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## *SYMPOSIUM*

### ADDRESSING THE SCHOOL-TO-PRISON PIPELINE THROUGH THREE NONTRADITIONAL PATHWAYS

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*He who opens a school door, closes a prison.*  
– Victor Hugo

Analogous to Nathaniel Hawthorne’s critique of his leaders’ decision to use punishment as a sign of public accountability, and his adoption of the phrase “the black flower of civilized society” to describe the prison,<sup>1</sup> our leaders in the White House, Congress, and the Supreme Court made several decisions about law and social policy between 1965 and 1973 that created a new culture of public accountability for uses (or misuses) of taxpayers’ money. By doing so, they inadvertently made it harder to invest in public education, but easier to invest in public prisons. The seeds that germinated from those decisions grew into a black flower whose bloom shaped American modernity for the next fifty years: the school-to-prison pipeline.<sup>2</sup>

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<sup>1</sup> Nathaniel Hawthorne, *The Scarlet Letter* 39 (Brian Harding ed., 2007).

<sup>2</sup> I use the term “school-to-prison” pipeline broadly to address the number of school-age children, adolescents, and teens who are justice-involved youth. How did they end up in the justice system? The pathway for some school-age youth began with a school referral to law enforcement officers based on a report of disruptive behavior—real or imagined. Another pathway for school-age youth is participation in illegal activities outside of school hours. Others arrive in the criminal justice system as children of an incarcerated mother or father,

The *San Antonio Independent School District v. Rodriguez* decision of 1973 fertilized this flower.<sup>3</sup> The United States Supreme Court held in *Rodriguez* that the U.S. Constitution did not protect education as a fundamental right; therefore, students could not challenge in federal court the funding disparities in Texas or elsewhere that privileged wealthier school districts while greatly disadvantaging poorer ones.<sup>4</sup> Even while acknowledging the need for higher quality schools and more equality in educational opportunity,<sup>5</sup> the Court eliminated a federal constitutional remedy to achieve greater equity in school funding. This left educational opportunity to the discretion of state legislatures and courts.<sup>6</sup> The Court contended that federalism constraints and contested foundational questions in education policy led it to decline to intervene.<sup>7</sup>

The Court's decision to reject the claim that education is a fundamental right in *Rodriguez*, and take a "hands-off" approach to federal support to fund public schools, did three things. First, the decision provided political cover to elected state and local officials who were already involved in ideological debates back home about school finance and equity. Second, it started what I will call a War on Property Taxes. Third, the ruling raised one big question for governors and elected officials to answer: How will state legislatures, education departments, and local school districts operationalize the notion of equity, and eventually adequacy, in light of

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while factors such as race, gender, disability, poverty, or other issues not related directly to a school also provide a pathway. Thus, the "school-to-prison" pipeline phrase is myopic, in part, as a point of origin for this phenomenon. For this reason, I would prefer to name what we see a "child-to-prison" pipeline. Nevertheless, I will use school-to-prison pipeline because it remains the most well-known phrase to describe the topic in this Essay.

<sup>3</sup> 411 U.S. 1 (1973).

<sup>4</sup> *Id.* at 35, 54–55.

<sup>5</sup> *Id.* at 58.

<sup>6</sup> See *id.* at 58–59; Charles J. Ogletree, Jr. & Kimberly Jenkins Robinson, Creating New Pathways to Equal Educational Opportunity, *in* *The Enduring Legacy of Rodriguez: Creating New Pathways to Equal Educational Opportunity* 263, 264 (Charles J. Ogletree, Jr. & Kimberly Jenkins Robinson eds., 2015); see also *A Federal Right to Education: Fundamental Questions for Our Democracy* (Kimberly Jenkins Robinson ed., 2019) (examining why the United States should recognize a federal right to education, how to recognize it, and what it should guarantee); Derek Black, Unlocking the Power of State Constitutions with Equal Protection: The First Step Toward Education as a Federally Protected Right, 51 *Wm. & Mary L. Rev.* 1343, 1408 (2010) (arguing that *Rodriguez* left open the possibility of enforcing equal protection by relying on state court definitions of a "minimally adequate education"); Susan H. Bitensky, Theoretical Foundations for a Right to Education Under the U.S. Constitution: A Beginning to the End of the National Education Crisis, 86 *Nw. U. L. Rev.* 550, 554 (1992) (exploring potential constitutional theories for recognizing a right to education).

<sup>7</sup> *Rodriguez*, 411 U.S. at 40–44.

*Rodriguez* given the different visions of public schooling that are supported by a living state constitution?

So, while the Court's ruling in *Rodriguez* supported a "hands-off" approach to funding public schools, it is worth noting that leaders in the White House and Congress during the same period of time were supporting a "hands-on" approach by implementing a tough-on-crime agenda that, ironically, impacted the same public school students (and their parents and communities) left behind by *Rodriguez* in 1973.

For example, a couple of years before *Rodriguez*, President Richard Nixon declared at a press meeting on June 17, 1971, that drug abuse in America was "public enemy number one[.]" and the crime that accompanied it was sweeping the nation.<sup>8</sup> He was not alone in this belief.

His predecessor, President Lyndon B. Johnson, shared a similar sentiment when he stated before Congress on March 8, 1965, that, "[c]rime has become a malignant enemy in America's midst."<sup>9</sup> A few months later, President Johnson signed Executive Order 11236 to establish the President's Commission on Law Enforcement and Administration of Justice.<sup>10</sup> The function of the Commission was to "[i]nquire into the causes of crime and delinquency, measures for their prevention, the adequacy of law enforcement and administration of justice, and the factors encouraging respect or disrespect for law . . . ."<sup>11</sup> One major product from the Commission is the 1967 publication of *The Challenge of Crime in a Free Society: A Report by the President's Commission on Law Enforcement and Administration of Justice*.<sup>12</sup> Chapter Three of the report addresses "Juvenile Delinquency and Youth Crime."<sup>13</sup> One suggestion from this Chapter is for the police, schools, and courts to play a bigger role in referring youth to law enforcement.<sup>14</sup> In regard to the juvenile justice system in particular, the Commission

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<sup>8</sup> *Id.*

<sup>9</sup> See Lyndon B. Johnson, Special Message to the Congress on Law Enforcement and the Administration of Justice, in 1 Pub. Papers 263, 263 (1965).

<sup>10</sup> Exec. Order No. 11,236, 3 C.F.R. 329 (1964–1965).

<sup>11</sup> *Id.*

<sup>12</sup> President's Commission on Law Enforcement & Administration of Justice, *The Challenge of Crime in a Free Society* (1967), <https://www.ojp.gov/sites/g/files/xyckuh241/files/archives/ncjrs/42.pdf> [<https://perma.cc/S36P-5W9X>].

<sup>13</sup> *Id.* at 55–89.

<sup>14</sup> *Id.* at 78–89. On page 89 is a chart to show the role of police in juvenile court and youth referrals compared to schools and parents.

recommended that “[t]o the greatest feasible extent, police departments should formulate policy guidelines for dealing with juveniles.”<sup>15</sup>

In 2023, we refer to this practice as the school-to-prison pipeline. To be clear, the *Rodriguez* decision of 1973 was not a case about the juvenile justice system. However, removing any federal accountability for ensuring that states provide equitable and adequate funding for students educated in lower-income school districts laid the groundwork for little to no state accountability for low-quality schools that serve as dead ends and drop out factories that feed our juvenile justice and adult prison systems.

So, how did we get here? And where do we go from here? To answer those questions, this Essay identifies how and why the school-to-prison pipeline became an acceptable norm in our public discourse about law and policy, summarizes its impact on students and society, and asks lawyers and reformers to reimagine how to address the issue by giving consideration to three novel pathways to change: (1) creative settlement of school funding litigation; (2) a prison-to-solutions pipeline; and (3) a Pell grants and civil society evaluation.

