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Journal

National Black Law Journal, 27(1)

Author

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Publication Date

2018-01-01

Peer reviewed

COULD THE STATE TAKEOVER OF PUBLIC SCHOOLS CREATE A STATE-CREATED DANGER?

THEORIZING AT THE INTERSECTION OF STATE TAKEOVER DISTRICTS, THE SCHOOL-TO-PRISON PIPELINE, AND RACIAL OPPRESSION

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ABSTRACT

Federal courts have consistently rejected plaintiffs' arguments that the government is liable when citizens suffer injuries at the hands of private third parties. In the context of education, there are few cases where federal courts have held that schools are liable for the injuries that students incur at the hands of private third parties. This Article puts forth a theoretical argument for schools, specifically schools operating under the governance of a state takeover district in a predominately Black school district with a predominately Black-elected school board, to be held liable for participating in disciplinary practices that are linked to the school-to-prison pipeline. The Article first traces the roots of the State-Created Danger Doctrine and then discusses the role of education reform policies in enabling the school-to-prison pipeline. Next, the Article provides a statistical analysis of three case studies in state takeover districts (Detroit, Memphis, and New Orleans). My research found no instances where the state takeover district disrupted the school-to-prison pipeline, but I discovered multiple instances where state takeover districts have exacerbated the school-to-prison pipeline. In this Article I argue that there is hope in the Sixth Circuit (Detroit and Memphis) for the use of the State-Created Danger Doctrine, which grows out of the Fourteenth Amendment's Due Process Clause, to mitigate the school-to-prison pipeline. However, the Fifth Circuit (New Orleans) appears to have foreclosed legal causes of action based on the State-Created Danger Doctrine. Finally, this Article provides a critical race critique of the school-to-prison pipeline and the few tools that Black people have to combat this form of racial subjugation in light of education reform policies.

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INTRODUCTION

The federal courts have generally ruled that the government has no duty to act to protect its citizens from harms committed by private parties. The federal courts have strictly followed this precedent, even in the face of the most unfortunate afflictions of pain and loss for plaintiffs.¹ Because public schools are component parts of the government, schools have generally not been required to protect students from private harms.² This Article argues that there are circumstances in which governments should be held responsible for injuries to students, even if those injuries occur at the hands of a private party. Courts have rejected arguments that schools are liable for injuries that their students suffered at the hands of a third party, mostly because they find that schools do not have custody of their students or because the schools did not create or increase the dangers that the students faced. In particular, this Article argues that when states take over public schools in a unilateral and hostile manner and those schools contribute to the school-to-prison pipeline, which disproportionately impacts Black male students, students should have a legally recognized right to sue for damages. I make this argument understanding that the school-to-prison pipeline is an extension of racial subjugation which dates back to the arrival of African slaves, and that entry into the school-to-prison pipeline places Black students, particularly, Black boys in physical, emotional, and social danger.

This Article provides both a legal and empirical analysis, and it proceeds in eleven parts. Part II of this Article conceptualizes the State-Created Danger Doctrine. Part III discusses the school-to-prison pipeline and its impact on Black students, specifically Black boys. Part IV of this Article considers contemporary education reform policies and frames efforts at education reform as dangers to Black boys. Part V discusses why it is important to assess how education reform policies, in the form of state takeovers of public school districts and public schools, impact Black boys. Part VI discloses the data sources and research methods for this Article. Parts VII–IX provide a statistical comparison of disciplinary outcomes for Black boys in schools under the governance of locally governed and popularly elected school districts and state takeover school districts in Detroit, Memphis, and New Orleans. Part X applies the applicable federal

¹ See *DeShaney v. Winnebago Cty. Dep't of Soc. Servs.*, 489 U.S. 189 (1989) (the Supreme Court did not find that the state must act affirmatively to protect its citizens where a boy was killed by his father despite the fact that the father was under the watch of child welfare authorities).

² For a more detailed discussion of this argument, see Jeff Sanford, *The Constitutional Hall Pass: Rethinking the Gap in § 1983 Liability that Public Schools Have Enjoyed Since DeShaney*, 91 WASH. U. L. REV. 1633 (2014).

appellate courts' decisions on the application of the State-Created Danger Doctrine in light of the statistical test performed in Parts VII–IX. Part XI applies critical race analyses to the findings of this paper.

It is worth noting that the U.S. Supreme Court has not issued explicit guidance on how federal appellate courts should apply the State-Created Danger Doctrine. Consequently, different appellate courts use different tests to reach their respective holdings. In general, courts that have applied the State-Created Danger Doctrine have required plaintiffs to show both that the state had a special relationship with the plaintiff and that the state's affirmative actions created the danger that harmed the plaintiff. As such, I will generally refer to the State-Created Danger Doctrine in a manner that includes both tests in this Article.

I. UNDERSTANDING THE STATE-CREATED DANGER DOCTRINE

In general, there is no requirement that governments in the United States protect their citizens from private harms.³ However, governmental entities may become liable for failing to protect their citizens under certain and limited scenarios.⁴ Cases arising under the State-Created Danger Doctrine are one of the exceptions to the general rule that governments in the United States are not required to protect their citizens from injuries incurred due to the actions of private individuals.⁵ In a State-Created Danger case, a citizen-plaintiff typically sues the government, and argues that the government could have and should have intervened in an event or a series of events that caused them harm.⁶ In State-Created Danger cases, the government usually and almost exclusively prevails⁷ because federal courts of appeal have required states to exhibit “an extremely high level of culpability” for State-Created Danger cases “to be actionable.”⁸ To date, every federal appellate court except for the Fifth Circuit Court of Appeals has acknowledged the theoretical viability of State-Created Danger Doctrine,⁹ but an initial period of promising results of the doctrine has succumb to less hopeful rulings in favor of governments and against citizens.¹⁰

³ *DeShaney*, 489 U.S. 1 at 195–201.

⁴ *Id.* at 199–200.

⁵ Laura Oren, *Some Thoughts on the State-Created Danger Doctrine: DeShaney is Still Wrong and Castle Rock is More of the Same*, 16 TEMP. POL. & C.R. L. REV. 47, 47 (2006) [hereinafter *DeShaney is Still Wrong*].

⁶ See Erwin Chemerinsky, *The State Created Danger Doctrine*, 23 Touro L. REV. 1 (2007).

⁷ *Id.*

⁸ Laura Oren, *Safari into the Snake Pit: The State-Created Danger Doctrine*, 13 WM. & MARY BILL RTS J. 1165, 1168 (2005).

⁹ *Id.* at 1173.

¹⁰ *DeShaney is Still Wrong*, *supra* note 5, at 48.

Despite increasingly intense fact patterns, courts of appeals have continued to dismiss plaintiffs' cases, grant summary judgment in a favor of governments, and even overturn significant and watershed jury verdicts in favor of plaintiffs.¹¹

Prior to the creation of the State-Created Danger Doctrine in *DeShaney v. Winnebago County Department of Social Services*,¹² the Supreme Court had held that there are some instances where the government is required to act affirmatively to protect individuals from harm because of a variety of factors that led to the creation of a special relationship between the parties.¹³ The Supreme Court's ruling in *DeShaney* now establishes that the government does not have an affirmative duty to intervene or protect citizens from injuries inflicted by private individuals.¹⁴ And the facts of *DeShaney* are scandalous in nature.

Joshua DeShaney was still an infant when his parents divorced.¹⁵ A Wyoming state court granted custody of Joshua to his father, Randy DeShaney, who later took Joshua and relocated to Winnebago County, Wisconsin.¹⁶ Randy remarried after he relocated to Winnebago County, but that marriage later ended in divorce.¹⁷ Randy's second wife alerted the Winnebago County Department of Social Services that Randy was potentially abusing and causing bodily harm to Joshua. Representatives from the Department of Social Services interviewed Randy who was suspected of abusing Joshua, but Randy denied the accusations.¹⁸ Within one year, Joshua was admitted into a hospital under the suspicion of abuse, and once again the Department of Social Services was notified.¹⁹ Following that hospital visit, Joshua was placed in the temporary custody of the hospital, but was returned to his father within three days.²⁰

The abuse continued for roughly thirteen months before Randy's abuses placed Joshua in a coma from which he later died.²¹ Joshua's mother filed suit against Winnebago County, the Department of Social Services, and multiple individual employees of the Department of Social Services under 42 U.S.C.

¹¹ See generally *DeShaney* is Still Wrong, *supra* note 5 (providing a truncated history of the State-Created Danger Doctrine's history).

¹² 489 U.S. 189 (1989).

¹³ See *Estelle v. Gamble*, 429 U.S. 97 (1976); *Martinez v. California*, 444 U.S. 277 (1980); *Youngberg v. Romero*, 457 U.S. 307 (1982).

¹⁴ *DeShaney*, 489 U.S. at 202.

¹⁵ *Id.* at 191.

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.* at 192.

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.* at 191–93.

§ 1983 in the United States District Court for the Eastern District of Wisconsin.²² Specifically, Joshua's mother asserted that the respondents deprived Joshua of his liberty without due process when they failed to act affirmatively to protect him from his father's violence. The District Court granted summary judgment in favor of the respondents, and the Seventh Circuit Court of Appeals affirmed.²³ The Supreme Court granted certiorari and then affirmed.²⁴ In writing the opinion, Chief Justice Rehnquist discussed how the U.S. Constitution does not require that the government take affirmative actions.²⁵ Instead, the Chief Justice wrote that the Constitution operates on negative liberties.²⁶

Since the Court's decision in *DeShaney*, plaintiffs have sought to use the State-Created Danger Doctrine in various contexts.²⁷ In the context of schools, federal appellate courts have been fairly unanimous in rejecting plaintiffs' claims brought under the State-Created Danger Doctrine.²⁸ Somewhat contrarily, if not defiantly, education law scholars have theorized the different ways that advocates might use the State-Created Danger Doctrine to protect students against potential unreasonable harms that could occur in public schools that are caused by school employees²⁹ and others.³⁰ These analyses have been conducted in light of the historical context of schools and school governance structures. There are limited analyses that consider the potential of the State-Created Danger Doctrine to protect students in contemporary school environments that can be governed by private boards and managed by private companies at the unilateral request and decision of state governmental agencies. Moreover, these new educational governance structures disrupt and alter traditional political accountability structures, disallowing communities, particularly Black communities, from preventing private individuals from abusing Black students.

²² *Id.* at 193.

²³ *Id.*

²⁴ *Id.* at 194.

²⁵ *Id.* at 195–96.

²⁶ *Id.*

²⁷ Chemerinsky, *supra* note 6.

²⁸ Sanford, *supra* note 2, at 1651.

²⁹ *See Id.*

³⁰ *See* Carl Rizzi, *A Duty to Protect: Why Gun-Free Zones Create a Special Relationship Between the Government and Victims of School Shootings*, 25 CORNELL J.L. & PUB. POL'Y 499 (2015); *see also* Adam Michael Greenfield, *Annie Get Your Gun 'Cause Help Ain't Comin': The Need for Constitutional Protection from Peer Abuse in Public Schools*, 43 DUKE L.J. 588 (1993).

II. BEYOND HOPELESSNESS AND INTO ENDANGERMENT: SCHOOLS AS A PATHWAY TO PRISON FOR BLACK BOYS

A. *The School-to-Prison Pipeline and Black Males: A Match Made in Policy and Practice*

The school-to-prison pipeline refers to policies and practices that remove students from the educational system and into the juvenile and criminal justice systems.³¹ Students are thrust into the school-to-prison pipeline because they have limited access to high-quality schools, receive disparate and inconsistent disciplinary consequences, are placed in alternative educational settings at disproportionate rates, and are subjected to inappropriate interactions with actors from the criminal justice system.³² Unfortunately, the school-to-prison pipeline does not impact all students at similar rates. Students who are marginalized, disenfranchised, and oppressed, especially Black boys, are more likely than their peers to enter the school-to-prison pipeline.³³ Because Black boys remain in the crosshairs of the school-to-prison pipeline and those sustaining the school-to-prison pipeline, the Schott Foundation has suggested a specific and deliberate research focus on Black males.³⁴ Moreover, other researchers have identified the school-to-prison pipeline as a prominent component of the Black male crisis in education.³⁵

More than 70 percent of state prison and local jail inmates and approximately 60 percent of federal prison inmates did not complete high school.³⁶ More than one in three male prison inmates indicated that behavior and academic disengagement contributed to their failure to graduate from high school.³⁷ When the male population is disaggregated, Black boys face overwhelming odds of

³¹ See CATHERINE Y. KIM, DANIEL J. LOSEN & DAMON T. HEWITT, *THE SCHOOL-TO-PRISON PIPELINE: STRUCTURING REFORM* (2010); see also Chauncey D. Smith, *Deconstructing the Pipeline: Evaluating School-to-Prison Pipeline Equal Protection Cases Through a Structural Racism Framework*, 36 *FORDHAM URB. L.J.* 1009 (2009).

³² See MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* (2010); KIM, *supra* note 31; Debra Fowler, *School Discipline Feeds the "Pipeline to Prison"*, 93 *PHI DELTA KAPPAN* 14 (2011); Smith, *supra* note 31.

³³ Jerlando F.L. Jackson & James Moore, *African American Males in Education: Endangered or Ignored?*, 108 *TCHRS. C. REC.* 201, 201–05 (2006); see also Pedro A. Noguera, *Reconsidering the 'Crisis' of the Black Male in America*, 24 *SOC. JUST.* 147–64 (1997); David Pluoise, *Remedying the Black Male 'Crisis'*, 25 *DIVERSE ISSUES IN HIGHER EDUCATION* 5 (2008).

³⁴ See SCHOTT FOUND. FOR PUB. EDUC., *THE URGENCY OF NOW: THE SCHOTT 50 STATE REPORT ON PUBLIC EDUCATION AND BLACK MALES* (2012).

³⁵ See Jackson, *supra* note 33, at 201–05; Noguera, *supra* note 33; Pluoise, *supra* note 33, at 5.

³⁶ See CAROLINE WOLF HARLOW, BUREAU OF JUST. STATS., *EDUCATION AND CORRECTIONAL POPULATIONS* (2010), available at www.bjs.gov/content/pub/pdf/ecp.pdf (2010).

³⁷ *Id.*

entering the criminal justice system.³⁸ Black boys who finish high school face educational, social, and occupational trajectories that are severely limited. The outcomes for Black boys who are subjected to disrupted educational opportunities are much more catastrophic. More than half of all Black boys who do not graduate high school are likely to be incarcerated before the age of thirty-five,³⁹ and Black males who did not graduate high school comprise roughly 40 percent of individuals who are incarcerated.⁴⁰ While Black males who do not complete high school have about a 60 percent likelihood of incarceration before 35, only 11 percent of White males who do not complete high school are likely to experience incarceration.⁴¹ Black males are also six times more likely to be imprisoned than are their White counterparts.⁴²

Michelle Alexander argues that “[t]he fate of millions of people—indeed the future of the [B]lack community itself—may depend on the willingness of those who care about racial justice to reexamine their basic assumptions about the role of the criminal justice system in our society.”⁴³ In a previous paper, I interpreted Alexander’s words to be a call to action for those who care about racial equity and justice to interrogate their beliefs about the role that public schools, education policy, and education reform play in our society.⁴⁴ More specifically, I suggested that advocates and allies for racial justice and equity “identify, confront, and redirect” the role that public schools, education policy, and education reform in initiating and contributing to the school-to-prison pipeline and disproportionate representation of Black people in the criminal justice system.⁴⁵ Contrary to popular narratives about the criminal-minded nature of Black people, many Black people are placed on a trajectory towards, into, and through the criminal justice system during their primary- and secondary-schooling

³⁸ See Smith, *supra* note 31.

³⁹ Becky Pettit & Bruce Western, *Mass Incarceration and the Life Course: Race & Class Inequality in U.S. Incarceration*, 69 AM. SOC. REV. 151, 162 (2004) (See Table 4, Black Men for the Year 1999).

⁴⁰ HARLOW, *supra* note 36.

⁴¹ Pettit, *supra* note 39 (See Table 4, Black Men for the Year 1999).

⁴² See George Gao, *Chart of the Week: The Black-White Gap in Incarceration Rates*, PEW RESEARCH CENTER (July 18, 2014), <http://www.pewresearch.org/fact-tank/2014/07/18/chart-of-the-week-the-black-white-gap-in-incarceration-rates>.

⁴³ ALEXANDER, *supra* note 32, at 16.

