

# The School-to-Prison Pipeline: The Business Side of Incarcerating, Not Educating, Students in Public Schools

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*In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.*

Chief Justice Earl Warren<sup>1</sup>

## I. INTRODUCTION

This essay takes a critical look at the practice of spending and profiteering by governments and private businesses to incarcerate, rather than educate, students in our public schools. This practice often forces students arrested or expelled from school into the school-to-prison pipeline.<sup>2</sup> If lawmakers and school administrators allow the strict disciplinary practices in public schools to continue, an even greater number of African American and Latino students will be deprived of an education. In turn, these children will continue to be exploited by the private prison industry and government prison systems, which use cheap labor from students pushed out of school to increase their bottom lines.

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1. *Brown v. Bd. of Educ. of Topeka*, 347 U.S. 483, 493 (1954).

2. See AM. CIVIL LIBERTIES UNION, LOCATING THE SCHOOL-TO-PRISON PIPELINE 1 (n.d.), available at [https://www.aclu.org/files/images/asset\\_upload\\_file966\\_35553.pdf](https://www.aclu.org/files/images/asset_upload_file966_35553.pdf) (“Overly harsh disciplinary policies push students down the pipeline and into the juvenile justice system.”).

The impact of purported race-neutral disciplinary policies, such as zero tolerance, in public schools is too harsh and fails to consider the crippling effects they have on the students subjected to exclusionary discipline.<sup>3</sup> These punitive policies eventually deprive students of civil rights and liberties, the right to an education among them, which courts must recognize as “The New Civil Right.” Disciplinary policies in public schools cannot force school administrators to arrest or expel students for non-violent offenses, especially when such sanctions have grossly disproportionate effects on students of color.<sup>4</sup>

In addition, the school environment should be conducive to learning, which cannot occur when the facility looks more like a prison than a classroom. If the government placed more resources into programs that seek to curb misbehavior instead of spending billions of taxpayer dollars on building a prison industry, students in public schools would have a real chance of becoming valuable contributors to society. Lawmakers and school administrators must abandon policies that criminalize adolescent behavior and redirect the resources poured into the militarized policing of students in public schools. Doing so promises to create schools and classrooms that are conducive to learning. In turn, this will reverse the trend of schools serving as pipelines to prison for African American and Latino youth.

The notion of being arrested at school and ending up in prison is foreign to me. I attended schools in the Chicago public school system from pre-school through my high school graduation, so it is unimaginable for me to think that if I were in a public school today, my adolescent back-talking and youthful challenges to authority could have landed me in prison instead of the legal profession or academia. I recall many times when my teachers had to deal with the challenges of students acting out in class, but this misbehavior was harmless, even at its worst. Not once did I see a police officer remove a student from

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3. Even worse for these inmates, once released from prison, many are barred from voting, legally discriminated against in employment and housing searches, and most importantly, denied educational opportunities. See F. MICHAEL HIGGINBOTHAM, *GHOSTS OF JIM CROW: ENDING RACISM IN POST-RACIAL AMERICA* 159 (2013) (discussing the consequences of a felony conviction).

4. See U.S. DEP’T OF EDUC., OFFICE FOR CIVIL RIGHTS, *CIVIL RIGHTS DATA COLLECTION: DATA SNAPSHOT: SCHOOL DISCIPLINE* 1-3, 6 (2014), available at <http://www2.ed.gov/about/offices/list/ocr/docs/crdc-discipline-snapshot.pdf> (noting the gross disparities).

campus or an administrator exile a student from school for days, weeks, or months.

I even remember when my classmates and I purposely broke the rules by going off the closed campus for a “Jew Town” polish and fries at lunch.<sup>5</sup> When we returned to class, our homeroom teacher told us that he “smelled what we had done.” I never feared that I would be denied an education because I had broken school rules. In today’s public school environment, however, I could easily see my actions leading me on a dramatically different path. Expulsion or suspension would have landed me alone at home, and negative forces in my community could have changed my fate as a bright, latchkey kid to something other than a lawyer, scholar, and teacher in this world.

The almost inevitable incarceration of students expelled or suspended by public school administrators is profitable for both the government and private businesses. The school-to-prison pipeline is a problem based in part on capitalistic principles of profit maximization. Today, the system uses students discarded by our schools and prevents them from securing an education, demonstrating the value placed on imprisonment over education by both our governments and the private prison industry. Students end up in prison through the school-to-prison pipeline—a phenomenon tied to the zero-tolerance policies of our schools and the failed education policies of our governments.<sup>6</sup> For African American and Latino students in particular, going to school and violating school rules can land them in prison. A recent report issued by the Department of Education Office for Civil Rights indicated that school administrators expelled, and law enforcement arrested, African American students in staggeringly disproportionate numbers

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5. I attended Whitney M. Young Magnet High School in Chicago, so every Dolphin, Chicagoan, and local visitor knows that the reference has no demeaning purpose. It was the name of the area, and also the local polish and hamburger stand that sold such addicting food that we had to leave campus for lunch to get some.

6. See AM. CIVIL LIBERTIES UNION, *supra* note 2, at 1. Many race-neutral laws, policies, and programs continue to have a disparate effect on African Americans in all aspects of society. See generally Sheryll Cashin, *Place, Not Race: Affirmative Action and the Geography of Educational Opportunity*, 47 U. MICH. J.L. REFORM 935 (2014) (linking school segregation to neighborhood school assignment plans, low academic achievement of students living in public housing, and disproportionate discrimination against people of color to mass incarceration, the war on drugs, and predatory lending).

compared to white students and other students of color.<sup>7</sup> The likelihood these students will end up in prison is also disproportionately high.<sup>8</sup> Without question, the rise in punitive discipline in our public schools contributes to the country's astonishing incarceration rate—currently the highest in the world.<sup>9</sup>

The United States prison population grew from less than 300,000 in 1972 to approximately 2,000,000 by the turn of the century.<sup>10</sup> As of 2012, our country incarcerated 920 out of every 100,000 adult citizens.<sup>11</sup> According to CNN, “[w]e imprison more of our own people than any other country on earth, including China which has four times our population, or in human history.”<sup>12</sup> Remarkably, the United States holds 25% of the world's prisoners, but only has 5% of the world's population.<sup>13</sup> According to 2009 statistics from the Census Bureau and the Department of Justice, African Americans and Latinos predominate the prison population despite comprising a relatively small percentage of the total United States population.<sup>14</sup>

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7. See U.S. DEP'T OF EDUC., OFFICE FOR CIVIL RIGHTS, *supra* note 4, at 1.

8. Carla Amurao, *Fact Sheet: How Bad Is the School-to-Prison Pipeline?*, PBS, <http://www.pbs.org/wnet/tavissmiley/tsr/education-under-arrest/school-to-prison-pipeline-fact-sheet/> (last updated Mar. 28, 2013, 11:40 PM) (linking school discipline to future incarceration).

9. *Id.*

10. See DONALD ADAMS, JR., BOYS: THEY'RE ALREADY PROGRAMMED AND RESISTING CHANGE: HOW TO CHANGE THE PROGRAM TO MEET THEIR NEEDS 45 (2011).

11. LAUREN E. GLAZE & ERINN J. HERBERMAN, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, CORRECTIONAL POPULATIONS IN THE UNITED STATES, 2012, at 3 (2013), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/cpus12.pdf>.

12. Lisa Bloom, *When Will the U.S. Stop Mass Incarceration?*, CNN (July 3, 2012, 12:21 PM), <http://www.cnn.com/2012/07/03/opinion/bloom-prison-spending/>.

