

**CHALLENGING EXCESSIVE FORCE: WHY POLICE OFFICERS
DISPROPORTIONATELY EXERCISE EXCESSIVE FORCE TOWARDS BLACKS
AND WHY THIS SYSTEMIC PROBLEM MUST END**

Note

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ABSTRACT

Because of the national attention on the Black Lives Matter movement, legal literature has focused on examining the absence of charges and the acquittals of police officers and vigilantes responsible for Black deaths. In particular, administrative agencies, academics, and courts are currently debating the sufficiency of the federal “pattern-and-practice” investigation process afforded to hold police departments accountable for excessive force misconduct following these executions.¹ Meanwhile, little attention has been given to a form of police misconduct permitted since the beginning of our nationhood, and directly affecting more individuals than these highly publicized, tragically fatal encounters with police officers—the criminalization of normal adolescent behaviors.² Although the Fourth Amendment³ prohibits the use of excessive force, and both the Fourteenth Amendment⁴ and the Civil Rights Act of 1871⁵ mandate the equal protection of the laws for all citizens of the United States, little national attention has been paid to the complete absence of a uniform national regulation of

1. See Bill Ong Hing, *From Ferguson to Palestine: Disrupting Race-Based Policing*, 59 HOW. L.J. 559 (2016) (noting that public outcry “has led to federal court oversight and sweeping reforms in . . . troubled, big-city police departments throughout the country.”).

2. See Seth Stoughton & Josh Gupta-Kagan, *Why Are Police Disciplining Students?*, ATLANTIC, (Oct. 29, 2015) <http://www.theatlantic.com/politics/archive/2015/10/when-should-police-discipline-students/413056/>.

3. U.S. CONST. amend. IV.

4. U.S. CONST. amend. XIV.

5. 42 U.S.C. § 1983 (1971).

school resource officer programs. And, despite their similarities, these two forms of police interactions—on community streets and in the hallways of public schools—have not been compared. This article fills that void by comparing the excessive force that Black adolescents experience during these encounters with police officers, arguing that Black deaths deserve justice to protect against violent exchanges with police officers and proposes ways to reform these interactions.

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I. INTRODUCTION

Laquan McDonald and K.B. were both teenagers engaged in normal adolescent misconduct—McDonald was allegedly challenging authority and destroying property, and K.B. was allegedly acting disorderly—when police officers callously used excessive force against them.⁶ However, that was the

6. See *J.W. v. Birmingham Bd. of Educ.*, 143 F. Supp. 3d 1118, 1131-32 (N.D. Ala. 2015); Laura Wagner & Bill Chappell, *Video Released Of Black Teen's Fatal Shooting By White Chicago Police Officer*, NPR (Nov. 24, 2015),

extent of the similarities between the two teenager's interactions with law enforcement officers.⁷ On the evening of October 20, 2014, Officer Jason Van Dyke killed Laquan McDonald on a Chicago street.⁸ McDonald was only 17 years old.⁹ Officer Van Dyke was barely out of his police cruiser before he began firing—16 rounds in under 16 seconds.¹⁰ The Chicago police, responding to a 911 call reporting someone using a knife to puncture car tires, alleged that McDonald refused to follow the officers' instructions,¹¹ and claimed he was walking down the street brandishing a knife and lunging at officers.¹²

By contrast, K.B. was a 15-year-old student at Woodlawn High School in Birmingham, Alabama, and was five months pregnant at the time of her encounter with Birmingham police.¹³ During an afternoon class change on February 21, 2011, Officer Silburn Smith, a school resource officer,¹⁴

<http://www.npr.org/sections/thetwo-way/2015/11/24/457233148/first-degree-murder-charge-for-chicago-police-officer-who-shot-teen>.

7. *Id.*

8. Wagner & Chappell, *supra* note 6 (on that night, Officer Van Dyke was on the scene “for less than 30 seconds before he started shooting.”); Complaint at 5, *Woodall v. Chicago*, No. 1:15-cv-11630, 2015 WL 9434277 (N.D. Ill. Dec. 23, 2015). Five years prior to McDonald's execution, a jury found Officer Van Dyke had used excessive force on a citizen and awarded that citizen \$350,000 in damages. *Id.* The City of Chicago failed to discipline Officer Van Dyke following this jury's finding and the City failed to reopen its investigation into the citizen's allegations that resulted in the jury verdict. *Id.*

9. Wagner & Chappell, *supra* note 6.

10. *Id.*

11. *Id.*

12. *See id.*; Elliott C. McLaughlin, *AG: Justice Department Investigating Whether Chicago Police Broke Law*, CNN (Dec. 7, 2015), <http://www.cnn.com/2015/12/07/us/chicago-police-justice-department-laquan-mcdonald-investigation/>.

13. *J.W.*, 143 F. Supp. 3d at 1131.

14. *See* Arne Duncan, *Introduction to Guiding Principles A Resource Guide for Improving School Climate and Discipline*, U.S. DEP'T OF EDUC. 1, 9 n.21 (Jan. 8, 2014), available at <http://www2.ed.gov/policy/gen/guid/school-discipline/guiding-principles.pdf>. School resource officers (SROs) are “career law enforcement officer[s], with sworn authority, who [are] deployed in community-oriented policing and assigned by the employing police department or agency to work in collaboration with schools and community-based organizations.” *Id.* The term is commonly “used interchangeably to refer to school security officers and other campus-based security officers.” *Id.* SROs include school-based law enforcement officers, school security officers, and any other campus based security officers. *Id.*

sprayed a non-resistant K.B. with Freeze +P mace.¹⁵ Officer Smith first approached K.B. because her crying was “creating [a] noisy disturbance,”¹⁶ but when she did not stop, Officer Smith handcuffed K.B.¹⁷ When her crying persisted, Officer Smith, without warning, sprayed K.B. with mace.¹⁸ K.B. vomited while she waited for Birmingham Fire and Rescue to respond.¹⁹ Upon their arrival, no treatment was provided to K.B.²⁰ Instead, she was asked a series of questions by the responders and they instructed “her to keep her eyes open and not to put water on her face.”²¹ Next, Officer Smith transported K.B. to Cooper Green Hospital where she declined treatment after the officer erroneously informed her there was nothing the medical professionals could do to ease her discomfort.²² Finally, while still in her mace-soaked clothes, Officer Smith transported K.B., to family court, where she was strip searched and remained until her mother picked her up.²³ K.B. was never charged with any criminal conduct.²⁴

Following the execution of McDonald and unnecessary use of mace on K.B., excessive force challenges were brought on behalf of both teenagers; however, the bodies reviewing their claims applied very different standards in determining whether the officers’ use of force was proper. For Officer Van Dyke to be held criminally liable for McDonald’s death, the Cook County State’s Attorney’s Office must bring criminal murder charges under the Illinois Criminal Code pursuant to a Complaint for Disciplinary Examination from the Independent Police Review Authority. Further, for McDonald’s family to recover damages for the teenager’s senseless killing would require them to file a civil suit against Officer Van Dyke and the City of Chicago.²⁵ On the other hand, K.B.’s encounter with Officer Smith was

15. *J.W.*, 143 F. Supp. 3d at 1131-32 (explaining that K.B. was crying following a verbal altercation with another student stemming from K.B.’s family’s decision to ask the other student, who had previously lived with them, to move out after he was caught stealing from the family).

16. *Id.* at 1126.

17. *Id.* at 1131.

18. *Id.*

19. *Id.*

20. *Id.*

21. *Id.*

22. *Id.*

23. *Id.*

24. *Id.*

25. See Mike Dumke & Tim Novak, *\$1 Million Per Shot—How Laquan McDonald Settlement Unfolded After That Initial Demand*, CHI. SUN-TIMES (Dec. 19, 2015), <http://chicago.suntimes.com/news/7/71/1192113/1-million-per-shot->

challenged in a civil class action suit filed in the U.S. District Court for the Northern District of Alabama, where the judge would decide whether the class presented enough evidence to demonstrate that they individually did not resist, flee, or try to assault someone—all grounds for the deployment of chemical spray in the Eleventh Circuit.²⁶ The stories of McDonald and K.B. illustrate the problem of systemic criminalization of adolescent conduct.²⁷

Part I provides a brief history of the rise of the American incarceration state and the connection to the escalation in the criminalization of Black teenager's normal adolescent behaviors.. Part II compares the use of excessive force during interactions between officers and Black adolescents on city streets and in public school hallways. In light of the disparate treatment of Black youth, Part III proposes ways in which the government can provide Blacks protection and explains why extending such protection may actually further the government's own interests.