⁴⁴ Steven L. Nelson & Jennifer E. Grace, *The Right to Remain Silent in New Orleans: The Role of Self-Selected Charter School Boards on the School-to-Prison Pipeline*, 40 NOVA L. REV. 447 (2016) [hereinafter *Right to Remain Silent*].

⁴⁵ *Id.* at 451.

experiences, where they are placed in under-resourced schools as they journey to overly-resourced prisons.⁴⁶

B. *Understanding the Roots of the School-to-Prison Pipeline*

School disciplinary policies and practices that originated in the 1980s and 1990s (if not earlier) in response to perceived increases in juvenile delinquency have contributed to racial disparities in the application of discipline in schools.⁴⁷ This is especially true for discipline that removes students from their educational settings or involves the juvenile and criminal justice systems.⁴⁸ Discussions about disparate disciplinary practices in schools considered the delinquent nature of Black students.⁴⁹ And, the conversations typically did not assess the manner in which delinquent public officials', intentional and orchestrated neglect of the Black community, or conspicuously absent educational, social, and occupational opportunities have contributed to mass incarceration in the Black community.⁵⁰ Schools that do not meet the needs of Black students, parents, and communities are, therefore, on the continuum that leads Black students into prisons.⁵¹ Nevertheless, schools are microcosms of larger societies and often provide concrete examples of the many factors that besiege Black communities.

Although research on the school-to-prison pipeline is gaining national attention, for decades researchers have documented the inequitable policies and practices that contribute to the school-to-prison pipeline.⁵² Education, legal, and policy researchers have begun to identify the factors that contribute to the school-to-prison pipeline and disrupt efforts to provide Black students, parents, and communities the tools necessary to be successful.⁵³ Moreover, schools and school districts have adopted and implemented policies and procedures that serve to force students out of schools and into the penal system.⁵⁴ These policies and consequences are problematic because the students who are removed from

⁴⁶ See Jackson, *supra* note 33, at 201–02 (2006).

⁴⁷ See Ellen Tuzzolo & Damon T. Hewitt, *Rebuilding Inequity: The Re-emergence of the School-to-Prison Pipeline in New Orleans*, THE HIGH SCH. J. 59, Dec. 2006.

⁴⁸ *Id.*

⁴⁹ See John Paul Wright et al., *Prior Problem Behavior Accounts for the Racial Gap in School Suspensions*, 42 J. CRIM. JUST. 257 (2014).

⁵⁰ See Right to Remain Silent, *supra* note 44.

⁵¹ KIM, *supra* note 31.

⁵² See CHILDREN'S DEFENSE FUND, SCHOOL SUSPENSIONS: ARE THEY HELPING CHILDREN? (1975), available at http://diglib.lib.utk.edu/cdf/data/0116_000050_000205/0116_000050_000205.pdf; Noguera, *supra* note 33; Russell J. Skiba et al., *Race Is Not Neutral: A National Investigation of African American and Latino Disproportionality in School Discipline*, 40 SCH. PSYCHOL. REV. 85 (2011).

⁵³ See Tuzzolo, *supra* note 47.

⁵⁴ *Id.*

schools through suspension, expulsion, or placement in alternative educational settings, or are associated with the penal systems have great difficulty disassociating with the criminal justice system.⁵⁵

C. Creating A Vicious Circle: The School-to-Prison Pipeline Comes Full Circle

The criminal justice system is one of many factors that influence the educational experiences of Black students. For instance, many Black students experience the incarceration of at least one parent.⁵⁶ It follows logically that Black students who have at least one parent that is incarcerated may also experience decreases in the quality and quantity of parental involvement in their educational processes. Parental involvement is an indicator of student success in schools⁵⁷; thus, the mass incarceration of Black parents is linked to decreased student achievement for Black students experiencing the incarceration of at least one parent. This decrease in student achievement is—at least partially—the result of the increase in the quantity and quality of the barriers that Black students must overcome to be successful students while having limited parental involvement due, in part, to the incarceration of Black parents. Likewise, excessive and excessively harsh disciplinary policies and practices contribute to a cycle of mass incarcerations because excessive disciplinary practices in schools lead to mass incarceration. Unfortunately, the excessive and disproportionate application of disciplinary policies betrays efforts at ensuring equitable educational opportunities and outcomes for Black students. Intuitively, disrupting the school-to-prison pipeline may also disrupt the mass incarceration of Black people.

One key result of the school-to-prison pipeline is that Black students are assigned a status as second-class citizens.⁵⁸ Michelle Alexander argues that the mass incarceration of Black people is similar to and is a new manifestation of slavery, Jim Crow, and other efforts to construct barriers to Black peoples' pursuit to join in and participate in society.⁵⁹ The criminalization of Black people commences early and is traceable to their experiences in primary and secondary schools. Black students are more likely to find themselves in alternative schools than are White students, and as a result, Black students' path to prison is

⁵⁵ See KIM, *supra* note 31.

⁵⁶ See ALEXANDER, *supra* note 32.

⁵⁷ See generally William Jeynes, *A Meta-Analysis of the Efficacy of Different Types of Parental Involvement for Urban Students*, 47 URB. EDUC. 706 (2012).

⁵⁸ ALEXANDER, *supra* note 32, at 16.

⁵⁹ *Id.*

hastened.⁶⁰ Black students are significantly more likely to be arrested on-campus than are their White counterparts; combined with Latino/a students, Black students comprise almost half of all juvenile arrests.⁶¹ Moreover, only slightly more than one-in-ten students who are incarcerated go on to complete high school in the traditional educational setting and the recidivism rate for students who are arrested is approximately 50 percent within two years of their initial release.⁶²

The school-to-prison pipeline has historical and nefarious roots. Scholars have argued that the evolution of the school-to-prison pipeline is a continuation of the criminalization of Black people, which started with the arrival of enslaved Africans to the United States.⁶³ Other scholars have noted that the school-to-prison pipeline is another form of White Americans' efforts to halt the racial integration of public schools, and is a continuance of state-sanctioned violence against Black people in the United States.⁶⁴ Still, some scholars argue further that the permanence of the school-to-prison pipeline, which contributes to the mass incarceration of Black people, is an example of the ways in which those in power have granted impunity and failed to protect the lives of Black people in the United States. Given these assertions, addressing the school-to-prison pipeline is an extension of the Civil Rights Movement and is necessary to efforts at securing more equitable educational, social, and occupational outcomes for Black people.⁶⁵

III. CONCEPTUALIZING EDUCATION REFORM POLICIES AS A DANGER TO BLACK BOYS

A. *Reframing State Takeover Districts as Education Reform in Light of Student Disciplinary Outcomes*

States have engaged in the takeover of public schools for decades, but there is little evidence that the state takeover of locally governed schools has overcome consistently and persistently low and inequitable opportunities and outcomes for Black and Brown students.⁶⁶ Recent federal legislation address-

⁶⁰ KIM, *supra* note 31.

⁶¹ *Id.*

⁶² *Id.*

⁶³ See Mark P. Fancher, *Born in Jail: America's Racial History and the Inevitable Emergence of the School-to-Prison Pipeline*, 13 J.L. SOC'Y 276 (2011); Tracie R. Porter, *The School-to-Prison Pipeline: The Business Side of Incarcerating, Not Educating, Students in Public Schools*, 68 ARK. L. REV. 55, 64–66 (2015).

⁶⁴ See Lia Epperson, *Brown's Dream Deferred: Lessons on Democracy and Identity from Cooper v. Aaron to the "School-to-Prison Pipeline"*, 49 WAKE FOREST L. REV. 687 (2014).

⁶⁵ See Deborah N. Archer, *Introduction: Challenging the School-to-Prison Pipeline*, 54 N.Y.L. SCH. L. REV. 867 (2009).

⁶⁶ Madlene P. Hamilton et al., *A Nostrum of School Reform? Turning Around Reconstituted*

ing education and educational equity has specifically encouraged education reform to assist school districts that struggle to obtain or maintain adequate test scores despite a lack of empirical evidence citing the efficacy of state takeovers of locally governed schools.⁶⁷ Moreover, federal education policy's movement toward education reform that calls for the state takeover of locally governed schools and school districts is problematic because of the lack of evidence suggesting that such takeovers are able to provide equitable educational opportunities and produce equitable educational outcomes for Black male students.⁶⁸

The No Child Left Behind Act of 2001 (NCLB) was the federal government's most aggressive attempt at encouraging nationally significant education reform; however, NCLB had severe shortcomings in its approach to pursuing equitable educational opportunities and outcomes for Black students. NCLB's most apparent oversight was the legislation's failure to recognize that identical interventions might produce dissimilar results in different contexts.⁶⁹ Through NCLB, Congress intended to assure that states, through their state educational agencies, would hold schools and school districts that failed to meet rigid measures of academic expectations, chiefly assessed by students' test scores, strictly accountable for closing academic gaps between students of color and White students.⁷⁰ States, in response to NCLB, subjected locally governed schools and school districts that failed to meet adequate yearly progress⁷¹ to harsh sanctions, including states' takeover of public schools and school districts.⁷² School choice was one of many education reform options that NCLB granted states seeking to takeover locally governed public schools and school districts.⁷³ Although only one option, school choice proved to be the most popular method of pursuing accountability, and ultimately, educational equity, for most states.⁷⁴ Congress'

Urban Texas High Schools, 49 URB. EDUC. 182, 187 (2014).

⁶⁷ See Robert A. Garda, Jr. & David S. Doty, *The Legal Impact of Emerging Governance Models on Public Education and Its Office Holders*, 45 URB. LAW. 21, 23 (2013) (describing No Child Left Behind's governance requirements); Osamuda R. James, *Opt-out Education: School Choice as Racial Subjugation*, 99 IOWA L. REV. 1083, 1090 (2014) (citing examples of federal education reform legislation).

⁶⁸ See Hamilton, *supra* note 66.

⁶⁹ Kevin G. Welner, *Can Irrational Become Unconstitutional? NCLB's 100% Presuppositions*, 38 EQUITY & EXCELLENCE IN EDUC. 171, 172 (2005).

⁷⁰ See Joseph O. Oluwole & Preston C. Green, III, *State Takeover of School Districts: Race and the Equal Protection Clause*, 42 IND. L. REV. 343, 345-46 (2009).

⁷¹ In general, each state is allowed to determine what adequate yearly progress means for its school districts and schools. Under NCLB, these measures were conducted—for the most part—with an emphasis on the results of standardized tests.

⁷² Oluwole, *supra* note 70, at 345-46.

⁷³ See James, *supra* note 67.

⁷⁴ *Id.*

promulgation of NCLB did not begin the nation's movement to high-stakes accountability or school and school district takeover,⁷⁵ nor was NCLB the end of states' use of drastic accountability measures against locally governed schools and school districts.

President Barack Obama's Race to the Top (RTTT), the education component of the American Recovery and Restoration Act of 2009, prompted states to pursue and implement additional education reform strategies, including those that broaden states' powers to take over locally governed schools and school districts.⁷⁶ Both the promulgation of policies pursuing the state takeover of locally governed schools and school districts and the actual state takeover of public schools and school districts have proliferated because of federal intervention.⁷⁷ The most recent version of the Elementary and Secondary Education Act, President Obama's Every Student Succeeds Act (ESSA), offered locally governed schools and school districts little relief from threats of actual state takeovers as a method of pursuing education reform. In many ways, ESSA was the Obama administration's answer to and replacement for President Bush's NCLB.

Undoubtedly, state takeovers of locally governed schools and school districts are a critical component of the education reform movement,⁷⁸ but state takeovers of locally governed schools and school districts as a result of consistently inadequate test scores are a relatively new phenomenon.⁷⁹ Initially, the state takeover of a school or school district was the response to a school district's financial mismanagement or cases of other illegal activities at the local level.⁸⁰ It is typical for states to report intentions of stabilizing the finances of school districts when conducting takeovers of locally governed schools and school districts.⁸¹ However, there is still no evidence that the state takeover of locally governed schools and school districts—which are predominately Black—produces dramatic gains, equitable educational opportunities, or equitable educational outcomes for students in districts subject to state takeover.⁸² State takeovers of locally governed schools and school districts have instead led to mixed academic

⁷⁵ See Jonathan C. Augustine & Craig M. Freeman, *Grading the Graders and Reforming Reform: An Analysis of the State of Public Education Ten Years After No Child Left Behind*, 57 LOY. L. REV. 237, 249 (2011).

⁷⁶ See Hamilton, *supra* note 66.

⁷⁷ Kenneth K. Wong & Francis X. Shen, *Measuring the Effectiveness of City and State Takeover as a School Strategy*, 78 PEABODY J. EDUC. 89, 92 (2003).

⁷⁸ See Oluwole, *supra* note 70, at 343.

⁷⁹ Wong, *supra* note 77, at 93.

⁸⁰ *Id.*

⁸¹ See Oluwole, *supra* note 70, at 343.

⁸² PATRICIA CAHAPE HAMMER, CORRECTIVE ACTION: A LOOK AT STATE TAKEOVERS OF URBAN AND RURAL DISTRICTS, IN AEL POLICY BRIEFS 4 (2005).

results for students.⁸³ While the academic results of the state takeover of locally governed schools and school districts are still in question, the reconstitution of locally governed schools and school districts has led to instability in educational leadership in affected schools and school districts.⁸⁴ Ironically, instability of leadership could possibly explain the inconsistent academic results of schools subject to the state takeover of locally governed schools and school districts.⁸⁵

The federal government did more than state its preference for state takeovers of locally governed schools and school districts in federal legislation. The federal government has dictated what states should do after conducting state takeovers of public schools. Federal education policy strongly suggests the conversion of locally governed schools into charter schools.⁸⁶ Specifically, federal policy suggests the use of fresh start provisions for converting locally governed schools into charter schools.⁸⁷ Fresh start provisions erase a school's and a community's history and culture in an effort to remove the political influence of current and past students, parents, and stakeholders. NCLB's fresh start provisions required that states restructure schools with consistently and persistently low test scores.⁸⁸ The fresh start provisions granted states broad discretion to convert schools into charter schools, replace all or most of the staff and faculty, contract with private providers to operate schools subject to state takeover, or to unilaterally seize control of locally governed schools.⁸⁹ States participating in the takeover of locally governed schools and school districts generally allow new operators of schools taken over by the state to replace community norms and replace those norms with new norms.⁹⁰ The exchange of norms does not typically involve input from the affected community.⁹¹

⁸³ James G. Cibulka, *Educational Bankruptcy, Takeovers, and Reconstitution of Failing Schools*, 102 Y.B. NAT'L SOC'Y STUD. EDUC. 249, 263 (2003).

⁸⁴ Hamilton, *supra* note 66, at 200.

⁸⁵ See Ashley Miller, *Principal Turnover and Student Achievement*, 36 ECON EDUC. REV. 60 (2013) (finding that student achievement data decreases in the years after the departure of a principal before rebounding in the three years after the arrival of the new principal). Still, Miller finds that principal turnover does not ultimately lead to students' dramatically higher academic performance. *Id.*

⁸⁶ See Jamie Gottlieb, *Harmonizing No Child Left Behind's Restructuring Provision and State Charter School Laws: The Need for Autonomy, Flexibility, and Adequate Resources*, 39 SETON HALL L. REV. 191, 210 (2009).

⁸⁷ *Id.*

⁸⁸ Heather Price, *Does No Child Left Behind Really Capture School Quality? Evidence from an Urban School District*, 24 EDUC. POL'Y 779, 781-82 (2010).

⁸⁹ *Id.* (stating the potential consequences for schools falling short of the mandates of the No Child Left Behind Act).

⁹⁰ *Id.*

⁹¹ See Steven L. Nelson & Heather N. Bennett, *Are Black Parents Locked Out of*

Education reform strategies have resulted in the unchecked expansion of charter schools⁹² and other schooling structures that create obstacles and erase Black peoples' involvement in education policy.⁹³ In the context of New Orleans's public schools, education reform policies resulted in an all-charter state takeover district⁹⁴ and a city that might soon be entirely charter.⁹⁵ Education reform continues to be forced upon New Orleans' families despite a lack of statistical evidence suggesting that market-based reforms increase student academic outcomes.⁹⁶ Some states, like Louisiana, often do not equitably share data needed to assess the impact of education reform strategies which complicates discussions necessary to create an educational system that equitably benefits all students.⁹⁷ Thus, some scholars openly question the government's claims that education reform policies are a pathway to equitable educational opportunities and outcomes and a remedy for consistently and persistently low educational, social, and occupational outcomes for Black students, parents, and communities.