13. *The Prison Crisis*, AM. CIV. LIBERTIES UNION, <https://www.aclu.org/safe-communities-fair-sentences/prison-crisis> (last visited Feb. 8, 2015) (“With only 5% of the world's population, the U.S. has 25% of the world's prison population—that makes us the world's largest jailer.”).

14. African Americans comprised 39.4% of the total prison and jail population in 2009. See HEATHER C. WEST, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, PRISON INMATES AT MIDYEAR 2009—STATISTICAL TABLES 20 (2010), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/pim09st.pdf>. Figures from the same year indicated Latinos made up 20.6% of the total jail and prison population. See *id.* In 2010, the African American population alone was 38.9 million, representing 12.6% of the total population. See KAREN R. HUMES ET AL., U.S. CENSUS BUREAU, OVERVIEW OF RACE AND HISPANIC ORIGIN: 2010, at 4 (2011), available at <http://www.census.gov/prod/cen2010/briefs/c2010br-02.pdf>. As of the most recent census, Latinos comprised 16.3% of the United States population. *Id.*

As for students, 40% of children expelled from public schools are African American.<sup>15</sup> Of students arrested or referred to law enforcement while in school, 70% are African American or Latino.<sup>16</sup> School administrators are also three and a half times more likely to suspend African American students than white students,<sup>17</sup> even for the same non-violent offenses. Even worse, these expelled or suspended students will likely never graduate high school and end up in prison, where 68% of male inmates do not have a high school diploma.<sup>18</sup> In 2011, the ACLU suggested that placing children from the school environment into the criminal justice system fueled “the nation’s addiction to incarceration.”<sup>19</sup> Each of these staggering statistics is rooted in the capitalistic goals of private businesses and public governments.

Regrettably, the prison system has become a very profitable business venture in America’s modern, capitalistic society.<sup>20</sup> According to a report issued by Pew Charitable Trusts, inmates released from state prison in 2009 cost states billions of dollars nationwide—a sobering figure considering most of those costs were spent incarcerating non-violent offenders.<sup>21</sup> In the prison industrial complex, private prisons have become a dominant force over the last three decades. The two largest private prison corporations—the Corrections Corporation of America (CCA)<sup>22</sup> and the GEO Group<sup>23</sup>—control 75% of the for-profit prison

15. Amurao, *supra* note 8.

16. *See id.*

17. *See id.*

18. *See id.*

19. Press Release, Am. Civil Liberties Union, New ACLU Report Documents Destructive Impact of Prison Privatization (Nov. 2, 2011), *available at* <https://www.aclu.org/prisoners-rights/new-aclu-report-documents-destructive-impact-prison-privatization>.

20. Adam Gopnik, *The Caging of America: Why Do We Lock Up So Many People?*, NEW YORKER (Jan. 30, 2012), <http://www.newyorker.com/magazine/2012/01/30/the-caging-of-america?currentPage=all> (“A growing number of American prisons are now contracted out as for-profit businesses to for-profit companies.”).

21. *Time Served: The High Cost, Low Return of Longer Prison Terms*, PEW CHARITABLE TRUSTS (June 6, 2012), <http://www.pewtrusts.org/en/research-and-analysis/reports/2012/06/06/time-served-the-high-cost-low-return-of-longer-prison-terms>.

22. *See The CCA Story: Our Company History*, CORRECTIONS CORP. AM., <https://www.cca.com/our-history> (last visited Feb. 8, 2015). CCA was the first private prison company in the United States, co-founded in 1983 by Tom Beasley, a former Chairman of the Tennessee Republican Party.

23. *See* GEO GROUP, INC., <http://www.geogroup.com/> (last visited Feb. 8, 2015). GEO calls itself “the world’s leading provider of correctional, detention, and community

business in the United States.<sup>24</sup> In 2010 alone, the two corporations generated nearly \$3 billion in revenue.<sup>25</sup> These figures equal or exceed some of the United States Department of Education's recent budget allocations, such as "a new five-year, \$2.5 billion Access and Completion Incentive Fund to support innovative state efforts to help low-income students complete college"<sup>26</sup> and "a \$3 billion increase in funding for K–12 education programs."<sup>27</sup> However, these long-term expenditures also assume that students will be in the public educational system long enough to take advantage of the programs, but school administrators instead use these funds for bureaucratic or policing expenses related to arresting, expelling, or suspending students.

A 2007 study by two civil rights organizations further demonstrated the government's emphasis on incarceration over education. Researchers found "the U.S. spent almost \$70 billion annually on incarceration, probation and parole."<sup>28</sup> This figure represented a 127% increase from 1987 to 2007, dramatically outpacing the funding for higher education during the same time period.<sup>29</sup> These findings suggest governments and private companies are willing to invest in incarceration, but not education. For private prison corporations, students are the commodities that support their investments, and these commodities are often African American or Latino.

Understanding the capital investments and policy decisions made by the government when it puts its citizens, specifically students, in prison explains why public school disciplinary policies perpetuate the school-to-prison pipeline. This critical

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reentry services with 106 facilities, approximately 85,500 beds, and 19,000 employees around the globe." *Id.*

24. Matt Stroud, *Why Would a Prison Corporation Restructure as a Real Estate Company?*, FORBES (Jan. 31, 2013, 10:46 AM), <http://www.forbes.com/sites/mattstroud/2013/01/31/why-would-a-prison-corporation-restructure-as-a-real-estate-company/>.

25. DAVID SHAPIRO, AM. CIVIL LIBERTIES UNION, BANKING ON BONDAGE: PRIVATE PRISONS AND MASS INCARCERATION 13 (2011), available at [https://www.aclu.org/files/assets/bankingonbondage\\_20111102.pdf](https://www.aclu.org/files/assets/bankingonbondage_20111102.pdf).

26. *U.S. Department of Education*, WHITE HOUSE, [http://www.whitehouse.gov/omb/fy2010\\_department\\_education/](http://www.whitehouse.gov/omb/fy2010_department_education/) (last visited Feb. 8, 2015).

27. OFFICE OF MGMT. & BUDGET, BUDGET OF THE UNITED STATES GOVERNMENT 26 (2010), available at <http://www.whitehouse.gov/sites/default/files/omb/budget/fy2011/assets/budget.pdf>.

28. Amurao, *supra* note 8.

29. *Id.*

essay addresses the government's investment in incarcerating over educating African American and Latino students through punitive discipline measures such as zero-tolerance policies. This essay postulates that harsh school discipline policies eventually lead to the incarceration of students of color—children the government is neither committed nor obligated to educate. Education is not a defined civil right, but the paradigm must shift and our society must start treating it as one. I also surmise that private prisons need students to become inmates in order to supply the prison industry with free or cheap labor. Thus, keeping students out of the education system and placing them in the prison system benefits both the government—because it avoids the costs associated with keeping those students in school—and private prisons—because they rely on a steady flow of inmates. Therefore, educating children, especially African American students, has less value to the government than perpetuating the flow of prisoners into the discount labor market. The federal government places emphasis, disappointingly, on the capitalistic notion of building a profitable prison industry for itself and for private corporations.

As a growing industry in the United States, private prisons and their corporate stockholders have an incentive to increase the prison population because prisoners are profitable commodities to their business.<sup>30</sup> These corporations derive their revenue from federal and state governments that contract out the management and operation of prisons, even allowing these corporations to design and construct the prison facilities.<sup>31</sup> The government guarantees a certain amount of money for each prisoner held in a private prison, which leads each prison to carefully control its costs, often aided by the use of cheap prison labor.<sup>32</sup> To ensure a stable flow of prisoners fills the cells in their facilities, stockholders of private prisons also engage in extensive lobbying efforts at both the federal and state levels.<sup>33</sup>

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30. See Gopnik, *supra* note 20 (“Northern impersonality and Southern revenge converge on a common American theme: a growing number of American prisons are now contracted out as for-profit businesses to for-profit companies.”).