II. INCARCERATION STATE AND THE CRIMINALIZATION OF NORMAL ADOLESCENT MISCONDUCT: BACKGROUND

The Founders first permitted the exercise of extradition authority with the “fugitive slave clause.”²⁸ This position of authority over the inferiority of Black citizens was reaffirmed by Justice Brown's utterance in *Plessy v.*

laquan-mcdonald-settlement-unfolded-initial-demand. The family did not have to sue once they obtained a copy of a Chicago Police Department video of the shooting. *Id.* The family demanded \$16 million to resolve all claims on behalf of McDonald's estate—\$1 million per shot— but they ultimately received \$5 million in a settlement agreement that was unanimously confirmed by the Chicago City Council. *Id.*

26. *See J.W.*, 143 F. Supp. 3d at 1126. Additionally, K.B. succeeded in demonstrating her excessive force claim for the SRO's failure to adequately decontaminate. *Id.* The Court found that the SROs did nothing to decontaminate students following direct sprays, which was certainly in conflict with both the Freeze +P manufacturer's suggestion and the practice of the police department. *Id.*

27. *See, e.g.,* Barbara Fedders & Jason Langberg, *School Discipline Reform: Incorporating the Supreme Court's "Age Matters" Jurisprudence*, 46 LOY. L.A. L. REV. 933 (2013).

28. U.S. CONST. art. IV, § 2, cl. 3 (“No person held to Service or Labour in one State, under the Laws thereof, escaping into another, shall, in Consequence of any Law or Regulation therein, be discharged from such Service or Labour, but shall be delivered up on Claim of the Party to whom such Service or Labour may be due.”).

Ferguson—that laws mandating “separate accommodations” are a constitutional exercise of a legislature’s police power, so long as the

“object of the amendment [at issue] was undoubtedly to enforce the absolute equality of the two races before the law[.] [B]ut, in the nature of things, it could not have been intended to abolish distinctions based upon color, or to enforce social, as distinguished from political, equality, or a commingling of the two races upon terms unsatisfactory to either.”²⁹

In overturning *Plessy v. Ferguson*, Chief Justice Warren in *Brown v. Board of Education* asserted that “[public education] is the very foundation of good citizenship.”³⁰ Public schools have thus been continually recognized as playing a crucial role in the education of American society, as “public schools [are] a most vital civic institution for the preservation of a democratic system of government,”³¹ and “education is necessary to prepare citizens to participate effectively and intelligently in our open political system.”³²

Order in a civil society is important. However, what is achieved through socializations that occur between Black adolescents and police officers in school halls closely resembles the culture of American prisons.³³ Despite the similarities of both forms of interactions that result in police officers unnecessarily exercising excessive force, the two forms of interactions have not been compared—this article aims to address that void. This Part provides a foundation for the comparison by first discussing the

29. 163 U.S. 537, 544 (1869) (citing “[t]he most common instance of this is connected with the establishment of separate schools for white and colored children”).

30. 347 U.S. 483, 493 (1954).

31. *Sch. Dist. of Abington v. Schempp*, 374 U.S. 203, 230 (1963) (Brennan, J., concurring).

32. *Wisconsin v. Yoder*, 406 U.S. 205, 221 (1972).

33. See Sarah Jane Forman, *Countering Criminalization: Toward a Youth Development Approach to School Searches*, 14 SCHOLAR 301, 304 (2011) (Large metropolitan school districts’ “citizen education [has] devolve[d] into ghetto education,” viewing students narrowly as threats or perpetrators of violence and adopting disciplinary practices closely resembling the culture of prisons. “Even the physical structures of some schools resemble a prison. ... [The students] are ill prepared for active and engaged citizenship, but are well on their way to political marginalization, disenfranchisement, and incarceration.”).

history, legal framework, and current reality of racially discriminatory exercise of excessive force by police officers in the streets and then does the same for the exercise of excessive force in public school halls.

A. Mass Incarceration of Blacks: History and Current Framework

The detention of Blacks in the United States is not a new phenomenon; rather, it is as old as slavery itself.³⁴ Mass incarceration is the result of policies that: (1) expanded offenses eligible for incarceration³⁵ and (2) lengthened existing standard incarceration periods.³⁶ This ultimately resulted in substantial impediments to poverty reduction—imposing barriers to employment, reducing lifetime and intergenerational earnings, removing primary earners and draining assets of already low-income families, limiting access to public benefits, and disrupting both the social and economic fabric of entire neighborhoods.³⁷

Ta-Nehisi Coates extensively examined America's incarceration phenomenon. After reviewing the National Research Council's data, he found that the current rate of American incarceration is "unprecedented," both historically and comparatively.³⁸ Through his research, Coates discovered that the increase in America's carceral state was not simply a well-intentioned response to a rise in crime, but instead a method by which America chose to address racial disparity.³⁹ Coates found that the American carceral state is the country's largest social-service program,

34. See U.S. CONST. art. IV, § 2, cl. 3.

35. Cara H. Drinan, *Clemency in a Time of Crisis*, 28 GA. ST. U. L. REV. 1123, 1140 (2012).

36. James Forman Jr., *Racial Critiques of Mass Incarceration: Beyond the New Jim Crow*, 87 N.Y.U. L. REV. 21, 48 (2012).

37. See Charles G. Koch & Mark V. Holden, *Home Opinion Readers Forum: How to Reduce Poverty, Improve Race Relations*, NATIONSIDE.ORG (Jan. 24, 2015), <https://nationinside.org/campaign/oklahoma-cure/posts/home-opinion-readers-forum-readers-forum-how-to-reduce-poverty-improve-race/>.

38. Ta-Nehisi Coates, *The Black Family in the Age of Mass Incarceration*, ATLANTIC (Oct. 2015), <http://www.theatlantic.com/magazine/archive/2015/10/the-black-family-in-the-age-of-mass-incarceration/403246/#Chapter%20II>. The U.S. now accounts for less than 5 percent of the world's inhabitants, but about 25 percent of its incarcerated inhabitants. *Id.* America's prison and jail population from 1970 until 2015 has increased sevenfold from some 300,000 people to 2.2 million. *Id.*

39. *Id.*

costing American tax payers \$80 billion annually to provide health care, meals, and shelter for an entire class of citizens.⁴⁰ Through the middle of the 20th century, America's imprisonment rate hovered at about 110 people per 100,000.⁴¹ However, the current imprisonment rate is at about 700 people per 100,000.⁴² America's closest to-scale competitor is Russia, who remains far behind the U.S. with only 450 people per 100,000.⁴³ In addition, American jails and prisons hold half a million more people than the Chinese incarceration system.⁴⁴

The obvious explanation for the unprecedented sharp increase in incarceration would be an increase in criminal misconduct.⁴⁵ However, Coates found that was not the case.⁴⁶ Instead, Coates found that since the early 1990s, the number of violent crimes committed has decreased while imprisonment rates and prison sentence lengths have increased.⁴⁷ In fact, between 1963 and 1993, while national murder rates doubled, robbery rates quadrupled, and aggravated assault rates nearly quintupled, the imprisonment rates for such crimes decreased.⁴⁸ Coates notes that incarceration rates have risen independent of crime, but not of criminal justice policies and not without a cost to taxpayers.⁴⁹

Moreover, the American criminal justice system is not only sending more people to prison, it is sending them to prison for longer sentences than ever before. Between 1993 and 2001, a 66 percent increase in the state prison population cost taxpayers \$53 billion and led to a reduction in the rate of serious crimes by a modest two to five percent.⁵⁰ From 1985 to 2000, the likelihood of a long prison sentence nearly doubled for drug possession, tripled for drug trafficking, and quintupled for non-aggravated assault.⁵¹ In addition, aggressive laws like California's "Three Strikes and You're Out"

40. *Id.*

41. *Id.*

42. *Id.*

43. *Id.*

44. *Id.* (China's population is four times that of the U.S.).

45. *Id.*

46. *Id.*

47. *Id.*

48. *Id.*

49. *Id.*

50. *Id.*

51. *Id.* (noting these convictions are disproportionately more common among Blacks than Whites).

mandate lengthy sentences for habitual offenders, but result in little reduction in felony crimes.⁵²

The bloated prison population may not have a direct correlation to the reduction of crime, but it has had disparately high consequences for the nation's most marginalized group: Blacks.⁵³ In fact, among this group of the nation's most marginalized, prison has become a norm—and even more disturbing, an anticipated benchmark signifying the transition to adulthood—rather than a rare or extreme event.⁵⁴ There is, however, a direct correlation between the sharp increase in the American prison population and the shift in the mission of the American penal system. During the 1970s, as Blacks occupied prison cells at a higher rate than their White counterparts, the mission of rehabilitation was largely abandoned in favor of retribution.⁵⁵ Among Black males born since the late 1970s, one in four were in prison by their mid-30s.⁵⁶ This number rose to, seven out of ten if they also dropped out of high school.⁵⁷ Between 1980 and 1997, incarceration rates for nonviolent drug offenses increased from 50,000 to over 400,000.⁵⁸ In the 1990s, South Carolina reduced in-prison education programs, banned air conditioners, discarded televisions, and discontinued intramural sports.⁵⁹ During this timeframe, the 1993 Texas legislature rejected a bill to infuse its schools with \$750 million, citing budget restrictions, but in the same year approved a \$1 billion budget to build more prisons.⁶⁰ In 2010, one in ten Black males between the ages of 20 and 40 were incarcerated, which 10 times the rate of their White peers.⁶¹

The incarcerated person does not bear the stigma associated with incarceration alone. Paternal incarceration is associated with behavior

52. *Id.* (noting California's "Three Strikes" law mandates a minimum 25-year sentence for a third "strikeable offense"—for example, murder or robbery—but it has reduced the rate of felony crime by only two percent).