Moreover, states frequently revise accountability scoring formulas, which interferes with efforts to evaluate the longitudinal growth of schools and school districts subject to state takeover.⁹⁸ As a result of the instability caused by the frequently changing scoring formulas, which overcomplicates data analysis, stakeholders in communities subject to state takeover or who have experienced state takeover of locally governed schools and school districts are placed in an untenable position. There is no clear guidance as to what these districts must do to avert state takeover, or in the alternative regain authority of schools formerly under local control. It is impossibly difficult to determine the longitudinal performance of schools or school districts that have been taken over by the

Challenging Disproportionately Low Charter School Board Representation? Assessing the Role of the Federal Courts in Building a House of Cards, 12 DUKE J. CON. L. & PUB. POL'Y 153 (2016) [hereinafter *House of Cards*].

⁹² See Danielle R. Holley-Walker, *Educating at the Crossroads: Parents Involved, No Child Left Behind and School Choice*, 69 OHIO ST. L.J. 911 (2008).

⁹³ See *House of Cards*, *supra* note 91.

⁹⁴ See Augustine, *supra* note 75.

⁹⁵ *But see* Danielle Dreilinger, *New Orleans' Final Direct-Run Schools Won't All Be Charters—For Now*, NEW ORLEANS METRO EDUC. NEWS (Apr. 20, 2017), http://www.nola.com/education/index.ssf/2017/04/no_charter_schools_new_orleans.html (explaining that poor external reviews stopped Superintendent Henderson Lewis, Jr.'s efforts to charter all remaining locally governed public schools in New Orleans).

⁹⁶ See Martha Abele MacIver & Douglas MacIver, *Which Bets Paid Off? Early Findings on the Impact of Private Management and K-8 Conversion Reforms on the Achievement of Philadelphia Students*, 23 REV. POL'Y RES. 1077 (2006).

⁹⁷ See generally ADRIENNE D. DIXSON, *REVIEW OF TEN YEARS IN NEW ORLEANS: PUBLIC SCHOOL RESURGENCE AND THE PATH AHEAD* (2015).

⁹⁸ *Id.*

state in quantitative terms, but qualitatively, education reform advocates do not typically choose to educate their children in the very schools that they establish in communities subject to state takeover.⁹⁹ This suggests that schools that education reform advocates establish in historically and contemporaneously marginalized, oppressed, and disenfranchised communities may not be suitable for more privileged children.¹⁰⁰

The proliferation of charter schools and the reemergence of some schools from reform status have given rise to portfolio school districts. Portfolio school districts are school districts that combine traditional public school options with education reform-oriented schooling options.¹⁰¹ There is some promise for education reform strategies to address the racial subjugation in public schools since some researchers have found that district-based education reform efforts¹⁰² and mayoral takeovers¹⁰³ (which more closely resemble local education reform efforts rather than state takeovers) are more effective at producing more equitable educational outcomes for students of color than state takeovers of public schools.

There is no evidence that supports claims that contemporary education reform policies are effective at addressing race and racism in the educational system, and the data that does exist is not promising.¹⁰⁴ For example, NCLB purported to emphasize instructional practices,¹⁰⁵ gaining the support of scholars and policy analysts as a tactic for pursuing educational equity.¹⁰⁶ The result of NCLB was contrary to the state goals—the law led to the hiring of novice, inexperienced educators in school districts that most desperately needed our best

⁹⁹ See Deborah M. Keisch & Tim Scott, *U.S. Education Reform and the Maintenance of White Supremacy Through Structural Violence*, 3 *LANDSCAPES OF VIOLENCE* (2015).

¹⁰⁰ *Id.* In most cases, school choice deconstructs school districting policies, allowing students to enroll in any school in the citywide or countywide school district in which the student lives. Thus, even if education reform advocates live outside of the traditional attendance of the reform-oriented schools, the children of the education reform advocates are still eligible for attendance at the education reform-oriented school.

¹⁰¹ See PAUL HILL ET AL., *PORTFOLIO SCH. DISTRICTS FOR BIG CITIES: AN INTERIM REPORT* (2009).

¹⁰² See R. ZIMMER ET AL., *EVALUATION OF THE EFFECTS OF TENN.'S ACHIEVEMENT SCH. DISTRICT ON STUDENT TEST SCORES* (2015); Vaughan Bytnes, *Getting a Feel for the Market: The Use of Privatized School Management in Philadelphia*, 115 *AM. J. OF EDUC.* 437 (2009); Right to Remain Silent, *supra* note 44.

¹⁰³ Wong, *supra* note 77, at 93.

¹⁰⁴ See WILLIAM J. MATHIS, *NCLB'S ULTIMATE RESTRUCTURING ALTERNATIVES: DO THEY IMPROVE THE QUALITY OF EDUCATION?* (2009).

¹⁰⁵ See Augustine, *supra* note 75.

¹⁰⁶ See JULIE F. MEAD & PRESTON C. GREEN, III, *CHARTERING EQUITY: USING CHARTER SCHOOL LEGISLATION AND POLICY TO ADVANCE EQUAL EDUCATIONAL OPPORTUNITY* (2012).

educators.¹⁰⁷ Perhaps more troubling is the fact that NCLB resulted in the loss of scores of veteran educators, many who feared the impending consequences of education reform.¹⁰⁸ Likewise, the state takeover of locally governed schools and school districts most often results in increased expenditures on students (per capita) as compared to traditional public schools when considering all funding sources.¹⁰⁹ But, most of the increased expenditures do not go to instruction, the supposed primary task of schools.¹¹⁰

It is possible that NCLB was ill-conceived and on a path to failure from its inception. During the early formulations of the law, scholars and policy analysts forewarned of the potential consequences of focusing on only one measure of student, school, and school district achievement.¹¹¹ Education reform-oriented policies, such as NCLB, did not increase test performance at the national level, a fairly restrictive definition of academic achievement; furthermore, these policies fell short of closing outcome and opportunity gaps at significant rates.¹¹² Likewise, education reform-oriented policies have contributed to the collapse of graduation rates for students of color.¹¹³ Therefore, it is reasonable to accept the argument that education reform policies aid and abet the school-to-prison pipeline by only holding schools and school districts accountable for test scores, which are frequently gamed by excluding undereducated or undesirable students while simultaneously not censuring schools and school districts for low graduation rates.¹¹⁴ To this point, some scholars have accused the government of seeking only to assure the public that meaningful accountability through education reform is occurring, while in actuality providing only symbolic—rather than substantive—means of addressing inequity in education.¹¹⁵

¹⁰⁷ See Hamilton, *supra* note 66.

¹⁰⁸ *Id.*

¹⁰⁹ Wong, *supra* note 77.

¹¹⁰ *Id.*

¹¹¹ See Damon T. Hewitt, *Reauthorize, Revise, and Remember: Refocusing the No Child Left Behind Act to Fulfill Brown's Promise*, 30 YALE L. & POL'Y REV. 169 (2011) [hereinafter Hewitt, *No Child Left Behind*].

¹¹² *Id.*

¹¹³ See Jason P. Nance, *School Surveillance and the Fourth Amendment*, 2014 WIS. L. REV. 79 (2014).

¹¹⁴ *Id.*

¹¹⁵ See James G. Cibulka, *Educational Bankruptcy, Takeovers, and Reconstitution of Failing Schools*, 102 Y.B. NAT'L SOC'Y STUD. EDUC. 249, 263 (2003).

B. *Rebutting State Takeover Districts and Education Reform as a Civil Right to Quality Education*

Scholars debate the efficacy of education reform policies to produce equitable educational outcomes. Some scholars have argued that education reform is working for Black students although there is not consistent and reliable evidence that education reform-oriented policies have moved the nation in the direction of educational equity.¹¹⁶ Other scholars counter that education reform policies deprive Black parents and communities of influence over and input into education policy and the politics of education, contrary to previous installments of civil rights-based education policy.¹¹⁷ The Elementary and Secondary Education Act, ESEA, the precursor to NLCB, targeted marginalized and disenfranchised school districts for federal funding in an effort to secure equitable educational opportunities and outcomes for students at risk of oppression, marginalization, and disenfranchisement.¹¹⁸ Other scholars have expressed concern that education reform advocates' unfettered reliance on parental choice has resulted in inequitable outcomes for students¹¹⁹ and in some cases have reversed and stymied movements towards educational equity.¹²⁰ A growing body of work on education reform policies indicates a consensus that these policies replicate the inequities that exist in education and other societal institutions.¹²¹ At the same time, the education reform movement has kidnapped the language of traditional civil rights and social justice advocacy to dupe marginalized and

¹¹⁶ See, e.g., Lokia M. Scott et al., *Dispelling Disparities for African American Male Students: A Review of Three Successful Charter School Models*, 5 J. OF AFR. AM. MALES IN EDUC., Spring 2014; see also Jonathan C. Augustine, *The Interest Convergence of Education Reform and Economic Development: A Response to "the State of Our Unions"*, 51 UNIV. OF LOUISVILLE L. REV. 407 (2013).

¹¹⁷ See generally Kevin Lawrence Henry, Jr., "Locking the Doors Before We Get the Keys": *Racial Realities of the Charter School Authorization Process in Post-Katrina New Orleans*, 30 EDUC. POL'Y 218 (2015) (finding that local, Black parents and communities were often unsuccessful in their bids to secure the right to operate charter schools, but larger, national educational and charter management organizations, run chiefly by White Americans, experienced much higher rates of success in obtaining charters).

¹¹⁸ See Hewitt, *No Child Left Behind*, *supra* note 111.

¹¹⁹ See MEAD, *supra* note 106.

¹²⁰ See generally Elizabeth K. Jeffers, *Discipline for Students in the Recovery School District (RSD) of New Orleans*, 12 POL'Y FUTURES IN EDUC. 1070 (2014) (discussing the intersections of race, (dis)ability, and education policy in New Orleans' Recovery School District. Jeffers argues that a unique combination of oppressions placed Black students with special educational needs in jeopardy of exclusion from participating in the city's public schools).

¹²¹ Steven L. Nelson, *Racial Subjugation By Another Name: Assessing the Impact of State Takeover Districts on the School-to-Prison Pipeline*, 9 GEO. J.L. & MODERN CRIT. RACE PERSP. I, 9 (2017) [hereinafter *Racial Subjugation*].

disenfranchised communities into accepting school choice as the modern civil rights struggle.¹²²

Racism, to no surprise, is a paramount concern for Black parents who choose to leave traditional public schools for education reform-oriented schools.¹²³ Black parents may find education reform policies appealing because traditionally Black Americans' struggle for educational equity has involved the acceptance of very few options, rather than Black Americans' wholesale acceptance of the argument that school choice is a civil right.¹²⁴ Moreover, Black Americans do not have a positive relationship with the traditional public schooling structures of the United States.¹²⁵ Black students often aspire to be active members of their schooling communities, but structural issues complicate and disrupt their efforts.¹²⁶ For instance, the disproportionate representation of Black students in special education is an example of the oppression that Black students face in public schools.¹²⁷

In the context of special education, Black students are overrepresented in the soft disability categories (emotional, cognitive, and behavioral), those disabilities that are more subjectively identified and are often more stigmatized in schools and society.¹²⁸ On the other hand, Black students are underrepresented in the hard disability categories (physical impairments and disabilities that are medically diagnosed), those disabilities that are more objectively identified and are often less stigmatized in schools and society.¹²⁹ Black students are also more likely to receive harsh disciplinary sanctions in traditional public schools, irrespective of the contextual or mitigating factors.¹³⁰ Black students are even more likely to be the recipient of disproportionately harsh and frequent discipline in predominately Black school settings that would be considered safe if the settings were not predominately Black.¹³¹ Because traditional public schools have

¹²² See Right to Remain Silent, *supra* note 44.

¹²³ Garvey Lundy & Anna Mazama, "I'm Keeping My Son Home": African American Males and the Motivation to Home School, *J. AFR. AM. MALES IN EDUC.* 53, 61 (2014).

¹²⁴ *Id.*

¹²⁵ See James, *supra* note 67.

¹²⁶ See Tyrone C. Howard, *Who Really Cares? The Disenfranchisement of African American Males in PreK–12 Schools: A Critical Race Theory Perspective*, 110 *TCHR. COLL. REC.* 954 (2008).

¹²⁷ Steven L. Nelson, *Special Education Reform Policies and the Permanence of Oppression: A Critical Race Case Study of Special Education Reform in Shelby County, Tennessee*, 60 *HOW. L.J.* 201, 215–16 (2017) [hereinafter Special Education Reform].

¹²⁸ James, *supra* note 67, at 1108.

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ *Id.*

served as a pathway to oppression, marginalization, and disenfranchisement for Black students, Black parents are likely seeking any, rather than a perfect alternative to traditional public school in the school choice and education reform movements.¹³²

Each state has the supreme authority to set education policy given the structure of the United States' federalism¹³³; thus, federal education reform efforts must overcome disparate state level education policies in order to bring all students to educational parity¹³⁴ (as defined as equal educational, social, and occupational outcomes).¹³⁵ Currently, each state is allowed to set its own criteria for naming and identifying what counts as educational achievement and excellence.¹³⁶ States have often created criteria that casts high minority districts as incapable of, or reluctant to cure underperformance, even as school districts with disproportionately higher numbers of students who are racial and ethnic minorities report test scores that do not dramatically diverge from districts with disproportionately lower numbers of students who are racial and ethnic minorities.¹³⁷ Specifically, Black students' performance continues to trail most, if not all, other ethnic and racial groups nationally in educational outcomes.¹³⁸ Even as student outcomes have worsened across the board, the lowering of Black students' academic outcomes has been particularly pronounced.¹³⁹

Black parents and students may prefer alternatives to traditional public schooling options as a result of the government's failure to provide viable and meaningful opportunities for Black communities' success in neighborhood schools (as opposed to a lack of school choice).¹⁴⁰ But, there is no evidence that education reform policies have closed opportunity gaps between Black and White students, notwithstanding the federal government's emergence as an agenda setter in education policy.¹⁴¹ According to one study in New Jersey,

¹³² See Lundy, *supra* note 123.

¹³³ See Kimberly J. Robinson, *The High Cost of the Nation's Current Framework for Education Federalism*, 48 WAKE FOREST L. REV. 287 (2013) (detailing further discussion of how federalism can and often does disrupt movements towards educational equity).

¹³⁴ See Lisa Bass & Cynthia Gerstl-Pepin, *Declaring Bankruptcy on Educational Equity*, 25 EDUC. POL'Y 908 (2011).

¹³⁵ Racial Subjugation, *supra* note 121, at 35.

¹³⁶ See David Hursh, *Assessing No Child Left Behind and the Rise of Neoliberal Education Policies*, 44 AM. ED. RES. J. 493, 504–06 (2007).

¹³⁷ *Id.*

¹³⁸ See Augustine, *supra* note 75, at 249.

¹³⁹ *Id.*

¹⁴⁰ See Julian Vazquez Helig, *Reforming the Refrain: Choice as a Civil Rights Issue*, 1 TEX. EDUC. REV. 83 (2013).

¹⁴¹ See Suzanna Klaf & Mei-Po Kwan, *The Neoliberal Straitjacket and Public Education in*

charter schools in Newark demonstrated only mixed academic results when adjusting for students' test scores¹⁴² entering those same charter schools.¹⁴³

C. Different Policies, Same Agenda: Education Reform, State Takeover Districts, and Privatization

Urban and high-minority school districts have historically had to fight to combat the reduction of financial support of public education.¹⁴⁴ Recently, education reform policies have provided disproportionate sums of federal aid to charter schools than traditional public schools.¹⁴⁵ Thus, traditional public schools are required to do more with less or fail to meet states' academic requirements and become subject to state takeover policies.¹⁴⁶ When traditional public schools are successful at this balancing act, education reform advocates argue that it is evidence that reducing spending on education improves outcomes. However, if traditional public schools fail at balancing more needs and requirements with less funding, education reform advocates argue for replacing traditional public schools with privatized education models.¹⁴⁷ Education reform policies and practices have been more than a divestment from public education, these policies and practices have served to greatly expand private industry's profits in education, which is traditionally regarded as a public good.¹⁴⁸ Not surprisingly, education reform-oriented consultancies have expanded significantly in the contemporary era of education reform.¹⁴⁹

the United States: Understanding Contemporary Education Reform and its Urban Implications, 31 *URB. GEOGRAPHY* 194 (2010); Shaun Michael Black, *An Examination of Urban School Governance Reform in Detroit Public Schools, 1999–2014* (2016) (unpublished Ph.D. dissertation, Wayne State University) (on file with author).