#### I. BRIEF OVERVIEW OF THE SCHOOL-TO-PRISON PIPELINE

The school-to-prison pipeline is real.<sup>16</sup> One researcher defines it as “the intersection of the K–12 public education system and law enforcement, and the trend of referring students directly to law enforcement for committing offenses at school or creating conditions that increase the probability of students eventually becoming incarcerated, such as suspending or expelling them.”<sup>17</sup> Although research and practice verify the existence of this pipeline, one area of limited research about it is the way a school’s disciplinary actions affect students as adolescents, as well as their future arrests and incarceration as adults.

To address that issue, researchers at Boston University, the University of Colorado Boulder, and Harvard University tracked 26,246 middle school students enrolled in Charlotte-Mecklenburg public schools from

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<sup>15</sup> *Id.* at 79.

<sup>16</sup> See generally Am. Bar Ass’n, ABA Task Force on Reversing the School-to-Prison Pipeline: Report, Recommendations and Preliminary Report (Jan. 2018), [<https://perma.cc/5NBC-33Z3>] (discussing the school-to-prison pipeline and ways to stop it).

<sup>17</sup> Jason P. Nance, Students, Police, and the School-to-Prison Pipeline, 93 *Wash. U. L. Rev.* 919, 923 (2016).

the 1998–1999 through the 2010–2011 academic years.<sup>18</sup> The school population was 48% Black, 39% white, and 8% Hispanic.<sup>19</sup> After evaluating data, the researchers published their findings in 2021:

- “[Y]oung adolescents who attend schools with high suspension rates are substantially more likely to be arrested and jailed as adults. These long-term, negative impacts in adulthood apply across a school’s population, not just to students who are suspended during their school years.”<sup>20</sup>
- “Students assigned to middle schools that are one standard deviation stricter—equivalent to being at the 84th percentile of strictness versus the mean—are 3.2 percentage points more likely to have ever been arrested and 2.5 percentage points more likely to have ever been incarcerated as adults. They also are 1.7 percentage points more likely to drop out of high school and 2.4 percentage points less likely to attend a 4-year college. These impacts are much larger for Black and Hispanic male students.”<sup>21</sup>
- “In looking at what types of crimes are involved, we find that school strictness increases later involvement in crimes related to illegal drugs, fraud, arson, and burglary, but not in serious violent crimes like murder, manslaughter, rape, robbery, and aggravated assault.”<sup>22</sup>
- “Negative effects are especially pronounced among Black and Hispanic male students, who are 5.4 percentage points more likely to be arrested and 4.4 percentage points more likely to be incarcerated as adults.”<sup>23</sup>

The authors acknowledge that while suspension and crime rates in Charlotte-Mecklenburg public schools are “well above the national

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<sup>18</sup> Andrew Bacher-Hicks, Stephen B. Billings & David J. Deming, Proving the School-to-Prison Pipeline: Stricter Middle Schools Raise the Risk of Adult Arrests, 21 *Educ. Next* 52, 54 (2021).

<sup>19</sup> *Id.* at 54.

<sup>20</sup> *Id.* at 52.

<sup>21</sup> *Id.*

<sup>22</sup> *Id.* at 56.

<sup>23</sup> *Id.*

averages,” the schools are fairly representative of large, urban districts in the South.<sup>24</sup>

Although those findings from North Carolina are alarming, the school-to-prison pipeline in the United States is not a new phenomenon. In 1974, for instance, approximately 1.7 million students were suspended from school, but the number increased to 3.1 million during the early 1990s.<sup>25</sup> As for race, the white student suspension rate increased from 3.1% to 5.09% between 1972 and 2000, and for Black students it increased from 6.0% to 13.2% during the same period.<sup>26</sup> During the 2015–2016 academic year, more than 2.7 million public school students were suspended from school.<sup>27</sup>

School suspensions also impact students with disabilities. As early as 1972, a group of advocates successfully challenged in federal court the exclusion of Black students with disabilities from school without due process.<sup>28</sup> Sadly, however, suspension and referrals continue into modern times. For instance, data from the U.S. Department of Education Office for Civil Rights identified the following:

- “Students with disabilities are more than twice as likely to receive an out-of-school suspension (13%) than students without disabilities (6%).”<sup>29</sup>
- “Suspension rates, by race, sex, and disability status combined: With the exception of Latino and Asian-American students,

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<sup>24</sup> *Id.* at 55.

<sup>25</sup> Johanna Wald & Daniel J. Losen, *Defining and Redirecting a School-to-Prison Pipeline*, 2003 *New Directions for Youth Dev.* 9, 10 (2003) (citation omitted).

<sup>26</sup> *Id.* For more information about race, suspension, and disproportionality, see generally Johanna Wald & Daniel J. Losen, *Out of Sight: The Journey Through the School-to-Prison Pipeline*, in *Invisible Children in the Society and Its Schools* 23 (Sue Books ed., 3d ed. 2007); Edward J. Smith & Shaun R. Harper, *Disproportionate Impact of K–12 School Suspension and Expulsion on Black Students in Southern States*, Univ. of Penn., Ctr. for the Study of Race & Equity in Educ. (2015), <https://race.usc.edu/wp-content/uploads/2020/08/Pub-14-Smith-and-Harper.pdf> [<https://perma.cc/S973-5WCA>].

<sup>27</sup> U.S. Comm’n on C.R., *Beyond Suspensions: Examining School Discipline Policies and Connections to the School-to-Prison Pipeline for Students of Color with Disabilities* 3 (July 2019) (citation omitted), <https://www.usccr.gov/reports/2019/beyond-suspensions-examining-school-discipline-policies-and-connections-school-prison> [<https://perma.cc/8ZMQ-JZKH>].

<sup>28</sup> *Id.* at 8 (citing *Mills v. Bd. of Ed. of D.C.*, 348 F. Supp. 866, 875–76 (D.D.C. 1972)).

<sup>29</sup> Off. for C.R., U.S. Dep’t of Educ., *Civil Rights Data Collection: Data Snapshot (School Discipline)* 1 (2014), <https://ocrdata.ed.gov/assets/downloads/CRDC-School-Discipline-Snapshot.pdf> [<https://perma.cc/9MSJ-APLQ>].

more than one out of four boys of color with disabilities (served by IDEA) — and nearly one in five girls of color with disabilities — receives an out-of-school suspension.”<sup>30</sup>

- “While [B]lack students represent 16% of student enrollment, they represent 27% of students referred to law enforcement and 31% of students subjected to a school-related arrest. In comparison, white students represent 51% of enrollment, 41% of students referred to law enforcement, and 39% of those arrested. Students with disabilities (served by IDEA) represent a quarter of students arrested and referred to law enforcement, even though they are only 12% of the overall student population.”<sup>31</sup>

A 2019 report published by the U.S. Commission on Civil Rights contains updated information about the impact of the school-to-prison pipeline on students of color with disabilities,<sup>32</sup> and also provides information about the effects discipline policies have on English language learners and LGBTQ students.<sup>33</sup>

Although the findings are alarming for Black and Hispanic boys, Black girls are not untouched by school discipline policies. Of all students enrolled in public schools in the United States, Black girls have the fastest growing suspension rate, which is six times higher than white girls and higher than 67% of boys.<sup>34</sup> According to one study about school suspensions in big city schools during the 2011–2012 academic year, 90% of all expulsions in New York City and 63% of expulsions in Boston were Black girls, while no expulsions were white girls.<sup>35</sup>

What factors account for the high suspension of Black girls? According to a report published in 2020 by The Education Trust and the National

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<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

<sup>32</sup> U.S. Comm’n on C.R., *supra* note 27, at 3–11.

<sup>33</sup> *Id.* at 5, 35.

<sup>34</sup> Subini Ancy Annamma et al., *Black Girls and School Discipline: The Complexities of Being Overrepresented and Understudied*, 54 *Urban Educ.* 211, 214 (2019), <https://journals.sagepub.com/doi/epub/10.1177/0042085916646610> [<https://perma.cc/P5GV-2EER>] (referencing academic and U.S. Department of Education data about civil rights in education).