53. *Id.*

54. *Id.*

55. *Id.* (In June 1971, President Nixon declared the "War on Drugs," a policy that directly increased the size and presence of federal drug control agencies and continued through the Clinton presidency.). Retribution is "the idea that prison should not reform convicts but punish them." *Id.*

56. *Id.*

57. *Id.*

58. *Id.*

59. *Id.* (demonstrating the State's shift in penal system mission).

60. *Id.*

61. *Id.*

problems and delinquency, especially among Black male youth.⁶² In fact, by 2000, more than one million Black adolescents had a father in jail or prison, and roughly half of those incarcerated fathers lived in the same household as their children before they were jailed.⁶³ The same study found that more than half of the fathers in state prisons reported that they were the primary breadwinner in their family.⁶⁴ Thus, adolescents suffer through the dismal effects of the gray wasteland, as the family struggles to stay together through incarceration: the increasing loss of income—beyond the ever-present racially based socio-economic disparity.⁶⁵ In addition to the family's essentials, these female-headed households must bear the costs of funding prison commissary, expensive prison phone calls, travel costs for visits to prisons increasingly located in predominately rural white communities, and legal fees.⁶⁶

If release from prison is possible, the aroma of freedom and the bliss of the family reunion are quickly hampered by the ever-present challenge of staying free. This position is evident by the recidivism rate: as of 2013, only one-third of all parolees successfully completed their term without arrest and were granted full freedom, as opposed to 1984, when 70 percent of all parolees were granted full freedom.⁶⁷ Thus, the bleak consequences linger over the incarcerated and their family and friends, long after the actual time behind bars, as incarceration increasingly becomes a de-credentialing institution for essentials like housing, employment, and social-service programs.⁶⁸ As a consequence, it is not uncommon for individuals released from prison to go homeless. It is also difficult even for those fortunate enough to find a place to live, as they can have difficulties keeping the

62. *Id.*

63. *Id.*

64. *Id.*

65. *Id.*

66. *Id.* (One person said, “First I would get one [visit] like every four months. ... And then I wouldn’t get none for like maybe a year. You know, because it was too far away. And I started to have losses. I lost my mom, my brothers...So it was hard, you know for me to get visits.” Another person’s parents took out a second mortgage and then a third to pay for his lawyers.).

67. *Id.*

68. *Id.* *But see*, *FACT SHEET: President Obama Announces New Actions to Promote Rehabilitation and Reintegration for the Formerly-Incarcerated*, THE WHITE HOUSE (Nov. 2, 2015), <https://www.whitehouse.gov/the-press-office/2015/11/02/fact-sheet-president-obama-announces-new-actions-promote-rehabilitation> (calling for Congress to pass meaningful criminal justice reform, the Sentencing Reform and Corrections Act of 2015).

residence because of their struggle to find a job.⁶⁹ Coates concluded that the effect of the country's failure to adequately educate the nation's Black youth is a weighty burden that the country must bear as a whole, through welfare dependency and a permanent increase in unemployment rates—issues that these policies themselves create.⁷⁰

B. School-to-Prison Pipeline: History and Current Framework

The current laws concerning the rights of students in public schools make pats, frisks, sniffs, and searches a norm. The Supreme Court announced weakened Fourth Amendment protection for students on school grounds in a series of cases—*New Jersey v. T.L.O.*,⁷¹ *Vernonia School District 47J v. Acton*⁷², and *Board of Education v. Earls*.⁷³ These cases established that Fourth Amendment rights apply to students, but also introduced a new standard that provides great deference to the authority of school administrators, and scant attention to the experience of the students.⁷⁴ The very low bar of “reasonable suspicion” causes adolescents to feel like the law is unfair and to question its legitimacy, because school administrators in positions of authority often treat them with distrust and disrespect.⁷⁵ Consequently, Black students are being taught a dangerous lesson in inferiority, in lowered expectations of privacy, and in second-class citizenship, and this lesson is reinforced daily in public schools.⁷⁶ This lesson is disproportionately taught more frequently at predominantly Black public schools and perpetuates the social norms that criminalize these Black adolescents.⁷⁷ The sacrifice of students' rights in the name of public school safety comes at a high cost to our society as a whole, especially because public schools provide such an important forum for children to learn about

69. Coates, *supra* note 38.

70. *Id.*

71. *See New Jersey v. T.L.O.*, 469 U.S. 325, 333 (1985) (finding that the Fourth Amendment's prohibition on unreasonable searches and seizures applies to searches conducted by public school officials).

72. *See Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 647 (1995).

73. *See Bd. of Educ. v. Earls*, 536 U.S. 822, 838 (2002).

74. *See* Jessica Feerman, *The Decriminalization of the Classroom: The Supreme Court's Evolving Jurisprudence on the Rights of Students*, 13 J. L. SOC'Y 301, 304–05 (2011).

75. *Id.* at 305–06.

76. *Id.*

77. *Id.*

the law and, at times, encounter the law first hand.⁷⁸ Those encounters can either foster notions of autonomy and liberty, or undercut them. Moreover, society has an interest in the development of fundamental values necessary to the maintenance of a civilized system of disciplining students.⁷⁹

The desire to protect the school learning environment from attack has led to the influx of SROs in public schools across the nation.⁸⁰ SROs have been utilized in public schools since 1953, and their presence has steadily increased over the last decade as an overzealous response to highly-publicized acts of violence committed at schools across the nation.⁸¹

In the late 1950s, SROs were first placed in public schools in Flint, Michigan, as part of an effort to foster positive relationships between the community's police and youth.⁸² SROs served various roles in public schools such as counselors, coaches, tutors, and mentors.⁸³ The program's basic idea spread across the nation, and in the 1990s, there was a drastic shift in the role of SROs from community liaisons to a role more focused on protecting both school safety and the learning environment.⁸⁴

The shift towards more heavy reliance on law enforcement and courts in public school disciplinary for misconduct infractions is problematic because it introduces adolescents to the incarceration system.⁸⁵ And, this form of discipline becomes a systemic issue because a revolving door is thus created, known as the "school-to-prison pipeline," which has been empirically shown to perpetuate into adulthood for a majority of these affected Black students.⁸⁶ The Civil Rights branches of both the Departments of Education and Justice jointly set out suggested guidelines for school discipline to assist schools in avoiding racially discriminatory

78. *Id.*

79. *See id.*; Coates, *supra* note 38.

80. *See* Forman, *supra* note 33, at 325.

81. *See id.*, at 325 n.107 ("The late 1990's saw a rash of high-profile school shootings: Pearl, Mississippi; West Paducah, Kentucky; Jonesboro, Arkansas; Edinboro, Pennsylvania; Springfield, Oregon; Richmond, Virginia; and most memorably, Littleton, Colorado.").

82. *See History of School Resource Officer Program*, BLACKFOOT POLICE DEPT (2012), http://www.blackfootpolice.org/sro/sro_history.html.

83. *Id.*

84. *Id.*

85. Jeff Deeney, *How to Discipline Students Without Turning School Into a Prison*, ATLANTIC (Jan. 9, 2014), <http://www.theatlantic.com/education/archive/2014/01/how-to-discipline-students-without-turning-school-into-a-prison/282944/>.

86. *Id.*

disciplinary practices.⁸⁷ Since 1968, the Department of Education has regularly conducted surveys to collect civil rights data, and the findings of the disproportional effect on minority students are astonishing.⁸⁸ Although Black students represent 15 percent of the nation's student population, they make up 35 percent of students suspended once, 44 percent of those suspended more than once, and 36 percent of students expelled.⁸⁹ And combined, Hispanics and Blacks comprise less than half of the student population, but this group of students account for more than half of students involved in school-related arrests or referrals to law-enforcement.⁹⁰ The detrimental consequences for these minority students whom the data illustrates are racially targeted for discipline go beyond the higher unlikelihood that they will complete high school to an increased likelihood of the students future involvement in the juvenile criminal justice system and drug use.⁹¹ Some argue that using less frequent and severe tactics would only lead to more chaotic and dangerous schools despite the voluminous data illustrating targeted racial discrimination of students.⁹²

The expansion in the number of SROs in public schools directly coincided with the 1999 Columbine High School mass shooting, which resulted in 15 deaths.⁹³ Following the devastating events at Columbine, the Department of Justice Office of Community Policing Services (COPS) initiated the "COPS in Schools" grant program.⁹⁴ In 2012, the push for expanding these types of programs to more schools across the nation found renewed strength in the wake of the Sandy Hook massacre.⁹⁵ Supporters

87. See Duncan, *supra* note 14.

88. See Deeney, *supra* note 85.

89. See *id.*

90. See *id.*

91. *Id.*

92. *Id.*

93. See *Columbine High School Shootings Fast Facts*, CNN, <http://www.cnn.com/2013/09/18/us/columbine-high-school-shootings-fast-facts/> (last updated May 26, 2016).