31. *Id.*

32. See Terry Carter, *Prison Break: Budget Crises Drive Reform, But Private Jails Press On*, A.B.A. J. (Oct. 1, 2012, 9:50 AM), [http://www.abajournal.com/magazine/article/prison\\_break\\_budget\\_crises\\_drive\\_reform\\_but\\_private\\_jails\\_press\\_on/](http://www.abajournal.com/magazine/article/prison_break_budget_crises_drive_reform_but_private_jails_press_on/).

33. See *id.*

Federal and state prison systems also utilize prison labor as a cheap alternative to the open market. Inmates in the federal prison system produce a vast array of the nation's military supplies.<sup>34</sup> Recently, Congress made a concerted effort to cut the cost of military uniforms by turning to the federal prison system, where workers are paid less than \$2 per hour.<sup>35</sup> In 2013, inmates in federal prisons "stitched more than \$100 million worth of military uniforms."<sup>36</sup> State prison systems are no different. For example, the State of California reduces prison terms for inmates who work during their sentences, such as by fighting wildfires.<sup>37</sup>

Today, the government invests more resources to maintain its expanding prison system than it does to educate our children. According to recent data collected from forty states by the Census Bureau and the Vera Institute of Justice, state governments spend more money per year to keep an individual in prison than they do to educate a student in a primary or secondary school.<sup>38</sup> The statistics revealed that at least forty states spent less than \$20,000 annually per student on education, and only twelve states spent more than \$10,000 per student.<sup>39</sup> However, approximately thirty states spent \$20,000 or more per inmate per year, and only ten states spent less than \$20,000.<sup>40</sup> Clearly, the money trail reveals the disturbing priority the government has placed on incarceration over education.

Part II of this essay discusses the history of exploitation of African Americans by American prison systems. Part II also analyzes zero-tolerance policies from a capitalist perspective and examines the disparate impact created when school administrators arrest, expel, or suspend African American and Latino students. Part III calls for serious reform in both school disciplinary policies and in the attitudes of school

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34. Ian Urbina, *Buying Overseas Clothing, U.S. Flouts Its Own Advice*, N.Y. TIMES, Dec. 23, 2013, at A1.

35. *Id.*

36. *Id.*

37. Alex Helmick, *Thousands of Inmates Serve Time Fighting the West's Forest Fires*, NPR (July 31, 2014, 4:15 PM), <http://www.npr.org/2014/07/31/336309329/thousands-of-inmates-serve-time-fighting-the-wests-forest-fires>.

38. *See Education vs Prison Costs*, CNNMONEY, <http://money.cnn.com/infographic/economy/education-vs-prison-costs/> (last visited Feb. 8, 2015).

39. *See id.*

40. *See id.*



administrators. I also suggest removing the strong police presence from public schools so that school administrators can create an environment that looks less like a prison and more like a classroom—an environment focused on learning, not punishment.

## II. THE PRISON PROFIT SCHEME

### A. From Slave Prisons to the School-to-Prison Pipeline

The modern private prison model has its roots in the expansive prison farms that replaced slave plantations following the Civil War.<sup>41</sup> During this period, states enacted segregation laws designed to maintain the racial hegemony that existed prior to the War.<sup>42</sup> The system exploited former slaves during this Jim Crow era by forcing them to work without compensation in jobs such as picking cotton and constructing railroads.<sup>43</sup> Prison labor represented a continuation of the slavery tradition, especially in the South.<sup>44</sup> For example, Arkansas, Louisiana, Mississippi, and Texas established “penal plantations” where inmates worked, all for the profit of the state.<sup>45</sup>

The post-Civil War prison system is still present today, and the system still functions primarily on a racially specific basis by utilizing the free or cheap labor of African American prisoners. In 2012, more African American men were “in the grip of the criminal-justice system—in prison, on probation, or on parole—than were in slavery.”<sup>46</sup> In recent years, almost 40% of the prison population consisted of African American inmates.<sup>47</sup> In fact, the incarceration rate of African American men was six

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41. See MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* 31-32 (2010).

42. *Id.* at 34.

43. See *id.* at 31-32.

44. See *id.* at 31 (“Convicts had no meaningful legal rights at this time and no effective redress. They were understood, quite literally, to be slaves of the state.”).

45. See MARIANNE FISHER-GIORLANDO, “PLANTATION PRISONS”: *ENCYCLOPEDIA OF PRISONS & CORRECTIONAL FACILITIES* 1 (2012), available at <http://www.sagepub.com/hanserintro/study/materials/reference/ref2.1.pdf>.

46. Gopnik, *supra* note 20.

47. *Seeing More Blacks in Prison Increases Support for Policies that Exacerbate Inequality*, *ASS’N PSYCHOL. SCI.* (Aug. 6, 2014), <http://www.psychologicalscience.org/index.php/news/releases/racial-disparities-incarceration.html>.

times higher than that of whites in 2010,<sup>48</sup> despite the fact that African Americans comprised only 12.6% of the American population.<sup>49</sup> This is shocking, but not unexpected, as over half of all African American men without a high school diploma will spend time in prison at some point during their lives.<sup>50</sup>

In the modern era of zero-tolerance policies, the government continues to prioritize education over incarceration, most likely because the tangible financial benefits attached to supporting a prison system outweigh the intangible benefit associated with education. This dichotomy appears to function as a driving force behind the school-to-prison pipeline. As states increasingly contract with private prisons and use prison labor, arresting students at school fuels the pipeline to prison. Even if arrested students only stay in prison for a short period of time, the system finds a way to exploit them.

Today, states frequently engage in unscrupulous practices when it comes to throwing our children behind bars. For example, in the mid-2000s, private juvenile detention facilities in Luzerne County, Pennsylvania received tens of millions of dollars in government contracts to house youthful offenders.<sup>51</sup> As a result, the industry of kids-for-cash became so pervasive that “[d]etention center workers were told in advance how many juveniles to expect at the end of each day—even before hearings to determine their innocence or guilt.”<sup>52</sup> Two local judges sent thousands of juvenile offenders to these private prisons, receiving \$2.6 million in kickbacks.<sup>53</sup> Children appeared before the judges following minor crimes such as mocking an assistant principal on a social media page, “trespassing in a vacant building,” and stealing DVDs from Wal-Mart.<sup>54</sup> Punishments

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48. Bruce Drake, *Incarceration Gap Widens Between Whites and Blacks*, PEW RES. CENTER (Sept. 6, 2013), <http://www.pewresearch.org/fact-tank/2013/09/06/incarceration-gap-between-whites-and-blacks-widens/>.

49. See HUMES ET AL., *supra* note 14, at 4.

50. Gopnik, *supra* note 20.

51. Thomas Frank, *Lock ‘Em Up: Jailing Kids Is a Proud American Tradition*, WALL ST. J., <http://www.wsj.com/articles/SB123854010220075533> (last updated Apr. 1, 2009, 12:01 AM).