<sup>35</sup> Kimberlé Williams Crenshaw, Priscilla Ocen & Jyoti Nanda, *Black Girls Matter: Pushed Out, Overpoliced and Underprotected*, *Afr. Am. Pol’y F.* 23 (Feb. 4, 2015), [https://www.aapf.org/\\_files/ugd/b77e03\\_e92d6e80f7034f30bf843ea7068f52d6.pdf](https://www.aapf.org/_files/ugd/b77e03_e92d6e80f7034f30bf843ea7068f52d6.pdf) [<https://perma.cc/K2ME-TLV4>].

Women’s Law Center, researchers concluded that Black girls who talk in class, share their beliefs, or stand up for justice are at times considered disruptive, and thus subject to exclusionary methods.<sup>36</sup> According to a group of researchers and educators that studied disciplinary data from a large urban school district, historical narratives about Black *women’s* behavior (e.g., being loud, mouthy, or “ghetto”) influence school personnel’s decisions to discipline Black *girls*.<sup>37</sup> Among young school-age girls, the largest predictor of later arrest in life is being held back, suspended, or expelled during middle school.<sup>38</sup> With this being the case, lawyers, judges, legislators, and educators should create an action plan to address the school-to-prison pipeline for Black girls—but also for girls in schools everywhere, be they in urban or rural areas.

## II. INFLUENCERS OF IDEAS THAT RESULTED IN THE SCHOOL-TO-PRISON PIPELINE

Given all of these factors, what influenced the public’s perceptions about youth culture and crime and led to the development of federal, state, and local disciplinary laws that pumped students through a school-to-prison pipeline since the *San Antonio Independent School District v. Rodriguez* decision of 1973?

Television news is one influence. Most homes in the United States during the 1980s and 1990s had a television, and by 2001, people spent

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<sup>36</sup> Kayla Patrick, Adaku Onyeka-Crawford & Nancy Duchesneau, “. . . And They Cared”: How to Create Better, Safer Learning Environments for Girls of Color, *The Educ. Trust* 9 (Aug. 20, 2020), [https://edtrust.org/wp-content/uploads/2014/09/And-they-cared\\_How-to-create-better-safer-learning-environments-for-girls-of-color\\_Aug-2020.pdf](https://edtrust.org/wp-content/uploads/2014/09/And-they-cared_How-to-create-better-safer-learning-environments-for-girls-of-color_Aug-2020.pdf) [<https://perma.cc/7F8W-WQFD>].

<sup>37</sup> Annamma et al., *supra* note 34, at 217. The authors identified four controlling images of Black women that influence how school personnel see Black girls:

“(a) Mammy or Matriarch, a woman who is nurturing, loving, and sexless; (b) Sapphire, the emasculating, overly aggressive, unfeminine, or masculine, and loud female; (c) Jezebel, as hypersexualized woman who pursues and initiates sex; and (d) The Welfare Queen, the woman who is conniving, loud, talks back, and is vampiric, sucking off the system by having children and refusing to work.”

See *id.* at 231 tbl.6 for a comparison of referral categories and dominant narratives about Black girls.

<sup>38</sup> Wald & Losen, *supra* note 25, at 11, referencing the impact of disciplinary action on girls in middle school and what it means for future actions in and out of school. See Am. Bar Ass’n & Nat’l Bar Ass’n, *Justice by Gender: The Lack of Appropriate Prevention, Diversion and Treatment Alternatives for Girls in the Justice System*, 9 *Wm. & Mary J. Women & L.* 73, 82–83 (2002).



approximately four hours a day watching it.<sup>39</sup> With a steady dosage of watching street gang activities, crack “epidemics” ravage cities, and violence inside and outside of public schools, the image of the “young” criminal in America came into view. Even when the research showed youth violence was falling, youth were nevertheless overrepresented in the news.<sup>40</sup> Often, the news portrayed Black and Hispanic youth as the purveyors of crime, but underrepresented them as victims of crime.<sup>41</sup> Blacks, in particular, were overrepresented as “criminals” in the news, four times more likely to be in a mug shot than whites, and more likely than whites to be shown in physical restraint.<sup>42</sup> At the same time, Blacks and Hispanics were portrayed as “predators” as well.<sup>43</sup>

Intellectuals and public leaders were another influence on the public’s perceptions of youth culture and crime. In 1995, the year after Congress enacted the Violent Crime Control and Law Enforcement Act of 1994,<sup>44</sup> which was one of the most far-reaching crime laws since the 1960s and one that had a devastating impact on communities of color,<sup>45</sup> and the Gun-Free Schools Act of 1994,<sup>46</sup> which included language to expel students from school for possession of a firearm (which then spilled over into suspension of students for weapon-less infractions),<sup>47</sup> Princeton University professor John Dilulio published an essay that changed how society talked about youth and crime.<sup>48</sup> He popularized the term “super-predator.”<sup>49</sup> He used the phrase to describe out-of-control white and Black

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<sup>39</sup> Nancy A. Heitzeg, *Education or Incarceration: Zero Tolerance Policies and the School to Prison Pipeline*, F. Pub. Pol’y, no. 2, 2009, at 3 (citation omitted), <https://files.eric.ed.gov/fulltext/EJ870076.pdf> [<https://perma.cc/Z5QQ-V83V>].

<sup>40</sup> *Id.* (citation omitted).

<sup>41</sup> *Id.* (citation omitted).

<sup>42</sup> *Id.*

<sup>43</sup> *Id.* at 4.

<sup>44</sup> Pub. L. No. 103-322, 108 Stat. 1796 (1994).

<sup>45</sup> Ranya Shannon, *3 Ways the 1994 Crime Bill Continues to Hurt Communities of Color*, Ctr. for Am. Progress (May 10, 2019), <https://www.americanprogress.org/article/3-ways-1994-crime-bill-continues-hurt-communities-color/> [<https://perma.cc/QG8F-YD73>].

<sup>46</sup> Pub. L. No. 103-382, 108 Stat. 3907 (1994) (codified at 20 U.S.C. § 7961).

<sup>47</sup> *Id.*; see, e.g., *Education on Lockdown: The Schoolhouse to Jailhouse Track*, Advancement Project 11–13 (Mar. 2005), <https://www.justice4all.org/wp-content/uploads/2016/04/Education-on-Lockdown.pdf> [<https://perma.cc/J6NH-WPQV>] (providing examples of how federal and state laws resulted in the suspension and arrest of students for weapons as well as for non-weapon related activities in several school districts).

<sup>48</sup> John J. Dilulio, Jr., *The Coming of the Super-Predators*, 1 *Wkly. Standard* 23 (1995).

<sup>49</sup> See *The Campaign for the Fair Sent’g of Youth, The Origins of the Superpredator: The Child Study Movement to Today* (May 2021), <https://cfsy.org/wp-content/uploads/Superpredator-Origins-CFSY.pdf> [<https://perma.cc/QC2S-33M8>].

youth growing up in the “abject moral poverty” that “begets juvenile super-predators whose behavior is . . . present-oriented” and who “perceive no relationship between doing right (or wrong) now and being rewarded (or punished) for it later.”<sup>50</sup>

In 1996, First Lady Hillary Clinton used the phrase “super-predator” during a campaign event held at Keene State College in New Hampshire to talk about youth crime.<sup>51</sup> She said these super-predator youth have “[n]o conscience, no empathy. We can talk about why they ended up that way, but first we have to bring them to heel.”<sup>52</sup>

Some beliefs about the “super-predator”—or whatever is the phrase of the decade—continue to this day. As do debates about the role of the courts or legislative bodies in addressing the school-to-prison pipeline. Virginia is one example.

### III. POLICY RESPONSES TO THE SCHOOL-TO-PRISON PIPELINE

According to a 2015 report published by the Center for Public Integrity, Virginia led the nation in the number of school referrals to law enforcement officers at nearly three times the national rate.<sup>53</sup> For instance, Virginia referred 16 for every 1,000 students to law enforcement compared to the national average of 6 for every 1,000 students.<sup>54</sup> Virginia also led the nation in the number of disabled students referred to law enforcement officers at 33.4 for every 1,000 students and was second only to Wyoming in Black student referrals at 25.3 for every 1,000 students.<sup>55</sup>

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<sup>50</sup> Dilulio, *supra* note 48, at 25–26.