94. Chongmin Na & Denise C. Gottfredson, *Police Officers in Schools: Effects on School Crime and Processing of Offending Behaviors*, JUST. Q. at 2–3, (Oct. 3, 2011), <http://ccjs.umd.edu/sites/ccjs.umd.edu/files/pubs/Police%20Officers%20in%20Schools-Effects%20on%20School%20Crime%20and%20the%20Processing%20of%20Offending%20Behaviors.pdf>.

95. Kevin Quinn, *My View: More School Resource Officers, More Safe School Communities*, CNN: SCHOOLS OF THOUGHT (Jan. 17, 2013), <http://schools>

advocated for the expansion of security practices typically only found in inner city schools—metal detectors and on-campus police—for predominately white middle-class and affluent school districts.⁹⁶

Although the specific goals of SRO programs may vary from school district to school district, the federal “COPS in Schools” program has two primary objectives: to “encourage working relationships between police and schools, thus bringing the principles and philosophy of community policing directly into the school environment,” and to “assist communities in focusing leadership and resources on the issues related to creating and maintaining a safe school environment.”⁹⁷ To accomplish these two primary objectives, COPS awarded grants in excess of \$750 million to more than 3,000 law-enforcement agencies as of July 2005, resulting in more than 6,500 newly hired SROs.⁹⁸ But the oversight for the recruitment and training of the SROs comes from the police departments rather than the school boards and school district officials.⁹⁹ Arguably the most alarming element of the debate over SROs is that they often have little or no training in working with youth, thus increasing the likelihood of schools directly subjecting students to school-based arrests, which is proven to be the quickest route from the classroom to the jailhouse.¹⁰⁰

Zero-tolerance policies also contribute to the current pattern of criminalization of adolescent behaviors.¹⁰¹ Although the evidence demonstrates that these policies are of little effectiveness in producing a safer school environment,¹⁰² they nevertheless remain popular—the punitive policies make the jobs of school administrators easier by subjecting violators to harsh punishments such as suspensions or expulsion, regardless of the circumstances that surround the misconduct or infraction.¹⁰³ Zero-tolerance is troubling because there is no such thing as a mitigating circumstance—the policy presumes that all explanations are excuses.¹⁰⁴ Critics, like Senator Richard Durbin, argue that the rigid policy pushes

ofthought.blogs.cnn.com/2013/01/17/my-view-more-school-resource-officers-more-safe-school-communities/.

96. *Id.*

97. Na & Gottfredson, *supra* note 94, at 2 n.1 (citing Girouard, 2001).

98. *Id.*

99. *See id.*

100. *School-to-Prison Pipeline*, ACLU, <https://www.aclu.org/fact-sheet/what-school-prison-pipeline>.

101. *Id.*

102. *Id.*

103. *See* Forman, *supra* note 33, at 330-31.

104. *See* Deeney, *supra* note 85.

already at-risk American youth who need the most help and attention out of school and sends a message that those students are not wanted.¹⁰⁵ During a federal hearing on the school-to-prison pipeline, Senator Durbin referenced the troubling fact that schools are increasingly a gateway to the criminal justice system, a consequence of a culture of zero-tolerance, which deprives many children of their fundamental right to an education.¹⁰⁶

III. CHALLENGING EXCESSIVE FORCE: INTERACTIONS WITH POLICE OFFICERS ON CITY STREETS AND IN PUBLIC SCHOOL HALLWAYS COMPARED

The job of police officers is to protect and serve; however, in practice the protection provided by police officers often does not extend to Black Americans. Instead, Black survival is dependent on a Black person's individual ability to protect their Black body.¹⁰⁷ Black adolescents develop a fear of police at a young age,¹⁰⁸ and understand the potential for unnecessarily excessive force during interactions with police officers.¹⁰⁹ Black adolescents understand that the location of this interaction controls

105. See *id.*; Marilyn Elias, *The School-to-Prison Pipeline: Policies and Practices that Favor Incarceration Over Education Do Us All A Grave Injustice*, TEACHING TOLERANCE 39 (Spring 2013), <http://www.tolerance.org/sites/default/files/general/School-to-Prison.pdf>.

106. Elias, *supra* note 105, at 39 (“Policies that encourage police presence at schools, harsh tactics including physical restraint, and automatic punishments that result in suspensions and out-of-class time are huge contributors to the pipeline.”).

107. TA-NEHISI COATES, *BETWEEN THE WORLD AND ME* 96 (2015).

108. Yolander G. Hurst et al., *The Attitudes of Juveniles Toward the Police: A Comparison of Black and White Youth*, POLICING: INT’L J. POLICE STRATEGIES & MGMT. 37, 37 (1997) (“The police expect trouble from black youth, and in turn young black males expect to be disrespected and harmed by the police.”); Stacey Patton, *In America, Black Children Don’t Get to be Children*, WASH. POST (Nov. 26, 2014), https://www.washingtonpost.com/opinions/in-america-black-children-dont-get-to-be-children/2014/11/26/a9e24756-74ee-11e4-a755-e32227229e7b_story.html?utm_term=.379a432a4821 (“When black parents read about the killings of Jordan Davis, Darius Simmons, Trayvon Martin, Michael Brown, Aiyana Stanley-Jones, Renisha McBride and so many others, they are forced to instill fear in their children—warning them about the dangers of white people and the police.”).

109. Marcus Woo, *How Science is Helping America Tackle Police Racism*, WIRED (Jan. 21, 2015), <https://www.wired.com/2015/01/implicit-bias-police-racism-science/> (“In one narrative, these deaths represent a pattern of racist police officers using unnecessary lethal force against black communities.”).

the outcome and that location may be the difference between life or death.¹¹⁰

In addition, the normalization of the incarceration of Black Americans depresses Black communities physically, emotionally, and economically,¹¹¹ erroneously distorting the image of the Black race within the minds of Black adolescents. As a result, Black adolescents self-identify as troublemakers, criminals, and inferior members of American society.¹¹² Most Black adolescents are taught in school environments that resemble prisons, a less than ideal learning environment.¹¹³ Black adolescents do not feel safe or protected at school; instead, they are exposed and vulnerable. At school, Black adolescents' misconduct is criminalized. Instead of teachers or administrators dealing with routine student behavior infractions, SROs and juvenile court systems handle the discipline.¹¹⁴ Consequently, Black students fall further behind in school.¹¹⁵

110. Hurst et al., *supra* note 108; *see generally* Susan E. Howell et al., *Black Cities/White Cities: Evaluating the Police*, 26 POLITICAL BEHAVIOR 45 (2004).

111. Jacqueline Johnson, *Mass Incarceration: A Contemporary Mechanism of Racialization in the United States*, 47 GONZ. L. REV. 301, 301 (2011) (“The high rate of incarceration among African American men is part of an overall trend in punishment defined by a dramatic increase in the carceral system—a term used to characterize the legitimization and normalization of imprisonment as a factor of social life.”).

112. Todd R. Clear, *Backfire: When Incarceration Increases Crime*, in THE UNINTENDED CONSEQUENCES OF INCARCERATION: PAPERS FROM A CONFERENCE ORGANIZED BY THE VERA INSTITUTE OF JUSTICE (1996), *available at* <http://archive.vera.org/sites/default/files/resources/downloads/uci.pdf> (“It is important to emphasize that normalization of prison life is only one of the emotional responses people will have to knowing someone who is incarcerated. The reactions to an incarcerated loved one are likely to include anger at the system, personal shame, loving support, and rejection.”).

113. Elias, *supra* note 105 (“One 2005 study found that children are far more likely to be arrested at school than they were a generation ago. The vast majority of these arrests are for nonviolent offenses. In most cases, the students are simply being disruptive. And a recent U.S. Department of Education study found that more than 70 percent of students arrested in school-related incidents or referred to law enforcement are black or Hispanic. Zero-tolerance policies, which set one-size-fits-all punishments for a variety of behaviors, have fed these trends.”).

114. DERRICK BELL, AND WE ARE NOT SAVED: THE ELUSIVE QUEST FOR RACIAL JUSTICE 147 (2008) (stating that Black students feel exposed and vulnerable at school); *Policing Students: Developments in the Law*, 128 HARV. L. REV. 1747, 1747 (2015) (“As a result, not only are children “being treated like criminals in school, but many are being shunted into the criminal justice system as

*A. Interactions Between Black Adolescents
and Police Officers on City Streets*

Just over midway through 2016, police in the United States had already killed 561 people.¹¹⁶ It has been nearly two years since Laquan McDonald was executed in Chicago and the rise of the Black Lives Matter movement. It is overwhelming to see, in the aftermath of McDonald's death, what Black Americans are up against, still living in a world where too many officers have their fingers on the triggers of their guns aimed directly at Black people.¹¹⁷ And it is even harder to understand how grainy videos

schools have begun to rely heavily upon law enforcement officials to punish students.”).