¹⁴² This is a discussion of value added measures. To give an example, the test scores for School A might average at about 90 percent. The test scores for School B might average about 70 percent. If students, on average, entered School A at 85 percent and students at School B, on average, entered at 50 percent, School B is better serving its students. More specifically, School A's achievement appears higher because its pool of students was stronger than School B's. It's an argument about creaming the best students from traditional public schools.

¹⁴³ See Jason M. Barr, Alan R. Sadovnik & Louisa Visconti, *Charter Schools and Urban Education Improvement: A Comparison of Newark's District and Charter Schools*, 38 *THE URB. REV.* 291 (2006) (finding that some charter schools improved the academic outcomes of enrolled students while others performed equal to or worse than locally governed schools).

¹⁴⁴ See Klaf, *supra* note 141.

¹⁴⁵ See Keisch, *supra* note 99.

¹⁴⁶ See Racial Subjugation, *supra* note 121.

¹⁴⁷ See Hamilton, *supra* note 66.

¹⁴⁸ *Id.*

¹⁴⁹ See Rachael Gabriel & Jessica Nina Lester, *Race to the Top Era of Education Consulting: A Call to Reform the Reformers*, 5 *INT'L J. OF EDUC. POL'Y* 33 (2011).

Efforts at education reform have proven relatively successful at making public education a private enterprise.¹⁵⁰ Despite the fact that more money is funneled into these educational consultancies, very little money is directed to areas that directly impact student performance.¹⁵¹ Privatized schools, such as charter schools—which are privately operated but publicly funded¹⁵²—receive more money than magnet schools, a publicly funded and publicly operated strategy that has consistently produced more and better academic gains for Black communities.¹⁵³ There has been a movement towards governing schools as if they were for-profit businesses that has occurred simultaneously to a shift in funding from publicly run to privately run public schools.¹⁵⁴ The education reform movement has aided in enshrining the economic systems that contribute to the oppression of Black Americans.¹⁵⁵ Education reform policies divert money from public education to private industry, but education reform policies also focus on career-readiness, often limiting Black students—those most likely to be impacted by punitive education reform policies—to career expectations and trajectories that exist in the current economic context.¹⁵⁶ As a result, Black students subjected to punitive education reform policies are not trained to become job creators, business leaders, or agenda setters for rising occupational trends; therefore, Black students are predestined to a career of servitude that is subject to the whims of the market.¹⁵⁷

At the federal level, education reform policies are so intertwined with market-based reforms that some policies explicitly require school choice as a part of education reform.¹⁵⁸ The federal preference for market-based education reform policies is abundantly clear from the government's use of economic language to justify, if not mandate, school choice.¹⁵⁹ President Obama's first secretary of edu-

¹⁵⁰ See Henry A. Giroux & Kenneth Saltman, *Obama's Betrayal of Public Education? Arne Duncan and the Corporate Model of Schooling*, 9 CULTURAL STUD. CRITICAL METHODOLOGIES 772 (2009).

¹⁵¹ See Gabriel, *supra* note 149.

¹⁵² See Preston C. Green III et al., *Charter Schools, Students of Color and the State Action Doctrine: Are the Rights of Students of Color Sufficiently Protected?*, 18 WASH. & LEE J. C.R. & SOC. JUST. 253 (2012).

¹⁵³ See Erica Frankenberg & Genevieve Siegel-Hawley, *Choosing Diversity: School Choice and Racial Diversity in the Age of Obama*, 6 STAN. J. OF C.R. & C.L. 219 (2010).

¹⁵⁴ See Augustine, *supra* note 75; Giroux, *supra* note 150.

¹⁵⁵ See Gabriel, *supra* note 149.

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

¹⁵⁸ See Erika K. Wilson, *Gentrification and Urban Public School Reforms: The Interest Divergence Dilemma*, 118 W. VA. L. REV. 677 (2015).

¹⁵⁹ See James, *supra* note 67; Gabriel, *supra* note 149.

cation, Arne Duncan, applied corporate terminology to describe his education reform agenda during his tenure as chief of the Chicago Public Schools.¹⁶⁰ There is very little evidence that there is a need to urgently deconstruct the public school system although education reform advocates routinely resort to hyperbolic rhetoric suggesting that there is such evidence.¹⁶¹ Forty years of standardized test scores, the holy grail of education reform advocates, suggests very marginal movements in student performance.¹⁶²

Despite the lack of tangible results, ledgers in the business community have boomed as a result of education reform policies.¹⁶³ School choice policies and practices that prioritize business profits over educational equity, serve as a form of racial subjugation. These policies and practices disrupt communities and allow administrators from outside the community to view students, parent, and community stakeholders as disempowered consumers.¹⁶⁴ In a concrete manner, this process marginalizes, disenfranchises, and oppresses Black Americans. For example, the state takeover process in Michigan was privately funded with a state-appointed board. That board usurped the power of the elected, predominately Black school board in Detroit, and left students, parents, and community members with little to no influence over education policy.¹⁶⁵

Actions like those in Detroit fuel arguments that education reform policies are part of multifaceted efforts to displace and replace Black urban dwellers.¹⁶⁶ Both federal and state policies that caused and maintained White flight¹⁶⁷ from urban areas have yielded to federal and state policies that allow states to takeover public schools and mute Black political power in urban areas.¹⁶⁸ Overt and covert social policies and practices that promoted White flight caused the significant loss of student populations and the concomitant loss of tax dollars

¹⁶⁰ See Giroux, *supra* note 150.

¹⁶¹ See Gabriel, *supra* note 149.

¹⁶² *Id.*

¹⁶³ *Id.*

¹⁶⁴ See James, *supra* note 67.

¹⁶⁵ See David Arsen & Mary L. Mason, *Seeking Accountability Through State-Appointed Emergency District Management*, 27 EDUC. POL'Y 248 (2013).

¹⁶⁶ See Keisch, *supra* note 99.

¹⁶⁷ In this context white flight refers to the “exodus of white families from urban schools.” Typically, white flight occurs when middle class, and usually white, families leave urban areas to avoid enrolling the families’ children in increasingly or predominately Black public school systems. In general, research on White flight suggests that there is a positive statistical relationship between increases in Black student enrollment and the departure of White students from public schools in urban areas. See Steven L. Nelson, *Still Serving Two Masters? Evaluating the Conflict Between School Choice and Desegregation Policies Under the Lens of Critical Race Theory*, 26 B.U. PUB. INT. L.J. 43, 55 (2017).

¹⁶⁸ See Wilson, *supra* note 158.

earmarked for education.¹⁶⁹ Therefore, it is unsurprising that urban school districts like Detroit, Memphis, and New Orleans are in financial straits.¹⁷⁰ In Detroit, Memphis, and New Orleans, student losses to suburban school districts have been compounded by Black student enrollments in charter schools, a key effect of modern education reform policies and practices.¹⁷¹

Education reform policies and practices are a part of middle-class White gentrifiers' efforts to avail themselves of urban places and spaces while escaping and ignoring Black peoples' urban living realities, which in part means troubled schools.¹⁷² These White gentrifiers are afforded the opportunity to opt-out of some, usually predominately Black, educational settings because contemporary education reform policies force urban school leaders to implement school choice to attract White gentrifiers.¹⁷³ Gentrification is a driving force behind school choice because White middle-class families are returning to the inner-city and are expecting to have access to schools that sustain White privilege and supremacy by indicating their access to educational options.¹⁷⁴ In this constructed reality of privilege and supremacy, Black people, and their culture need to be fixed or otherwise altered for the better.¹⁷⁵ Similarly, there is some cognitive dissonance in this construct since gentrification is purportedly about urban renewal or urban revitalization, and Black schools and school districts are not necessarily being assaulted, displaced, or eradicated through nefarious intentions.¹⁷⁶

Notwithstanding its euphemistic disposition, gentrification, also known as urban renewal, is violence against Black people. Since to a great extent it is a form of commodifying Black bodies for the sake of sustaining White privilege and supremacy, we should probably refer to gentrification and its parallel policies in education reform by a more appropriate moniker, urban-racial cleansing. Gentrification policies and practices flagrantly intend to displace marginalized, disenfranchised, and oppressed Black people in order to make space for White populations to fulfill their whimsical desires.¹⁷⁷ Not surprisingly, the

¹⁶⁹ See Arsen, *supra* note 165.

¹⁷⁰ *Id.*

¹⁷¹ *Id.*

¹⁷² See Tomeka Davis & Deidre Oakley, *Linking Charter School Emergence to Urban Revitalization and Gentrification: A Socio-Spatial Analysis of Three Cities*, 32 J. OF URB. AFF. 81 (2013).

¹⁷³ See Wilson, *supra* note 158.

¹⁷⁴ *Id.*

¹⁷⁵ *Id.*

¹⁷⁶ *Id.*

¹⁷⁷ See Davis, *supra* note 172.

business community's investment in market-based education reform policies and practices often coincides with efforts at urban-racial cleansing.

D. No Seat at the Table: Education Reform, State Takeover Districts, and the Elimination of the Ability of Black People to Self-Govern

Setting aside the intentions of state takeover policies, education reform strategies that rely too heavily on standardized testing often result in the censuring of high-minority, low-income school districts in a disproportionate manner.¹⁷⁸ Moreover, proponents of education reform seek to address those who have fallen victim to oppression, marginalization, and disenfranchisement, but proponents of education reform do not often seek to address the systemic issues that create disparate educational outcomes.¹⁷⁹ Proponents of education reform policies operate under the assumption that the educational outcomes for poorer, Black students, parents, and communities in urban settings will improve if there is only access to the market-based choices that are available to wealthier, suburban White parents.¹⁸⁰ These same education reform advocates and policies fail to pursue meaningful choice for poorer, Black students, parents, and communities in urban settings. Given that contemporary education reform policies are concerned with accountability and improved student test scores,¹⁸¹ the tangible embodiment of education reform is a set of federal policies that have coerced overextended school districts into improving students' test scores, even if by illegal means.¹⁸²

Likewise, education reform proponents assert that education reform policies could increase parental involvement,¹⁸³ but education reform policies, especially those policies implementing school choice, are likely to remove democratic control of public schools, which undermines Black parents' ability to effectuate change through the democratic process.¹⁸⁴ Unsurprisingly, education reform-oriented scholars have unabashedly called for the replacement of elected school boards with private school boards with no political accountability, under the assumption that such an effort would increase student test scores.¹⁸⁵ Education reform policies and practices attenuate the powers of locally elected school

¹⁷⁸ See Klaf, *supra* note 141.

¹⁷⁹ See Arsen, *supra* note 165.

¹⁸⁰ See Wilson, *supra* note 158.

¹⁸¹ See Gottlieb, *supra* note 86.

¹⁸² See Klaf, *supra* note 141.

¹⁸³ See Augustine, *supra* note 75.

¹⁸⁴ See Aaron Jay Saiger, *The Last Wave: The Rise of the Contingent School District*, 84 N.C. L. REV. 857 (2005).

¹⁸⁵ See MacIver, *supra* note 96.

boards in relation to the governance of schools, and this attenuation undermines the basic principles of democracy.¹⁸⁶ In no uncertain terms, Black students, parents, and community members' desires are as disregarded in the education reform movement as they are in traditional public schools or any other political process in the United States.¹⁸⁷ In particular, education reform advocates do not seriously consider the inputs, desires, and complaints of Black students, families, and communities,¹⁸⁸ and as a result of this, Black students, families, and communities are disenfranchised, marginalized, and oppressed.¹⁸⁹

At their cores, education reform policies operate to reform school district governance structures, summarily replacing existing decisionmakers with new educational policy powerbrokers.¹⁹⁰ The implementation of education reform policies disproportionately displaces Black educational policy power structures, replacing them with political structures that are dominated by White decisionmakers.¹⁹¹ Furthermore, state takeover policies have the effect of marginalizing and disenfranchising Black communities since the majority of school districts subjected to state takeover have been predominately composed of minorities.¹⁹² Those most impacted by the state takeover of public schools are not likely to have substantial and significant input into the development of policies and procedures aimed at education reform.¹⁹³ Moreover, those most affected by education reform policies are likely to see policies enacted that directly contradict their expressed desires.¹⁹⁴ Black education policymakers, who are most likely to be impacted by state takeover policies, report suspicions of being targeted for state takeover.¹⁹⁵ The education reform movement has unleashed nothing short of an assault on Black Americans' right to participate in education policy and

¹⁸⁶ See James, *supra* note 67.

¹⁸⁷ *Id.*

¹⁸⁸ See generally ELIZABETH USEEM ET AL., *THE ROLE OF DISTRICT LEADERSHIP IN RADICAL REFORM: PHILADELPHIA'S EXPERIENCE UNDER THE STATE TAKEOVER, 2001–2006* (2006).

¹⁸⁹ See Right to Remain Silent, *supra* note 44.

¹⁹⁰ See Garda, *supra* note 67; Gottlieb, *supra* note 86.

¹⁹¹ See Steven L. Nelson, *Killing Two Achievements with One Stone: The Intersectional Impact of Shelby County on the Rights to Vote and Access High Performing Schools*, 13 HASTINGS RACE & POVERTY L.J. 225 (2016) [hereinafter *Killing Two Achievements*]; House of Cards, *supra* note 91; Right to Remain Silent, *supra* note 44.

¹⁹² See LIZ ARASIM, *STATES' INTERVENTIONS IN SCH. DISTRICTS* (1999); Arsen, *supra* note 165; Holley-Walker, *supra* note 92; House of Cards, *supra* note 91; *Killing Two Achievements*, *supra* note 191; Right to Remain Silent, *supra* note 44; Oluwole, *supra* note 70.

¹⁹³ See Keri Foster, "Pushed Out of School for Being Me": *New York City's Struggle to Include Youth and Community Voices in School Discipline Reform*, 42 VALUES IN URB. EDUC. 43 (2015).

¹⁹⁴ See Arsen, *supra* note 165.

¹⁹⁵ See Oluwole, *supra* note 70.

the politics of education.¹⁹⁶ This assault works alongside other efforts at Black voters' disenfranchisement such as felony disenfranchisement, strict voter identification laws, and efforts to limit access to the polls via temporal and location restrictions.¹⁹⁷ Moreover, removing Black people from the education policy process and the politics of education disrupts and undermines efforts at coalition building, serving to reduce opportunities to address systemic issues that promote inequitable educational opportunities and outcomes.¹⁹⁸

Both federal and state policies advocating for education reform have given rise to robust state takeover policies that primarily focus on the usurpation of local powers.¹⁹⁹ The judiciary—both federal and state—has justified the diminution of Black peoples' political power and right to self-govern, arguing that unprecedented problems in the Black community necessitated state interventions in the area of education and education policy.²⁰⁰ Legal precedent suggests that there is no legal recourse for Black communities seeking to challenge states' unilateral seizure of their schools.²⁰¹ Of course, communities subjected to the state takeover of public schools may have causes of action under the Voting Rights Act or the Equal Protection Clause if state takeover legislation is developed or promulgated with explicitly racist intentions.²⁰² This is not, however, a likely scenario. Currently there is limited potential of administrative challenges to state takeover policies.²⁰³ The judiciary, policymakers, and education reform advocates, operate in a system that is shielded from the input of those most impacted. Those decision makers reinforce deficit ideologies, assuming that Black people, not the system, need to be addressed and reformed.²⁰⁴

Through concerted efforts to individualize the educational outcomes of Black students rather than addressing systemic policies, procedures, and practices that enshrine racial oppression, education reform policies sustain the United States' lineage of otherizing blackness and things associated with

¹⁹⁶ See Racial Subjugation, *supra* note 121.

¹⁹⁷ See Keisch, *supra* note 99.

¹⁹⁸ See James, *supra* note 67.

¹⁹⁹ See Arsen, *supra* note 165; Justin Smith, *Hostile Takeover: The State of Missouri, the St. Louis School District, and the Struggle for Quality Education in the Inner-City*, 74 Mo. L. REV. 1143 (2009).

²⁰⁰ See House of Cards, *supra* note 91.

²⁰¹ See House of Cards, *supra* note 91; Klaf, *supra* note 141; Antonia Darder, *Racism and the Charter School Movement: Unveiling Myths*, TRUTHOUT (Nov. 30, 2014), <http://www.truth-out.org/opinion/item/27689-racism-and-the-charter-school-movement-unveiling-the-myths>.