52. Ian Urbina, *Despite Red Flags About Judges, A Kickback Scheme Flourished*, N.Y. TIMES, Mar. 28, 2009, at A1.

53. *Id.*

54. Stephanie Chen, *Pennsylvania Rocked By ‘Jailing Kids For Cash’ Scandal*, CNN, <http://www.cnn.com/2009/CRIME/02/23/pennsylvania.corrupt.judges/> (last updated Feb. 24, 2009, 10:15 AM).

ranged from enrollment in a wilderness camp or boot camp all the way to detention.<sup>55</sup>

Over the past twenty years, the private prison industry has seen revenues increase almost exponentially. In 2010 alone, the two largest private prison corporations brought in revenues totaling in the billions.<sup>56</sup> According to an ACLU report which documented record levels of incarceration and revenue among private prison corporations, profits often drive state decisions regarding incarceration.<sup>57</sup>

At the state level, governments facing shrinking budgets must find a way to either raise revenues or cut costs, and prison labor can do both. For example, some speculate corporations are attracted to invest in the United States by the deep labor pool offered in our prison systems.<sup>58</sup> They suspect large domestic corporations benefit from the “competitive spiral” created by cheap prison labor.<sup>59</sup> For these companies, prison labor is competitive with third-world countries because inmates are frequently paid low wages or are not compensated at all for their work.<sup>60</sup> Cash-strapped governments have even resorted to selling prisons, as CCA has recently offered to not only contract prison services, but to purchase prisons outright from financially distressed states.<sup>61</sup>

On one end of the spectrum sits profit maximization. Private prisons achieve this goal by assuring a continuous flow of new inmates, often through students expelled or suspended by school administrators or arrested at school by police. Therefore, for-profit prisons reap the economic benefits of the incarceration of our youth. Without the requirements of unions, safety regulations, pensions, social security benefits, sick leave and overtime for prison labor, these prisons are able to pay wages as low as \$0.23 per hour.<sup>62</sup> According to data from 2011, 33% of

55. *Id.*

56. SHAPIRO, *supra* note 25, at 13.

57. *Id.* at 32.

58. Simon McCormack, *Prison Labor Booms As Unemployment Remains High; Companies Reap Benefits*, HUFFINGTON POST, [http://www.huffingtonpost.com/2012/12/10/prison-labor\\_n\\_2272036.html](http://www.huffingtonpost.com/2012/12/10/prison-labor_n_2272036.html) (last updated Dec. 10, 2012, 2:19 PM).

59. *Id.* (internal quotation marks omitted).

60. *See id.* (“[S]ome prisoners don’t make a dime for their work . . .”).

61. *See* Carter, *supra* note 32.

62. Caitlin Seandel, *Prison Labor: Three Strikes and You’re Hired*, ELLA BAKER CENTER HUM. RTS. (June 27, 2013), <http://ellabakercenter.org/blog/2013/06/prison-labor-is-the-new-slave-labor>.

the nation's juvenile delinquents were housed in private facilities in 1999.<sup>63</sup> Twelve years later, this figure had increased to 40%.<sup>64</sup> Reports suggested for-profit prison enterprises “capitalized on budgetary strains across the country as governments embrace[d] privatization in pursuit of cost savings.”<sup>65</sup>

For the largest private prison corporations, revenues continue to increase. In 2010, CCA generated revenues from governmental entities or agencies as follows: 50% from states, 15% from the Bureau of Prisons, 16% from the United States Marshals Service, 12% from Immigration and Customs Enforcement, and 7% from other sources.<sup>66</sup> In the same year, GEO's revenues came from the following sources: 47% from states, 20% from Immigration and Customs Enforcement, 19% from the Marshals Service, and 14% from the Bureau of Prisons.<sup>67</sup> This big business of incarceration seeks to maximize profits by any means necessary. To do so, the industry needs the government to supply the bodies. Unfortunately, too many of those bodies come from our education system through discipline policies that criminalize adolescent misbehavior and place students in the prison system with scant hope of ever receiving an education.

### B. Zero-Tolerance Policies Supply Students to Prisons

On the other end of the spectrum sits the public education system. Public education fails to produce revenue and often requires significant spending by struggling governments. However, the system increases the state prison population by

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63. Chris Kirkham, *Prisoners of Profit: Private Prison Empire Rises Despite Startling Record of Juvenile Abuse*, HUFFINGTON POST (Oct. 22, 2013), <http://projects.huffingtonpost.com/prisoners-of-profit>.

64. *Id.*

65. *Id.*

66. See CORRECTIONS CORP. OF AM., 2010 ANNUAL REPORT ON FORM 10-K, at F-13 (2011), available at <http://www.cca.com/investors/financial-information/annual-reports>. Private prisons have incredible influence over immigration legislation, which has led to a staggering increase in the incarceration of illegal immigrants. See SHAPIRO, *supra* note 25, at 7. Annually, the federal government imprisons over 400,000 immigrants at a cost of almost \$2 billion in custody-related operations, from which both CCA and GEO generate substantial revenues. *Id.*

67. GEO GROUP, INC., 2010 ANNUAL REPORT 1 (2011), available at [https://materials.proxyvote.com/Approved/36159R/20110303/AR\\_84939/images/Geo\\_Group-AR2010.pdf](https://materials.proxyvote.com/Approved/36159R/20110303/AR_84939/images/Geo_Group-AR2010.pdf).

providing the children necessary to fulfill contracts with private prison corporations.<sup>68</sup> Far too often, these inmates come from impoverished urban communities with high crime rates, harsh sentencing practices, and public schools that employ strict disciplinary measures.<sup>69</sup>

Many private prison companies also engage in extensive lobbying activities at both the state and federal levels.<sup>70</sup> In a recent report, the Southern Poverty Law Center highlighted the questionable motives of the industry:

With 1.6 million people living behind bars, the U.S. already has the world's largest population of prisoners—and the highest per-capita rate of incarceration. But the prison industry wants more. GEO's annual report is clear about that—noting that “positive trends” in the industry may be “adversely impacted” by early release of inmates and changes to parole laws and sentencing guidelines.<sup>71</sup>

Thus, lobbying efforts are imperative. In fact, private prison corporations have spent millions on campaign contributions to political candidates at the state and federal levels,<sup>72</sup> ostensibly to promote “zero tolerance” in education legislation and mandatory sentencing for many non-violent offenses. In Florida, one private for-profit prison system and its executives acted as “prodigious political rainmakers . . . donating more than \$400,000 to state candidates and committees

68. IN THE PUB. INT., CRIMINAL: HOW LOCKUP QUOTAS AND “LOW-CRIME TAXES” GUARANTEE PROFITS FOR PRIVATE PRISON CORPORATIONS 5 (2013), available at <http://www.inthepublicinterest.org/sites/default/files/Criminal-Lockup%20Quota-Report.pdf>.

69. See ADVANCEMENT PROJECT, TEST, PUNISH, AND PUSH OUT: HOW “ZERO TOLERANCE” AND HIGH-STAKES TESTING FUNNEL YOUTH INTO THE SCHOOL-TO-PRISON PIPELINE 13-14 (2010), available at [http://b.3cdn.net/advancement/d05cb2181a4545db07\\_r2im6caqe.pdf](http://b.3cdn.net/advancement/d05cb2181a4545db07_r2im6caqe.pdf) (providing examples of “excessive” punishment).

70. See SHAPIRO, *supra* note 25, at 38.

71. See Booth Gunter, *Investigation, Lawsuit Expose Barbaric Conditions at For-Profit Youth Prison in Mississippi*, S. POVERTY L. CENTER (May 3, 2012), <http://www.splcenter.org/get-informed/news/splc-investigation-lawsuit-expose-barbaric-conditions-at-for-profit-youth-prison-i> (quoting GEO GROUP, INC., *supra* note 67, at 24).