115. Nancy A. Heitzeg, *Criminalizing Education: Zero Tolerance Policies, Police in the Hallways and The School to Prison Pipeline*, ST. CATHERINE UNIV. (Summer 2009), https://www.hamline.edu/uploadedFiles/Hamline_WWW/HSE/Documents/criminalizing-education-zero-tolerance-police.pdf (“Students are left to fend for themselves, and if they are re-instated are now further behind their peers and more likely to be suspended again.” “Zero tolerance has engendered a number of problems: denial of education through increased suspension and expulsion rates, referrals to inadequate alternative schools, lower test scores, higher dropout rates, and racial profiling of students..... Once many of these youths are in “the system,” they never get back on the academic track. Sometimes, schools refuse to readmit them; and even if these students do return to school, they are often labeled and targeted for close monitoring by school staff and police. Consequently, many become demoralized, drop out, and fall deeper and deeper into the juvenile or criminal justice systems. Those who do not drop out may find that their discipline and juvenile or criminal records haunt them when they apply to college or for a scholarship or government grant, or try to enlist in the military or find employment. In some places, a criminal record may prevent them or their families from residing in publicly subsidized housing. In this era of zero tolerance, the consequences of child or adolescent behaviors may long outlive students’ teenage years.”).

116. See *The Counted: People Killed by Police in the US*, GUARDIAN, <http://www.theguardian.com/us-news/ng-interactive/2015/jun/01/the-counted-police-killings-us-database> (last visited July 6, 2016).

117. Roxane Gay, *Alton Sterling and When Black Lives Stop Matter*, N.Y. TIMES (July 6, 2016), http://www.nytimes.com/2016/07/07/opinion/alton-sterling-and-when-black-lives-stop-mattering.html?_r=0.

capturing police brutality do not translate into justice.¹¹⁸ And yet, this is our new reality.

In our new reality, “this brand of tragedy has become routine.”¹¹⁹ Society has become “complicit in the spectacle of Black death.”¹²⁰ Although “voyeuristic,” society watches the “grainy videos,” “shot by [] bystander[s] and widely available online, [capturing] the final moments of [] black [lives],” human beings.¹²¹ The videos of victims’ deaths “allow[] us to bear witness, but it will not necessarily bear justice.”¹²² There are protests as victims’ “famil[ies] and communities try to find something productive to do with their sorrow and rage.”¹²³ Each victim’s past is “laid bare, every misdeed brought to light and used as justification for police officers choosing to act as judge, jury, and executioner—due process” on the city street and in a public school hallway.¹²⁴ The National Rifle Association remains silent because “the Second Amendment is rarely celebrated in these cases.”¹²⁵ Eventually, “[t]he Department of Justice will investigate [the] case.”¹²⁶ The responsible officers could face criminal charges, but as has become routine in this grotesque song and dance, “it is rare for police officers to be convicted in such shootings.”¹²⁷

What is truly haunting about this new reality are the news conferences featuring Black victims’ families. Children sobbing and crying out for their beloved parent.¹²⁸ Spouses and parents of the deceased choking out prepared statements.¹²⁹ The grief and the magnitude of loss burdening them

118. *Id.* (“I don’t think we could have imagined that video of police brutality would not translate into justice, and I don’t think we could have imagined how easy it is to see too much, to become numb. And now, here we are.”).

119. *Id.*

120. *Id.*

121. *Id.*

122. *Id.*

123. *Id.*

124. *Id.*

125. *Id.* See German Lopez, *An Open Carry Law Didn’t Stop Police from Killing Alton Sterling*, VOX (July 6, 2016), <http://www.vox.com/2014/12/13/7384813/black-open-carry> (“Open carry laws have little to do with whether a police shooting is justified.” The ultimate question is: Did the officer(s) reasonably believe Alton Sterling, or John Crawford, or Tamir Rice, or ... was about to shoot them at that moment? “That’s the key question, regardless of open carry laws.”).

126. Gay, *supra* note 117.

127. *Id.*

128. *Id.*

129. *Id.*

is audible in their cries and it is worn by them more vividly than their own Black skin.¹³⁰ It is a reminder that society “cannot indulge in the luxuries of apathy and resignation.”¹³¹ “If the video of [a Black death] feels too familiar, the video of [the victims’ families’] raw and enormous grief must not.”¹³² Society must “bear witness and resist numbness.”¹³³ Society must snap out of its apathetic daze. It is time for society to emerge and help bear the unnatural burden shouldered by the families and communities that are innocent victims of Black death at the hands of callous police.¹³⁴

*B. Interactions Between Black Adolescents
and Police Officers in Public School Hallways*

Unfortunately, the combined effects of the loss of privacy, the influx in the presence of SROs in public schools, and the rigid application of zero-tolerance policies result in SROs routinely being called upon for normal school discipline.¹³⁵ This common occurrence directly facilitates the formal processing of an increasing number of youth for minor offenses and harsh responses to minor disciplinary situations through the victimization and the criminalization of students.¹³⁶ What results from the nexus between school administrators and SROs is a revolving door to the criminal justice system.¹³⁷ One historical but unconvincing explanation for the rise in the number of students introduced to the criminal-justice system is that the presence of SROs creates bonds of trust with students, making it more likely that the students will report potential crimes to the SROs.¹³⁸

The reality is that SROs play fundamentally different roles in society; thus, SROs will fall back on their training—enforcing the law—when asked to step in as disciplinarians.¹³⁹ SROs are police officers, patrolling public school hallways as they would the city streets.¹⁴⁰ The goal behind using

130. *Id.*

131. *Id.*

132. *Id.*

133. *Id.*

134. *Id.*

135. See Amanda Merkwae, *Schooling The Police: Race, Disability, and the Conduct of School Resource Officers*, 21 MICH. J. RACE & L. 147 (2015).

136. See Na & Gottfredson, *supra* note 94, at 3.

137. See Forman, *supra* note 33, at 329.

138. See Na & Gottfredson, *supra* note 94, at 4.

139. Forman, *supra* note 33, at 329.

140. See *id.* at 327-30.

SROs is to address and prevent serious, real, and immediate threats to the physical safety of the school and its community.¹⁴¹ The unfortunate consequences are that Black students are less safe at school, and that the school learning environment is not protected.¹⁴²

The increased use of SROs is arguably evidence of a greater program at play: the school-to-prison pipeline. Michael Harris, senior juvenile justice attorney for the National Center for Youth Law, references a South Carolina SRO who violently removed a student from a classroom in October 2015 as a perfect illustration of the school-to-prison pipeline.¹⁴³ Harris explains that students act daily according to normal adolescent behavior—non-violent minor infractions, such as texting or playing a game on their iPad during class—that is not directly a threat of danger to themselves or others.¹⁴⁴ In tandem with the school-to-prison pipeline observation, a study by the ACLU has noted that suspensions have sharply increased from 1.7 million in 1974 to 3.1 million in 2000.¹⁴⁵ The consequences of this staggering increase disproportionately affect children of color.¹⁴⁶

Some argue that the use of SROs is facilitating the larger shift toward school accountability for student performance on standardized achievement requirements, which encourages schools to remove from their rolls students with poor performance and low attendance.¹⁴⁷ Unsurprisingly, students who are suspended and expelled go unsupervised and without constructive activities.¹⁴⁸ These students also fall behind on coursework, which leads to a greater likelihood that the students become disengaged in school and drop-out altogether.¹⁴⁹ These factors substantially increase the likelihood of

141. Duncan, *supra* note 14, at 10.

142. Forman, *supra* note 33, at 304.

143. Matt Pearce & Sonali Kohli, *Violent South Carolina classroom arrest adds to 'school-to-prison pipeline' debate*, L.A. TIMES (Oct. 27, 2015), <http://www.latimes.com/nation/la-na-police-schools-20151028-story.html>

144. *Id.*

145. *School-to-Prison Pipeline*, *supra* note 100.

146. Pearce & Kohli, *supra* note 143 (noting that a “federal report from the Department of Education’s Office for Civil Rights” found that between 2011 and 2012, “black students represented about 16% of the student population, but accounted for 27% of all student referrals to law enforcement, and 31% of school-related arrests,” and quoting Janel George of the NAACP Legal Defense Fund, “[Schools] are spaces where [black students] should feel safe,” but instead these students are “feeling profiled, they’re feeling criminalized.”).

147. *See School-to-Prison Pipeline*, *supra* note 100.