²⁰² See House of Cards, *supra* note 91.

²⁰³ See Wilson, *supra* note 158.

²⁰⁴ See James, *supra* note 67.

blackness.²⁰⁵ Education reform policies and practices subjugate Black people by restricting political access, thoughts, educational opportunities, and controlling Black bodies. Education reform policies enable states to regularize power structures and align local behaviors to governmental norms.²⁰⁶ Put more explicitly, education reform policies, while on their faces profess to increase parental control, often limit the Black parents' political power.²⁰⁷ Research further suggests that Black stakeholders resist and reject education reform policies and practices that have the effect of marginalizing, disenfranchising, and oppressing them²⁰⁸; needless to say, this resistance is futile as education reform advocates move ahead with school reconstitutions that deprive Black communities of their sense of community, their right to self-determination, and ability to effect change through the democratic process.²⁰⁹

Contemporary education reform practices are designed to capitalize on rational and unrestricted choice.²¹⁰ However, most parents in school districts likely to be targeted for state takeover are offered an illusory choice—choose education reform or choose to keep your child in a woefully underfunded and under-resourced traditional public school.²¹¹ Making this choice even more illusory, many school districts subjected to state takeover do not have an adequate supply of significantly higher performing schools for parents to actualize a meaningful choice of schools.²¹²

The closure of traditional public schools under contemporary education reform policies sometimes results in poorer, Black communities existing in school deserts—areas with no or inadequate schooling options—perhaps an illustration of the shortsightedness of education reform policies.²¹³ School deserts are problematic because they serve to destabilize Black urban communities.²¹⁴ Furthermore, school deserts serve to limit the education options for communities subject to state takeover policies.²¹⁵ For instance, Black urban parents

²⁰⁵ See Michael J. Dumas, *Against the Dark: Antiblackness in Education Policy and Discourse*, 55 *THEORY INTO PRACTICE* 11 (2016); Klaf, *supra* note 141.

²⁰⁶ See Dardar, *supra* note 201; Klaf, *supra* note 141; Right to Remain Silent, *supra* note 44.

²⁰⁷ See Killing Two Achievements, *supra* note 191; Augustine, *supra* note 75.

²⁰⁸ See Arsen, *supra* note 165; Byrnes, *supra* note 102; Mathis, *supra* note 104.

²⁰⁹ See Don Sawyer, *I Ain't Do Nothing: The Social and Academic Experiences of Black Males in a Dismantled School* (Dec. 2013) (unpublished Ph.D. dissertation, Syracuse University) (on file with author).

²¹⁰ See James, *supra* note 67.

²¹¹ *Id.*

²¹² See Sawyer, *supra* note 209.

²¹³ See Wilson, *supra* note 158.

²¹⁴ *Id.*

²¹⁵ See James, *supra* note 67.

may be coerced into accepting educational options that are subpar when compared to the educational options provided to wealthier zip codes.²¹⁶ Even worse, Black parents lacking sufficient economic resources may find that they are both legally and financially restricted to these subpar educational provisions.²¹⁷ When adjacent and successful school districts exist, they are often legally allowed and capable of accepting students with limited educational options in their home districts. But, there are no incentives for those districts to enroll students from under-resourced school districts since doing so might place the intervening school district in jeopardy of failing to meet strict academic expectations.²¹⁸ Even schools and school districts that are well positioned to accept students with disproportionately low academic outcomes might be dissuaded from doing so out of fear that they will be labeled and stigmatized as academically failing. This is somewhat ironic given that contemporary education reform policies are built on the premise of expanding school choice for families subjected to education reform policies.

E. *Linking State Takeover Districts as Education Reform and the School-to-Prison Pipeline*

Education reform policies have resulted in narrow definitions of achievement. These definitions are one-size-fits-all and focus, principally, on students' scores on standardized assessments.²¹⁹ Contemporary education reform policies focus on technical accountability—or policies that hold schools strictly accountable while neglecting contextual factors that have influenced a school's performance.²²⁰ Education reform policies would likely be more effective if they focused on democratic accountability, or policies that consider whether those impacted by reforms have access to powerbrokers and the political processes necessary to pursue remedies for violations of local, state, and federal civil rights laws.²²¹ The byproduct of the modern era of education reform, which focuses on technical accountability, is that a good school is one in which Black bodies are controlled—prioritizing discipline over instruction.²²² Thus, contemporary education reform policies contribute to increased levels of juvenile delinquency by

²¹⁶ *Id.*

²¹⁷ *Id.*

²¹⁸ See Hamilton, *supra* note 66; Holley-Walker, *supra* note 92.

²¹⁹ Hamilton, *supra* note 66, at 183.

²²⁰ Arsen, *supra* note 164, at 251.

²²¹ *Id.*

²²² See Jose Garcia & Noah De Lissovoy, *Doing School Time: The Hidden Curriculum Goes to Prison*, 11 J. CRITICAL EDUC. POL'Y STUD. 49 (2013); Giroux, *supra* note 150, at 2.

encouraging schools to avoid enrolling the students most in need of educational intervention.²²³

The impact of the school-to-prison pipeline is a paramount concern in education policy.²²⁴ Over disciplining has the impact of diminishing the educational, social, and occupational outcomes of Black students.²²⁵ Despite prevailing myths, there is no evidence that disparate disciplinary outcomes for Black students are the result of consistently and persistently misbehavior of Black students.²²⁶ Furthermore, there is not a significant correlation between race and the severity of disciplinary infractions at school.²²⁷ In fact, studies have confirmed that White students are disciplined for more objective disciplinary violations—those determined by actualization of a behavior, and Black students are disciplined for more subjective violations—those attributed to attitudinal characteristics.²²⁸ Instead, there is evidence that disparate disciplinary outcomes for Black students are the consequence of conscious policy preferences and decisions to enact and exact punitive disciplinary measures for Black students.²²⁹

Winner-take-all accountability structures, or laws and policies that aim to establish cut scores as indicators for achievement, under education reform have tacitly encouraged administrators to implement policies and practices that disproportionately target students seen as undesirable, namely Black students.²³⁰

²²³ See Giroux, *supra* note 150; Hamilton, *supra* note 66; Ellen Tuzzolo & Damon T. Hewitt, *Rebuilding Inequity: The Re-Emergence of the School-to-Prison Pipeline in New Orleans*, 2006 THE HIGH SCH. J. 59.

²²⁴ See Nance, *supra* note 113; Tuzzolo, *supra* note 223.

²²⁵ See PETER LEONE ET AL., SCHOOL FAILURE, RACE AND DISABILITY: PROMOTING POSITIVE OUTCOMES, DECREASING VULNERABILITY FOR INVOLVEMENT WITH THE JUVENILE DELINQUENCY SYSTEM (2003); KEVIN MURRAY, AT WHAT COST? THE CHARTER SCHOOL MODEL AND THE HUMAN RIGHT TO EDUCATION (2014); Bass, *supra* note 136; Anne Gregory et al., *The Achievement Gap and the Discipline Gap: Two Sides of the Same Coin?*, 39 EDUCATIONAL RESEARCHER 59 (2010); Hewitt, *No Child Left Behind*, *supra* note 111; Howard, *supra* note 126; MacIver, *supra* note 96; Tuzzolo, *supra* note 222; Asia Jones Roche, Practices and Procedures that Influence African-American Males to Dropout from Public School (2011) (unpublished Ph.D. dissertation, Virginia Polytechnic Institute and State University) (on file with author).

²²⁶ See ANNE GREGORY ET AL., HOW EDUCATORS CAN ERADICATE DISPARITIES IN SCHOOL DISCIPLINE: A BRIEFING PAPER ON SCHOOL-BASED INTERVENTIONS (2014); Tuzzolo, *supra* note 222.

²²⁷ Russell J. Skiba et al., *African-American Disproportionality in School Discipline: The Divide Between Best Evidence and Legal Remedy*, 54 N.Y.L. SCH. L. REV. 1071, 1094 (2009).

²²⁸ *Id.*

²²⁹ See Gregory, *supra* note 225; see also Nance, *supra* note 113; Kelly Welch & Allison Ann Payne, *Racial Threat and Punitive School Discipline*, 57 SOC. PROBS. 25 (2010).

²³⁰ See Hewitt, *No Child Left Behind*, *supra* note 111; Daniel J. Losen, *The Color of Inadequate School Resources: Challenging Racial Inequities that Contribute to Low Graduation Rates and High Risk for Incarceration*, CLEARINGHOUSE REV. J. OF POVERTY L. & POL'Y 616, 631 (2005).

These strategies have, however, been educationally unsound and have failed to improve student disciplinary outcomes.²³¹ Furthermore, increased uses of harsh disciplinary practices lead to distrust among school personnel and the communities they serve.²³² Feelings of distrust are exacerbated in schools subject to district reconstitution through education reform policies since those policies exclude Black students, parents, and communities from decisionmaking, which increases entry points into the school-to-prison pipeline²³³ by setting and implementing vague disciplinary policies and procedures.²³⁴

NCLB, an education reform policy that advocated for the state takeover of underperforming schools, ultimately contributed to the school-to-prison pipeline.²³⁵ NCLB's focus on standardized testing as a sole measure of academic achievement betrayed the legislation's effort at pursuing educational equity. Consistent and persistent gaps in high school graduation rates, disciplinary rates, and college matriculation continue to belie claims that education reform policies are effective at providing equitable educational opportunities for Black students.²³⁶

When states takeover locally governed public schools and provide little opportunity for local oversight or accountability, they place Black students at risk of entering the school-to-prison pipeline.²³⁷ On this point, Charter schools, many of which are created in the aftermath of state takeovers of public schools and school districts, have disciplinary rates that outpace those of traditional public schools.²³⁸ This is problematic because increased disciplinary rates are associated with the school-to-prison pipeline. Education reform practices that maintain methods for local citizens to hold school leaders accountable are more promising than education reform strategies that eliminate local accountability structures, but even locally accountable education reform strategies produce mixed results.²³⁹ Education reform policies and practices are economically driven by existing racial disparities in wealth. Thus, education reform advocates,

²³¹ See Nance, *supra* note 113, at 100; Skiba, *supra* note 227, at 1075.

²³² See Foster, *supra* note 193, at 45.

²³³ See GREGORY, *supra* note 226, at 2.

²³⁴ See Dean Hill Rivkin, *Legal Advocacy and Reform: Litigating School Exclusion*, 75 TENN. L. REV. 265, 271 (2009).

²³⁵ See Losen, *supra* note 230, at 622–23.

²³⁶ See Hewitt, *No Child Left Behind*, *supra* note 111, at 177.

²³⁷ See Right to Remain Silent, *supra* note 44.

²³⁸ See MURRAY, *supra* note 225, at 22.

²³⁹ See Wong, *supra* note 77, at 91.

who are likely White liberals, have good reason to perpetuate the school-to-prison pipeline since doing so sustains the racial wealth gap.²⁴⁰

IV. THE IMPORTANCE OF RESEARCHING STATE TAKEOVER SCHOOL DISTRICTS IN PREDOMINATELY BLACK CITIES

In 1989, few states had legislation that allowed for the state government to unilaterally take control of a local school district's public schools.²⁴¹ Even fewer states had used their powers to seize control of a local school district's public schools.²⁴² Fifteen years later, in 2004, nearly 60 percent of all states had legislation providing for each respective state to take control of locally governed school districts.²⁴³

The advent and intensification of policies aimed at reforming primary and secondary education enabled, if not mandated, policies allowing for the state takeover of locally governed school districts. For example, some states used the flexibility in NCLB's accountability structures to delay the implementation of education reform strategies that sought high-stakes accountability; in these cases, high-stakes accountability typically failed to materialize until NCLB.²⁴⁴ Even states that implemented high-stakes accountability sometimes satisfied federal education reform accountability-based policies by lowering academic standards.²⁴⁵ A substantial amount of states escaped the consequences of the high-stakes accountability required under NCLB through the receipt of federal waivers from the United States Department of Education.²⁴⁶ Although many states received federal waivers and were, therefore, not at risk of receiving federal penalties for failing to meet NCLB's requirements, these states still engaged in the state takeover of school districts that were both predominately Black and had predominately Black governing boards.²⁴⁷

²⁴⁰ See Kenneth J. Fasching-Varner et al., *Beyond the School-to-Prison Pipeline and Towards an Educational and Penal Realism*, 47 EQUITY & EXCELLENCE IN EDUC. 410, 415 (2014).

²⁴¹ *Id.* In 1989, only six states had legislation allowing for the unilateral takeover of public schools. *Id.*

²⁴² *Id.* Only New Jersey and Kentucky had initiated the state takeover of locally governed school districts. *Id.*

²⁴³ See Oluwole, *supra* note 70. In 2009, 29 states had enacted legislation allowing for the state to seize control of locally governed school districts. *Id.*

²⁴⁴ *Id.* at 343.

²⁴⁵ Hewitt, *No Child Left Behind*, *supra* note 111, at 175.

²⁴⁶ *Id.* at 174.

²⁴⁷ Racial Subjugation, *supra* note 121, at 18.

The states of Louisiana,²⁴⁸ Michigan,²⁴⁹ and Tennessee²⁵⁰ have each enacted legislation allowing for the state to take control of locally controlled public school districts in crisis.²⁵¹ All three states also have constitutional or statutory requirements stating that local school boards must be elected.²⁵² Because of the United States' system of shared governmental power, federalism, the extant influence of the elected school boards in each state with a state takeover district varies.²⁵³ Elected school boards in Detroit, Memphis, and New Orleans retain substantial powers over some, but not all, public schools.²⁵⁴ Put more simply, all three cities contain at least two school districts that operate independently of each other and with distinct governing structures, authorities, and institutions.²⁵⁵ Recently published articles²⁵⁶ and reports²⁵⁷ suggest that education reform strategies that are heavily accountable to the local community produce better academic results for students.²⁵⁸

The report by Zimmer and colleagues relies on state test scores to measure student progress and improvements.²⁵⁹ Other scholars have evaluated student disciplinary data to assess student outcomes in schools with and without local governance.²⁶⁰ State departments of education and proponents of education reform have typically been successful at thwarting the independent assessment of the role of education reform policies in improving student outcomes by restricting access to data on student, school, and school district performance.²⁶¹ Despite that, scholars have evaluated the role of race and racism in education reform.

²⁴⁸ La. R. S. § 17:10.5.

²⁴⁹ Mich. Comp. Laws § 380.1280c.

²⁵⁰ See TENN. CODE § 49-1-614 (2017).

²⁵¹ Oluwole, *supra* note 70, at 352, 360.

²⁵² Racial Subjugation, *supra* note 121, at 18.

²⁵³ See generally Robinson, *supra* note 133.

²⁵⁴ Racial Subjugation, *supra* note 121, at 18.

²⁵⁵ *Id.*

²⁵⁶ See Killing Two Achievements, *supra* note 191.

²⁵⁷ See generally ZIMMER, *supra* note 102.

²⁵⁸ *Id.*

²⁵⁹ *Id.*

²⁶⁰ See Julian Vasquez Helig et al., *Is Choice the Panacea? An Analysis of Black Secondary Student Attrition from KIPP, Other Private Charters and Urban Districts*, 2 BERKELEY REV. OF EDUC. 153, 161 (2011) [hereinafter *Is Choice the Panacea*]; see also Right to Remain Silent, *supra* note 44, at 455.

²⁶¹ BARBARA FERGUSON, RESEARCH ON REFORMS, CLOSING SCHOOLS, OPENING SCHOOLS AND CHANGING SCHOOL CODES: INSTABILITY IN THE NEW ORLEANS RECOVERY SCH. DIST. 7 (2014), <https://perma.cc/8YUK-N9UN>.

Data from predominately Black school districts indicate that Black students in traditional public schools suffer fewer occurrences of harsh discipline than do Black students in education reform-oriented schools and school districts.²⁶² The following analysis explores whether discipline data for Black male students in state takeover districts in Detroit, Memphis, and New Orleans corroborates previous studies²⁶³ that suggest that the state takeover of public schools and school districts, especially upon the charterization of the schools taken over, places Black students in increased jeopardy of entering the school-to-prison pipeline. The investigation into the role of education reform strategies in expanding or retracting the school-to-prison pipeline is paramount because schools not only serve the purpose of requiring students to complete individual academic tasks, schools also serve to prepare students for effective and productive involvement in society.