72. Daniel J. D'Amico, *The Business Ethics of Incarceration: The Moral Implications of Treating Prisons Like Businesses*, REASON PAPERS, Fall 2009, at 125, 133-134, available at [http://reasonpapers.com/pdf/31/rp\\_31\\_8.pdf](http://reasonpapers.com/pdf/31/rp_31_8.pdf). From 2003 to 2011, CCA spent \$23.4 million on lobbying members of Congress and several federal agencies, a time period which “coincid[ed] with increased immigration enforcement and detentions.” Carter, *supra* note 32. In 2011 alone, CCA received \$208 million from contracts with a single federal agency—United States Immigration and Customs Enforcement—and the GEO Group received \$216 million. *Id.*

over the last 15 years.”<sup>73</sup> The Florida Republican Party received the lion’s share of this money, taking in over \$276,000.<sup>74</sup> Consequently, private prisons exercise influence over politicians and the legislative process, which if used in the area of school disciplinary policy might lead to the further spread of zero-tolerance policies. These efforts by private prison corporations shift the government’s focus away from providing a quality education and reducing mass incarceration.<sup>75</sup>

The government also concentrates considerable resources and effort toward building more prisons than schools at a time when governments are closing urban schools and reducing funding at the local public school level.<sup>76</sup> Furthermore, contractual obligations with private prisons force states to increase the number of prisoners.<sup>77</sup> Governments at all levels—federal, state, county, city, and school districts—do not invest nearly the same amount of resources into our schools. Instead, they choose to perpetuate the school-to-prison pipeline.

This trend occurs due to the implementation and enforcement of policies that criminalize and incarcerate students. Strict public school discipline policies championed by “tough on crime” politicians exacerbate delinquency problems and increase incarceration rates among students. These policies

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73. Kirkham, *supra* note 63.

74. *Id.*

75. This argument is not new. See Bloom, *supra* note 12. From 1989 to 2012, California built almost one new prison every year. *Id.* During the same time period, California opened only one new public college. *Id.* California’s experience is indicative of a national trend in prison spending. See *id.* (“Nationwide, spending on prisons has risen six times faster than spending on higher education.”).

76. See, e.g., Joy Resmovitz & Kim Bellware, *Chicago School Closings: District Plans to Shutter 54 Schools*, HUFFINGTON POST, [http://www.huffingtonpost.com/2013/03/21/chicago-school-closings-2013\\_n\\_2927419.html](http://www.huffingtonpost.com/2013/03/21/chicago-school-closings-2013_n_2927419.html) (last updated Mar. 22, 2013) (discussing the closing of fifty-four public schools in Chicago).

77. See Julia Bowling, *Do Private Prison Contracts Fuel Mass Incarceration?*, BRENNAN CTR. JUST. (Sept. 20, 2013), <http://www.brennancenter.org/blog/do-private-prison-contracts-fuel-mass-incarceration>. One report that examined sixty-two private prison contracts in twenty-one states revealed the following:

[T]he majority of these contracts guarantee that the state will supply enough prisoners to keep between 80 and 100 percent of the private prisons’ beds filled. If the state fails to fulfill this “bed guarantee,” it must pay a fine to the company running the prisons—in effect, paying for each prison bed regardless of whether it holds a prisoner.

*Id.*

commonly treat adolescent behavior as criminal conduct.<sup>78</sup> Oftentimes, students “are criminalized for minor misbehavior such as talking too loudly or violating a school dress code.”<sup>79</sup> Even worse, schools often feature an excessive police presence, some even dressed in military-style uniforms and carrying military-style weaponry, ready to take students away from school and into the prison system.<sup>80</sup> The thought of attending a public school under these conditions scares me, even as an adult. In fact, many of my middle-class friends with children swear that they will never put their children in public schools, despite the economic sacrifice that accompanies private education. We should place students on pathways to college and the careers of their dreams, not “push[] [them] out of the classroom and into the juvenile justice system through the use of overly harsh school disciplinary policies.”<sup>81</sup>

There exists growing support to end the use of harsh school disciplinary policies. The American Bar Association recommended ending “zero tolerance” as early as 2002, primarily because the policies treat students as criminals for non-violent crimes.<sup>82</sup> The ABA found that mandatory expulsion or referral to the court system created damaging consequences for students who may have never been in trouble with the law.<sup>83</sup> Most zero-tolerance policies require referral to the criminal justice system for any offense related to weapons, drugs, or violence, regardless of the circumstances, the nature of the offense, or the student’s history.<sup>84</sup> This leaves no discretion for school administrators; they must remove students from school and push them into the prison system. The ACLU is working to end zero-tolerance policies because they “criminalize minor infractions of school rules . . . for behavior that should be handled inside the school.”<sup>85</sup> In its work, the ACLU described a

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78. *Ensuring Every Child Can Dream BIG!*, ADVANCEMENT PROJECT (Dec. 5, 2013), <http://www.advancementproject.org/blog/entry/ensuring-every-child-can-dream-big>.

79. *Id.*

80. See ADVANCEMENT PROJECT, *supra* note 69, at 15.

81. *Ensuring Every Child Can Dream BIG!*, *supra* note 78.

82. See *ABA Opposes ‘Zero Tolerance’ in Schools*, ABC NEWS (Feb. 20, 2002), <http://abcnews.go.com/US/story?id=94043>.

83. *See id.*

84. *Id.*

85. *School-to-Prison Pipeline*, AM. CIV. LIBERTIES UNION, <https://www.aclu.org/school-prison-pipeline> (last visited Feb. 8, 2015).

national trend where “children are funneled out of public schools and into the juvenile and criminal justice systems,”<sup>86</sup> later to be exploited by the private prison industry. The National Bar Association considers public education a civil right and urges schools to afford due process to students before they are arrested, expelled, or suspended, which denies them an education.<sup>87</sup>

For example, consider the ACLU’s story of Kyle Thompson. Kyle was suspended for six months following a non-violent encounter where witnesses in the classroom stated that Kyle “playfully” tugged at a note confiscated by a teacher.<sup>88</sup> The note included a “hit list of people [Kyle] wanted to hit on the football field.”<sup>89</sup> Instead of handling Kyle’s non-violent situation in the classroom, the teacher immediately reported him to the school principal.<sup>90</sup> The principal called the police, who placed Kyle in handcuffs and took him to the police station.<sup>91</sup> School administrators suspended Kyle for six months, almost two-thirds of the academic year.<sup>92</sup> While he did not face jail time, the event forever changed Kyle’s life and increased his chances of succumbing to negative influences during his six-month suspension. The school also denied him six months of education. Kyle’s situation demonstrates the need for school administrators to handle minor disciplinary issues without depriving a student of an education. However, the harsh mandates of zero-tolerance policies often require school administrators to penalize students without any discretion. This prevents children from pursuing an education and may lead to their ultimate demise in our modern society.

However, some school administrators retain discretion in certain circumstances, which allows them to decline to apply punitive disciplinary action. Statistics from the Department of Education Office for Civil Rights from the 2011–12 school year

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86. *Id.*

87. See NAT’L BAR ASS’N, 2014–2015, YEAR AT A GLANCE (2014) (on file with author) (identifying the NBA’s initiative supporting education as a civil right).

88. See Diana Scholl, *Why is Kyle Thompson Under House-Arrest?*, AM. CIV. LIBERTIES UNION (Sept. 24, 2013, 3:07 PM), <https://www.aclu.org/blog/racial-justice/why-kyle-thompson-under-house-arrest>.