148. *Id.*

149. *Id.*

these students' future court involvement.¹⁵⁰ Zero-tolerance policies and other exclusionary practices may remove problematic students from the pool for whom schools are academically accountable, effectively increasing school averages on standardized test scores and reducing truancy rates.¹⁵¹ However, the harsh reality is that as youths miss an increasing number of days of school due to suspensions and expulsion, these students fall further behind, making promotion to the next grade and graduation much less likely.¹⁵² This negatively impacts our society as a whole because these individuals are more likely to be dependent on social welfare programs or the prison system for support.

Ultimately, there is no empirical support for these policies. Former FBI profiler Mary Ellen O'Toole explains that perpetrators of mass school shootings like the one at Columbine and Sandy Hook do not just snap.¹⁵³ O'Toole developed a threat assessment model as a framework for school officials to evaluate a student and determine whether "he or she has the motivation, means, and intent to carry out a proclaimed threat."¹⁵⁴ The Four-Pronged Assessment Model focuses on four major areas of a student's life: personality of the student, family dynamics, school dynamics and the student's role in those dynamics, and social dynamics.¹⁵⁵ According to O'Toole's assessment model, these individuals who perpetrate mass school shootings undergo a gradual change in personality, and over time they are no longer capable of feeling empathy or expressing emotions.¹⁵⁶ These individuals were often rejected by someone, usually a member of the opposite sex, and they exhibit many individual warning signs that are each significant enough to gain the attention of someone in their life and cause

150. *Id.*

151. *Id.*

152. *Id.*

153. MARY ELLEN O'TOOLE, THE SCHOOL SHOOTER: A THREAT ASSESSMENT PERSPECTIVE 11-24 (1999), available at <https://www.fbi.gov/file-repository/stats-services-publications-school-shooter-school-shooter> (outlining a four-pronged assessment model that can be used by educators, law enforcement, mental health professionals and others to assess threats against schools in the aftermath of the Columbine shooting); *Profiler: Conn. Shooter's Warning Signs Likely Ignored*, CBS NEWS (Dec. 15, 2012), <http://www.cbsnews.com/news/profiler-conn-shooters-warning-signs-likely-ignored/>.

154. O'TOOLE, *supra* note 153, at 10.

155. *Id.*

156. *Id.*

them to pause and investigate further.¹⁵⁷ In Columbine, the police knew that Dylan Klebold had a website, a prior criminal record, and had asked his parents for a gun.¹⁵⁸ Klebold's parents noticed that he was withdrawn, and his teacher was alarmed enough by an essay he submitted, which detailed circumstances ultimately similar to what actually occurred, to notify his parents and the school's counselor.¹⁵⁹ O'Toole concedes that, although none of these warning signs individually might have risen to the level of a red flag, each situation was enough that someone should have inquired deeper into Klebold's transforming mindset.¹⁶⁰ But no one did.

Therefore, O'Toole debunks the justification for employing more SROs to police additional public school hallways: to address and prevent serious, real, and immediate threats to the physical safety of the school and its community.¹⁶¹ And, O'Toole's assessment model makes it clear that additional SROs in the hallways do not address the issue of increasing violence within schools. Instead, O'Toole's assessment model focuses on information that is personally related to an individual who makes a threat of violence against a school. And, rather than focusing on training educators "in the basic concepts of threat assessment, personality assessment and risk assessment, and assessing all threats in a timely manner,"¹⁶² our nation's school systems are choosing to expand SRO programs. Therefore, our nation's schools serve as a gateway for the school-to-prison pipeline to metastasize to more public schools and disparately affect the nation's marginalized Black adolescents.

157. *See generally id.*, at 11-14.

158. Canning C. Craft, *There Were Too Many Warning Signs Before Columbine To Ignore*, WASH. POST (Mar. 1, 2016), https://www.washingtonpost.com/opinions/there-were-too-many-warning-signs-before-columbine-to-ignore/2016/03/01/f6063bf6-df0a-11e5-8c00-8aa03741dced_story.html?utm_term=.ffd63fe7bd71#comments; David Kohn, *Columbine: Where There Warning Signs*, CBS NEWS (Apr. 17, 2001), <http://www.cbsnews.com/news/columbine-were-there-warning-signs/>.

159. Craft, *supra* note 158.

160. O'TOOLE, *supra* note 153, at 10 ("The assessment is based on the 'totality of the circumstances' known about the student in four major areas[.]").

161. Duncan, *supra* note 14, at 10.

162. O'TOOLE, *supra* note 153, at 10.

IV. PROPOSALS FOR CHANGE:
REFORMING DISPARATE TREATMENT OF BLACKS

A. Why Blacks Deserve More Protection

As the evidence in Part I demonstrates, Black citizens have been marginalized since the founding of America. The schoolhouse serves as the first opportunity most citizens have to experience the power of democracy. In the aftermath of the increasing victimization and criminalization of Black adolescents in the school halls and streets, we have seen social unrest expressed in various forms¹⁶³ and we have seen the damaging effects excessive force has on society as a whole, as it perpetuates the feeling of division and inferiority through generations.¹⁶⁴ Change does not seem possible when there is much evidence that Black lives do not matter. Where do we go from here?

We must first diagnose the problems. The problem is not with those who recognize that any form of injustice is an injustice against everyone. The problem lies in a society that labels Black people as criminals and thugs rather than human beings whose lives are valuable and fully deserving of equal protection.¹⁶⁵ The problem lies in a society that responds to these common occurrences of excessive force against black bodies with resignation and apathy.¹⁶⁶ The problem is a law enforcement regime that employs excessive force and acts with deliberate indifference for Black

163. See Mark Sandritter, *A Timeline of Colin Kaepernick's National Anthem Protest and the Athletes Who Joined Him*, SB NATION (Nov. 6, 2016), <http://www.sbnation.com/2016/9/11/12869726/colin-kaepernick-national-anthem-protest-seahawks-brandon-marshall-nfl>; Jon Swaine & Tom Dart, *Dallas Shooting: Tensions Over Race, Guns and Policing Threaten to Boil Over*, GUARDIAN (July 10, 2016), <https://www.theguardian.com/us-news/2016/jul/09/dallas-shooting-police-race-protests-obama>; Julian E. Zelizer, *Is America Repeating the Mistakes of 1968?*, ATLANTIC (July 8, 2016), <http://www.theatlantic.com/politics/archive/2016/07/is-america-repeating-the-mistakes-of-1968/490568/>.

164. See Perry Bacon, Jr., *How the 2016 Election Exposed America's Racial and Cultural Divides*, NBC NEWS (Nov. 11, 2016), <http://www.nbcnews.com/politics/white-house/how-2016-election-exposed-america-s-racial-cultural-divides-n682306>; *The Dividing of America*, ECONOMIST (July 16, 2016), <http://www.economist.com/news/leaders/21702188-donald-trumps-nomination-cleveland-will-put-thriving-country-risk-great>.

165. Coates, *supra* note 38.

166. Gay, *supra* note 117.

lives. The problem is a justice system that rarely prosecutes or convicts police officers who “protect and serve” by executing innocent people.

B. A New Framework for Policing Adolescents

A new framework for discipline of adolescents for typical behavior in the city streets and hallways is necessary. The way to appropriately accomplish this on the city streets is to train officers in compassion and empathy.¹⁶⁷ In addition, officers must receive adolescent-specific training in de-escalation tactics and adolescent reasoning.¹⁶⁸ Rather than entering situations with a warrior mentality, officers must view all people with whom they interact as human beings. Officers should consider that each child they interact with has parents that love them, and that each adult that they interact with is a child of parents and possibly a parent with a family that loves and depends on them. One way to appropriately accomplish this in public schools is by permanently removing all police officers from schools. This will close the revolving door to the prison system by completely removing SROs from participating in routine discipline in schools. It will also leave the job of dealing with routine discipline to the ones best equipped to deal with it: educators.¹⁶⁹ Consequently, educators must also invest time and resources in threat assessment and de-escalation training.¹⁷⁰

*C. Protecting Black Adolescents
Under the Existing SRO Program Framework*

A risky, but sufficient, alternative to pulling police officers out of schools entirely is to implement written agreements between the police departments and the school districts they serve.¹⁷¹ The presence of SROs provides an opportunity for officers to engage in positive interactions essential to community policing efforts, especially with the minority youth

167. Benjamin Thomas et al., *School Resource Officers: Steps to Effective School-Based Law Enforcement*, EDUC. DEV. CTR. 5, 6, 10-11 (Sept. 2013), <http://www.ncjfcj.org/sites/default/files/SRO%20Brief.pdf>.

168. *Id.* at 10, 11.

169. Jan Fisher, *To Refer or Not to Refer... That is the Question*, TEACHERS.NET, <http://www.teachers.net/gazette/SEP00/fisher.html> (last visited Oct. 22, 2016).

