WOLLENBERG, *supra* note 259, at 151.

268. Crawford v. Bd. of Educ. of Los Angeles, 458 U.S. 527, 530-34 (1982).

269. WOLLENBERG, *supra* note 259, at 157.

270. THE WILLIAMS SETTLEMENT REPORT, *supra* note 242, at 11; Settlement Agreement, *supra* note 243.

271. Lockard, *supra* note 224, at 392.

272. Figures show that while California spends roughly $7,324 on each student per year, comparable states like New York and New Jersey spend over $11,000 on each student. *See* Education Data Partnership, California's Rankings 2001-02, http://www.ed-data.k12.ca.us/Articles/CalRankings.asp.

273. *See generally* First Amended Complaint, *supra* note 222.

274. *See* Lockard, *supra* note 224, at 387.

275. *Id.*

276. Serrano v. Priest, 487 P.2d 1241, 1248 (Cal. 1971). In *Serrano*, Los Angeles public school students brought a class action suit against California state officials alleging that California's property tax based school financing system violated their right to education under the California Constitution, as well as the Fourteenth Amendment right to equal protection

Park Unified School District—which was predominately minority—received $577 per year, compared to $1,231 for each student in the Beverly Hills Unified School District, which was predominately white.[277] Further, court documents from the 1971 case *Serrano v. Priest* present that California's property tax based school financing system caused students of color to receive racially-disparate education funding.[278]

In *Serrano*, the California Supreme Court attempted to eliminate gross disparities in California public school funding by holding California's property tax school financing system in violation of the California Constitution.[279] As a remedy, the Court required that the State of California eliminate all wealth-related differences in school funding by ensuring that expenditures for every California student be within $100 of each other.[280] In response to *Serrano*, in 1978, "anti-tax" advocates passed Proposition 13, a state referendum.[281] Proposition 13 wiped out the effect of *Serrano* by shifting California's local property tax financing system to a statewide scheme that capped annual property taxes at one percent of property value, and limited annual property tax increases to no more than two percent per year.[282] Proposition 13 caused California property tax revenues to decrease by more than sixty percent. As a result, California has never been able to achieve *Serrano*'s goal of bringing all public student expenditures within $100 of each other.[283]

4. The Convergence of Pipeline Factors in California

The persistence of macro-sorting in California likely harmed the *Williams* plaintiffs by disproportionately placing them in historically poor, underachieving school districts. By excluding people of color from white neighborhoods and public schools until the mid-twentieth century, California law and "white cartel organizations worked together to achieve a monopoly on access to good neighborhoods"[284] and schools. As a result, white Californians had access to "more wealth, higher property tax values

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under the United States Constitution. The California Supreme Court ruled in favor of the plaintiffs in both claims. *Id.*

277. *Id.*

278. *Id.*; Complaint, Serrano v. Priest, 487 P.2d 1241 (Cal. 1971) (Civ. 35017).

279. Serrano v. Priest, 557 P.2d 929 (Cal. 1976).

280. *See id.*; Lockard, *supra* note 224, at 389.

281. JON SONSTELIE ET AL., PUB. POLICY INST. OF CAL., FOR BETTER OR FOR WORSE? SCHOOL FINANCE REFORM IN CALIFORNIA 50-51 (2000), *available at* http://www.ppic.org/main/publication.asp?i=65.

282. *Id.*

283. Lockard, *supra* note 224, at 390.

284. Roithmayr, *Locked in Segregation*, *supra* note 125, at 204.

and a better tax revenue than . . . non-white[s]."[285] The economic effects of California's racial exclusion were reinforced through the state's use of local property tax school financing through the 1970s.[286] When considered over-time, such actions continue to have intergenerational effects on California youth. Numerous studies show that schooling and wealth function as forms of social capital that transfer across generations.[287] Consequently, the schooling and economic monopolies held by white Californians in the past affect today's students of color by limiting their ability to attend quality schools.

In addition, because past housing and economic discrimination make it more likely for California's minority youth to be located in poor communities and failing schools, they are more likely to be subject to the intrusive criminalizing practices used within California's poor urban school districts. For instance, figures show that in California, students of color are roughly three times more likely to be arrested for a violent felony.[288] After arrest for a violent felony, California's minority youth are three times more likely to be charged in an adult court than white youth.[289] Once charged, California's "minority youth are 8.3 times more likely than white youth to be sentenced by an adult court."[290]

In addition to being criminalized at disparate rates, figures show that California's minority youth are far more likely to receive an inadequate education compared to their white counterparts. Expert reports cited by the plaintiffs in *Williams* show that, in California, "[t]he schools with fewer qualified teachers are disproportionately located in neighborhoods where most residents are Latino and African-American."[291] On average, one-fourth of teachers in California's predominately minority schools do not have full teaching credentials, compared to just one-twentieth in the case of predominately white schools.[292] California figures also show that, compared to predominately white schools, predominately minority schools are

285. *Id.*

286. *See* Serrano v. Priest, 487 P.2d 1241 (Cal. 1976).

287. *See, e.g.*, Samuel Bowles & Herbert Gintis, *The Inheritance of Inequality*, 16(3) J. ECON. PERSP. 3 (2002).

288. Espiritu, *supra* note 258, at 200.

289. *Id.*

290. *Id.*

291. Jeannie Oakes & Martin Lipton, *Schools that Shock the Conscience:* Williams v. California *and the Struggle for Education on Equal Terms Fifty Years After* Brown, 11 ASIAN L.J. 234, 240 (2004).

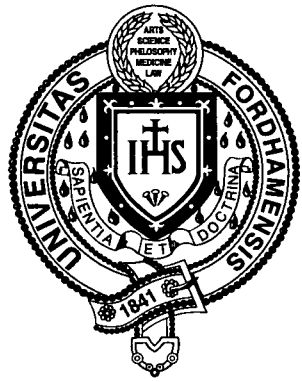
292. *Id.*

more likely to have inadequate learning materials,[293] as well as overcrowded and decaying facilities.[294]

CONCLUSION

Racism has placed people of color at the bottom of American society since its founding. While past forms of discrimination, such as slavery and Jim Crow, subjugated minorities overtly, contemporary oppression is far more nebulous. Put plainly, "whites only" signs have come down, and "separate but equal" is no longer the law. Yet in their place exists a structural racism of significant power. Powerful not only in harm, but also in form because its ambiguity prevents courts from recognizing its existence. Within the context of education and criminal justice, structural racism exhibits itself through the school-to-prison pipeline. The pipeline is not synonymous with any single policy or practice. Rather, the pipeline consists of numerous inter-institutional actions that collectively undereducate and over-incarcerate students of color at disparate rates. Because contemporary equal protection jurisprudence focuses on motive, courts have failed to meaningfully address the pipeline's systemic invidiousness. In contrast, this Note evaluates the ways in which criminalization, sorting, and economic policies and practices converge to deny students of color equal opportunities by pushing them out of school and into prison. Courts should do the same because a structural racism framework protects students of color more adequately than motive-centered equal protection analysis.

293. *Id.* at 241.
294. *Id.* at 242.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