89. *Id.*

90. See *id.*

91. *Id.*

92. *Id.*



revealed that administrators exercised discretion more frequently when disciplining white students.<sup>93</sup> Furthermore, the Department of Education recently found that school administrators suspended students of color more often than their white peers.<sup>94</sup> These results may amount to selective enforcement of facially neutral policies against students of one race, which is prohibited intentional discrimination.<sup>95</sup> The study revealed that school administrators disproportionately applied suspensions and zero-tolerance policies against African American and Latino students.<sup>96</sup> Statistics also showed white students were disciplined less severely than students of color for the same offenses.<sup>97</sup>

The Department of Education study demonstrates that the impact of zero-tolerance policies on suspended students is significant. Prominent psychologists contend that “rigid and inflexible discipline policies directly conflict with two major developmental needs of school-aged youths: (1) the development of strong and trusting relationships with key adults in their lives, particularly those in their school; and (2) the formation of positive attitudes toward fairness and justice.”<sup>98</sup> As it relates to the formation of positive attitudes toward fairness and justice, “by subjecting students to automatic punishments that do not take into account extenuating or mitigating circumstances, zero tolerance policies represent . . . a ‘lost

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93. Press Release, U.S. Dep’t of Educ., *Expansive Survey of America’s Public Schools Reveals Troubling Racial Disparities* (Mar. 21, 2014), *available at* <http://www.ed.gov/news/press-releases/expansive-survey-americas-public-schools-reveals-troubling-racial-disparities-1>. The report “compiled data from all 97,000 of the nation’s public schools and its 16,500 school districts—representing 49 million students.” *Id.*

94. *Id.*

95. U.S. Dep’t of Justice & U.S. Dep’t of Educ., *Joint “Dear Colleague” Letter on the Nondiscriminatory Administration of School Discipline*, U.S. DEP’T EDUC. (Jan. 8, 2014), <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201401-title-vi.html> (reporting the Departments of Justice and Education often receive complaints from parents alleging that teachers only refer students of a particular race outside of the classroom for discipline, even though students of other races in that classroom commit the same infractions).

96. *Id.*

97. *See id.*

98. ADVANCEMENT PROJECT & HARVARD UNIV. CIVIL RIGHTS PROJECT, *OPPORTUNITIES SUSPENDED: THE DEVASTATING CONSEQUENCES OF ZERO TOLERANCE AND SCHOOL DISCIPLINE 10* (2000), *available at* <http://civilrightsproject.ucla.edu/research/k-12-education/school-discipline/opportunities-suspended-the-devastating-consequences-of-zero-tolerance-and-school-discipline-policies/crp-opportunities-suspended-zero-tolerance-2000.pdf>.

moment to teach children about respect, and a missed chance to inspire their trust of authority figures.”<sup>99</sup> Suspension represents a preferable method of discipline because students may eventually return to school. The psychological impact, however, still forces students on a downward slope away from getting an education. This is true because “[s]uspended students are less likely to graduate on time and more likely to be suspended again.”<sup>100</sup> These students “are also more likely to repeat a grade, drop out, and become involved in the juvenile justice system,”<sup>101</sup> possibly because suspension places them in an unsupervised environment.

Even more troubling is the impact of zero-tolerance policies on the suspension of preschool children. According to Department of Education statistics, African American students comprised 18% of the nation’s preschool enrollment in 2011–12 but accounted for “42% of preschool students suspended once, and 48% of students suspended more than once.”<sup>102</sup> Misbehavior by preschool children is a problem best handled by counselors, not police, and certainly not helped by pushing such young children out of the education system. Many of the children suspended by school administrators “have learning disabilities or histories of poverty, abuse or neglect, and would benefit from additional educational and counseling services.”<sup>103</sup> By exercising discretion toward non-violent students with behavioral issues, school administrators can put students on the path to success and provide an opportunity for students to get “educated, not incarcerated.”<sup>104</sup>

As revealed by the alarming findings by the federal government, the nation’s largest associations of lawyers and judges, and influential social justice organizations, unplugging schools from the prison pipeline must be done “with all deliberate speed.” These organizations resoundingly agree—zero-tolerance policies unequivocally harm students in public schools and governments must abolish policies that criminalize

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99. See *id.* at 12 (quoting Dirk Johnson, *Schools New Watchword: Zero Tolerance*, N.Y. TIMES (Dec. 1, 1999), <http://www.nytimes.com/1999/12/01/us/schools-new-watchword-zero-tolerance.html>).

100. Press Release, U.S. Dep’t of Educ., *supra* note 93.

101. See *id.*

102. *Id.*

103. *School-to-Prison Pipeline*, *supra* note 85.

104. *Id.*

adolescent student behavior. Lawmakers and school administrators must consider alternatives because denying an education to public school students cannot be the only choice.

### III. PLUGGING THE SCHOOL-TO-PRISON PIPELINE AT THE MAIN

*[W]e must remember that we cannot teach a student who is not in school.<sup>105</sup>*

The public education system is the water main in the school-to-prison pipeline. The discipline disparities in America's public schools are indicative of the brokenness of our public education system. Whether students of color attend a predominantly white or predominately African American school, the outcome is the same—African American and Latino students are denied an education.

The public school system for African American and Latino students seemingly provides a dual pipeline to prison. First, students face arrest in school and later become entangled in the criminal justice system, possibly without any chance of going home. Second, students expelled or suspended may have no other educational alternative and are often later arrested as a consequence of negative influences.

To cap the school-to-prison pipeline, our current system must undergo a legal reformation. Lawmakers cannot allow capitalism to influence discipline in our public schools, nor can school administrators continue to disproportionately discipline our children of color. First, zero-tolerance policies are not the solution to controlling the school environment when the policies detrimentally harm students by putting them in prison or excluding them from school. Zero-tolerance policies for all non-violent behavioral offenses must be eliminated, and students cannot be arrested, expelled, or suspended for significant periods of time. Second, to the extent policies give school administrators discretion for all non-violent offenses that do not involve a weapon,<sup>106</sup> they must exercise this discretion and keep students in school. This allows African American and Latino

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105. Amurao, *supra* note 8.

106. I specifically include drug possession among these non-violent, non-weapons offenses, unless there is intent to distribute. Students use various forms of drugs, both legal and illegal, for which jail or expulsion is not the answer. In these cases, counseling and rehabilitation are more suitable.

students to receive the same treatment as their white peers. Our society can no longer place children under arrest and exile them from the learning environment. After all, many of these students are acting like adolescents, not criminals. Third, school administrators must create an environment which embraces learning, not warfare. States and school districts must redirect the funds currently used for school security to other areas. For example, schools could devote resources to educational enhancement programs and social services for troubled students. This could include counseling services to help students with behavior issues or equipment that aids students in advancing their education to be competitive in the global market.

#### A. Eliminating Zero-Tolerance Policies for All Non-Violent Offenses

Originally, zero-tolerance policies sought to deter students from carrying weapons, possessing drugs, and engaging in violence in the school environment.<sup>107</sup> The disciplinary response required for these offenses was initially suspension or expulsion.<sup>108</sup> However, zero-tolerance policies have transformed and now mandate one-size-fits-all consequences for various behavioral situations, forcing school administrators to expel or suspend students, or to refer them to local police.<sup>109</sup> These “policies have generally involved harsh disciplinary consequences such as long-term and/or permanent suspension or expulsion for violations, and often arrest and referral to juvenile or adult court.”<sup>110</sup> According to one commentator, these policies also “target students for minor infractions, increasingly focus on younger elementary and pre-school students, and often rely on force and arrest for relatively minor disciplinary issues.”<sup>111</sup>

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107. *Zero Tolerance and Alternative Strategies: A Fact Sheet for Educators and Policymakers*, NAT'L ASS'N SCH. PSYCHOLOGISTS, [http://www.nasponline.org/resources/factsheets/zt\\_fs.aspx](http://www.nasponline.org/resources/factsheets/zt_fs.aspx) (last visited Feb. 8, 2015) [hereinafter *Zero Tolerance and Alternative Strategies*]. In fact, a 2001 report found the following percentages of zero-tolerance policies applied to these offenses: firearms (94%); weapons other than firearms (91%); alcohol (87%); drugs (88%); violence (79%); tobacco (79%). *Id.*

108. *Id.*

109. *Id.*

110. NANCY A. HEITZEG, EDUCATION OR INCARCERATION: ZERO TOLERANCE POLICIES AND THE SCHOOL TO PRISON PIPELINE 9 (2009), available at <http://files.eric.ed.gov/fulltext/EJ870076.pdf>.