<sup>51</sup> Jonathan Capehart, Hillary Clinton on “Superpredator” Remarks: “I Shouldn’t Have Used Those Words,” *Wash. Post* (Feb. 25, 2016, 2:59 PM), <https://www.washingtonpost.com/blogs/post-partisan/wp/2016/02/25/hillary-clinton-responds-to-activist-who-demanded-apology-for-superpredator-remarks/> [<https://perma.cc/Q7JG-RLRM>].

<sup>52</sup> *Id.* For an overview of how forty major U.S. news outlets promoted the “super-predator” idea between 1995 and 2000, see generally Carroll Bogert & Lynnell Hancock, *Superpredator: The Media Myth that Demonized a Generation of Black Youth*, *The Marshall Project* (Nov. 20, 2020), <https://www.themarshallproject.org/2020/11/20/superpredator-the-media-myth-that-demonized-a-generation-of-black-youth> [<https://perma.cc/KH7D-UL2B>]. A video clip of John Dilulio and Hillary Clinton is here.

<sup>53</sup> Susan Ferriss, *Virginia Tops Nation in Sending Students to Cops, Courts: Where Does Your State Rank?*, *Ctr. for Pub. Integrity* (Apr. 10, 2015), <https://publicintegrity.org/education/virginia-tops-nation-in-sending-students-to-cops-courts-where-does-your-state-rank/> [<https://perma.cc/J9WP-87MK>].

<sup>54</sup> *Id.*

<sup>55</sup> *Id.*

The actions in Virginia prompted *The Washington Post* editorial board to write a critique of the Commonwealth's actions.<sup>56</sup>

In 2019, the Legal Aid Justice Center in Charlottesville published a study that documented the negative impact Virginia's disorderly conduct laws has on schools and students.<sup>57</sup> Data points of note include the following activities:

- Black students represented approximately 22% of the Virginia school population, although they averaged over 62% of the school-based disorderly conduct criminal complaints between 2016 and 2019.<sup>58</sup>
- White students represented approximately 50% of the Virginia school population, but they averaged only 29% of the school-based disorderly conduct criminal complaints between 2016 and 2019.<sup>59</sup>

The report also identified gender differences by race:

- Black girls represented approximately 11% of the Virginia school population but averaged 29% of the school-based disorderly conduct criminal complaints in 2019.<sup>60</sup>
- White girls represented approximately 24% of the Virginia school population but averaged 10% of the school-based disorderly conduct criminal complaints in 2019.<sup>61</sup>

Concerned about the issue, Senator Jennifer McClellan (D-Richmond) worked with Charlottesville and Richmond stakeholders to find a solution. In 2020, she sponsored two bills in the Virginia General Assembly.

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<sup>56</sup> Editorial Board, *Why is Va. Treating its Students—Especially its Black Students—Like Criminals?*, *Wash. Post* (Oct. 22, 2017), [https://www.washingtonpost.com/opinions/from-the-classroom-to-the-courts-in-va-too-many-students-get-treated-like-criminals/2017/10/22/119cda9a-b5d9-11e7-9e58-e6288544af98\\_story.html](https://www.washingtonpost.com/opinions/from-the-classroom-to-the-courts-in-va-too-many-students-get-treated-like-criminals/2017/10/22/119cda9a-b5d9-11e7-9e58-e6288544af98_story.html) [<https://perma.cc/35PN-HHQX>].

<sup>57</sup> Amy Woolard, Rachael Deane & Shannon Ellis, *Decriminalizing Childhood: Ending School-Based Arrest for Disorderly Conduct*, Legal Aid Just. Ctr. (Oct. 2019), <https://www.justice4all.org/wp-content/uploads/2019/10/LAJC-DC-policy-brief-FINAL.pdf> [<https://perma.cc/GW7K-FQJ7>].

<sup>58</sup> *Id.* at 3.

<sup>59</sup> *Id.* at 4.

<sup>60</sup> *Id.* at 5.

<sup>61</sup> *Id.*

**Senate Bill 3:** provides that an elementary or secondary school student is not guilty of disorderly conduct “if the disorderly conduct occurred on school property, on a school bus, or at any activity conducted or sponsored by any [elementary or secondary] school.”<sup>62</sup>

**Senate Bill 729:** eliminates the requirement that school principals report to law enforcement certain enumerated acts that may constitute a misdemeanor offense.<sup>63</sup>

Why did Senator McClellan introduce legislation to address the school-to-prison pipeline? “When we started sort of digging into some of the cases that they had . . . one of the biggest things kids were referred for was disorderly conduct,” McClellan said.<sup>64</sup> “It was things like a kid on a bus in Henrico County was charged for singing a rap song and a kid in Lynchburg was sent to the principal’s office and kicked this trash can on the way out of class.”<sup>65</sup>

Both bills are now the law of the state.<sup>66</sup> Lawmakers in other states may propose similar legislation. At the same time, many organizations such as the American Bar Association,<sup>67</sup> the ACLU,<sup>68</sup> the NAACP,<sup>69</sup> as well as the U.S. Department of Education and U.S. Department of Health and

<sup>62</sup> S. 3, 2020 Gen. Assemb., Reg. Sess. (Va. 2020).

<sup>63</sup> S. 729, 2020 Gen. Assemb., Reg. Sess. (Va. 2020).

<sup>64</sup> Brendan Shillingford & Anya Sczerzenie, *New Virginia Laws Seek to Close “School-to-Prison Pipeline”*, AP News (Dec. 3, 2020), <https://apnews.com/article/race-and-ethnicity-virginia-coronavirus-pandemic-richmond-bills-1c407c5efd8f05fa8be8e24c853c3f4e> [<https://perma.cc/GT6N-FFV3>].

<sup>65</sup> *Id.*

<sup>66</sup> 2020 Va. Acts 241–42, 542.

<sup>67</sup> Am. Bar Ass’n, *School to Prison Pipeline, Resolution Adopted by the House of Delegates*, August 8–9, 2016 (Sept. 24, 2018), [https://www.americanbar.org/groups/public\\_interest/child\\_law/resources/attorneys/school-to-prison-pipeline/](https://www.americanbar.org/groups/public_interest/child_law/resources/attorneys/school-to-prison-pipeline/) [<https://perma.cc/5LN5-KL9X>].

<sup>68</sup> See generally *School-to-Prison Pipeline*, Am. C.L. Union, <https://www.aclu.org/issues/juvenile-justice/school-prison-pipeline?redirect=racial-justice/what-school-prison-pipeline> [<https://perma.cc/WKZ9-8FH3>] (explaining the ACLU’s legal and policy work dedicated to challenging the “school-to-prison pipeline”); *Locating the School-to-Prison Pipeline*, Am. C.L. Union (2008), [https://www.aclu.org/sites/default/files/images/asset\\_upload\\_file966\\_35553.pdf](https://www.aclu.org/sites/default/files/images/asset_upload_file966_35553.pdf) [<https://perma.cc/9FW5-J5B9>] (identifying the “stops” on the path to incarceration including failing public schools, school discipline policies, and juvenile detention, among others).

<sup>69</sup> See generally NAACP Legal Def. & Educ. Fund, *Dismantling the School-to-Prison Pipeline* (2018), [https://www.naacpldf.org/wp-content/uploads/Dismantling\\_the\\_School\\_to\\_Prison\\_Pipeline-2.pdf](https://www.naacpldf.org/wp-content/uploads/Dismantling_the_School_to_Prison_Pipeline-2.pdf) [<https://perma.cc/PJ99-76VA>] (identifying the school-to-prison pipeline as one of the most urgent challenges in education today).