V. DATA SOURCES AND METHODOLOGY

The data relied on in this Article was retrieved from the Civil Rights Data Collection Database and is made available from the United States Department of Education. I extracted raw data on student populations and instances of schools' use of harsh disciplinary tactics for all public schools within the geographic boundaries of the cities of Detroit, Memphis, and New Orleans from the data compiled by the United States Department of Education. The data covers self-reported data from the 2013–2014 school year.²⁶⁴ To facilitate understanding of the statistical values of the data that I extracted from the database and to exhibit actual rates of disciplinary sanctions issued to students, I converted the data into percentages.

To compare the proportion of suspensions, I calculated the citywide suspension rate by averaging the suspension rates of all schools located within each

²⁶² See generally *Is Choice the Panacea*, *supra* note 260 (citing that charter schools and other schools seeking to employ school choice often have higher attrition rates, especially for Black students). Given that Helig and colleagues state that poor performing students are more likely to contribute to high attrition rate in charter schools and that scholars continue to struggle with the concept of *counseling out*, or unofficial and undocumented expulsions, I assume that some, if not a significant proportion of students contributing to astronomical attrition rates in charter schools are students who have been asked to leave. See also *Right to Remain Silent*, *supra* note 44, at 458.

²⁶³ See *Is Choice the Panacea*, *supra* note 260; see also *Right to Remain Silent*, *supra* note 44, at 458.

²⁶⁴ The data for this study was taken directly from the Civil Rights Data Collection Database, and the assertions in this paper do not account for instances of under-reporting of data from either locally governed or state takeover school districts. I acknowledge that erroneous data reporting may impact the analyses presented, but the sum of all reported data is expected to offset any and all erroneous data inputs.

respective city. The percentage of schools in each state takeover district that exceeded the citywide average suspension rate was compared to the percentage of schools under the governance of each locally elected school board that exceeded the citywide average suspension rate. The purpose of these comparisons was to determine if there were statistically different proportions of schools in either category that exceeded the citywide average suspension rate.²⁶⁵

I compared the number of participating schools from state takeover districts and districts governed by locally elected school boards to determine if the membership in either category was associated with a higher likelihood of participating in expulsions, law enforcement referrals, or school-based arrests. The purpose of these comparisons was to determine if there were statistically different proportions of schools in either category that exceeded the citywide average of participation in expulsions, law enforcement referrals, or school-based arrests. A proportional comparison of the raw counts of schools participating in expulsions, law enforcement referrals, or school-based arrests was a more appropriate measure than a comparison of the proportion of schools participating in expulsions, law enforcement referrals, or school-based arrests because citywide averages are likely to be low or easily influenced by outliers for the more extreme versions of harsh discipline.

I conducted proportional analyses by utilizing the Fisher Exact Test of Independence. The Fisher Exact Test is less robust than other inferential statistical tests, however, the U.S. Department of Education Office of Civil Rights has recently used the test to prove that segregation in public schools unlikely the consequence of random chance.²⁶⁶ Moreover, the Fisher Exact Test of Independence is designed to produce an exact p-value²⁶⁷ for statistical comparisons, even from small sample sizes. I have previously argued that the Fisher Exact Test is an appropriate test of statistical comparisons in education because of the federal government's reliance on the test in previous cases.²⁶⁸

²⁶⁵ While proportional analyses may reveal differences in the proportional achievement of two different groups, statistically significant differences rely on statistically testing to assess whether—given the relative sizes of the two samples—whether there is a difference that is extreme enough to suggest that the difference is due to something other than random chance.

²⁶⁶ See Letter from Timothy Blanchard, Dir., Dep't of Educ., to Dr. William Keresztes, Complainant (July 1, 2014), <https://www2.ed.gov/about/offices/list/ocr/docs/investigations/more/02141077-a.pdf>.

²⁶⁷ In statistical analyses, p-value is the probability of seeing a comparison as extreme or more extreme than the values being compared. In the social sciences a statistically significant p-value is usually set at .05, which is an indicator that there is a 5 percent or less probability of observing a more extreme comparison. Thus, any comparison with a p-value under .05 suggests that the difference in the two proportions are rare and likely not the result of random chance.

²⁶⁸ Special Education Reform, *supra* note 127, at 215–16.

VI. IMPACT OF STATE TAKEOVERS OF PUBLIC SCHOOLS ON PUSH OUT OF BLACK MALE STUDENTS

Push out refers to school disciplinary policies that encourage students to drop out of school.²⁶⁹ Suspensions and expulsions with educational services are examples of push out.²⁷⁰ Push out is materially different than shut out²⁷¹ or snatch out,²⁷² which are both explained *infra*, in that push out may occur through a school's actions or inactions. As I discuss later, shut out and snatch out often require affirmative acts by the school's officials.

Table 1 provides relevant data on single incident suspension rates²⁷³ for public schools in Detroit, Memphis, and New Orleans as well their respective state takeover districts. In general, there are statistically significant differences in the proportion of schools exceeding the citywide average for single incident suspensions in all three cities. In five of six comparisons, there are statistical differences in the comparison of the proportion of schools from state takeover and locally governed school districts.

In the city of Detroit, schools in the state takeover district, the Educational Achievement Authority, more often exceeded citywide single-incident suspension rates for Black male students who are not identified as having a disability than the schools under the governance of the locally elected school board. On the other hand, schools under the governance of the Educational Achievement Authority are almost equally as likely as schools under the governance of Detroit City Schools to issue at least one suspension to Black male students who are identified as having a disability.

In the city of Memphis, schools under the governance of the Achievement School District, the state takeover district, less often exceeded the citywide suspension average for suspending Black male students at least once than schools under the governance of the Shelby County Schools, the locally governed school district. In fact, the Achievement School District's self-reported data revealed that none of its schools exceeded the citywide average suspension rate for Black male students who have not been identified as having a disability and only one of its schools exceeded the citywide suspension rate for Black male students who have been identified as having a disability.

²⁶⁹ Racial Subjugation, *supra* note 121, at 20.

²⁷⁰ *Id.*

²⁷¹ *Id.* at 24.

²⁷² *Id.* at 25.

²⁷³ Single incident suspension rates include all students who have been suspended at least once in the academic year.

Finally, the data from New Orleans’ public schools suggests that schools in the state takeover district, the Recovery School District, as compared to schools in the locally governed public schools, the Orleans Parish School Board, more often exceeded the citywide average suspension rate for Black male students notwithstanding whether or not the Black male students receiving single incident suspensions are identified as having a disability.

Table 1: Proportional Analyses of Schools Exceeding Average Suspension Rates in Respective Districts for Single Out-of-School Suspensions for Black Male Students

	Educational Achievement Authority—Detroit	Detroit City Schools
Schools Suspending Non-Identified Black Male Students Once	11 (91.67%)	44 (44.44%)
Schools Not Suspending Non-Identified Students Once	1	55
p-value: 0.002**		
Schools Suspending Identified Black Male Students Once	5 (41.67%)	44 (44.44%)
Schools Not Suspending Identified Students Once	7	55
p-value ≈ 1.00		
	Achievement School District—Memphis	Shelby County Schools
Schools Suspending Non-Identified Black Male Students Once	0 (0%)	92 (35.38%)
Schools Not Suspending Non-Identified Black Male Students Once	17	168
p-value: 0.0001*		
Schools Suspending Identified Black Male Students Once	1 (5.88%)	113 (43.46%)
Schools Not Suspending Identified Black Male Students Once	16	147
p-value: 0.002**		
	Recovery School District—New Orleans	Orleans Parish Schools

Schools Suspending Non-Identified Black Male Students Once	30 (55.56%)	4 (20%)
Schools Not Suspending Non-Identified Black Male Students Once	24	16
p-value: 0.008**		
Schools Suspending Identified Black Male Students Once	29 (53.7%)	4 (20%)
Schools Not Suspending Identified Black Male Students Once	25	16
p-value: 0.017*		

In general, there are statistically significant differences in the proportion of schools that exceed the citywide average for multiple suspensions of Black male students in all three cities. In four of six comparisons, there are statistical differences in the comparison of the proportion of schools from state takeover and locally governed school districts that exceed each city's respective average of Black male students receiving multiple out-of-school suspensions.²⁷⁴ In Detroit, schools under the governance of the Educational Achievement Authority, as compared to schools under the governance of the Detroit City Schools, more often exceeded the average rate of issuing Black male students who have been identified as disabled multiple suspensions in a given academic year. There is, however, no statistical difference between the proportion of schools in the Educational Achievement Authority and Detroit City Schools that exceed the average rate of issuing multiple suspensions to Black male students who have been identified as disabled in a given academic year.

In Memphis, schools under the governance of the Achievement School District more often exceeded the citywide average of issuing Black male students multiple suspensions in a given academic year—irrespective of the student's disability classification than did schools under the governance of the Shelby County Schools. Finally, schools under the governance of the Recovery School District, RSD, more often than schools under the operation of the Orleans Parish School Board exceeded the citywide suspension rate for Black male students who have been identified as disabled multiple times in a given school year, but there is no statistical difference in the proportion of schools under each

²⁷⁴ Because a proportional difference is notable only to the extent that we can say that there are some possible differences. However, a statistical difference indicates that this isn't random chance. There is something clearly different about how these two entities are experiencing this phenomenon.

respective governance structure when comparing each districts’ proportion of schools that exceed the citywide suspension rate of Black male students who have not been identified as disabled for multiple suspensions. Table 2 provides the data pertinent to the statistical analyses of schools exceeding the citywide suspension rate for multiple out-of-school suspensions for Black male students in state takeover districts and locally governed schools in Detroit, Memphis, and New Orleans.

Table 2: Proportional Analyses of Schools Exceeding Average Suspension Rates in Respective Districts for Multiple Incident Out-of-School Suspensions for Black Male Students

	Educational Achievement Authority – Detroit	Detroit City Schools
Schools Suspending Non-Identified Black Male Students Multiple Times	9 (75%)	41 (41.41%)
Schools Not Suspending Non-Identified Black Male Students Multiple Times	3	58
p-value: 0.034*		
Schools Suspending Identified Black Male Students Multiple Times	7 (58.33%)	40 (40.40%)
Schools Not Suspending Identified Black Male Students Multiple Times	5	59
p-value: 0.354		
	Achievement School District – Memphis	Shelby County Schools
Schools Suspending Non-Identified Black Male Students Multiple Times	10 (58.82%)	9 (3.46%)
Schools Not Suspending Non-Identified Black Male Students Multiple Times	7	251
p-value: 0.0001***		
Schools Suspending Identified Black Male Students Multiple Times	5 (29.41%)	20 (7.69%)

Schools Not Suspending Identified Black Male Students Multiple Times	12	240
p-value: 0.011*		
	Recovery School District—New Orleans	Orleans Parish Schools
Schools Suspending Non-Identified Black Male Students Multiple Times	20 (37.04%)	4 (20%)
Schools Not Suspending Non-Identified Black Male Students Multiple Times	34	16
p-value: 0.26		
Schools Suspending Identified Black Male Students Multiple Times	26 (48.15%)	2 (20%)
Schools Not Suspending Identified Black Male Students Multiple Times	28	18
p-value: 0.003**		

Table 3 provides the data that I used to analyze the proportion of schools in state takeover districts as opposed to locally governed school districts that participate in the expulsion of Black male students while also affording those students educational services during the expulsion period. There are generally no statistically significant differences when comparing the number of schools in state takeover districts and locally governed school districts that issue expulsions with services to Black male students. In Memphis and in New Orleans, there are no statistical differences between the rates at which schools in state takeover and locally governed school districts expel Black male students with the provision of educational services.

There are, however, substantial differences in the rate at which schools in state takeover and locally governed school districts in Memphis and New Orleans issue Black male students expulsions with the provision of services, and these substantial differences are true notwithstanding the disability classification of Black males. In Detroit, schools under the governance of the Detroit City Schools, the locally governed school district more often than schools in the Education Achievement Authority issued expulsions with services for Black male students who have not been identified as disabled. On the other hand, there is no statistical difference between the proportion of schools in the Detroit state

takeover district and the schools governed by the Detroit City Schools that issue expulsions with the provision of educational services for Black male students.

Table 3: Proportional Analyses of Schools’ Involvement in Expulsions With Services in State Takeover Districts Versus Locally Governed School Districts.

	Education Achievement Authority—Detroit	Detroit City Schools
Schools Expelling Non-Identified Black Male Students w/ Services	0 (0%)	31 (31.31%)
Schools Not Expelling Non-Identified Black Male Students w/ Services	12	68
p-value: 0.019*		
Schools Expelling Identified Black Male Students w/ Services	0 (0%)	12 (12.12%)
Schools Not Expelling Non-Identified Black Male Students w/ Services	12	87
p-value: 0.356		
	Achievement School District—Memphis	Shelby County Schools
Schools Expelling Non-Identified Black Male Students w/ Services	10 (58.82%)	104 (40%)
Schools Not Expelling Non-Identified Black Male Students w/ Services	7	156
p-value: 0.136		
Schools Expelling Identified Black Male Students w/ Services	6 (35.29%)	59 (22.69%)
Schools Not Expelling Identified Black Male Students w/ Services	11	201
p-value: 0.243		
	Recovery School District—New Orleans	Orleans Parish Schools

Schools Expelling Non-Identified Black Male Students w/ Services	18 (33.3%)	3 (15%)
Schools Not Expelling Non-Identified Black Males Students w/ Services	36	17
p-value: 0.154		
Schools Expelling Identified Black Male Students w/ Services	11 (20.37%)	1 (5%)
Schools Not Expelling Identified Black Male Students w/ Services	43	19
p-value: 0.162		

VII. IMPACT OF STATE TAKEOVER OF PUBLIC SCHOOLS ON SHUT OUT OF BLACK MALE STUDENTS

While push out refers to a school's efforts, implicit or explicit, to encourage students to remove themselves from the educational setting, "*shut out* refers to a school's refusal to educate a student."²⁷⁵ In no uncertain terms, shut out is the school's decision to not provide the primary service which schools are tasked to provide—the education of students. In this Article, shut out refers to the expulsion of a student while not affording that student educational services, a clear indication that the school does not intend to fulfill its obligation to educate the expelled student.²⁷⁶

Table 4 provides the data regarding the proportion of schools in state takeover and locally governed school districts in Memphis and New Orleans that expelled Black male students without educational services. Because no schools in the City of Detroit under the governance of either the Educational Achievement Authority or the Detroit City Schools reported any schools that expelled Black male students without the provision of educational services, the city of Detroit's information is not provided in Table 4.

In three of the four analyses, schools in state takeover districts reported less occurrences of expelling Black male students without the provision of educational services than did schools in locally governed school districts. These comparisons are not, however, statistically significant. For instance, schools in the Achievement School District, Memphis' state takeover district, are substantially, but not statistically, less likely than school under the governance of Shelby

²⁷⁵ Racial Subjugation, *supra* note 121, at 24.

²⁷⁶ *Id.*

County Schools, the locally governed school district, to expel a Black male student without agreeing to provide the student educational services. Schools in the Recovery School District, New Orleans’ state takeover district, are substantially, but not statistically, less likely than schools under the governance of the Orleans Parish School Board to expel a Black male student who has not been identified as having a disability without arranging for the student to receive educational services. On the other hand, the opposite is true for Black male students who have not been identified as having a disability in New Orleans’ public schools.

Table 4: Proportional Analysis of School Involvement in Expulsion Without Educational Services Between State Takeover Districts and Locally Governed Schools Districts in Predominately Black Cities

	Achievement School District—Memphis	Shelby County Schools
Schools Expelling Non-Identified Students w/o Services	2 (11.76%)	79 (30.38%)
Schools Not Expelling Non-Identified Students w/o Services	15	181
p-value: 0.166		
Schools Expelling Identified Students w/o Services	0 (0%)	28 (10.77%)
Schools Not Expelling Identified Students w/o Services	17	232
p-value: 0.233		
	Recovery School District—New Orleans	Orleans Parish Schools
Schools Expelling Non-Identified Students w/o Services	8 (14.81%)	1 (5%)
Schools Not Expelling Non-Identified Students w/o Services	46	19
p-value: 0.429		
Schools Expelling Identified Students w/o Services	1 (1.85%)	2 (10%)
Schools Not Expelling Identified Students w/o Services	53	18
p-value: 0.176		

VIII. IMPACT OF STATE TAKEOVER OF PUBLIC SCHOOLS ON SNATCH OUT OF BLACK MALE STUDENTS

“Snatch out refers to situations where students are removed from the school building by police authorities.”²⁷⁷ School discipline that encompasses snatch out²⁷⁸ is the harshest form of school discipline against Black male students. Both push out and shut out dramatically increase the potential for Black male students to have interactions with law enforcement officials or the criminal justice system, but snatch out provides a direct link to the school-to-prison pipeline in that Black male students incur immediate interactions with law enforcement officials and likely the criminal justice system.