111. *Id.* at 10.

School districts and administrators must revise their policies to reduce suspension and expulsion rates among today's students. If they choose to ignore the problem, the school-to-prison pipeline will continue to flourish.

According to the National Association of School Psychologists, school administrators and teachers favor zero-tolerance policies because "they remove difficult students from school . . . [and] send a clear, consistent message that certain behaviors are not acceptable in the school."<sup>112</sup> No research has shown, however, that zero-tolerance policies are effective for long-term deterrence, and such policies fail to further the goal of providing students with an education because they increase dropout rates.<sup>113</sup> Nevertheless, school administrators frequently employ exclusionary discipline in response to a wide range of common misbehavior, and the benefits to the school environment do not justify the harm caused to students.

Our schools experienced a rapid proliferation in zero-tolerance policies despite the absence of data demonstrating their efficacy.<sup>114</sup> Yet some zero-tolerance policies are triggered by non-violent behavior such as truancy, "disrespect," and "noncompliance."<sup>115</sup> Suspending students for attendance problems is not an appropriate response, especially when missing school may indicate neglect, abuse, or some other problem unbeknownst to school administrators. Suspension for "disrespect" and "noncompliance" are similarly inappropriate because these behavioral problems may reflect an undiagnosed mental illness or some unfavorable condition at home. Children frequently challenge authority at all levels of adolescence, but punishing them by putting them out of school will not change their misbehavior. In fact, suspending students from school places them in an environment free from supervision and creates an opportunity for otherwise non-violent students to socialize with their more deviant peers. Thus, days or months away from school increase the likelihood of a student entering the school-to-prison pipeline. We must keep these students in school and address their behavioral issues in a way that helps them obtain an education without disturbing the learning environment.

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112. *Zero Tolerance and Alternative Strategies*, *supra* note 107.

113. *See id.*

114. HEITZEG, *supra* note 110, at 11.

115. *See Zero Tolerance and Alternative Strategies*, *supra* note 107.

Kicking students out of school should never be a school administrator's first choice. Unlike the post-*Brown* period, during which state lawmakers threatened to fine or imprison school administrators who attempted to desegregate schools,<sup>116</sup> today's school administrators wield authority unfettered by the threat of fines or imprisonment. Administrators must adopt an approach to discipline that utilizes "mental health experts," such as "school psychologists, counselors and social workers . . . to research and develop discipline policies and positive behavior training strategies."<sup>117</sup> Because discipline often indicates underlying behavioral issues, we must address any problems that affect the student, whether it is an unsteady home situation, a mental illness, abuse or neglect, or another circumstance that distracts from learning. At best, teachers and administrators should adopt attitudes that protect a child's access to an education and views education as a civil right. Similarly, federal, state, and local governments should place greater emphasis on keeping students in the public education system, especially when the likely alternative is prison.

#### B. Changing the Attitudes of School Administrators

Even if lawmakers eliminate zero tolerance for non-violent offenses, they cannot unilaterally change the attitudes of public school administrators, which may be entrenched in racial and social biases, or who may feel ill-equipped to meet the needs of students. Without addressing this, they will continue to use expulsion and suspension for disciplinary violations involving students of color. African American students in particular experience harsher punitive discipline than their nonminority peers, even when controlling for socioeconomic status.<sup>118</sup> Annually, 40% of all students expelled from school are African American, and 70% of all in-school arrests involve African American or Latino students.<sup>119</sup> Social biases, and stereotypes about African American children in general, may account for this disproportionate application. According to some, these

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116. See HIGGINBOTHAM, *supra* note 3, at 126 (describing these efforts in several southern states).

117. *Zero Tolerance and Alternative Strategies*, *supra* note 107.

118. *Id.*

119. Amurao, *supra* note 8.

attitudes are attributable to explicit and implicit biases.<sup>120</sup> To the extent possible, teachers and administrators must eliminate the biases formed about African American students. In her address at the University of Arkansas, Professor Laura R. McNeal urged districts to train school administrators and teachers about developmental and cultural competency as one means of addressing the problems associated with biases.<sup>121</sup> Common sense suggests that some form of bias causes today's school administrators to discipline African American children more harshly in the absence of zero-tolerance policies. Biases could also account for the inconsistent application of zero-tolerance policies, which are often applied unevenly following minor rule infractions involving African American students. Recognizing administrators use discretion in disciplinary decisions, the Department of Education issued guidelines, rather than mandates, for administrators to consider because of the disparate impact commonly experienced by African American students.<sup>122</sup>

Recent guidance clarifies how districts can meet their obligations under Title IV and Title VI of the Civil Rights Act of 1964,<sup>123</sup> which, among other things, outlawed racial discrimination in the public school system.<sup>124</sup> In the release, the Departments of Justice and Education used words such as "recommendations," "guidance," and "may,"<sup>125</sup> to describe the

120. See Laura R. McNeal, Assistant Professor of Law, Univ. of Louisville Louis D. Brandeis Sch. of Law, Address at the National Bar Association Wiley A. Branton Issues Symposium at the University of Arkansas (Nov. 7, 2014).

121. See *id.*

122. See *School Climate & Discipline*, U.S. DEPARTMENT EDUC., <http://www2.ed.gov/policy/gen/guid/school-discipline/index.html> (last visited Feb. 8, 2015); see also Press Release, U.S. Dep't of Justice, Office of Juvenile Justice & Delinquency Prevention, Attorney General Holder and Secretary Duncan Announce Supportive School Discipline Initiative (July 21, 2011), available at <http://www.ojjdp.gov/enews/11juvjust/110721.html> (announcing a new federal initiative to combat the school-to-prison pipeline). The guidance results from the work of the Supportive School Discipline Initiative, a collaboration between the Departments of Justice and Education to address the school-to-prison pipeline. Press Release, U.S. Dep't of Justice, Office of Juvenile Justice and Delinquency Prevention, Departments of Justice and Education Release School Discipline Guidance Package, (Jan. 9, 2014), available at <http://www.ojjdp.gov/enews/14juvjust/140109.html>.

123. See Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (1964).

124. See U.S. DEP'T OF EDUC. & U.S. DEP'T OF JUSTICE, SUPPORTIVE SCHOOL DISCIPLINE 3 (n.d.), available at <http://www2.ed.gov/policy/gen/guid/school-discipline/appendix-3-overview.pdf>.

125. See *id.* at 1-3.

policy, which sought to “ensure that discipline policies are drafted and applied in a manner that does not discriminate against racial or ethnic groups.”<sup>126</sup> Mandatory federal and state education policies, however, can do more—they must adopt a stronger tone and temperament for school administrators to follow, especially given the current disproportionate treatment along racial lines. Ultimately, “attitude reflect[s] leadership,”<sup>127</sup> which from a historical context provides insight as to the influence of racial bias on the discipline of students of color in our public schools.

Even for young children, the federal government found that exclusionary discipline practices occur at high rates in early learning settings, and at even higher rates for young boys of color.<sup>128</sup> The Departments of Health and Human Services and Education stated the federal government hopes “to prevent, severely limit, and work toward eventually eliminating the expulsion and suspension—and ensure the safety and well-being—of young children in early learning settings.”<sup>129</sup> For an issue that has readily been identified as a national problem from a child’s early developmental stages, elimination cannot come soon enough. Unless the government takes immediate action to eliminate the disparate impact, the matter is left solely to the discretion of school administrators. This will not protect students from administrators who make decisions based on biases toward African American children.