Human Services,<sup>70</sup> are also addressing the school-to-prison pipeline. So are some researchers who suggest using trauma-informed education, behavioral models, and restorative justice to address the school-to-prison pipeline.<sup>71</sup>

#### IV. THREE NONTRADITIONAL APPROACHES

At the same time that we propose policy and programmatic approaches to address the school-to-prison pipeline, here are three nontraditional approaches.

##### *A. Creative Settlement of School Funding Litigation*

Families, students, and educators have sued state governments for decades over issues of inequity or inadequacy of resources. The *San Antonio Independent School District v. Rodriguez* plaintiffs provide an early example. With the federal doors closed because of *Rodriguez*, families and their attorneys have advanced other legal theories to return to federal court. One legal approach is a right to literacy.

In *Gary B. v. Whitmer*, for instance, a group of students from low-performing schools in the Detroit public school system sued the state of Michigan in 2016 and alleged that they had been denied their right to a basic minimum education under the Due Process and Equal Protection Clauses of the Fourteenth Amendment, meaning an education that “provides a chance at foundational literacy.”<sup>72</sup> In 2018, the U.S. Court of Appeals for the Sixth Circuit ruled in favor of the plaintiffs in a 2-1 decision, with a narrow focus in scope on education.<sup>73</sup> The court stated that:

Importantly, the right defined in this opinion is narrow in scope. It does not guarantee an education at the quality that most have come to expect in today’s America (but that many are nevertheless denied). Rather, the

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<sup>70</sup> U.S. Dep’t of Health & Hum. Servs. & U.S. Dep’t of Educ., Policy Statement on Expulsion and Suspension Policies in Early Childhood Settings 8–11 (2014), <https://oese.ed.gov/files/2020/07/policy-statement-ece-expulsions-suspensions.pdf> [<https://perma.cc/H4PX-SZ4K>] (providing recommendations for state actions in early childhood settings).

<sup>71</sup> Judith A.M. Scully, Examining and Dismantling the School-to-Prison Pipeline: Strategies for a Better Future, 68 Ark. L. Rev. 959, 995–1003 & nn.247–308 (2016) (identifying examples of research and programs).

<sup>72</sup> 957 F.3d. 616, 620–21 (6th Cir. 2020).

<sup>73</sup> *Id.* at 620, 659–60.

right only guarantees the education needed to provide access to skills that are essential for the basic exercise of other fundamental rights and liberties, most importantly participation in our political system.<sup>74</sup>

The state filed an appeal, but before a decision was reached by the appeals court, Governor Gretchen Whitmer and the *Gary B.* plaintiffs reached a settlement that required the state to pay the school district nearly \$3 million and the governor to propose legislation that would provide approximately \$95 million in additional funds to support a host of literacy-focused programs for Detroit schools.<sup>75</sup> This was a historic win for plaintiffs and a show of political compromise by the state.<sup>76</sup>

Another right to literacy case is *Ella T. v. State of California*. In this case, a group of families with children who attended low-performing public schools in Los Angeles Unified School District, Stockton Unified School District, and Inglewood Unified School District filed a lawsuit in 2017 claiming that while a fundamental right to an education is supported by the California Constitution and several statutes, students were denied access to literacy.<sup>77</sup> Three years later, the plaintiffs and the state reached a \$50 million settlement to establish a block grant to support literacy for the seventy-five lowest performing elementary schools.<sup>78</sup>

Settlements in cases like *Gary B.* and *Ella T.* included money and academic programs targeted to risk factors that resulted in students not

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<sup>74</sup> *Id.* at 659.

<sup>75</sup> Press Release, State of Michigan Office of the Governor, Governor Whitmer and Plaintiffs Announce Settlement in Landmark Gary B. Literacy Case (May 14, 2020), <https://www.michigan.gov/whitmer/news/press-releases/2020/05/14/governor-whitmer-and-plaintiffs-announce-settlement-in-landmark-gary-b--literacy-case> [<https://perma.cc/XG4Q-F7UP>]. The attorney for the plaintiff, Mark Rosenbaum, linked literacy to democracy. “By accepting the Court’s decision that a minimum basic education is a foundational requirement for full participation in our democracy, Governor Whitmer is acknowledging that no child should be denied his or her right to fully pursue the American Dream based on the color of their skin or their family’s income.” *Id.*

<sup>76</sup> Valerie Strauss, Michigan Settles Historic Lawsuit After Court Rules Students Have a Constitutional Right to a ‘Basic’ Education, Including Literacy, *Wash. Post* (May 14, 2020, 12:50 PM), <https://www.washingtonpost.com/education/2020/05/14/michigan-settles-historic-lawsuit-after-court-rules-students-have-constitutional-right-basic-education-including-literacy/> [<https://perma.cc/RXT3-DS5M>].

<sup>77</sup> Complaint at 1–3, *Ella T. v. State*, No. BC685730 (Cal. Super. Ct. Dec. 5, 2017).

<sup>78</sup> Valerie Strauss, California Students Who Sued the State Because They Can’t Read Just Won \$53 Million for Troubled Schools, *Wash. Post* (Feb. 23, 2020, 10:00 AM), <https://www.washingtonpost.com/education/2020/02/23/california-students-who-sued-state-because-they-cant-read-just-won-53-million-troubled-schools/> [<https://perma.cc/2PET-PWUH>].

receiving the literacy skills which are essential to success in K–12 education, college, or the workforce. Those same risk factors—lack of quality access to financial, human, and technological resources that result from the types of funding disparities that were challenged in *Rodriguez*—can also play a role in leading students to drop out of school (which is an indirect pathway to the school-to-prison pipeline).

The findings from the research about dropping out of school, lack of high-quality literacy skills, or both, and adult incarceration are clear. According to a 2016 federal Department of Education report about literacy skills of 18- to 74-year-olds in the United States: (1) 30% of people in prisons did not complete high school compared to 14% of the general population; (2) 29% of people in prison scored below Level 2 on a literacy test compared to 19% of U.S. households; (3) 52% of people in prison scored below Level 2 on a numeracy test compared to 29% of U.S. households; and (4) 25% of people in prisons had come from a household where neither parent had attained a high school diploma.<sup>79</sup> But this is not a new problem. In 1997, 41% of people in local jails and state prisons had not finished the twelfth grade.<sup>80</sup>

Thus, risk factors that impacted *Gary B.* and *Ella T.* students' ability to gain literacy skills are not radically different from the risk factors that possibly led their peers into the school-to-prison pipeline. Accordingly, creative settlement of school funding litigation could be designed to expand educational opportunities that better prepare free *and* incarcerated students for citizenship, civic engagement, and college and career readiness. With this in mind, attorneys should craft such settlements to benefit three types of incarcerated youth: (1) youth who could have benefited directly from a settlement as either a plaintiff, or as a student at a school selected by the state for programmatic support, but cannot do so because he or she is behind bars; (2) youth who are parents so that they can gain the educational and employment opportunities that will enable them to minimize the likelihood that their children will one day follow the same pathways to incarceration; and (3) youth who want to pursue a

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<sup>79</sup> Bobby D. Rampey et al., Nat'l Ctr. for Educ. Stats., NCES 2016-040, Highlights from the U.S. PIAAC Survey of Incarcerated Adults: Their Skills, Work Experience, Education, and Training 5–7, 25 (2016), <https://nces.ed.gov/pubs2016/2016040.pdf> [<https://perma.cc/4GVM-6HEE>].

<sup>80</sup> Caroline Wolf Harlow, Special Report, Education and Correctional Populations, Bureau of Just. Stats. 1 (Apr. 15, 2003), <https://www.bjs.gov/index.cfm?ty=pbdetail&iid=814> [<https://perma.cc/R9TY-696B>].

postsecondary education or workforce training but are denied access to public benefits to pay for it either due to incarceration or post-release felon status.

### *B. A Prison-to-Solutions Pipeline*

I began to visit prisons in several states beginning in 2015. Part of my goal was to observe diverse education practices in prison, ranging from adult basic education to postsecondary degree-granting programs.<sup>81</sup> On a couple of visits I observed incarcerated adults participating in an entrepreneurship certificate program.