Table 5 provides the relevant data for the statistical tests comparing the proportion of schools from state takeover and locally governed schools that referred Black male students to law enforcement. Because no school in the City of Detroit reported referring a Black male student to law enforcement, neither the Detroit City Schools nor the Educational Achievement Authority have been included in this table. In Memphis, no school in the Achievement School District reported that they referred a Black male student to law enforcement, but the Shelby County Schools did report referring Black male students to law enforcement. The result of this data is that schools under the governance of the Achievement School District are less likely than schools under the governance of the Shelby County Schools to refer Black male students who have not been identified as disabled to law enforcement. In regard to Black male students who have been identified as disabled, both schools under the governance of the Achievement School District and the Shelby County Schools have about the same likelihood of referring a Black male student to law enforcement. In New Orleans, there is no statistical difference between the proportion of schools under the governance of the Recovery School District and the Orleans Parish School Board that refer Black male students to law enforcement.

²⁷⁷ *Id.* at 25.

²⁷⁸ For the purposes of this Article, snatch out includes circumstances in which school officials refer Black male students to law enforcement and when law enforcement officials arrest Black male students on school grounds at the request of school officials. In general, there are no statistical association between school governance structure (state takeover versus locally governed school district) and the use of snatch out disciplinary tactics against Black male students.

Table 5: Proportional Analyses of Schools’ Law Enforcement Referral Involvement Between State Takeover and Locally Governed Districts in Predominately Black Cities for Black Male Students

	Achievement School District – Memphis	Shelby County Schools
Schools with Law Enforcement Referrals of Non-Identified Black Male Students	0 (0%)	52 (20%)
Schools without Law Enforcement Referrals of Non-Identified Black Male Students	17	208
p-value: 0.049*		
Schools with Law Enforcement Referrals of Identified Black Male Students	0 (0%)	5 (1.92%)
Schools without Law Enforcement Referrals Identified Black Male Students	17	255
p-value: 1.0		
	Recovery School District – New Orleans	Orleans Parish Schools
Schools with Law Enforcement Referrals of Non-Identified Black Male Students	4 (7.41%)	3 (15%)
Schools without Law Enforcement Referrals of Non-Identified Black Male Students	50	17
p-value: 0.379		
Schools with Law Enforcement Referrals of Identified Black Male Students	3 (5.56%)	0 (0%)
Schools with Law Enforcement Referrals of Identified Black Male Students	51	20
p-value: 0.559		

Table 6 provides the data used to determine whether there are a higher proportion of schools utilizing school-based arrests as a disciplinary tactic against Black male students in state takeover districts as opposed to locally

governed school districts. Because no school in the City of Detroit reported having a Black male student arrested, neither the Detroit City Schools nor the EAA have been included in this table. There were no statistically significant differences in the proportion of schools utilizing school-based arrests as a disciplinary tactic against Black male students in either Memphis or New Orleans.

Table 6: Proportional Analyses of Schools’ School-Based Arrest Involvement Between State Takeover and Locally Governed Districts in Predominately Black Cities for Black Male Students

	Achievement School District—Memphis	Shelby County Schools
Schools with Arrests of Non-Identified Black Male Students	0 (0%)	38 (14.62%)
Schools without Arrests of Non-Identified Black Male Students	17	222
p-value: 0.142		
Schools with Arrest of Identified Black Male Students	0 (0%)	4 (1.54%)
Schools without Arrests of Identified Black Male Students	17	256
p-value: 1.0		
	Recovery School District—New Orleans	Orleans Parish Schools
Schools with Arrests of Non-Identified Black Male Students	1 (1.85%)	1 (5%)
Schools without Arrests of Non-Identified Black Male Students	53	19
p-value: 0.470		
Schools with Arrest of Identified Black Male Students	2 (3.7%)	0 (0%)
Schools without Arrests of Identified Black Male Students	52	20
p-value: 1.0		

IX. APPLYING THE STATE-CREATED DANGER DOCTRINE TO STATE TAKEOVER SCHOOLS IN THE SELECTED CITIES

A. *Detroit and Memphis: The Sixth Circuit Jurisdictions*

In the years since *DeShaney*, the Sixth Circuit Court of Appeals has established a three-part test to determine when the government may be liable

under the State-Created Danger Doctrine.²⁷⁹ First, the plaintiff must establish that the state acted affirmatively and in doing so created or increased the risk that the plaintiff would incur harm at the hands of a third-party.²⁸⁰ Next, the plaintiff must prove that the state, through its affirmative act, created or greatly increased a danger that placed the plaintiff, as opposed to the general public, at risk of injury from the third party.²⁸¹ Finally, the plaintiff must prove that the state knew or should have known that its affirmative act placed the plaintiff, specifically, in danger of the resultant harm.²⁸²

It is only upon the plaintiff sufficiently proving the elements of that three-part test that the government may be liable for creating or enhancing the danger to an individual that is brought by a private actor. In sum, when the government through an affirmative act causes or greatly increases the risk that its citizens will suffer harm from a private actor, the government will be held responsible for creating a special danger, and a court will find that the government had a duty to protect its citizens from the risk resulting from the government's actions.²⁸³

In the Sixth Circuit, to be considered an affirmative act the government must create a danger to which the plaintiff is not already exposed,²⁸⁴ or the government must substantially increase the danger to which the plaintiff was already exposed.²⁸⁵ In the case of the state takeover and subsequent chartering of public schools in the Sixth Circuit, the federal courts are likely to require that plaintiffs prove that the state, through their affirmative acts, created a structure that placed a particular subset of students in peril or in the alternative, increased the peril to which those students were exposed.

In the case of both Detroit and Memphis, the states of Michigan²⁸⁶ and Tennessee²⁸⁷ have explicitly created a separate subset of schools. These schools are operated under separate, unique, and oftentimes unchecked governance structures. In particular, parents have no electoral power to influence policies

²⁷⁹ See *Jones v. Reynolds*, 438 F.3d 685, 690 (6th Cir. 2006) (restating the requirements for establishing governmental liability under the state-created danger doctrine).

²⁸⁰ See *Cartwright v. City of Marine City*, 336 F.3d 487, 493 (6th Cir. 2003); see also *Kallstrom v. City of Columbus*, 136 F.3d 1055 (6th Cir. 1998).

²⁸¹ See *Cartwright*, 336 F.3d at 493; see also *Kallstrom*, 136 F.3d 1055.

²⁸² See *Cartwright*, 336 F.3d at 493; see also *Kallstrom*, 136 F.3d 1055.

²⁸³ See *Kallstrom*, 136 F.3d at 1066.

²⁸⁴ See *Sargi v. Kent City Board of Education*, 70 F.3d 907, 913 (6th Cir. 1995).

²⁸⁵ See *Gazette v. City of Pontiac*, 41 F.3d 1061, 1065 (6th Cir. 1994); see also *Ewolski v. City of Brunswick*, 287 F.3d 492, 509 (6th Cir. 2002).

²⁸⁶ MICH. COMP. LAWS § 380.1280c (2017) (Establishing the Educational Achievement Authority).

²⁸⁷ TENN. CODE § 49-1-614 (2017) (Establishing the Achievement School District).

and procedures within these schools²⁸⁸ and the structure of governance is specifically intended to relieve affected parents and communities of any influence.²⁸⁹ Given that state takeovers of public schools occur almost exclusively in school districts that have a disproportionate number of students of color, particularly Black students, and school districts that are governed by policymakers of color, federal courts could possibly find that the creation of state takeover districts, unlike traditional school districts,²⁹⁰ fulfill the special relationship requirement of *DeShaney*.²⁹¹

DeShaney dictates that the state has a special relationship with an individual whom the state has rendered incapable of caring for himself. Thus, the state has an affirmative duty to protect those who experience restrained liberty at the hands of the state.²⁹² Although compulsory attendance laws are routinely rejected as a ground for state liability under the state-created doctrine, the combination of compulsory attendance laws with the explicit definition of attendance zones and the removal of stakeholders' abilities to combat abusive policies and procedures may more closely resemble incarceration as opposed to traditional schooling. Therefore, it can be argued that the state's creation of state takeover districts that target predominately Black school districts and remove the ability of impacted populations to resist oppression and abuse was an affirmative act that exposed a group with whom the state created a special relationship to dangers, or increased the dangers to which the group was already exposed. The state's takeover of public schools in Black communities and the subsequent installation of government bodies that are wholly unaccountable to the Black communities in question goes well beyond the government being passive in the oppression of Black communities;²⁹³ in this instance, these communities would not be exposed to dangers but for the intervention of the state. Put more explicitly, but for the state's intervention, Black male students would not be subjected to the increased likelihood of entering the school-to-prison pipeline. Since entering the school-to-prison pipeline places Black males at greater risk of physical, economic, and psychological harm, and the state,

²⁸⁸ See *Killing Two Achievements*, *supra* note 190.

²⁸⁹ See *House of Cards*, *supra* note 91.

²⁹⁰ See Sanford, *supra* note 2, for a lengthier explanation of these cases.

²⁹¹ *DeShaney v. Winnebago Cty. Dep't of Soc. Servs.*, 489 U.S. 189, 189–94 (1989).

²⁹² *Id.* at 200.

²⁹³ See *McQueen v. Beecher Cmty. Schs.*, 433 F.3d 460, 466 (2006) (discussing how the state is not liable if the government returns the plaintiff to a similar danger and/or moves the plaintiff a less dangerous position). In effect, the Sixth Circuit requires that the government act, affirmatively, in a manner that places the plaintiff in a position where s/he is more likely to be victimized by a private party.

through conducting a takeover of public schools, has prevented the Black community from intervening on its own behalf—the state is the only available entity to prevent the harm concomitant to Black males’ entrance into the school-to-prison pipeline. Black students, parents, and communities are empowered to participate in the development and implementation of education policy under ordinary circumstances. However, under state takeover legislation, Black students, parents, and communities are specifically prevented from participating in the development and implementation of education policy. The harm of entering the school-to-prison pipeline is statistically greater after states conduct school and school district takeovers in predominately Black districts, and the state—in all three cases in this study—moved to prevent Black students, parents, and community members from preventing Black students from experiencing the increased likelihood of entering the school-to-prison pipeline. This argument, if it holds, would satisfy the first prong of the Sixth Circuit’s test for governmental liability under the State-Created Danger Doctrine.

To fulfill the Sixth Circuit’s requirements to hold the government liable for harm to its citizens at the hands of a private actor, a plaintiff must prove that the state created a danger that would impact the plaintiff or a class to which the plaintiff belonged as opposed to the general public. To establish that the plaintiff is at risk of special danger, the court must find that “the state’s actions place the victim specifically at risk, as distinguished from a risk that affects the public at large.” In *McQueen v. Beecher Community Schools*, the Sixth Circuit held that an entire school may suffer special damage, or a damage that is specific to the plaintiff rather than society at-large.²⁹⁴ This is specifically the case since the court in *McQueen* found that others were in danger, but the students in immediate proximity to the armed and unsupervised student were in at much greater risk of harm than was the general public.²⁹⁵ Thus, even if the state’s affirmative acts created collateral damage to the general public, that collateral damage does not negate the special damage that the state’s affirmative acts may create for specific plaintiffs or classes of plaintiffs.

In the case of the state takeover of public schools in predominately Black school districts with predominately Black governing boards, the state’s legislative actions may potentially harm all citizens, but the state’s actions are much more likely to harm the students, families, and communities impacted by the actual state takeover of public schools. In a previous article, I argued that the

²⁹⁴ See *McQueen*, 433 F.3d at 468 (“ . . . we have little difficulty assuming that if the relevant group included everyone in the school, the special danger requirement would still be satisfied.”).

²⁹⁵ *Id.*

state takeover of public schools in predominately Black school districts with predominately Black elected governing boards is a manifestation of antiblackness in education policy and is likely intentional.²⁹⁶ Thus, the harm of over disciplining is substantially more likely to impact Black students since predominately Black school districts are far more likely to experience state takeover.²⁹⁷

The state takeover of public schools in predominately Black areas serves to disrupt the political power of Black peoples to influence education policy. More specifically, in Detroit and Memphis public school districts that are disproportionately Black are governed by predominately Black policymakers. But, state takeover districts in Detroit and Memphis are governed by predominately White policymakers who are not held accountable to the predominately Black communities they serve. The result of these state takeover policies that affirmatively seize control of public schools and disallow Black parents to participate in direct advocacy to address abuses of processes in Detroit and Memphis is that Black boys face dramatically increased occurrences of harsh disciplinary practices that are linked to or directly place them into the school-to-prison pipeline.²⁹⁸

Research would suggest that Black boys are already placed at disproportionate risk of entering the school-to-prison pipeline,²⁹⁹ but the state takeover of public schools in Detroit and Memphis has increased the number of disciplinary actions associated with the school-to-prison pipeline that Black boys in Detroit and Memphis face. The statistics reported in Part V of this paper suggest that there are a number of comparisons between disciplinary rates and occurrences in locally governed and state takeover school districts that are statistically significant, providing evidence that these statistics are extreme in that they are not likely the result of typical statistical variance.³⁰⁰ Thus, the state takeover of public schools in Detroit and Memphis may satisfy the Sixth Circuit's requirement that the state's affirmative action creates a new harm or greatly exacerbates an existing harm.

Finally, a plaintiff must prove that the state knew or had reason to know that the state's affirmative acts would harm the plaintiff.³⁰¹ Therefore, it is not enough for the state to have known that the plaintiff might suffer some harm—the state must know or have reason to know that the plaintiff would suffer the actual harm that occurred. Whether legislators in Michigan or Tennessee knew

²⁹⁶ See Racial Subjugation, *supra* note 121.

²⁹⁷ See Oluwole, *supra* note 70, at 344.

²⁹⁸ See Part V and the accompanying text and tables.

²⁹⁹ Smith, *supra* note 31, at 1011–12.

³⁰⁰ See Part V and the accompanying text and tables.

³⁰¹ See *Jones v. Reynolds*, 438 F.3d 685, 690 (6th Cir. 2006).

or had reason to know that Black male students would suffer disproportionate occurrences of harsh discipline appears to be in question.

However, scholars in other contexts are reporting that the state takeover of schools and the subsequent chartering of those schools increases the risk of Black students' removal from the educational setting.³⁰² Moreover, the debate concerning the over disciplining of Black students, especially Black male students, has existed for decades. The third prong of the Sixth Circuit's test intends to assess whether the government was deliberately indifferent to the plight of the citizens it has placed in danger or the citizens who have experienced an increase in danger because of the affirmative actions of the state.³⁰³ Given the persistence of the debate regarding over disciplining and the school-to-prison pipeline, it is by definition deliberate indifference if the state has done little to nothing to explore the impact of this form of education reform on Black male students who are already subjected to a specific and well established danger. Moreover, education scholars continue to berate recent education reforms as being levers for increases in the school-to-prison pipeline.³⁰⁴

Therefore, it is reasonable to conclude that the state knew or had reason to know that its policies increased the likelihood that Black male students would suffer increased instances of harsh discipline. Furthermore, neither the state of Michigan or Tennessee has endeavored to place appropriate systems in place to limit the potential of increasing Black boys' entrance into the school-to-prison pipeline, nor has either state made provisions for Black students, parents, and communities to address issues related to Black males' entry into the school-to-prison pipeline. Instead, each state has removed the political of Black stakeholders in their state takeover legislation.

B. *The Fifth Circuit: New Orleans*

Unlike the Sixth Circuit Court of Appeals, the Fifth Circuit has not acknowledged the existence of the State-Created Doctrine.³⁰⁵ As such, there is no potential for a Due Process Claim against the state takeover of locally governed public schools in New Orleans. The Fifth Circuit Court of Appeals' rejection of the State-Created Danger Doctrine is problematic because the court's rejection of the State-Created Danger Doctrine impedes Black students, parents, and communities' ability to address the ways that the state takeover of public schools amplifies the school-to-prison pipeline in New Orleans.

³⁰² See *Right to Remain Silent*, *supra* note 44; see also Hamilton, *supra* note 66.