Recent efforts to address the school-to-prison pipeline are not the first time that the federal government passed a law or implemented a policy resisted by school administrators. Well after the *Brown II* decision, school districts and administrators across the country refused to desegregate, and state and local

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126. Evie Blad, *New Federal School Discipline Guidance Addresses Discrimination, Suspensions*, EDUC. WK. (Jan. 8, 2014, 9:52 AM), [http://blogs.edweek.org/edweek/rulesforengagement/2014/01/new\\_federal\\_school\\_discipline\\_guidance\\_addresses\\_discrimination\\_suspensions.html](http://blogs.edweek.org/edweek/rulesforengagement/2014/01/new_federal_school_discipline_guidance_addresses_discrimination_suspensions.html).

127. REMEMBER THE TITANS (Walt Disney Pictures 2000).

128. U.S. DEP’T OF HEALTH & HUMAN SERVS. & U.S. DEP’T OF EDUC., POLICY STATEMENT ON EXPULSION AND SUSPENSION POLICIES IN EARLY CHILDHOOD SETTINGS 1 (2014), available at [http://www.acf.hhs.gov/sites/default/files/ecd/expulsion\\_suspension\\_final.pdf](http://www.acf.hhs.gov/sites/default/files/ecd/expulsion_suspension_final.pdf).

129. *Id.*



government leaders blatantly disregarded the law.<sup>130</sup> Particularly in the South, but also more subtly in the North, state legislators publicly committed to maintain segregated schools.<sup>131</sup> Even after the federal government offered funding incentives to desegregate schools in 1965,<sup>132</sup> some school districts refused to comply with the *Brown* mandates.<sup>133</sup> Entrenched in this historical segregationist attitude may be an implicit bias involving African American inferiority, which leads some to believe that African Americans deserve whatever harsher punishment results for violations of the law. Even when administrators apply purportedly race-neutral zero-tolerance policies, their uneven application reflects the historically poor local leadership within America's public schools.

The research is clear—school administrators disproportionately suspend, expel, or facilitate the arrest of African American students for non-violent offenses more than any other race.<sup>134</sup> Instead of determining the underlying cause of student misbehavior, administrators pass the problem to the criminal justice system. Among these harshly disciplined students, many have “a history of abuse, neglect, poverty or learning disabilities.”<sup>135</sup> Violence in the school setting is unacceptable, but treating children like criminals for non-violent adolescent behavior damages their lives forever, especially if students go from school directly into the criminal justice system. Failing to address this further fuels our country's “addiction to

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130. See JERROLD M. PACKARD, *AMERICAN NIGHTMARE: THE HISTORY OF JIM CROW* 238 (2002) (noting the resistance); see also HIGGINBOTHAM, *supra* note 3, at 126 (same).

131. See HIGGINBOTHAM, *supra* note 3, at 126; see also Peter C. Alexander, *Seeking Educational Equality in the North: The Integration of the Hillburn School System*, 68 *ARK. L. REV.* 13 (2015) (describing the desegregation of the school system in Hillburn, New York).

132. See Elementary and Secondary Education Act of 1965, Pub. L. No. 89-10, 79 Stat. 27 (1965). The Elementary and Secondary Education Act of 1965 allocated over \$1.5 billion in local school aid to incentivize desegregation by increasing the enrollment of African Americans students. See HIGGINBOTHAM, *supra* note 3, at 127.

133. See HIGGINBOTHAM, *supra* note 3, at 128-30.

134. See U.S. DEP'T OF EDUC., OFFICE FOR CIVIL RIGHTS, *supra* note 4, at 1-3, 6.

135. See Amurao, *supra* note 8. See generally Reginald L. Robinson, *Do Zero-Tolerance Policies Ostensibly Get Applied Disproportionally to Black Children?*, 68 *ARK. L. REV.* \_\_\_\_ (forthcoming 2015) (addressing whether zero-tolerance policies are applied disproportionately against African American children because they pose a material and substantial risk to disrupt school authority or rather to subconsciously confirm the maltreatment suffered by school administrators in their early years).

incarceration” and perpetuates a capitalistic tenement to the school-to-prison pipeline.<sup>136</sup>

### C. Creating Appropriate Public School Environments: Schools, Not Prisons

When students enter through metal detectors, when police officers surround them strapped with automatic weapons, and when uniformed officers constantly arrest students for adolescent misbehavior, schools look more like way stations to prison than institutions of learning. School resource officers have been present in schools for much of the last decade.<sup>137</sup> These “resource officers” are ideally placed in schools to serve as role models, and often “shape[] the school social climate and students’ legal socialization.”<sup>138</sup> Despite their presence, some high schools experience an increase in disciplinary infractions.<sup>139</sup>

In the Los Angeles Unified School District, the district’s 2014 budget allocated “more than \$91 million on policing and security, including nearly \$50 million for campus police officers and more than \$32 million for civilian campus aides hired to patrol halls.”<sup>140</sup> This money should be spent educating students, not heavily policing them, especially when these funds could be used for special education, to hire additional counselors, or for seriously underfunded healthcare, after-school, and in-school food programs.<sup>141</sup> Recently, the district spent \$13 million on 21,000 iPad Air tablets and 6000 Google Chromebooks for testing, but with disciplinary policies that favor expelling or suspending students, fewer students will be exposed to this new

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136. See Press Release, Am. Civil Liberties Union, *supra* note 19.

137. See Grace Chen, *Cops and Children: Why Police Officers Are Stationed at Elementary Schools*, PUB. SCH. REV., <http://www.publicschoolreview.com/blog/cops-and-children-why-police-officers-are-stationed-at-elementary-schools> (last visited Feb. 8, 2015).

138. *Id.* (internal quotation mark omitted).

139. See *id.*

140. Susan Ferris, *California Report: Don’t Spend New Education Money on Campus Police*, CENTER FOR PUB. INTEGRITY, <http://www.publicintegrity.org/2014/03/20/14453/california-report-dont-spend-new-education-money-campus-police> (last updated May 19, 2014, 12:19 PM).

141. See *id.*

technology.<sup>142</sup> Denying them not only an education, but also a chance to be competitive, creates a disadvantage when these students seek employment and other opportunities in the workforce. Once schools place students into the school-to-prison pipeline, their chances of receiving an education or succeeding in this world become daunting. Our government has failed to prioritize education, both inside and outside of prison. School should be a safe environment where students can learn and grow, not a place that operates as an assembly line to prison.

#### IV. CONCLUSION

This essay examines the school-to-prison pipeline through a capitalistic lens, revealing that African American and Latino students expelled, suspended, or arrested in public schools are exploited by the prison industry. I also examine the modern and historical context in which the prison regime has made profits, particularly from African Americans. More than any other time in our history, the prison industry relies on uneducated African American, and now Latino, males for financial gain. The school-to-prison pipeline creates a disparate impact on students of color, and when these students experience exclusionary discipline, they often end up in the criminal justice system. Sadly, both government and the private prison industry benefit as a result.

Lawmakers must eliminate the use of zero-tolerance policies for non-violent offenses. Furthermore, school administrators must exercise discretion when disciplining African American students. This starts by changing the attitudes of administrators. If this cannot be achieved, they must be relieved of their duties. Lastly, school administrators must remove the strong police presence in public schools and allow schools to create an environment that looks less like a prison and more like an educational institution that teaches, rather than punishes, our nation's schoolchildren.

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142. See Vanessa Romo, *LAUSD Completes Buy of iPads, Chromebooks for State Testing*, L.A. SCH. REP. (Jan. 6, 2015, 9:45 AM), <http://laschoolreport.com/lausd-completes-buy-of-ipads-chromebooks-for-state-testing/>.