One example is the Prison Entrepreneurship Program (“PEP”), a Texas-based program that educates incarcerated men about the principles of business to become entrepreneurs upon release.<sup>82</sup> PEP’s course includes a three-month Leadership Academy that focuses on character development, and a six-month Business Plan Competition—a sort of “shark tank” event.<sup>83</sup> PEP hosted a business competition during my visit, so a colleague joined me to judge several rounds of concept pitches. We provided feedback to each person, and the winner of the competition had a monetary prize set aside to support his business upon release. While everyone cannot win the monetary prize, every person upon completion of the program earns a Certificate in Entrepreneurship from Baylor University’s Hankamer School of Business.<sup>84</sup> In addition to the academic work, PEP family liaisons partner with incarcerated men to complete a family survey and then use the results to open lines of communication with family members, if none exists, or to strengthen relationships that exist.<sup>85</sup>

Another entrepreneurial program is RISE, a Nebraska-based program with a mission “[t]o break the generational cycles of incarceration.”<sup>86</sup> It

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<sup>81</sup> For an overview of four types of correctional education programs inside prison, see Lois M. Davis et al., *Evaluating the Effectiveness of Correctional Education: A Meta-Analysis of Programs That Provide Education to Incarcerated Adults*, RAND Corp. 1 (2013), [https://www.rand.org/pubs/research\\_reports/RR266.html](https://www.rand.org/pubs/research_reports/RR266.html) [<https://perma.cc/H6DR-PVU9>].

<sup>82</sup> Prison Entrepreneurship Program, <https://www.pep.org> [<https://perma.cc/DAP4-WJHJ>] (last visited Mar. 14, 2023).

<sup>83</sup> Empowering Innovation, Prison Entrepreneurship Program, <https://www.pep.org/empowering-innovation/> [<https://perma.cc/484J-MBLL>] (last visited Mar. 22, 2023).

<sup>84</sup> *Id.*

<sup>85</sup> *Id.*

<sup>86</sup> Who We Are: Overview, RISE, <https://www.seeusrise.org/who-we-are/> [<https://perma.cc/GTD4-X9AK>] (last visited Mar. 23, 2023).



is the largest non-profit in the state focused solely on programs to support people in prison and upon release.<sup>87</sup> RISE has several programs. One is the six-month In-Prison Program that focuses on job readiness, character development, and entrepreneurship.<sup>88</sup> Another is the RISE Business Academy, which is a twelve-week program tailored to teaching business essentials.<sup>89</sup> After completion of the program, each person participates in a business pitch competition.<sup>90</sup> A research assistant and I participated as judges, and afterward we participated in the first RISE graduation. Upon completion of the program, every person earns a Certificate of Career Readiness from the University of Nebraska Omaha's School of Business Administration.<sup>91</sup> RISE also has a ten-month Youth & Family Program to provide incarcerated men and women with courses to help them deal with family separation, conflict, and other issues.<sup>92</sup>

One takeaway for me from each prison I visited is that incarcerated adults have a desire to improve their lives through educational programs.<sup>93</sup> Another takeaway is that incarcerated people are often in the

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<sup>87</sup> *Id.*

<sup>88</sup> In-Prison Program, RISE, <https://www.seeurise.org/what-we-do/programs/> [<https://perma.cc/NB8Z-CPBL>] (last visited Mar. 14, 2023).

<sup>89</sup> RISE Business Academy: About the Program, RISE, <https://www.seeurise.org/what-we-do/programs/rise-academy-business-program/> [<https://perma.cc/8QWZ-ZEB5>] (last visited Mar. 14, 2023).

<sup>90</sup> *Id.*

<sup>91</sup> United Way of the Midlands Awards \$45,000 to RISE Grant to Fund Post-Release Programs, RISE (July 23, 2020), <https://www.seeurise.org/news/blog.html/article/2020/07/23/united-way-of-the-midlands-awards-45-000-to-rise-grant-to-fund-post-release-programs> [<https://perma.cc/L2MZ-6D5W>].

<sup>92</sup> RISE Youth & Family Program, RISE, <https://www.seeurise.org/what-we-do/programs/rise-family-program.html> [<https://perma.cc/HV2X-42P2>] (last visited Mar. 14, 2023).

It is worth noting that the University of Virginia supports a credit-bearing certificate program for men and women living inside Virginia prisons through a partnership with Resilience Education. This Charlottesville-based nonprofit organization provides a complete, end-to-end solution and digital platform for graduate business and law students to teach and support incarcerated and formerly incarcerated individuals. To date, 700 incarcerated adults have earned certificates in entrepreneurship, business foundations, and personal finance through partnerships with Darden, Columbia, and Wharton business schools. To learn more about Resilience Education, go to <https://www.resilience-education.org/> [<https://perma.cc/2L5Q-ECMB>].

<sup>93</sup> See generally A Story to Tell: The Importance of Education During Incarceration as Told by 22 Men and Women Who Know Firsthand (Gerard Robinson ed., 2021), [https://advancedstudiesinculture.org/wp-content/uploads/2021/03/a-story-to-tell\\_gerard\\_robinson4.pdf](https://advancedstudiesinculture.org/wp-content/uploads/2021/03/a-story-to-tell_gerard_robinson4.pdf) [<https://perma.cc/KFM7-XEBY>] (sharing firsthand accounts of the necessity of access to education during incarceration).

best position to utilize their entrepreneurial training to solve challenges they face inside and outside of prison. One challenge I heard repeatedly from incarcerated men and women in Texas and Nebraska—and in other states too—is figuring out how to make sure that their children do not end up in prison like them.

Children left behind due to parental incarceration is not uncommon. According to the Annie E. Casey Foundation, more than five million children—or one in fourteen minors under the age of eighteen—have had a parent incarcerated in prison or jail at some point in their lives.<sup>94</sup> And of the nearly 5 million children who ever had a parent incarcerated in 2019–2020, over 2.1 million were white, 1.2 million were Black, 1 million were Hispanic, 44,018 were American Indian, and 20,771 were Asian or Pacific Islander.<sup>95</sup> In state prison, nearly 58% of females had minor children compared to 47% of men.<sup>96</sup> As for the race and gender of parents in state prison, 3 in 5 white and Hispanic (60% and 62%, respectively) women, and 1 in 2 Black (50%) women, were mothers of minors.<sup>97</sup>

Given that children of the incarcerated are, on average, six times more likely to become incarcerated themselves,<sup>98</sup> we must broaden our list of problem solvers to include people living *inside* U.S. prisons. The first step toward this goal is to consider incarcerated parents as assets, not liabilities, in our battle to address the challenges associated with, in this instance, the generational child-to-prison pipeline. The second step is to take a lesson from the entrepreneurship programs I visited by sponsoring an in-prison business competition for incarcerated parents in every state.

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<sup>94</sup> A Shared Sentence: The Devastating Toll of Parental Incarceration on Kids, Families and Communities, Annie E. Casey Found. 1 (2016), <https://assets.aecf.org/m/resourcedoc/aecf-asharedsentence-2016.pdf> [<https://perma.cc/M93T-RQB3>]; David Murphey & P. Mae Cooper, Parents Behind Bars: What Happens to Their Children?, Child Trends 3 (Oct. 2015), <https://www.childtrends.org/wp-content/uploads/2015/10/2015-42ParentsBehindBars.pdf> [<https://perma.cc/N6L5-X6MH>].

<sup>95</sup> Children Who Had a Parent Who Was Ever Incarcerated By Race and Ethnicity in the United States, Kids Count Data Ctr., <https://datacenter.kidscount.org/data/tables/9734-children-who-had-a-parent-who-was-ever-incarcerated-by-race-and-ethnicity#detailed/1/any/false/1769/10,11,9,12,1,13/18995,18996> [<https://perma.cc/CSQ3-FAEC>] (last visited Mar. 14, 2023).

<sup>96</sup> Laura M. Maruschak, Jennifer Bronson & Mariel Alper, Survey of Prison Inmates, 2016: Parents in Prison and Their Minor Children, Bureau of Just. Stats. 1 (March 2021), <https://bjs.ojp.gov/content/pub/pdf/pptmcspl6st.pdf> [<https://perma.cc/UQJ9-CNG2>].