170. *Id.*

171. *See, e.g.*, SCHOOL BOARD OF BROWARD COUNTY, BROWARD COUNTY COLLABORATIVE AGREEMENT ON SCHOOL DISCIPLINE (Nov. 5, 2013), *available at* http://b.3cdn.net/advancement/db79d1858f4c5f3e13_7hm6bq78b.pdf.

community, a key demographic highly distrustful and suspicious of police.¹⁷² SROs can serve in a role that impacts the lives of these youth beyond being a uniformed police presence in school halls.¹⁷³ Therefore, it is most appropriate for SROs to only serve as mentors, counselors, and role models.¹⁷⁴ SROs must occupy the role of warrior only when guarding and protecting their students from unnecessary indignity and harm.¹⁷⁵ These positive interactions within the school setting will shape the perceptions of the youth directly affecting their future interactions with officers in the community.¹⁷⁶ If the boundaries of a SROs presence in a school are respected then the school-to-prison pipeline can be avoided, a much-needed result if the SRO program will continue at any level in America.¹⁷⁷

To amend the program, the focus must first be an investment in providing support and training for teachers in effective discipline and best practices for behavior modification to keep students in school and out of the criminal-justice system.¹⁷⁸ Teachers are present in classrooms daily; therefore, teachers are in the best position to know the unique needs of their students over the judgment SROs and school administrators.¹⁷⁹ Empirical research shows that when teachers take a responsive approach rather than a punitive approach to adolescent misconduct, the students are more likely to complete their education.¹⁸⁰ Daniel Losen, director of the Center for Civil

172. See Thomas, *supra* note 167, at 5-6, 10-11.

173. See Phillip Matthew Stinson, Sr. & Adam M. Watkins, *The Nature of Crime by School Resource Officers: Implications for SRO Programs*, SAGE OPEN 6-7 (2014), <http://sgo.sagepub.com/content/spsgo/4/1/2158244014521821.full.pdf>.

174. See *id.*

175. See *id.*

176. See JACK MCDEVITT & JENN PANNIELLO, NAT'L INST. OF JUST., NATIONAL ASSESSMENT OF SCHOOL RESOURCE OFFICER PROGRAMS: SURVEYS OF STUDENTS IN THREE LARGE NEW SRO PROGRAMS 1-3 (2005).

177. See Elias, *supra* note 105, at 40 (“How can school districts divert the school-to-prison pipeline? 1. Increase the use of positive behavior interventions and support. 2. Compile annual reports on the total number of disciplinary actions that push students out of the classroom based on gender, race, and ability. 3. Create agreements with police departments and court systems to limit arrests at school and the use of restraints, such as mace and handcuffs. 4. Provide simple explanations of infractions and prescribed responses in student code of conduct to ensure fairness. 5. Create appropriate limits on the use of law enforcement in public schools. 6. Train teachers on the use of positive behavior supports for at-risk students.”).

178. *Id.*

179. *Id.*

180. *Id.*

Rights Remedies at UCLA’s Civil Rights Project, authored a recent report on school discipline in the U.S.¹⁸¹ In this report, Losen notes that the teacher in South Carolina’s Spring Valley High School had many alternatives available to effectively handle normal adolescent defiance.¹⁸² Some alternatives included waiting until the end of class to deal with the student’s misconduct or bringing in a counselor employed by the school, who is especially trained in de-escalation for such a situation.¹⁸³ Losen’s position on restorative practices—restoring peace in classrooms by dealing with problem students in a separate location from the class to prevent humiliation—is echoed by the Departments of Education and Justice’s Guidelines for School Discipline.¹⁸⁴ These guidelines suggest restorative practices, mediation, and amends-making as alternatives to automatic suspensions, expulsions, and rush referrals to the juvenile criminal-justice system.¹⁸⁵ Losen believes that under no circumstances should a teacher in a similar situation choose to call the SRO to have the student arrested.¹⁸⁶ Additionally, all police should receive such adolescent specific training to facilitate more effective and less harmful encounters with youth in the community.¹⁸⁷ This would also assist encounters with those with diminished capacity.¹⁸⁸

Next, the focus of training for law-enforcement members stationed in schools should be shifted to revamping the role filled by such officers.¹⁸⁹

181. Pearce & Kohli, *supra* note 143.

182. *Id.*

183. *Id.*

184. Deeney, *supra* note 85 (stating that restorative practices “seek to make both the victims and the offenders whole and productive” members of the community again “through mediation and amends-making.” The aim is to prevent the further spread of violence through employing non-punitive conflict resolution and peer support “and to resolve problems that do occur peacefully through communication among victims, perpetrators and facilitators.”).

185. *Id.*

186. Pearce & Kohli, *supra* note 143 (Calling a SRO to have a student arrested for adolescent misconduct “doesn’t make any sense.”).

187. *Id.*

188. *See generally* U.S. GOV’T ACCOUNTABILITY OFFICE, SECLUSIONS AND RESTRAINTS: SELECTED CASES OF DEATH AND ABUSE AT PUBLIC AND PRIVATE SCHOOLS AND TREATMENT CENTERS 7 (2009), <http://www.gao.gov/assets/130/122526.pdf> (discussing cases where students with disabilities died because they were physically restrained by school staff, even though the children did not appear to be physically aggressive).

189. *See* Stinson & Watkins, *supra* note 173, at 3.

Mo Canady, executive director of the National Association of School Resource Officers, acknowledges the astonishing fact that there are no national standards for training SROs. Canady asks school districts to step up to fill the void because when officers are well-trained and work closely with school officials, arrests in schools go down.¹⁹⁰ Currently, many SROs receive no training specific to their role in schools.¹⁹¹ Step one requires the school districts and law-enforcement agencies to form a collaborative partnership like that developed in New York City between the Department of Education and the NYPD Safety Office.¹⁹² Together, the school districts and law-enforcement agencies must establish clearly defined boundaries between behavior that qualifies as school discipline and that which qualifies as criminal justice.¹⁹³ The Agreements should establish boundaries that eliminate SROs' involvement in routine discipline in their official

190. Pearce & Kohli, *supra* note 143.

191. See Stinson & Watkins, *supra* note 173, at 3.

192. See Duncan, *supra* note 14, at 10 (“To help clarify the scope of an officer’s responsibilities for school safety, schools may find it helpful to specify that law enforcement approaches (such as arrest, citations, ticketing, or court referrals) should be used only as a last resort, and never to address instances of non-violent misbehavior that do not pose a serious and immediate threat to school safety. In addition, schools may find it useful to identify and document examples of the types of conduct or incidents that generally would not meet the definition of an immediate threat to school safety, such as tardiness, loitering, use of profanity, dress code violations, and disruptive or disrespectful behaviors.”); Melinda D. Anderson, *When Schooling Meets Policing*, ATLANTIC (Sept. 21, 2015), <http://www.theatlantic.com/education/archive/2015/09/when-schooling-meets-policing/406348/> (“[A] group of parents, students, and community members in the Bronx, alarmed at the high number of arrests and summonses issued by SROs in their schools, called for a public hearing in 2012 with the New York City Department of Education and the NYPD Safety Office. That discussion led to monthly meetings and, eventually, a training workshop for New York City school police. . . . Since the trainings commenced in 2012, Bronx schools have seen a significant fall in arrests and summonses. . . . While [the groups] don’t always agree, the drop in arrests and summonses is a testament to [the NYPD’s] willingness to collaborate and openness to change.”); SCHOOL BOARD OF BROWARD COUNTY, *supra* note 171.

193. See Duncan, *supra* note 14, at 3 (“[S]chools should provide clear definitions of the officers’ roles and responsibilities on campus, document those expectations in a written agreement or memorandum of understanding, focus officers’ roles primarily on safety, provide proper training, and continuously monitor the program’s activities through regular data collection and evaluation.”).

capacity.¹⁹⁴ SROs have no business being involved in formal discipline, especially suspensions and expulsions. The U.S. Department of Education acknowledges the critical role that a school-wide discipline policy plays in ensuring a strong and positive school climate.¹⁹⁵ The Department of Education focuses on effective communication of school-wide discipline policy as essential for teachers, school administrators, and law-enforcement to know their respective roles as disciplinarians.¹⁹⁶ In the absence of a present safety risk or the commitment of a serious crime, SROs should not be requested to intervene in their official law-enforcement capacity. Furthermore, educators should not request assistance from SROs in routine discipline.¹⁹⁷ The Department of Education even suggests that all SROs should expressly decline requests for intervention when necessary.¹⁹⁸

An example of a comprehensive and collaborative effort which resulted in an Agreement on school discipline is the Agreement entered into by Broward County Public Schools and the Broward County Police.¹⁹⁹ The major premise of the Agreement was that SROs must allow the totality of the circumstances—a balancing of the many factors unique to each student and the circumstances of each situation—to guide discipline.²⁰⁰ This Agreement embodies all the suggested considerations to shield students,

194. *Id.* at 9.

195. *Id.* at 3.