³⁰³ See Sanford, *supra* note 29, at 1644.

³⁰⁴ See Racial Subjugation, *supra* note 121.

³⁰⁵ *Beltran v. City of El Paso*, 367 F.3d 299, 307 (5th Cir. 2004).

The Fifth Circuit has rejected the State-Created Danger Doctrine under even the most extraordinary, extreme and vile circumstances.³⁰⁶ In *Doe ex rel. Magee v. Covington County School District*, school officials—on multiple occasions—released a nine-year-old elementary school student to a stranger.³⁰⁷ Ultimately, this stranger molested the child after checking her out from school and before returning the child to her school.³⁰⁸ School officials checked the nine-year-old back into school after each check-out.³⁰⁹ Jane Doe, the nine-year-old student, and her parents filed suit against the school district and various representatives of the school district in the U.S. District Court for the Southern District of Mississippi, alleging that the school district’s ineffective check-out policy deprived Jane Doe of her constitutional right to substantive due process.³¹⁰ The plaintiffs asserted that the school district assumed a duty to protect Jane when it delivered the nine-year-old to the custody of a stranger, detaching her from those who could protect her.³¹¹

The defendants in *Covington* moved to dismiss the plaintiff’s suit,³¹² and the district court granted the defendants’ motion to dismiss.³¹³ The Fifth Circuit Court of Appeals affirmed in part and reversed in part the district court’s decision.³¹⁴ On rehearing, en banc, the Fifth Circuit vacated its previous decision.³¹⁵ Thus, even when a school acts affirmatively to place a student in danger, the Fifth Circuit does not find facts like the facts in *Covington* substantial enough to trigger the State-Created Danger Doctrine. Therefore, it is unnecessary to hypothesize a manner in which the Fifth Circuit would apply the doctrine because in effect they have rejected the existence of the State-Created Danger Doctrine.

X. CONTINUED RACIAL SUBJUGATION: A CRITICAL RACE PERSPECTIVE ON BLACK BOYS, THE SCHOOL-TO-PRISON PIPELINE, STATE TAKEOVER DISTRICTS, AND HAVING NO WAY OUT

Critical race analyses are appropriate frameworks for analyzing and theorizing the continued racial subjugation of Black students in educational

³⁰⁶ *Doe ex rel. Magee v. Covington Cnty. Sch. Dist.*, 673 F. Supp. 2d 392, 395 (S.D. Miss. 2009), *aff’d*, 675 F.3d 389 (5th Cir. 2012) (en banc).

³⁰⁷ *Id.*

³⁰⁸ *Id.*

³⁰⁹ *Id.*

³¹⁰ *Id.* at 337–38.

³¹¹ *Covington*, 649 F.3d at 340.

³¹² *Id.* at 339.

³¹³ *Id.* at 405.

³¹⁴ *Doe ex rel. Magee v. Covington Cnty. Sch. Dist.*, 649 F.3d 335, 353–54 (5th Cir. 2011), *aff’d in part, rev’d in part*, 675 F.3d 849 (5th Cir. 2012) (en banc).

³¹⁵ *Id.*

systems.³¹⁶ Critical Race Theory arose from the work of legal scholars, but Ladson-Billings and Tate IV first explicitly and exclusively applied Critical Race Theory to the practice of education.³¹⁷ Ladson-Billings and Tate defined Critical Race Theory in education as the myriad of ways that traditional civil rights laws are hijacked by White Americans.³¹⁸ Just as the legal tradition of Critical Race Theory had numerous tenets, Critical Race Theory in education focuses on the ubiquitous and impenitent nature of race and racism at the intersection of law, policy, politics and how race and racism serves to sustain racial oppression through the public education system.³¹⁹

For example, Professor Derrick Bell asserted that civil rights remedies developed from interest convergence, when the political desires of Black and White people intersect, rather than as a result of White people's effort to rectify the wrongs that Black people have endured at the hands of White people.³²⁰ Many White people, especially White liberals, support education reform policies, and this may be the result of interest convergence. In particular, interest convergence, in this Article, is found in the efforts of Black parents to find better schooling opportunities for Black students and White parents seeking to find educational options for their children where White parents have disproportionate political power. Education reform strategies that remove Black people from political power and replace those powerbrokers with White education policymakers provides White parents with political power, and promises Black parents more and better educational options. Likewise, White Americans rely on arguments about increased academic outcomes and equitable educational opportunities in support of their efforts for education reform, but statistical evidence suggests that Black students do not experience higher academic outcomes in state takeover districts.³²¹ Similarly, state takeover districts are problematic because they exacerbate other issues that deny Black people educational equity, such as the school-to-prison pipeline.³²² Thus, even when the interests of White

³¹⁶ See Steven L. Nelson, *Different Script, Same Caste in the Use of Passive and Active Racism: A Critical Race Theory Analysis of the (Ab)use of "House Rules" in Race-Related Education Cases*, 21 WASH. & LEE J. C. R. & SOC. JUST. 297 (2016) [hereinafter *Different Script, Same Caste*]; see also *Racial Subjugation*, *supra* note 121.

³¹⁷ See Gloria Ladson-Billings & William F. Tate IV, *Towards a Critical Race Theory of Education*, 91 TCHR. COLL. REC. 47 (1995).

³¹⁸ *Id.*

³¹⁹ See *Different Script, Same Caste*, *supra* note 316.

³²⁰ See Derrick A. Bell, Jr., *Brown v. Board of Education and the Interest Convergence Dilemma*, 93 HARV. L. REV. 518 (1980).

³²¹ See Wong, *supra* note 77.

³²² See *Racial Subjugation*, *supra* note 121; *Right to Remain Silent*, *supra* note 44.

Americans and Black Americans converge, the interests of White Americans are prioritized.

Alan David Freeman argued that civil rights remedies are ineffective because (1) they are framed from the perspective of the perpetrators as opposed to the victims, and (2) they are too rigid and inflexible to address the amorphous nature of racism in the United States.³²³ Freeman's critical race perspective on civil rights law is applicable to the continued oppression of Black boys through policies and practices that result in Black boys entering the school-to-prison pipeline.³²⁴ Freeman's version of critical race theory argues that civil rights laws and remedies focus on procedural rather than substantive outcomes, resulting in procedural protections that fail to result in any material substantive changes in Black peoples' circumstances.³²⁵ Education reform policies aimed at providing the path to equitable educational opportunities but falling well short of promising equitable educational outcomes is an example of providing procedural, but not substantive, guarantees. Freeman also argues that civil right remedies' origins from White peoples' perspective creates policies that are not intended to expand Black peoples' civil rights.³²⁶ Moreover, Freeman asserts that the rigid nature of law allows for White people to create new manifestations of racism.³²⁷

Because civil rights remedies focus on procedures and not substantive outcomes, Black people are guaranteed a hearing on civil rights issues, but there is no promise of civil rights-oriented outcomes. Current education reform activities have changed laws, policies, and procedures related to altering the educational, social, and occupational trajectories of Black students, but the statistical evidence in this Article suggests that education reform, through the state takeover of public schools, has not provided better disciplinary outcomes for Black students. Moreover, the legal analysis in this Article reveals that even the use of constitutional exceptions, such as the State-Created Danger Doctrine, leaves Black students subjected to the school-to-prison pipeline in search of a civil rights.

While Freeman and Bell discuss the limits of policy to address race, racism, and oppression, I have previously argued that the interactions between policy, policymakers, and the federal courts is a creation of both White supremacy and privilege because White Americans can unilaterally set and alter societal rules

³²³ See Alan David Freeman, *Legitimizing Racial Discrimination through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine*, 62 MINN. L. REV. 1049 (1978).

³²⁴ See Racial Subjugation, *supra* note 121.

³²⁵ *Id.*

³²⁶ *Id.*

³²⁷ *Id.*

to assure that White people are perpetual winners and can always create barriers to educational equity.³²⁸ Other scholars have predicted the scenario that I discussed in the *Washington & Lee Journal of Civil Rights and Social Justice*. In particular, Derrick Bell argued that racism is permanent,³²⁹ and Lia Epperson asserted that the school-to-prison pipeline is a modern manifestation of White people's efforts to subjugate Black people.³³⁰

Similarly, other critical race scholars have considered that governments in the United States have failed to protect Black peoples' lives since we arrived to this country in bondage.³³¹ If Bell,³³² Epperson,³³³ and Armstrong³³⁴ are correct, the only rational outcome of the state takeover of Black-run schools and school districts is the continued and further oppression, marginalization, and disenfranchisement of Black students, parents, and communities with limited or no legal recourse for the Black people impacted.³³⁵ In this Article, I find very little evidence that would support the claim that the state takeover of Black-run schools assists in disrupting the school-to-prison pipeline. As I have argued in my paper titled *Different Script, Same Caste in the Use of Passive and Active Racism: A Critical Race Theory Analysis of the (Ab)use of "House Rules" in Race-Related Education Cases*, "[t]he only change consistently evident from the state takeover of public schools is the change of power from Black hands to White hands."³³⁶ Of course, this argument has proven true in the context of education reform in the manifestation of charter schools,³³⁷ special education reform,³³⁸ and school desegregation.³³⁹ If, in fact, education and education reform is a continuation of

³²⁸ See *Different Script, Same Caste*, *supra* note 316.

³²⁹ See Derrick A. Bell, Jr., *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation*, 85 *YALE L.J.* 470 (1976).

³³⁰ See Epperson, *supra* note 64.

³³¹ See generally Margalynne J. Armstrong, *Are We Nearing the End of Impunity for Taking Black Lives?*, 56 *SANTA CLARA L. REV.* 721 (2016) (linking the United States' history of both actively killing and passively failing to protect Black peoples through both written and unwritten policies to contemporary issues of police brutality).

³³² See Bell, *Serving Two Masters*, *supra* note 329.

³³³ See Epperson, *supra* note 64.

³³⁴ See Armstrong, *supra* note 331.

³³⁵ Racial Subjugation, *supra* note 121, at 31.

³³⁶ *Id.*

³³⁷ See Preston C. Green, III et al., *Charter Schools, Students of Color and the State Action Doctrine: Are the Rights of Students of Color Sufficiently Protected?* 18 *WASH. & LEE J. C. R. & SOC. JUST.* 253, 271–75 (2012) (suggesting that the charter school movement, with language based in the civil rights movement, might unwittingly rescind the rights that students of color have in schools since there are questions concerning whether charter schools are, in fact, state actors).

³³⁸ See *Special Education Reform*, *supra* note 127.

³³⁹ See Erica Frankenberg et al., "Fighting 'Demographic Destiny': A Legal Analysis of

the bondage that Black people faced when arriving to the shores of the United States, it naturally follows that schools fall within the definitions of incarceration that federal courts have found trigger a state's responsibility to act affirmatively to prevent the injury of those who are incarcerated.

Critical Race Theory's critique of colorblindness is applicable to the persistence of the school-to-prison pipeline. The judicial system has made concerted efforts to decouple and detach contemporary concepts of race and racism and the United States' history of racially oppressing Black people.³⁴⁰ In the instance of education reform policies and practices, there have been few discussions or actions that address how the historical oppression of Black people in the United States in the form of under-resourced and neglected predominately Black school districts manifests itself in lowered academic outcomes and how this oppression is rooted in racial hatred and White supremacy. In fact, the state takeover of public schools in predominately Black school districts that are governed by predominately Black school boards is an added insult and more importantly, an added oppression for Black students, parents, and communities since the supermajority of school districts subjected to state takeover have been predominately minority school districts.³⁴¹

In this Article, I have discussed how education reform policies that assess students, schools, school districts, and entire communities based on test scores have resulted in the over disciplining of Black students and Black students' entrance into the school-to-prison pipeline.³⁴² Even more recent education reform policies, such as President Barack Obama's Every Student Succeeds Act (ESSA), have failed to directly and inescapably address the disproportionate use of harsh disciplinary tactics on Black students and the school-to-prison pipeline. Instead, much of the ESSA's language maintains federal education policy's focus on the test-heavy language of NCLB and offers only precatory language pursuing other forms of academic accountability and almost no explicit command to address disproportionate discipline.³⁴³ In fact, the word discipline appears only once in the federal rules promulgating the Every Student Succeeds Act, and that mention is on page 188, out of 192 pages.³⁴⁴ Somewhat contradictory, ESSA

Attempts of the Strategies That White Enclaves Might Use to Maintain School Segregation, 24 GEO. MASON U. CIV. RTS. L.J. 39 (2013) (providing an analysis of how White Americans have maintained White supremacy despite shifting demographics).

³⁴⁰ See Neil Gotanda, *A Critique of "Our Constitution is Colorblind"*, 44 STAN. L. REV. 1 (1991).

³⁴¹ See Oluwole, *supra* note 70, at 344.

³⁴² See Part IV and related text.

³⁴³ See Racial Subjugation, *supra* note 121, at 31.

³⁴⁴ See generally 34 C.F.R. pts. 200 & 290 (2016). Despite significant discussion in the

and other recent education reform laws, policies, and practices purport to seek increased parental involvement through school choice, but these laws, policies, and practices also seek to remove Black parents' ability to impact education law, education policy, and the politics of education by disrupting Black peoples' ability to elect and hold accountable education policymakers.³⁴⁵

It is not surprising that White people are asserting a right to govern even predominately Black schools and school districts that are under the governance of predominately Black school boards. Cheryl Harris argued that whiteness is a legally protected property right in the United States.³⁴⁶ Put more succinctly, the courts have protected the right to White privilege and in doing so, have cemented White supremacy as a part of the American political fabric. In the context of state takeovers of locally governed public schools and school districts, schools and school districts that are disproportionately Black experience state takeovers at higher rates than do disproportionately White schools and school districts.³⁴⁷

Harris' discussion of whiteness, especially as applied to the state takeover of public schools and school districts, can be complemented by Michael J. Dumas' discussion of antiblackness in education policy.³⁴⁸ Dumas argues that education policy is developed and implemented with a "disregard for and disgust with blackness."³⁴⁹ Dumas discusses antiblackness in education policy in the context of school desegregation,³⁵⁰ but in other works, he uses the antiblackness framework to critique education reform policies as antiblack.³⁵¹ The disregard

proposed federal rules for implementing President Obama's Every Student Succeeds Act, the word discipline can only be found once in the entire 192-page document. The failure to address the excessive and disparately applied discipline of Black students in public schools stands in stark contrast to any illusory commitment to closing the graduation gap and minimizing drop-out rates, for a student who is the recipient of excessive discipline is much more likely to not complete high school and experience incarceration.

³⁴⁵ See Racial Subjugation, *supra* note 121, at 31.

³⁴⁶ See Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1077 (1993).

³⁴⁷ See Right to Remain Silent, *supra* note 44, at 474–75 (arguing that the state takeover of public schools in New Orleans resulted in a traditional public school system that was disproportionately White as compared to those schools subjected to state takeover and that the disproportionately White schools spared from the state's takeover produced fewer instances of harsh disciplinary tactics used against Black students).

³⁴⁸ See Michael J. Dumas, 'Waiting for Superman' to Save Black People: Racial Representation and the Official Antiracism of Neoliberal School Reform, 34 DISCOURSE: STUDIES IN THE CULTURAL POL. OF EDUC. 531 (2013).

³⁴⁹ See Michael J. Dumas, *Against the Darkness: Antiblackness in Education Policy and Discourse*, 55 THEORY INTO PRACTICE 11 (2016).

³⁵⁰ *Id.* at 12.

³⁵¹ See Michael J. Dumas, "Losing an Arm": Schooling as a Site of Black Suffering, 17 RACE, ETHNICITY & EDUC. 1 (2014).

and disgust that Dumas names and categorizes in his piece, *Race, Ethnicity & Education*, is found in state takeovers of public schools and school districts. This is especially the case since education reform policies, in the manifestation of state takeover districts, has not disrupted and in many cases, has contributed to and exacerbated the school-to-prison pipeline. Education reform policies, such as state takeover efforts, bastardize Black students, parents, and communities and compound other forms of antiblackness in education policy.³⁵² Black students, parents, and communities are dehumanized in public schools and school districts, but they are also intentionally and wickedly removed from roles that would allow them to mitigate or prevent their bastardization.³⁵³ I believe Dumas is absolutely correct—the educational system is a site of Black suffering.³⁵⁴

³⁵² See Racial Subjugation, *supra* note 121, at 32.

³⁵³ *Id.*

³⁵⁴ *Id.* at 32 (citing Dumas, ‘Waiting for Superman’, *supra* note 348).