<sup>97</sup> *Id.* at 2.

<sup>98</sup> Eric Martin, Hidden Consequences: The Impact of Incarceration on Dependent Children, 2017 Nat'l Inst. of Just. J. 11, 12 (citation omitted).

Incarcerated people without children, incarcerated parents that lost their legal rights to their children, or people who want to help create solutions are welcome to join the competition. The aim here is for people closest to the problem to pitch their solutions to the child-to-prison pipeline that include programs, a technology-driven idea that requires apps and games, or a new business. Each winner will receive a monetary gift to support the proposal for implementation upon release, along with professional coaching, and access to grants, loans, and early-stage seed funding.

### *C. Pell Grants and Civil Society Evaluation*

The stories of the creation, demise, and resurrection of the Pell grant program are tales of three presidential administrations.<sup>99</sup> The first is President Lyndon Johnson. In a special message delivered on January 12, 1965 to Congress titled “Toward Full Educational Opportunity,” Johnson said, “Higher education is no longer a luxury, but a necessity.”<sup>100</sup> Ten months later, he signed the Higher Education Act of 1965 (“HEA”).<sup>101</sup> During the signing ceremony, Johnson provided a national vision for higher education:

The President’s signature upon this legislation passed by this Congress will swing open a new door for the young people of America. For them, and for this entire land of ours, it is the most important door that will ever open—the door to education. And this legislation is the key which unlocks it.<sup>102</sup>

People locked behind prison walls was one group of higher education students that benefited from “the door to education” that was opened and paid for by what later became known as the Pell grant.<sup>103</sup> With the

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<sup>99</sup> For an overview of the legislative, executive, and judicial politics associated with the Pell grant program from 1965 to 2022, see generally Gerard Robinson, From “Undeserving Criminals” to “Second Chance Students”: Pell Grant Eligibility and Incarcerated Students. U. Pa. J. L. & Soc. Change Online (Apr. 1, 2022), [https://www.law.upenn.edu/live/news/14647-from-undeserving-criminals-to-second-chance#\\_ednref22](https://www.law.upenn.edu/live/news/14647-from-undeserving-criminals-to-second-chance#_ednref22) [<https://perma.cc/34MR-BNUF>].

<sup>100</sup> Lyndon B. Johnson, Special Message to the Congress: “Toward Full Educational Opportunity” (Jan. 12, 1965), in 1 Pub. Papers 25, 30 (1965).

<sup>101</sup> Pub. L. No. 89-329, 79 Stat. 1219 (1965) (codified as amended in scattered sections of Title 20).

<sup>102</sup> Lyndon B. Johnson, “Remarks at Southwest Texas State College Upon Signing the Higher Education Act of 1965” (Nov. 8, 1965), in 2 Pub. Papers 1102, 1102 (1965).

<sup>103</sup> With an amendment to HEA in 1972, the federal program was named The Basic Educational Opportunity Grant (“BEOG”). In 1980, BEOG was renamed to honor the work of Senator Claiborne Pell (D-RI) in higher education. From that point forward it is known as

amendment to HEA in 1972, the number of incarcerated students using a Pell grant to pay for college grew from 11,000 in the 1970s to 23,000 by the mid-1990s.<sup>104</sup>

But in 1994, President Bill Clinton locked “the door to education” for incarcerated students when he signed the Violent Crime Control and Law Enforcement Act of 1994.<sup>105</sup> According to the new “tough on crime” law:

**SEC. 20411. Awards of Pell Grants to Prisoners Prohibited.** (a) In General—Section 401(b)(8) of the Higher Education Act of 1965 (20 U.S.C. 1070a(b)(8)) is amended to read as follows: “(8) No basic grant shall be awarded under this subpart to any individual who is incarcerated in any Federal or State penal institution.”<sup>106</sup>

President Clinton had bipartisan support for abolishment of the Pell grant for incarcerated students. During the House debates about the bill in 1994, for example, Representative Bart Gordon’s (D-TN) statement about incarcerated Pell students represented what a lot of lawmakers thought at the time: “Law-abiding students have every right to be outraged when a Pell grant for a policeman’s child is cut but a criminal that the officer sends to prison can still get a big check.”<sup>107</sup> Jack Fields (R-TX) shared a similar theme: “Every dollar in Pell Grant funds obtained by

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the Pell grant program. See Education Amendments of 1972, Pub. L. No. 92-318, §§ 401, 411, 86 Stat. 235, 247–51 (1972) (current version at 20 U.S.C. § 1070a); see also John Lee, *The Early Years of the Pell Grant*, in *Reflections on Pell: Championing Social Justice through 40 Years of Educational Opportunity*, The Pell Inst. 40–43 (June 2013), [http://www.pellinstitute.org/downloads/publications-Reflections\\_on\\_Pell\\_June\\_2013.pdf](http://www.pellinstitute.org/downloads/publications-Reflections_on_Pell_June_2013.pdf) [<https://perma.cc/8FBP-DXR3>] (detailing the early history of the BEOG and federal higher education priorities); Dallas Pell, *To Restore Pell Grants in Prison is to Restore my Father’s Vision of Educational Opportunities for All*, in *Reflections on Pell: Championing Social Justice through 40 Years of Educational Opportunity*, The Pell Inst. 86–87 (June 2013), [http://www.pellinstitute.org/downloads/publications-Reflections\\_on\\_Pell\\_June\\_2013.pdf](http://www.pellinstitute.org/downloads/publications-Reflections_on_Pell_June_2013.pdf) [<https://perma.cc/8FBP-DXR3>] (providing the thoughts of Senator Pell’s daughter on advancing her dad’s vision for higher education for incarcerated people, and her support of it through a membership in Education from the Inside Out coalition).

<sup>104</sup> Gerard Robinson, *Observations about the Second Chance Pell Experimental Sites Initiative*, *Advanced Stud. in Culture Found.* 5–7 (June 2021).

<sup>105</sup> Pub. L. No. 103-322, 108 Stat. 1796 (1994) (current version at 34 U.S.C. ch. 121).

<sup>106</sup> *Id.* § 20411.

<sup>107</sup> Nick Anderson, *Advocates Push to Renew Pell Grants for Prisoners, Citing Benefits of Higher Education*, *Wash. Post* (Dec. 3, 2013), [https://www.washingtonpost.com/local/education/when-congress-cut-pell-grants-for-prisoners/2013/12/03/fedcabb2-5b94-11e3-a49b-90a0e156254b\\_story.html](https://www.washingtonpost.com/local/education/when-congress-cut-pell-grants-for-prisoners/2013/12/03/fedcabb2-5b94-11e3-a49b-90a0e156254b_story.html) [<https://perma.cc/DG39-J5RP>].

prisoners means that fewer law-abiding students are eligible for assistance.”<sup>108</sup>

The ban on Pell grants for incarcerated students did not go unchallenged. An incarcerated man in a New York state prison filed a pro se challenge in *Nicholas v. Riley*.<sup>109</sup> However, the U.S. District Court for the District of Columbia granted the government’s motion to dismiss because the plaintiff failed to state a claim upon which relief could be granted under the Equal Protection or Due Process Clauses.<sup>110</sup>

Between 1995 and 2015, no Pell grant was awarded to incarcerated students in state and federal prisons. But this practice changed with President Barack Obama. On July 16, 2015, Obama became the first sitting president to visit a federal prison.<sup>111</sup> That same week, Obama said we needed a comprehensive approach to giving people second chances.<sup>112</sup> A few weeks later, his administration announced the launch of what would come to be known as the Second Chance Pell Experimental Sites Initiative (“SCPESI”).<sup>113</sup> It allowed for an experimental program where prisons and postsecondary institutions would gain access to \$30 million to fund Pell grants for 12,000 incarcerated students to see how SCPESI “[i]nfluences participation in education opportunities as well as academic and life outcomes.”<sup>114</sup>

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<sup>108</sup> Robinson, *supra* note 104, at 6.