196. *Id.* at 9-10 (“To ensure the proper functioning of any school-based law enforcement program and to avoid negative unintended consequences, schools should provide clear definitions of the officers’ roles and responsibilities on campus, written documentation of those roles, proper training, and continuous monitoring of the program’s activities through regular data collection and evaluation. ...[The SRO’s role is that of] law enforcer, informal counselor, and educator. In their capacity as counselors and educators SROs can, and should, support positive school climate goals by developing positive relationships with students and staff, and helping to promote a safe, inclusive, and positive learning environment.”).

197. *Id.* at 10.

198. *Id.*

199. *See* SCHOOL BOARD OF BROWARD COUNTY, *supra* note 171.

200. *Id.* at 2-3 (the Agreement suggests that factors that should be considered “include, but [are] not limited to,” the student’s “age,” specific “behavioral history,” the “present circumstances,” “the degree of harm caused” by the student’s misconduct, “the student’s willingness to repair the harm” that resulted from their actions, the student’s specific “disciplinary record,” the student’s specific “academic record,” the “general demeanor and disposition” the student shows “toward others,” whether the student suffers from a “disability” or whether the student has a “special education status”).

especially those at an increased risk, from being unnecessarily introduced into the criminal justice system for normal adolescent behaviors while remaining flexible and open for amendments.²⁰¹ The Broward County Agreement clearly defines student misbehavior and non-violent misdemeanors, and outlines bright-line boundaries for response while taking into account emergencies and discretion.²⁰² For example,

In any school year, the first instance of student misbehavior that rises to the level of a non-violent misdemeanor and requires consultation with a police officer should not result in arrest nor the filing of a criminal complaint, but instead be handled through the Code of Student Conduct and Discipline Matrix.²⁰³

Additionally, the Agreement outlines a time frame for training SROs following the implementation and continued education for those directly interacting with students and making discipline or arrests decisions.²⁰⁴ The Agreement also mandates data collection for the Eliminating the Schoolhouse to Jailhouse Committee to monitor compliance with the agreement and public reporting.²⁰⁵

SROs would also benefit from specialized training in adolescent psychology, including social and cognitive development.²⁰⁶ Understanding how adolescents think and why adolescents act the way they do will permit SROs to safely and efficiently adjust their tactics and expectations for each unique encounter with youth.²⁰⁷ Cultural competence and implicit-bias training will also promote fair and impartial responses to student behavior, enhancing positive interactions between officers and students from diverse backgrounds.²⁰⁸ Advanced training in interpersonal communication, conflict

201. See *id.*

202. *Id.* at 3–4. Additionally, the Agreement provides specific conditions which must be present to refer an incident to law enforcement for “repeated misbehavior.” *Id.*

203. *Id.* at 3.

204. *Id.* at 6.

205. *Id.*

206. Thomas, *supra* note 167, at 10, 11.

207. *Id.* at 11.

208. *Id.*

avoidance, and de-escalation will help to prevent violent encounters that disrupt not just the classroom but the entire community.²⁰⁹

Finally, data collection and continuous improvement are crucial to the continuation of the SRO program.²¹⁰ The Department of Education suggests that schools should closely monitor SRO programs, ensuring that the program is meeting the school's individual safety goals, expressly outlined in written agreements between the school system and the police department, and that the program is not creating any negative unintended consequences to students and the education environment.²¹¹ One way to ensure school safety goals are being met is through collection of comprehensive data on officer activity, including but not limited to information regarding any school-based arrests, citations, searches, and referrals.²¹² Additionally, the districts should develop a complaint process to allow students and the community to state concerns regarding school safety and SRO activities and promptly address all credible concerns.

As we see in K.B.'s case, the Court implemented protections for students who attend the Birmingham City Schools under the school system's existing SRO framework. There the Court ordered the parties to jointly collaborate to develop a practical training and procedures plan to address the deficiencies in the relationship.²¹³ And if the parties determine that mace should still be used on students in the school system, the Court required that the new procedures include that SROs must decontaminate all students that they spray with mace, in addition to, six general practices to serve as guidance for the parties when crafting their plan:

“(1) unless doing so would endanger the student, officer, or bystanders, after an S.R.O. sprays a student with [pepper spray] and has secured the student, the officer must provide the student with an opportunity to decontaminate with water, either in the form

209. *Id.*

210. See SCHOOL BOARD OF BROWARD COUNTY, *supra* note 171, at 6.

211. John B. King, Jr., *Letter from the Secretary of Education*, U.S. DEP'T OF EDUC. (Sept. 8, 2016), <https://www2.ed.gov/policy/gen/guid/school-discipline/files/ed-letter-on-sros-in-schools-sept-8-2016.pdf>.

212. See Tammy Reinhart Kochel et al., *Outcome-Oriented SRO Performance Measures: Learning from a Pilot Study*, DEP'T OF JUST., 4-7 (Dec. 2004), https://cops.usdoj.gov/html/cd_rom/sro/FinalCDPubs/OutcomeOrientedSRO_LearningPilot.pdf.

213. *J.W.*, 143 F. Supp. 3d at 1178.

of a shower, washing at a sink, or using an eye wash station; (2) because of the lingering exposure from contaminated clothing, at all times, Chief Roper must maintain at each school where the Birmingham Police Department allows S.R.O.s to spray students with [pepper spray] a sufficient number, (as agreed by the parties), of sweat suits in varying sizes, and must allow the student to change out of his or her contaminated clothes; (3) the S.R.O. must then place the student in front of a fan; (4) Chief Roper must ensure that S.R.O.s have available sealable plastic and/or garbage bags that an affected student can use to store her contaminated clothing; and (5) Chief Roper must replace each sweat suit a student uses so that the total number available at the start of each week is always the same as the initial number agreed on by the parties.”²¹⁴

The Court also required the parties to draft a single page flyer to be submitted for court approval and then disseminated to educate students enrolled at Birmingham City Schools about the effects of pepper spray and suggested methods of decontamination.²¹⁵

V. CONCLUSION

Where do we go from here? I did not think we could reach a point in our society when videos of police brutality would not translate into justice, and I did not think we could reach a point in our society where we would become completely numb to injustice because of its frequency. Now, the reality is that justice for the senseless execution of Blacks seems nebulous. Our new reality is a story of routine tragedy. It has been five years since a non-resisting K.B. was handcuffed and soaked with mace in the halls of a Birmingham City School. It has been nearly two years since Laquan McDonald was executed in Chicago. For two years, activists of today’s

214. *Id.*

215. *Id.* at 1179.

generation have put themselves on the front lines²¹⁶ as police officers continue to act against Black bodies with excessive violence. In the aftermath of these tragedies, it has become routine for each victim's past to be "laid bare, every misdeed brought to light and used as justification for police officers' choosing to act as judge, jury, and executioner—due process" on the city street and in a public school hallway.²¹⁷ Eventually, the Department of Justice may investigate the McDonald case.²¹⁸ Charges might be brought against the officer(s) involved, but, as has become routine in this grotesque song and dance, it is rare for police officers to be convicted in such shootings.²¹⁹

Therefore, those of us who recognize the systemic problems that any injustice presents to our society must get involved in reforming our communities. Now is the time for action, to save a generation from a lifetime of an erroneous perception of inferiority, insecurity, violence, incarceration, and welfare dependence. The senseless execution of Blacks must end. We must demand more from our law enforcement officers and hold them accountable to their sworn duties to protect and serve everyone. We must inquire into the role SROs play in our nation's school systems and the training these officers receive. We must demand more from our educators tasked with enlightening the next generation. Teachers and administrators must be accountable in their duty to meet the educational needs of all students. We must demand that data is collected about adolescent encounters with law enforcement officers nationally and that the

216. David Goldman, *Protests Against Police Violence Continue Across U.S.*, CBS NEWS (July 12, 2016), <http://www.cbsnews.com/news/protests-against-police-violence-continue-across-us/>.

217. See Carlos Maza, *How News Networks Criminalize Black Victims of Police Violence*, MEDIA MATTERS FOR AMERICA BLOG (July 7, 2016), <http://mediamatters.org/blog/2016/07/07/how-news-networks-criminalize-black-victims-police-violence/211427>; see also Gay, *supra* note 117.

218. See Simone Weichselbaum, *The Problem with Policing the Police*, TIME, <http://time.com/police-shootings-justice-department-civil-rights-investigations/> ("Justice Department has charged more than 400 law-enforcement and corrections officers with various violations of constitutional rights in recent years. But its occasional inquiries into police shootings have often left the activists disappointed – as they were when the department concluded in March that the killing of Michael Brown in Ferguson did not violate federal law.").

219. See Matt Ferner, *Here's How Many Cops Got Convicted for On-Duty Shootings*, HUFF. POST (Jan. 13, 2016), http://www.huffingtonpost.com/entry/police-shooting-convictions_us_5695968ce4b086bc1cd5d0da ("Only about 20 percent of the officers arrested are ever convicted of murder or manslaughter").

data be made public for all to review. We must demand that law enforcement officers and educators undergo regular training in de-escalation, adolescent reasoning, and threat assessment. We must put an end to the school-to-prison pipeline.