<sup>109</sup> 874 F. Supp. 10 (D.D.C. 1995), *aff’d sub nom.* *Nicholas v. Reno*, No. 95-5047, 1995 WL 686227 (D.C. Cir. Oct. 10, 1995).

<sup>110</sup> *Id.* at 12–15.

<sup>111</sup> Michael A. Memoli, Obama to Become First Sitting President to Visit a Prison, *L.A. Times* (July 10, 2015, 1:15 PM), <https://www.latimes.com/nation/la-na-obama-prison-visit-20150710-story.html> [<https://perma.cc/2QFW-WGDZ>].

<sup>112</sup> Sarah Wheaton, I Could Have Wound Up in Prison, Obama Tells Inmates, *Politico* (July 17, 2015, 12:04 AM), <https://www.politico.com/story/2015/07/barack-obama-prison-visit-inmates-oklahoma-120241> [<https://perma.cc/243A-8KKW>].

<sup>113</sup> Notice Inviting Postsecondary Educational Institutions to Participate in Experiments Under the Experimental Sites Initiative; Federal Student Financial Assistance Programs Under Title IV of the Higher Education Act of 1965, as Amended, 80 Fed. Reg. 45964 (Aug. 3, 2015), <https://www.govinfo.gov/app/details/FR-2015-08-03/2015-18994> [<https://perma.cc/TG5X-SPZW>].

<sup>114</sup> *Id.*; see also Press Release, U.S. Dep’t of Educ., U.S. Department of Education Announces It Will Expand the Second Chance Pell Experiment for the 2022–2023 Award Year (July 30, 2021), <https://www.ed.gov/news/press-releases/us-department-education-announces-it-will-expand-second-chance-pell-experiment-2022-2023-award-year> [<https://perma.cc/SJM3-Y3W8>]. An article from *The Washington Post* contains both figures. See Danielle Douglas-Gabriel, 12,000 Inmates to Receive Pell Grants to Take College Classes, *Wash. Post* (June 24, 2016, 12:02 AM)

The number of postsecondary institutions participating in SCPEI increased from 67 colleges in 28 states in 2016 to 200 colleges working in prisons in 48 states, Washington, D.C., and Puerto Rico in 2022.<sup>115</sup> In terms of results for SCPEI participants, 22,117 unique—or “unduplicated”—students enrolled in the program between 2016–2020.<sup>116</sup> From this group more than 7,000 students have earned a certificate or diploma (3,499), associate degree (3,035), or bachelor’s degree (540).<sup>117</sup>

In 2020, “the door to education” was unlocked, once again, to Pell eligible students in prison when Congress passed the FAFSA Simplification Act.<sup>118</sup> This Act lifted the ban on Pell grants for incarcerated students. On October 28, 2022, the U.S. Department of Education published final regulations to support the implementation of Pell grants back into prisons for the first time since the 1990s.<sup>119</sup> The regulations will take effect on July 1, 2023.<sup>120</sup>

How does all of this relate to the school-to-prison pipeline?

Approximately 600,000 people leave state and federal prisons each year.<sup>121</sup> Many of these men and women enrolled in education courses

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point/wp/2016/06/24/12000-inmates-to-receive-pell-grants-to-take-college-classes/  
[https://perma.cc/7N2X-BDF2].

<sup>115</sup> Kimberly Hefling, Pell Grants for Prisoners Moves Forward, Roughly 12,000 Inmates Expected to Participate, Politico (June 24, 2016, 1:04 AM), <https://www.politico.com/story/2016/06/pell-grants-prisoners-224756> [https://perma.cc/7GXT-Y4KP]; Kelsie Chestnut, Niloufer Taber & Jasmine Quintana, Second Chance Pell: Five Years of Expanding Higher Education Programs in Prisons, 2016–2021, Vera Inst. of Just. 1 (May 2022), <https://www.vera.org/downloads/publications/second-chance-pell-five-years-of-expanding-access-to-education-in-prison-2016-2021.pdf> [https://perma.cc/HR92-WHN8]; Myra Hyder, Accessing Pell Grants for College Programs in Correctional Settings, Vera Inst. of Just. 2 (Jan. 2023), <https://www.vera.org/downloads/publications/accessing-pell-grants-for-college-programs-in-correctional-settings.pdf> [https://perma.cc/9MFV-3BUY].

<sup>116</sup> Kelsie Chesnut & Allan Wachendorfer, Second Chance Pell: Four Years of Expanding Access to Education in Prison, Vera Inst. of Just. 1 (Apr. 2021), <https://www.vera.org/downloads/publications/second-chance-pell-four-years-of-expanding-access-to-education-in-prison.pdf> [https://perma.cc/ST22-YEM9]. The Vera Institute of Justice provides technical support to colleges and prisons participating in SCPEI.

<sup>117</sup> *Id.* at 2.

<sup>118</sup> FAFSA Simplification Act, Pub. L. No. 116-260, div. FF, tit. vii, 134 Stat. 3137 (2020).

<sup>119</sup> 87 Fed. Reg. 65426 (Oct. 28, 2022) (to be codified at 34 C.F.R. parts 600, 668, 690).

<sup>120</sup> *Id.*

<sup>121</sup> FACT SHEET: Biden-Harris Administration Expands Second Chance Opportunities for Formerly Incarcerated Persons, The White House (Apr. 26, 2022), <https://www.whitehouse.gov/briefing-room/statements-releases/2022/04/26/fact-sheet-biden-harris-administration-expands-second-chance-opportunities-for-formerly-incarcerated-persons/> [https://perma.cc/2S ZW-4TZY].

while incarcerated. A meta-analysis of thirty-seven years of literature about correctional education showed some promising trends for participants. One trend worth noting is that incarcerated people who enrolled in a correctional education program had 28% lower odds of recidivating than incarcerated peers that did not participate in correctional education.<sup>122</sup>

With the reinstatement of Pell grants for incarcerated students beginning in 2023, I expect more students will enroll in college-in-prison programs. Once they complete a program and return to their communities, I believe many of them will be an asset, be it professionally, economically, or academically.<sup>123</sup> Others will be a role model to school-age students and drop-outs living in some of the toughest urban and rural zip codes in the state.

With this said, I would like to see an AmeriCorps-type program available to formerly incarcerated, Pell-educated people who want to work with families and youth involved in the school-to-prison pipeline. A longitudinal study component must accompany the program. For if the goal of SCPEI was to see how it “[i]nfluences participation in education opportunities as well as academic and life outcomes,”<sup>124</sup> a study of Pell-educated participants’ impact on reducing the school-to-prison pipeline, reducing future arrests and/or incarceration of youth in adulthood, and participation in civic society initiatives (to name only a few) is a worthy investment.

#### CONCLUSION

As we reflect on the *San Antonio Independent School District v. Rodriguez* decision at fifty years, we must broaden the lens by which we assess the impact this decision had on policies and practices that affect public education in general, but also its direct or indirect role in the growth of a black flower in American society known as the school-to-

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<sup>122</sup> Robert Bozick, Jennifer Steele, Lois Davis & Susan Turner, Does Providing Inmates with Education Improve Postrelease Outcomes? A Meta-Analysis of Correctional Education Programs in the United States, 14 J. Experimental Criminology 389, 390 (2018).

<sup>123</sup> See A Story to Tell, supra note 93, at 15–49.

<sup>124</sup> Notice Inviting Postsecondary Educational Institutions to Participate in Experiments Under the Experimental Sites Initiative; Federal Student Financial Assistance Programs Under Title IV of the Higher Education Act of 1965, as Amended, 80 Fed. Reg. 45964 (Aug. 3, 2015), <https://www.govinfo.gov/app/details/FR-2015-08-03/2015-18994> [<https://perma.cc/2PKB-J4WE>].

prison pipeline. Doing so will require us to review our ideals about the role of education in a democratic society, to redefine the meaning of accountability and punishment, and to reconsider the successes and challenges of American modernity.